

**WWW.CRIMESAGAINSTCHILDREN.COM: ADDRESSING CHILD PORNOGRAPHY VIA THE
INTERNET IN AFRICA**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE LLM DEGREE IN
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DECLARATION

I, Omowumi Modupe ASUBIARO, declare that the work presented in this dissertation is original. It has never been presented at any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Signature:.....

Date:.....

DEDICATION

I dedicate this dissertation to my parents Michael and Lydia Asubiaro, for making me who I am today; to the blessed memory of late Akin Taylor and to the millions of African children who are victims of child pornography.

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All honour and adoration to the Alpha and Omega for being there from the beginning to the end. I would not have made it without his grace and strength.

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LIST OF ABBREVIATIONS

ACLU	American Civil Liberties Union
ACRWC	African Charter on the Rights and Welfare of the Child
CD	Compact Disc
CDA	Communications Decency Act
CJA	Criminal Justice Act
CJPOA	Criminal Justice and Public Order Act
COPA	Child Online Protection Act
CPPA	Child Pornography Prevention Act
CRC	Convention on the Rights of the Child
ECPAT	End Child Prostitution Child Pornography and Trafficking of Children for Sexual Purpose
FPA	Films and Publication Act
FPAB	Films and Publication Amendment Bill
GA	United Nations General Assembly
ICMEC	International Centre for Missing and Exploited Children
ICT	Information and Communication Technology
IGO	Inter-governmental Organisations
INTERPOL	International Criminal Police Organisation
IRC	Internet Relay Chat
ISP	Internet Service Provider
IT	Information Technology
IWF	Internet Watch Foundation
NAP	National Action Plan
NGO	Non-governmental Organisation
OAU	Organisation for African Unity
PCA	Protection of Children Act
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNICEF	United Nations Children's Fund
US	United States of America
www	World Wide Web

CHAPTER 1

INTRODUCTION

1.1 Background

Child pornography is the record of sexual abuse against a child. It can be a visual, descriptive or audio depiction of a child engaged in sexual activity with an adult, other children or sometimes an animal.¹ Child pornography has existed for a long time and dates as far back as ordinary pornography. However, it has now become 'a problem of international proportion with the development of computer technology' and the Internet.²

Prior to the 1980's child pornography was produced into paper-based photographic forms, magazines, videos and in drawings.³ After that period and during the late 1980's, the child pornography industry saw the emergence of the Internet as a means of producing, possessing and distributing child pornography by paedophiles, child molesters and for financial gain.⁴ This has inevitably increased the demand for child pornography because with the Internet, it is now possible to quickly distribute the images to millions of people by just a click of the mouse.⁵

The increased demand for child pornography was enhanced by the nature of the Internet. The Internet is a public international network of millions of computers, which is a unique medium of communication. It allows its users to express ideas, opinions and share information inexpensively, at a fast speed and to all imaginable locations including the privacy of people's homes. A growing democratising medium, it is uniquely suited to both the promotion and violation of human rights.⁶

Admittedly, child pornography itself is a violation of the fundamental human rights of children however, the Internet increases the scope of these violations. The increase in the scope of violation is due to the fact that the Internet provides a means whereby child pornography can be

¹ Oddis, D 'Combating Child pornography on the Internet: The Council of Europe's Convention on Cybercrime' (2002) 16 *Temple international and Comparative Law Journal* 596.

² Healy, M (1996)'Child Pornography: An International Perspective' 1 available at <www.crime-research.org/articles/536> [accessed on 3 September 04].

³ Carr J (2001) 'Theme Paper on Child Pornography for the 2nd World Congress on Commercial Sexual Exploitation of Children' 3 available online at www.ecpat.net/eng [accessed on 3 September 04].

⁴ Jenkins, P (2001) 'Beyond Tolerance: Child Pornography on the Internet' 47. See also Healy (n 2 above)4.

⁵ Jones, L 'Regulating child pornography on the Internet- the implications of Article 34 of the United Nations Convention on the Rights of the Child' (1998) vol. 6, No. 1 *The International Journal of Children's Rights* 58. See also Jenkins (n 4 above) 49.

⁶ Centre for Democracy and Technology 'The Internet and Human Rights: An overview' available at <www.cdt.org> [accessed on 15 March 04].

made available and accessible to many Internet users at the same time, thereby duplicating the abuse. These violations, especially in relation to child pornography have resulted in legal and non-legal responses aimed at regulating the content of the Internet.

1.2 Statement of research problem

Child pornography via the Internet is an international phenomenon and though Africa is increasing its access rate to the Internet, there are virtually no laws in place to deal with child pornography on the Internet. This could result in the situation whereby Africa will become a host to a myriad of paedophiles, child pornographers and child pornographic sites. In addition, there could be strong links between child pornography on the Internet and other crimes such as child trafficking, child sex tourism and child prostitution, which are increasing concerns in Africa. There is therefore a need to address child pornography, as Africa has been identified as one of the greatest traffickers of children and one of the current hot spots for child sex tourism and child prostitution. Additionally, some African states are failing in their international obligations to take appropriate steps to combat child pornography on the Internet.

1.3 Focus and objectives of the study

The study will focus on child pornography on the Internet as a manifestation of sexual abuse and sexual exploitation of children. The debate will centre around the exacerbated effect of child pornography on victims and subsequent effects on the society. Ultimately, the study aims to highlight the various legal and non-legal responses specific to child pornography on the Internet with a view to proffer solutions to African states on how to deal with the problem. The study will also lend an African voice to the ongoing debate on how to deal with the problem of child pornography on the Internet.

1.4 Significance of study

Some of the literature on child pornography fail to analyse the impact of child pornography on the Internet in Africa. Authors usually defend this stand by the lack of data on the extent of the problem in Africa. However, Africa is increasingly experiencing child pornography via the Internet and statistics are rising.⁷ One reason for the emergence of data and the rise in statistics could be the rate at which Africa is gradually gaining access to Internet and Information and Communication Technology (ICT). Another reason could be the laxity given to such offences in Africa, which has resulted in the influx of perpetrators into Africa. The increase in statistics can also be attributed to the realisation of the problem by some African governments, which has resulted in international cooperation and effective law enforcement. However, despite all these efforts and the commitment

⁷ Chetty, I, Chairman, Films and Publication Board of South Africa, personal interview on 27 October 04. According to him, from January – November 2004, 801 cases will be going to Court. He asserts that there has been an 100% percent increase in the number of cases and images and that there is concrete proof that African children are increasingly used for child pornography.

of African states to the protection of children's rights, expressed in international instruments, there still needs a more target-based approach to dealing with the problem of child pornography on the Internet in Africa. Therefore, this study will draw from the experiences from countries that have responded to the problem of child pornography via the Internet through laws and other non-legal responses. These experiences will act as recommendations to African governments committed to the protection of its most vulnerable members of society: children.

1.5 Research questions

What are the exacerbated effects that the Internet has on the victims of child pornography? How does the Internet expand the scope of the violations to include the society? What are the legal responses and non-legal responses currently in place in Africa and beyond in dealing with child pornography on the Internet? Do international instruments and national laws specifically and efficiently deal with the Internet as a means of producing, possessing and distributing child pornography?

1.6 Literature review

Child pornography generally has been well commented on by academicians and psychologists. However, literature on child pornography on the Internet did not emerge until during and after the First World Congress Against the Commercial Sexual Exploitation of Children held in Stockholm in 1996. This provided the platform for papers and subsequent literature, research projects, articles and comments on the impact of the Internet on child pornography. Nevertheless, it should be noted that some of the responses to child pornography on the Internet have dated back to emergence of such literature. To show this, in 1997, Akdeniz⁸ provides an insight into the problem and the responses in the United Kingdom and the United States. In addition, the battle by governments, law enforcement agencies and the Internet industry in combating the problem of child pornography via the Internet between 1997 and 2000 is adequately covered in the articles of Stewart⁹ and Oddis¹⁰ respectively.

Further more, with the emergence of case law on the issue; there was a need to shift the focus to the influence of the Internet on the perpetrator and the motive for the crime. Jenkins¹¹, Taylor and

⁸ See Akdeniz, Y 'The Regulation of Pornography and Child Pornography on the Internet' (1997) 1 *The Journal of Information, Law and Technology (JILT)* available at <http://elj.warwick.ac.uk/jilt/internet/97_lakdz/> [accessed on 18 August 04].

⁹ Stewart, J 'If This is The Global Community, We Must Be On The Bad Side Of Town: International Policing of Child Pornography on The Internet' (1997) 20 *Houston Journal of International Law* 415 454.

¹⁰ See Oddis (n 1 above).

¹¹ See Jenkins (n 4 above).

Quayle¹² using evidence gathered during research try to explain the role of the Internet through the perspective of perpetrators in order to attempt to find a lasting solution to the problem.

However, in relation to Africa, there is very little literature on child pornography on the Internet.¹³ This study therefore aims to contribute to the literature on child pornography on the Internet in Africa.

1.7 Methodology

The study will mainly consist of an analysis of literature on child pornography on the Internet including the existing international instruments, national laws and other relevant documents. In addition, a great deal of research shall be done on the Internet to analyse recent developments in countries such as the United States (US) and the United Kingdom (UK). A critical analysis of the problem using the African perspective in relation to Africa's development in Information Technology (IT) will be adopted.

1.8 Limitations of proposed study

There are numerous crimes perpetuated via the Internet, which violate human rights but this study will be limited to child pornography via the Internet in Africa. Though child pornography is a type of pornography, pornography in its generality will not be discussed in detail except for occasional references. The study will not deviate into the debate of whether child pornography falls within the context of freedom of expression. Therefore, the study will flow from the assumptions that possessors and creators of child pornography are in violation of children's fundamental human rights. Besides, the study will not entertain debates on the nature of the perpetrators. This is because perpetrators of child pornography are not limited to a particular set of individuals or profession.

Also, simple IT terms will be employed in the course of the study to avoid misinterpretation and to ensure clarity.

1.9 Proposed structure

The study will be divided into five chapters. Chapter one lays the basis for the study and the context in which the study is set with a brief introduction on the topic. Chapter two defines concepts

¹² Taylor, M & Quayle, E (2003) 'Child Pornography: An Internet Crime'.

¹³ The literature found on Africa were Van der Westhuizen (2001) 'The child's right against exploitation in the form of pornography on the Internet: A South African perspective' [an unpublished thesis]; du Toit, P 'Internet Pornography: A Wide Focus on How it Relates to Children' (2002) 3 (1) CARSA 19 24.

such as child pornography in relation to sexual abuse and sexual exploitation of a child. The main focus of the chapter lies in the analysis of the exacerbated effects of child pornography on the Internet on the victims and on the society. Chapter three explores the legal responses to the problem with a view to demonstrate how the legal responses deal with child pornography on the Internet. Chapter four deals with the non-legal responses to child pornography on the Internet and Chapter five concludes the study and sets out recommendations.

CHAPTER 2

UNPACKING CHILD PORNOGRAPHY AND ITS ELEMENTS ON THE INTERNET: DEFINING CONCEPTS

2.1 Introduction

Human rights as they are provided for in the Universal Declaration of Human Rights (UDHR)¹⁴ include a wide spectrum of rights for everyone. The concept of everyone includes children. Before the UDHR, the League of Nations had promoted the idea of granting special protection to children by adopting the 1924 Declaration on the Rights of the Child (1924 Declaration).¹⁵ In 1959, the United Nations (UN) adopted a Declaration on the Rights of the Child, where the rights from the 1924 Declaration were reaffirmed and further elaborated.¹⁶ The need to give the force of legally binding obligations to children's rights culminated in the adoption of Convention on the Rights of the Child (CRC).¹⁷ As of September 2004, they were 192 state parties to the CRC, making it the most ratified international instrument in the world. Children's rights are further enshrined in the African Charter on the Rights and Welfare of the Child (ACRWC)¹⁸.

The rights enshrined in the CRC seek to promote one of the four general principles that guided the drafters of the Convention.¹⁹ One of these principles states 'that in all actions concerning children, the best interest of the child shall be the primary consideration'.²⁰ This principle laid the basis for article 34 of CRC, which provides that:

'States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials'.

¹⁴ Universal Declaration of Human Rights, adopted 10/12/1948; UN.G.A Res 217 A (III), UN.GAOR, 3rd Session, UN. Doc. A/810 (1948).

¹⁵ Geneva Declaration of the Rights of the Child of 1924, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

¹⁶ Bolin Pennegard, A M, 'Overview over Human Rights –the Regime of the UN' in Alfredsson G et al. (eds), *International Human Rights Monitoring Mechanisms* 48.

¹⁷ CRC, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 adopted 20 November 1989, entered into force 2 September 1990.

¹⁸ ACRWC, OAU Doc/CAB/LEG/24.9/49, adopted in 1990, entered into force 29 November 1999.

¹⁹ Bolin Pennegard, A M (n 16 above) 47.

²⁰ CRC, article 3. Other principles includes the principle of the full and equal value of children and that each child shall enjoy the rights set forth in the CRC without discrimination; the principle that the right to life does not only entail the right to be protected against being killed but a right to survival and development; and the that children are capable of forming their own views and shall also have the right to participate and express their views, which shall be duly respected.

To understand child pornography in the context of CRC and as a violation of article 34, the relationship between child pornography and article 34 will be analysed in the light of sexual abuse and sexual exploitation. The chapter will also explain the access points on the Internet where child pornography is produced, possessed and distributed and the exacerbated effects of the Internet on child pornography victims and the society.

2.2 Child pornography as a violation of child sexual abuse and sexual exploitation

Child pornography is a violation of article 34, CRC, which prohibits sexual abuse and sexual exploitation of children. The analysis of the components of sexual abuse and sexual exploitation will explain this assertion.

Child sexual abuse involves forcing or enticing a child to take part in sexual activities. This is the case whether or not the child is aware of what is happening.²¹ Usually, in cases of sexual abuse, the perpetrator is in an authoritative position over the child. In practise, child pornography entails that a child is sexually abused; therefore, child pornography constitute child sexual abuse.

Sexual exploitation is the use of a child to meet the sexual needs of others.²² This could be commercial or non-commercial. The commercial sexual exploitation of children consists of practices that demean, degrade or threaten the physical and psychosocial integrity of children.²³ ECPAT²⁴ suggests three primary and interrelated forms of commercial sexual exploitation of children: prostitution, pornography and trafficking for sexual purposes.²⁵ Others forms of commercial sexual exploitation include child sex tourism, child marriages and forced marriages. It is argued that the most important ingredient in commercial sexual exploitation is the monetary reward, which the perpetrator seeks to gain. On the other hand, non-commercial sexual exploitation is mere use of the child to satisfy the sexual needs of the perpetrator with no intention for monetary gains.

²¹ Lyon, C et al (2003) (eds) 'Child Abuse' (3rd ed) 76.

²² For a detailed discussion of sexual exploitation of children, see Van Bueren, G, (2000). 'The United Nations Convention on the Rights of the Child: an Evolutionary Revolution' in Davel, C. J. ed. *Introduction to child law in South Africa* 275.

²³ ECPAT 'CSEC Definitions' available at <www.ecpat.net> [accessed on 12 October 04].

²⁴ ECPAT acronym stands for 'End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes'.

²⁵ ECPAT (n 24 above).

In relation to child pornography, a perpetrator uses the images either to gain monetary rewards (by trading in the images) or to satisfy his/her sexual needs. This act amounts to sexually exploiting a child.

Therefore, child pornography includes an image showing the sexual abuse of a child engaging in sexual activity for the purpose of satisfying the sexual needs of the perpetrator or others (when distributed on the Internet).²⁶

Operation Avalanche²⁷ shows that the sexual abuse of a child recorded in an image of child pornography is sometimes used for commercial gains. During the operation, Landslide Inc. (an American company) was found to have been trading in sites containing images of child pornography. The company was found to have made a profit of \$1.4 million every month. Therefore, child pornography images used for monetary rewards show that the crime is a form of sexual exploitation of a child.

2.3 Other rights violated by child pornography

When the sexual abuse of children is recorded in other type of media such as video cassettes or published in books and circulated between consumers, the extent of rights violated is limited to that of the child used in the production and any other children which may be unfortunate to come across such images.²⁸ In relation to these forms of media, the violations committed against children are in form of violence, physical abuse and torture and violation of the right to dignity of the victim, but this is restricted to the victim. Furthermore, due to the limited circulation of the traditional form of child pornography, it may be difficult to prove the effect of child pornography on the society and especially on other children.

International instruments provide for the right to be free from torture, cruel, degrading and inhuman treatment.²⁹ The making/production of child pornography generally entails that the perpetrator

²⁶ The others referred to here can either be paedophiles or such persons who due to the availability of child pornography became addicts and consequently child sexual abusers.

²⁷ U.S Postal Inspection Service 'Operation Avalanche' <<http://www.usps.com/postalinspectors/avalanch.htm>>[accessed on 30 September 04]. Operation Avalanche was an investigative operation carried out in the US.

²⁸ The likelihood of a child getting hold of a videocassette or publication not on the Internet is slim but the likelihood of children having access to the images on the Internet is high. See Hecht, M E & Neufeld R (2000) 'The Internet and International Children's Rights' in Halpin, E F & Hoskins E (eds) *Human Rights and the Internet* , 153 165 . They argue that '[a]s the Internet becomes more accessible, the likelihood of psychological harm to children who see or read harmful material is increased. In the end, two categories of children are victimized. They are increasingly referred to as 'children behind the screen' and children 'in front of the screen'.

²⁹ CRC, article 37 and ACRWC, article 16.

forces the victim to engage in sexual activity thereby resulting in torture. In addition to this victims are made to engage in sexual activity in manners, which are inhuman, degrading and cruel. The African Commission on Human and Peoples' Rights have held that actions, which cause serious physical or psychological suffering and humiliate the individual or force him/her to act against his will or conscience amount to torture.³⁰ In line with this reasoning is the report that the making of child pornography usually involve the use of force even though the images reveal a smiling child and there are reports that some victims had torture marks on their body.³¹

The above violation is closely linked to the dignity of African children.³² The right to human dignity is a right that is inherent in all human beings. Due to the fact that a description of the act of sexual abuse will constitute child pornography, it is argued that the description done by Oddis is a violation of the right to dignity, particularly as it involves acts of bestiality.³³ The point that child pornography violates the rights of children cannot be overemphasised but the role of Internet in exacerbating these violations should be stressed.

2.4 Internet: What is it?

The Internet was an invention of the US Military in 1969 after the Soviet Union released information about a nuclear weapon.³⁴ The Advanced Projects Agency, an agency of the US Department of Defence developed a system called ARPANET basically to transmit data, conduct defence-related research and communicate. It is important to bear in mind the fact that the Internet does not contain any information of itself. The Internet transmits all the information; it acts as a sort of plumbing machine for the information which is actually produced and found in a computer.

The Internet, a dynamic tool in cyber space is the medium through which child pornography is pumped into millions of computers and subsequently to millions of viewers almost at the same time and 'real time'.³⁵ The nature of Internet is such that it affords the perpetrator anonymity; allows for

³⁰ See Communication 64/92, 68/92 and 78/92, *Krischna Achuthan, Amnesty International v. Malawi*, para 8.

³¹ Save The Children Europe Group 'Position paper on child pornography and Internet-related sexual exploitation of children' 10 available online at <www.savethechildren.org> [accessed on 18 August 04].

³² Children's right to dignity is a right enshrined in all the instruments providing for the protection of children's rights. The preambles of the CRC and the ACRWC strongly affirms the enjoyment of the rights enshrined in the UDHR by children.

³³ Oddis (n 1 above) 596.

³⁴ Sterling, B 'Short History of the Internet' available online at <<http://w3.aces.uiuc.edu/AIM/scale/nethistory.html>> [accessed on 3 September 04].

³⁵ The term real time here means at the same time the images are being made. With the use of Webcam (a camera that can be attached to the computer to transmit images and pictures as it taken, the production and the distribution or viewing of child pornography can be simultaneous.

encryption³⁶; creates new consumers for child pornography; can be used to produce images without the real children and widens the scope of distribution.

2.5 Internet, a violation tool?

Before the late 1980's, the most common medium of disseminating child pornography was through other media forms such as cassettes, hard copies of photographs usually sent by post. This was quite hard to track as most perpetrators kept the dissemination within a particular group of known perpetrators. Consequently, the use of Internet as a means of disseminating child pornography, which is cheaper and faster became the stock in trade.³⁷ Now, with the prevalent use of Internet, we see four main access points where child pornography can be produced, possessed and distributed. The access points are websites (otherwise called 'www')³⁸, emails and mailing lists³⁹, Internet relay chat (IRC) or instant messaging⁴⁰ and usenets/newsgroups/bulletin boards⁴¹. Besides, the Internet's most controversial characteristics, animosity, have aided the expansion of child pornography industry and the impudence of perpetrators to commit violations.⁴²

2.6 Exacerbated effects of child pornography on the Internet on victims and other children

The harmful effect of child pornography, particularly child pornography transmitted via the Internet, can be felt not only by the viewers of the images but most importantly the subject of the images, namely children.⁴³ Currently, there are about 64.5 million domain names, millions of newsgroups and usenets and countless ways of interacting using an IRC.⁴⁴ All these are accessible from Africa

³⁶ Encryption is the use of a mathematical function and key to transform a message into another message, which requires a password before it can be viewed.

³⁷ Carr (n 3 above)7.

³⁸ This can be referred to as a system of linking together hundreds of millions of electronic documents called web pages on to millions of computers called websites. Websites can be used to display visual and described child pornography. Available at <<http://news.netcraft.com>> (accessed on 16 September 04). See Edwards,L & Waelde, C (eds) (2000) 'Law and the Internet. com: a frame work for electronic commerce' 3.

³⁹ These are one to one mails. It is a form of written conversation. The mailing list enables access to emails by millions of subscribers at the same time. See Edwards & Waelde (n 32 above)4.

⁴⁰ IRC's are access points where instant messages can be exchanges. These messages can be pictures or texts and perpetrators use this medium to predate, meet and solicit victims. See Carr (n 32 above) 24. '...in December 1997, researchers from the COPINE project sampled 55 channels on two different IRC networks. They each had titles like "babysex", or "preteensex" or "toddler spanking"...(with) 518 participants'.

⁴¹ UseNet is a worldwide system consisting of a set of newsgroups with names that are classified hierarchically by subject. Articles, messages or pictures are posted by the members of the group with appropriate software. See What is use net available at <<http://www.faqs.org/faqs/usenet/what-is/part1/>> [assessed on 16 September 04].

⁴² du Toit, P 'Internet Pornography: A Wide Focus on How it Relates to Children' (2002) 3 (1) CARSA 19.

⁴³ Carlos-Santos, O 'Child Pornography on the Internet' in Arnaldo, C (ed) (2001) *Child Abuse on the Internet: Ending the Silence* 57.

⁴⁴ 'Statistics of domain names' available at <<http://news.netcraft.com>> [accessed on 3 September 04].

even though admittedly, most did not originate in Africa.⁴⁵ Africans are becoming the most recent Internet consumers and this, in many ways, increases the effect and the number of victims.⁴⁶

However, due to the international nature of Internet, child pornography is simultaneously available across the world. Notwithstanding the lack of data in Africa on this phenomenon, Africa is nevertheless not immune from the effect of child pornography on the Internet. Noting that child pornography has been identified as 'an emotional issue, and quite naturally the debate around it [may] ...be characterised by strong moral and political imperatives'⁴⁷, the following sections will deal with the effects in the line of violations of rights and compounded effects on other children.

2.6.1 Violation of fundamental rights

(I) The right to privacy and freedom of expression

The Internet provides a neutral ground for the perpetrators to meet with the child and unlawfully obtain the identity of the child. In most cases, the child believes his/her identity is being given to a trusted friend or peer. This violation is directly connected to the use of the Internet. Accordingly, this is an invasion of the victim's right to privacy in that children will no longer be free to express themselves for fear of revealing themselves to predators on the Internet.

The link between the two rights is that the right to privacy of the child is violated in the process of the child exercising his/her right to freedom of expression and to receive and impart knowledge. Furthermore, children by virtue of the international instruments have a right to freedom of expression. This right includes seeking, receiving and imparting information via any media of their choice.⁴⁸ This fundamental right is important for this discussion in the sense that inevitably, African children's rights to freedom of expression will be seriously curtailed if they cannot seek and receive information, which is germane to their development for the fear of abusers lurking on the Internet.

⁴⁵ Jensen, M (2000) 'Africa Internet Status' available online at <<http://www3.sn.apc.org/africa/afstat.htm>> [accessed on 15 August 04]. 'There are about 140 electronic mailing lists and UseNet newsgroups on the Internet which discuss issues relating to Africa (although a significant proportion of them are more closely affiliated with US African-American issues). These lists and newsgroups are almost entirely hosted off-continent except for a number in South Africa, North Africa and Kenya.'

⁴⁶ Jensen (n 45 above) '[There is a]... current estima[te] of the total number of African Internet users at around 5-8 million...'. See also Oyelaran-Oyeyinka, B and Adeya, C N (2002) 'Internet Access in Africa: An Empirical Exploration' available online at <<http://www.intech.unu.edu>> [accessed on 18 August 04]. 'At the regional level, the share of Sub-Saharan Africa...rose from a meagre 0.1% in 1998 to 0.4% in 2000'.

⁴⁷ Taylor & Quayle (n 12 above) 17.

⁴⁸ CRC, article 13 and ACRWC, article 7.

The right to privacy is also violated by the transmission and distribution of images on the Internet. The right to privacy includes the right to be protected against 'arbitrary or unlawful interference with his or her privacy, family, home or correspondence'.⁴⁹ It also includes the right to be free from unlawful attacks on his or her honour and reputation. This right is violated when Internet is used as a means of contacting a victim on IRC's and distribution of images (where the particular victim has been involved) via the Internet, as this constitutes an invasion of the victims right to privacy.

(II) Further violations of other rights

As stated earlier, child pornography itself is a violation of the right to be free from sexual abuse and sexual exploitation, however, the effect of the Internet on these violations is that when the violation is reproduced every time the image is downloaded, viewed or shared on the Internet. Furthermore, the Internet expands the scope of the violation of the right to be free from torture, physical violence and the right to dignity of the victim. Child pornography on the Internet can constitute mental torture and violence because of the knowledge by the victims that the images are circulating on the Internet, a public medium.

Article 19 of the CRC provides for the protection of children from mental violence. The impact of the knowledge that an image in which a child has been involved in producing child pornography is being transmitted via the Internet constitutes mental torture on a child viewing the images.

When images of a child are depicted in a pornographic publication, it erodes the dignity of the victim. The effect on a child especially when such image is transmitted via the Internet is such that the child feels utterly violated, devalued and dehumanised by the fact that his/her family and friend can have access to the permanent record which could have travelled to numerous countries not only in Africa but all over the world.

The South African Constitutional Court in the *De Reuck* case confirmed that:

'children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth'.⁵⁰

Other forms of abuse include psychological abuses. In this regard, the South African Constitutional Court in the *De Reuck* case agreeing with the conclusions in *Osborne v Ohio* and *Sharpe* case

⁴⁹ CRC, Article 16 and ACRWC, article 10.

⁵⁰ *De Reuck* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) para 63. See also *Osborne v Ohio* 495 US 103 (1990).

stated that the psychological harm to the child photographed is exacerbated if he or she knows that the photograph continues to circulate among viewers who use it to derive sexual satisfaction.⁵¹

2.6.2 The compounding effect of child pornography on the Internet: the prevalence and other crimes against children

(I) Indirect non-legal effect of Internet distribution on the society

The initial availability on the Internet may lead the society to react in one or two ways; either by an increase in the forms and rate of sexual abuse against children or the emergence of legal and non-legal actions as responses to the issue. The increase of the phenomenon in the past few years, aided by the development of ICT has resulted in an increase in trafficking of children, child prostitution and child sex tourism.

(a) Child trafficking

In Africa, the problem of child trafficking has been recognised as a problem of a great magnitude, which is reaching alarming proportions.⁵² This problem has been exacerbated by the lack of data on the number of children that are trafficked daily, the reduced government inaction and poor media coverage.⁵³ There are strong indications that the development of Internet and its access points such as websites, newsgroups, Usenets and IRC's, which are used by perpetrators to interact (among themselves), has increased the demand for children which has the effect of increasing trafficking in children.⁵⁴

In practise, this is evidenced by a process whereby when a new member proceeds to join a Newsgroup/UseNet; such person is mandated to submit new images of child pornography before admittance into the group.⁵⁵ Using the same child, which has featured in other pornographic images will jeopardise his/her chances for admittance into the group. This has consequently increased the need for children to be trafficked from Africa and Asia to other regions where ICT is very advanced in order to meet the demand for new subjects in the production of child pornography.

⁵¹ *De Reuck* (n 49 above), para 64.

⁵² Du Toit (n 42) 21; UNICEF 'Media Kit - EMBARGO: 23 April 2004 Launch of the Innocenti Insight: Trafficking in Human Beings, especially Women and Children, in Africa' available at <www.unicef-cdf.org/presscentre/presskit/insight [accessed on 3 September 04].

⁵³ AFRUCA (14 October 2003) 'Trafficking of African Children to the UK: Denouncing the Better Life Syndrome' Seminar Report (Synopsis).

⁵⁴ Carr (n 3 above) 19 20.

⁵⁵ Taylor & Quayle (n 12 above) 187.

(b) Child sex tourism

This form of sexual exploitation of children is currently receiving much attention in the area of combating sexual abuse and sexual exploitation of children.

Child sex tourism is a well known phenomenon, and now, we are starting to see a new class of child sex offender: one who makes contact with a child over the Internet and is then willing to travel perhaps huge distances, crossing states, continents and countries, for the purposes of meeting and sexually abusing a child.⁵⁶

The effect of transmitting child pornography on the Internet is such that potential child abusers and perpetrators travel to countries especially in Africa and use children for sexual purposes. There are two factors, which makes this possible. The first is that Africa has opened its borders to foreigners from developed countries mainly because of economic development; secondly the perpetrator has sometimes formed a cordial relationship with other perpetrators in various countries by means of the Internet.⁵⁷ In addition, when children are trafficked from developing nations to developed nations for the production of child pornography, this can increase the appetites of other perpetrators who then go in search of younger and newer victims in developing countries.⁵⁸

(c) Child Prostitution

Save The Children Europe in their report based on studies carried out in Europe, made the point that there is a connection between child pornography and children who are forced into prostitution.⁵⁹ Carr takes the baton further by linking child pornography to the increase in child prostitution especially in cases of children trafficked from developing countries.

Most of the children depicted were Caucasian, many from the US, but some of the children were from India, Mexico and Africa. The growth in child sex tourism in the 1980s and 1990s increasingly saw images of children from Asia and Eastern Europe being added to the stock, as exploiters filmed their crimes and shared evidence. ... The link between child prostitution, child sex tourism and child pornography is strong.⁶⁰

Child pornography is also strongly linked to child prostitution and its growth because sometimes perpetrators give money to the child or lure the child into making the images for the purpose of money.

⁵⁶ Taylor & Quayle (as above) 7.

⁵⁷ Jenkins (n 4 above) 201.

⁵⁸ Marks, K 'British Sex Tourists Turn Killing Fields of Cambodia Into Paedophiles' Playground' *Independent*, January 5, 2003. Available online at <<http://www.independent.co.uk/>> [accessed on 10 October 04].

⁵⁹ Save The Children Europe Group (n 31 above) 10.

⁶⁰ Carr (n 3 above) 20.

In addition, it has been reported that some perpetrators were once abused themselves and had viewed images of child pornography while growing up or had been abused and made to believe it was 'alright and that every child was experiencing such abuse'.⁶¹ Therefore, the Internet creates more perpetrators.

(II) Direct non-legal effect on the victim and other children

Child pornography images on the Internet constitute a permanent crime record to prove that a crime was actually perpetrated against a child and serves as a piece of evidence used to investigate and subsequently apprehend perpetrators.⁶² As a form of permanent record, it may also traumatize the child victim to know that prosecution could arise from such permanent record especially if the child is filmed as having sex with another minor.⁶³

In fact, the mere transmission of these images via the Internet dehumanises other children who feel degraded in society at large as a result of such victimisation and abuse. In addition, the non-legal effects on other children include the fact that such images desensitises children and can cause other psychological harm. Utting has described the ultimate effect of this on other children.

Child abusers show ...child pornography to children as means of "lowering their inhibitions". They will show pictures in which the children have been forced to smile so that it can be claimed, especially to younger children, that they are "having fun". With Older children pornography ... child pornography ... is used to excite them and to show what is being done as 'alright'.⁶⁴

Child pornography via the Internet further relegates the position of the child in the society as they can be made to feel like tools in the hands of adults. Perpetrators of child pornography also use this as a form of 'grooming process'. This has been described as a process whereby the perpetrators use the images to groom the child into thinking that all children are involved in such act. The ultimate effect of this is desensitisation of the child.⁶⁵

⁶¹ Jones (n 5 above) 70 citing DeMarce, J Lawyer gets 15 months for computer porn, *The Record*, October 8 1996.

⁶² Save The Children Europe Group (n 31 above) 15.

⁶³ Carr (n 3 above) 15 citing Sir William Utting, para 9.18, "people Like us", The Report of The Review Of The Safeguards For Children Living Away from Home, UK Department of health, 1997. '... can be used as blackmail to force the child to commit further sexual or other offences. This is true if the child is shown abusing other children.'

⁶⁴ Carr (n 3 as above) 15.

⁶⁵ *De Reuck* (supra) para 65, where the court accepts the state's contention that the 'images are used to groom children for sexual abuse by showing them acts other children have purportedly performed; secondly to reinforce cognitive sexual distortions, i.e. the belief that sex with children is acceptable; and finally for paedophiles to fuels their fantasies prior to committing as act of sexual abuse where, the sentence for paedophiles to fuel their appetite. This shows the multiplier effect of Internet on the violations.

2.7 Conclusion

This chapter has examined the concept of child pornography as a component of sexual abuse and sexual exploitation of children. In addition, it has attempted to explain how the Internet can be used to increase the availability of child pornography. As a result, the effect of child pornography and in particular the impact of transmitting such via the Internet can be seen as horrifying. While other medium of dissemination can be easily tackled and the evidence of the crime immediately destroyed by the relevant authority, thereby reducing the effect of such images on the abused child and the society at large, combating the problem on the Internet poses a herculean task, which legal instruments, government and non-governmental entities are currently trying to grapple with. With these issues in mind, the next chapter will seek to highlight the legal responses to this particular crime perpetrated against children.

CHAPTER 3

LEGAL RESPONSES TO CHILD PORNOGRAPHY ON THE INTERNET

3.1 Introduction

The technological battles between child pornographers and the forces that seek to combat them, have been fought for a long time.⁶⁶ Responding to child pornography, which is in material form such as videos and publications was relatively easy for government, NGO's, the Internet industry and private entities until the 1990's with the emergence of the Internet as a new medium.⁶⁷ The lead in developing responses was taken by countries such as the US and the UK to mention a few. Nevertheless, contrary to the view expressed by most authors about the unavailability of data in Africa on the subject, there have been a considerable number of responses in Africa, particularly South Africa.⁶⁸

In keeping with the developments of technology and its impact on child pornography, certain legal responses have been formulated. These legal responses have included international instruments adopted to fill lacunas in previous instruments such as the CRC. Other legal responses include the enactment of national laws drafted specifically to deal with child pornography on the Internet.

The first section of this chapter will focus on how the international instruments have been developed to include Internet as a means of producing and distributing child pornography. In the second section, a similar analysis will be undertaken in relation to national laws, and the third section shall highlight some jurisprudence from non-African courts and the South African courts to show how the courts have interpreted the various laws.

3.2 Analysis of international instruments

The international instruments that will be analysed in this section are relevant in terms of the definition they have given to child pornography and its bearing on African countries. The international instruments are the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Council of Europe Convention on Cyber Crime. In relation to international instruments, which deal with the rights of children, the ACRWC will not be discussed in detail, because it unfortunately does not give a definition of child pornography. The ACRWC like the CRC only prohibits 'sexual exploitation and

⁶⁶ Jenkins (n 4 above) 143.

⁶⁷ Stewart (n 9 above) 205.

⁶⁸ Healy (n 2 above) 1.

the use of children in pornographic images'.⁶⁹ Therefore, the analysis will be restricted to the two previously mentioned international instruments.

3.2.1 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

As mentioned in the previous chapter, the CRC is the main instrument that sets out the rights of the child. However, the CRC does not define child pornography; it merely outlaws 'the exploitative use of children in pornographic performances and materials'.⁷⁰ Due to this lacuna in the CRC, in 1993, the UN Commission on Human Rights called for a working group to prepare a draft optional protocol. The purpose of the protocol was to make sexual exploitation of children an offence subject to universal jurisdiction.⁷¹ In effect, this would have resulted in all states regardless of the location of the offence or the nationality of the offender having jurisdiction to try the offence. In 2000, the Optional Protocol to the Convention on the Rights of the Child on the Sale of children, Child Prostitution and Child Pornography (Optional Protocol) was adopted as an additional Protocol to the CRC.

According to the Optional Protocol, child pornography is defined as

'[a]ny representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primary sexual purposes'.⁷²

This definition in the Optional Protocol can be said to include all forms of representation, audio, visual and pseudo-photographs⁷³, written or otherwise.

In relation to whether the definition deals with the Internet, The phrase 'by whatever means' in the definition of child pornography in the Optional Protocol suggests a broad band which captures all types of transmission; books, films, soft copies such as diskettes, compact discs (CD's) and most importantly the Internet. Moreover, it is noticeable from the preamble to the Optional Protocol that it specifically deals with the Internet as a means of child pornography. The preamble acknowledges concern for the 'growing availability of child pornography on the Internet' and calls for the adoption of a 'holistic approach' to combat the problem.⁷⁴ Additionally, the Optional Protocol enjoins State parties to make offences of transmitting child pornography via the Internet a punishable offence.⁷⁵

⁶⁹ ACRWC, article 27.

⁷⁰ CRC, article 34(c).

⁷¹ J Son cited in Stewart (n 9 above) 428.

⁷² Optional Protocol, article 2(c).

⁷³ Pseudo- photographs are images made by computers or other technologies, which appears to be a photograph.

⁷⁴ Optional Protocol, Preamble.

⁷⁵ Optional Protocol, article 3(3).

However, the enforcement mechanism of the Optional Protocol like that of the CRC leaves much to be desired. This is because there is really no real enforcement body to implement the findings of the Committee on the Rights of the Child in cases where violations are found against State parties.

In relation to its relevance to Africa, of the 16 African States that have ratified the Optional Protocol, only South Africa has fulfilled its obligation under the Optional Protocol. The rest are failing in their obligations under the Optional Protocol to enact laws to deal with the problem of child pornography on the Internet.⁷⁶

3.2.2 Council of Europe Convention on Cyber Crime (Europe Convention)⁷⁷

On 23 November 2001, the Council of Europe on 23 November 2001 opened for signature, the first international treaty on crimes committed via the Internet. The Europe Convention followed the numerous Council of Europe decisions regarding the regulation and prevention of electronic child pornography.⁷⁸ The Europe Convention deals particularly with infringements of copyright, computer related fraud, child pornography and violations of network security. Its main objective, set out in the preamble is to pursue a common criminal policy aimed at protecting the society against cyber crime and fostering international cooperation.⁷⁹

The Europe Convention is the product of four years of work not only by Council of Europe experts, but also by the United States, Canada, Japan, South Africa and other countries. To date, there are 34 European countries signatories to the Europe Convention, four non-member states of the Council of Europe and eight ratifications.⁸⁰ Interestingly, South Africa is a signatory to the Europe Convention. The implication of this for South Africa is that it must not act contrary to the spirit of the Europe Convention.⁸¹ The Europe Convention can also be seen as setting a universal standard for other European national legislation to follow as it succinctly deals with producing, offering,

⁷⁶ The other African States that have ratified to the Optional Protocol are Botswana, Cape Verde, Democratic Republic of Congo, Egypt, Equatorial Guinea, Lesotho, Mali, Mozambique, Namibia, Morocco, Rwanda, Sierra Leone, Uganda, Chad, Tunisia and Tanzania. However, there are 36 African signatories to the Protocol.

⁷⁷ European Convention on Cybercrime Budapest, 23.Xi.2001, adopted on 19 September 2001, entered into force on 1 July 2004.

⁷⁸ See Communication from the European Commission to the European Council, the European Parliament, the Economic and Social Commission and the Commission of the Regions, COM (00) 890 final available at <<http://europea.eu.int>> [accessed on 9 October 04]. See also, Oddis (n 1 above) 609.

⁷⁹ Europe Convention, Preamble.

⁸⁰ The non-members who are signatories to the Convention are Canada, Japan, South Africa and United States. The following European countries have ratified: Albania, Croatia, Estonia, Hungary, Lithuania, Romania, Slovenia and The Former Yugoslav Republic of Macedonia.

⁸¹ Article 18, United Nations Convention on the Law of Treaties Signed at Vienna 23 May 1969, entered into force on 27 January 1980.

distributing, procuring and possessing child pornography through a computer system.⁸² The Europe Convention has been described as 'ground breaking'.⁸³

In defining child pornography, the Europe Convention states that child pornography

. . . include[s] pornographic material that visually depicts: a) a minor engaged in sexually explicit conduct; b) a person appearing to be a minor engaged in sexually explicit conduct; c) realistic images representing a minor engaged in sexually explicit conduct.⁸⁴

Though it appears that the definition above is more concerned about what materials constitute child pornography, article 9 criminalizes various aspects of the electronic production, possession and distribution of child pornography. Article 9 (1)(a) criminalizes the production of child pornography for the purpose of distribution through a computer system. The term 'procuring for oneself or for another' in article 9 (1)(d) means actively obtaining child pornography, e.g. by downloading it. The possession of child pornography in a computer system or on a data carrier, such as a diskette or CD-Rom, is criminalized in article 9 (1) (e). The visual depiction envisaged by the Europe Convention includes data stored on computer diskette or on other electronic means of storage, which are capable of conversion into a visual image. Therefore, the Internet has been suitably targeted at as a means of producing, possessing and distributing child pornography.

The definitions in the international instruments above make use of words, which embraces the forms in which child pornography can be depicted. The phrase 'any representation' and 'pornographic material' in the Optional Protocol and the Europe Convention respectively can be regarded as embracing of all types of media possible for depicting child pornography such as audio, written, video, films, photographs, arts, and carvings.

3.3 Analysis of national laws

In Africa, sadly, of the 16 African countries parties to the Optional Protocol, only South Africa has enacted a law dealing with child pornography on the Internet. Though the justification for this may be attributed to the high level of Internet access in South Africa, this argument is weakened by data previously pointed out in chapter two. The data show that other countries such as Nigeria, Egypt and Kenya also have a high level of the Internet access.⁸⁵ Nevertheless, these countries have failed to enact laws to deal with the problem of child pornography on the Internet. However, for the purposes of drawing guidance from national responses, this section will highlight the legal national

⁸² Europe Convention, article 9.

⁸³ Oddis (n 1 above) 616.

⁸⁴ Europe Convention, article 9 (2).

⁸⁵ Oyelaran-Oyeyinka & Adeya (n 46 above).

responses to child pornography on the Internet in countries such as the US and the UK in addition to the African example of South Africa.

3.3.1 Non-African National Laws

(I) United States (US)

The US Federal Code 18 ss2256 defines child pornography to be:

'...any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture...of sexually explicit conduct...[which] contains a visual depiction of a minor engaging in sexually explicit conduct...'

The definition proffered in the US suffers the same problem as most definitions, which is the non-inclusion of audio and written depictions of child pornography. In relation to the Internet, websites carry prose versions of child pornography. It is therefore argued that definitions of what constitutes child pornography, especially as it relates to the Internet should encompass audio and written representations.

In the US, the fight against child pornography via the Internet through laws started in 1996 with the enactment of the Communications Decency Act (CDA) and the Child Pornography Prevention Act (CPPA).⁸⁶ The CPPA explicitly prohibits not only child pornography but makes it illegal to knowingly mail⁸⁷, receive⁸⁸, produce⁸⁹, sell⁹⁰, possess⁹¹ images of child pornography. Similarly, CDA criminalizes the transmission of obscene or indecent messages to any recipient under the age of 18 years.⁹² Another very important regulation of the content of the Internet in the US is the Children's Online Privacy Protection Act of 1998, which seeks to regulate the conduct of ISP's and invariably impacts on the availability of child pornography on the Internet.⁹³

In principle, the CPPA sought to expand the scope and type of image that will constitute child pornography under the US Federal Code. Furthermore, somewhat progressively, the US imposes a duty on:

Whoever, while engaged in providing an electronic communication service or a remote computing service to the public, through a facility or means of interstate or foreign commerce, obtains knowledge of facts or circumstances from which a violation of section 2251, 2251A, 2252, 2252A, or 2260 of title 18, United States

⁸⁶ CPPA 18 U.S.C. § 2252, Chapter 110 of the Federal Code; CDA 47 U.S.C §223.

⁸⁷ 18 U.S.C § 2252A (1).

⁸⁸ 18 U.S.C § 2252A (2).

⁸⁹ 18 U.S.C § 2252A (3).

⁹⁰ 18 U.S.C § 2252A (4) (b).

⁹¹ 18 U.S.C § 2252A (5) (b).

⁹² 18 U.S.C §223 (a) (1) (B) (ii).

⁹³ 15 U.S.C. §§ 6501-6506, P.L. No. 105-277, 112 Stat. 2681-728.

Code, involving child pornography (as defined in section 2256 of that title), is apparent, shall, as soon as reasonably possible, make a report of such facts or circumstances to a law enforcement agency or agencies.⁹⁴

In a real sense, these definitions seek to combat child pornography on the Internet but the struggle for the protection of freedom of expression and the fear of arbitrary regulation of the Internet by the US government has resulted in activists challenging the laws identified above.⁹⁵ A detailed discussion of the challenges will be enumerated in (3.4 below).

(II) United Kingdom (UK)

In the UK, child pornography is described as an indecent photograph of a child.⁹⁶ The criticism against such definition is similar to that against the definition in the US, in that it omits written description of child pornography. The current relevant laws dealing with child pornography on the Internet are the Sexual Offences Act 2003, the Protection of Children Act 1978 (PCA) and the Criminal Justice Act 1988 (CJA). However, these laws must be read together with the amended Criminal Justice and Public Order Act of 1994 (CJPOA)⁹⁷ and the Criminal Justice and Court Services Act 2000.

Section 1(a) of the PCA makes it an offence to take or permit to take or make any indecent photograph or pseudo-photographs of a child. The PCA also makes it an offence to distribute or show indecent photograph of a child. However, the CJPOA inserted section 7 (4) into the PCA to encompass indecent photographs of a child stored in a computer disc or by other electronic means, which is capable of conversion into a photograph. It should be noted that Schedule 9, paragraph 3 of the CJPOA amends the word 'publication' in section 1 (3) of the Obscene Publications Act 1959 to cover the Internet as a means of publication.⁹⁸ The new amendment reads, 'or where the matter is data stored electronically [and] transmits that data'. The word 'matter' here refers to the images of child pornography, which are considered as obscene materials. The implication of the amendment is that any publication even though on the Internet is considered obscene, will fall under child pornography.

In addition to this section, section 160 of the CJA makes it an offence to have an indecent photograph or pseudo-photograph. This section adequately covers possession via the Internet.

⁹⁴ Child Abuse Act 1990 of United States of America, section 227.

⁹⁵ Maher, T 'Government Regulation of Internet Content' (1997) 1 *New Atlantis Now* available at <<http://www.usual.com/article4.htm>> [accessed on 22 August 04].

⁹⁶ CJA 1988, section 160 as amended by the UK CJPOA 1994.

⁹⁷ CJPOA, section 84 amends section 1 & 7 of PCA 1978 and section 160 CJA 1988

⁹⁸ Akdeniz (n 8 above) 10.

Therefore, offences involving child pornography on the Internet would be prosecuted under either section 1 and 6 of the PCA or section 160 of the CJA.

The definitions enumerated in the international instruments and national laws raise some pertinent issues. Firstly, the scope covered by the definitions in most cases does not extend to other all forms of depicting sexual abuse of children. This is a shortcoming when the definitions are aligned with the definition of pornography. Pornography is defined as the 'creative activity (writing or pictures or films etc.) of no literary value other than to stimulate sexual desire'.⁹⁹ Therefore, child pornography is the involvement of a child in such creative activity. Using this definition, there is therefore an omission in the laws dealing with child pornography. There is an exclusion of written description of the sexual abuse of a child.

Secondly, there are differences in the definitions. Jones has identified the causes for this as resulting from differences in culture and tolerance in society.¹⁰⁰ Carr agrees with this analysis but argues that despite the differences, there are still common grounds in the definitions. Words such as 'minor' or 'child' occur in the definitions.¹⁰¹ He also suggests a further reason for differences in laws dealing with child pornography namely that the age for children under national laws usually varies from one jurisdiction to another.

Other controversies surrounding the definition of child pornography are derived from arguments about the types of images that constitute child pornography. The controversial images are 'child erotica' and virtual images. A brief discussion of these controversial images is important because the images form a large percentage of the images available on the Internet. The controversies related to these images are fuelled by the fact that some images often labelled 'child erotica' are allowed and considered legal depending on the jurisdiction and on the country.¹⁰² In the same vein, 'virtual images' in some jurisdictions are not considered as constituting child pornography because they do not involve the use of real children.¹⁰³

Child erotica

These are images of children, which are considered legal because the pictures are viewed as promoting arts. Child erotica includes items such as toys, games, children's clothing, sexual aids, manuals, and drawings. Proponents of the argument that child erotica should be prohibited define

⁹⁹ Definition of pornography available at <www.cogsci.princeton.edu/cgi-bin/webwn> [accessed on 12 October 04].

¹⁰⁰ Jones (n 5 above) 57.

¹⁰¹ Carr (n 3 above) 10.

¹⁰² Jones (n 5 above)58.

¹⁰³ Mills, L 'Ashcroft v Sharpe: The virtual reality of Child pornography' (2002) 3 *CARSA* .

it as 'soft child porn' or 'posing pictures'.¹⁰⁴ On the other hand, Healy argues that child pornography should be distinguished from child erotica and describes the latter as 'any material relating to children that serves a sexual purpose for a given individual' (paedophiles).¹⁰⁵ The apparent legality given to child erotica is derived from the fact that the images or depictions are innocent and contain no sexual exploitative materials. However, Save The Children posits that there is a strong link between child abuse and child erotica.¹⁰⁶ The argument that there is a connection between child erotica and child abuse is persuasive and can be further strengthened by the fact that perpetrators have often been found to be in possession of items labelled child erotica.¹⁰⁷

It will be interesting to test the debate of child erotica in Africa. Due to the dearth of laws on the issue, it is difficult to conclude on whether child erotica will be accepted or rejected as constituting child pornography in Africa. However, the conservative nature of Africa which finds its origin in deeply rooted traditions may suggest that upcoming laws may either not target such issues or will most likely make child erotica illegal. Furthermore, the reluctant attitude to deal with issues such as homosexuality and paedophilia in Africa may lead one to conclude that such images may not be accepted or even addressed.

On the other hand, it is arguable that the African continent even though deeply rooted in traditional values and customs, nevertheless is being exposed to influences such as Internet and globalisation and this has somewhat increased the tolerance rate. Such that, what is tolerated in South Africa for example, where sexual orientation is constitutionally guaranteed and given equal protection of the law may not be tolerated in other countries such as Nigeria or Ghana.¹⁰⁸ Therefore, the issue of child erotica needs to be addressed in formulating legal responses to deal with child pornography on the Internet in order to avoid future complexities.

¹⁰⁴ See Save The Children Europe Group (n 31 above).

¹⁰⁵ See Healy (n 2 above)

¹⁰⁶ See Save The Children Europe Group (n 31 above).

¹⁰⁷ See Lanning, K 'Child Molesters: A Behavioural Analysis' available at <http://www.missingkids.com/en_US/publications/NC70.pdf = 23/9/04> [accessed on 23 August 04].

¹⁰⁸ The South African courts have in many cases upheld the equality clause enshrined in Section 9 of the 1996 Constitution of South Africa. In the same vein, the South African government has in many ways ensured equal rights for same-sex partners. An example of this is the promulgation of The Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000. The South African Courts have also reiterated equality of rights to same sex partners. On the other hand, in Nigeria, the public frowns upon same sex partners. 'Lesbians to face disciplinary actions', Sun News 17 September 04 available online at <www.sunnewsonline.com> [accessed on 17 September 04].

Virtual images

Virtual images are images made by the use of computer software's. In the US for instance, virtual images of child pornography is not illegal.¹⁰⁹ However, these images whether virtual or real are illegal in Canada.¹¹⁰ Even though Mills argue that virtual child pornography is not a victimless crime because, the image must have been based on a real child.¹¹¹ However, the US Supreme Court maintains that it is a creation of an imaginative mind which should be protected by the First Amendment.¹¹² In the South African context, it is argued that virtual child pornography is covered by the words 'however created' in the definition of child pornography in the Films and Publication Act No. 34 of 1999.

3.3.2 African national laws

Although most African national legislation does not define child pornography but some outlaws sexual activities with minors or publications which portray sexual activities with minors, while others define child pornography in terms of other forms of pornography as 'immoral acts'.¹¹³ However, the Films and Publications Act of South Africa (FPA)¹¹⁴ broadly defines child pornography and deals with the Internet as a means for child pornography.

The first version of the FPA was drafted in 1996. The 1996 FPA was the result of the transformational work of the Task Group on Films and Publications. The task group was set up after the previous law (Publication Act No. 42 of 1974) failed the constitutional scrutiny.¹¹⁵ The 1996 FPA came into force on 1 June 1998 and provided for 'classification and not censorship' of films and publications with the exception of child pornography.¹¹⁶ In 1999, the 1996 FPA was amended.

The 1999 amendment was basically for the purposes of providing for the appointment of the Films and Publication Board (the Board) and the Film and Publication Review Board; to provide for the

¹⁰⁹ See *Ashcroft v. Free Speech Coalition* 198 F3d 1083 (2002).

¹¹⁰ See *R v. Sharpe* (2001) SCC 2 and *R v Pecchiari* (1995) 22 OR (3rd) 748-766.

¹¹¹ Mills (n 102 above) 40.

¹¹² *Ashcroft v. Free Speech* (supra).

¹¹³ See The Children's Act of Ghana, sections 12 & 87; Children's Act of Kenya, sections 13 & 15; Child Rights Bill of Nigeria, sections 32 – 37 & 42; Kenya Penal Code, section 52, and Egypt Penal Code, article 178.

¹¹⁴ Films and Publication Act No. 34 of 1999.

¹¹⁵ Films and Publication Board 'From Censorship to Classification' available online at <www.fpb.gov.za/documents/histroy.htm> [accessed on 9 September 04]. It failed constitutional scrutiny because it sought to censor what South Africans could see or not see.

¹¹⁶ Films and Publication Board (n 135 above). In essence, child pornography will be censored and classified. The other types of publications and images were not censored because of the need to protect fundamental human rights such as freedom to choose what to read and see.

protection of children against mental, physical and sexual exploitation or coercion to engage in the production of pornographic film, publication or visual representation among other things. It is worthy to note that prior to the amendment, the 1996 FPA did not contain a definition of what child pornography is. The 1999 FPA corrected this by inserting a definition of child pornography in the definition section of the FPA. For the purpose of this study, it worthy to note the inclusion of the word 'the Internet' in the definition of publication under chapter 1(xv) of the amended 1999 FPA.

As mentioned earlier, the definition in the 1999 FPA can be said to cover virtual child pornography due to the substitution of the definition of visual representation to read:

- (a) a drawing, picture, illustration, painting, photograph or image or (b) a drawing, picture, illustration, painting, photograph or image or any combination thereof, produced through or by means of computer software on a screen or a computer printout

Therefore, however the image is created, either by using a real child or using computer technology (as is the case with virtual child pornography), such images are covered under the 1999 FPA.

Furthermore, the objects of the 1996 FPA contained in section 2 was substituted to include

[T]o regulate the creation, production, possession and distribution of certain publications and certain films ...on the Internet and (b) make the exploitative use of children in pornographic publications films or on the Internet punishable...

Therefore, a person guilty of an offence section 27 of the 1999 FPA will be liable to a fine or not more than five years imprisonment as provided for in section 30 of the 1996 FPA. Other amendments to the 1996 FPA by the 1999 FPA includes the inclusion of 'child pornography' in the Schedule 1 and 6 of the FPA as one of the publications or films which will be classified 'XX' by the Board.

However, on 27 October 2004, due to the increase in the availability of child pornography on the Internet in South Africa, Parliament passed an amendment to the 1999 FPA.¹¹⁷ The 2003 amendment seeks to achieve the following objectives:

'...to make further provision for the prohibition of child pornography; ...to provide for the registration of [I]nternet service providers; to provide for an obligation to report offences involving child pornography; and to increase penalties for offences involving child pornography...'.¹¹⁸

In line with the new amendment, child pornography is now defined as

'[a]ny image, however created or any description of a person real, or simulated, or who is depicted or described as being, under the age of 18 years –

- (i) engaged in sexual conduct;
- (ii) participating in, or assisting another person to participate in, sexual conduct; or

¹¹⁷ ioL ' Police: Increase in child porn cases in SA' *Independent Online* October 11 available at <<http://www.ioL.co.za/index.php>> [accessed on 12 Oct.04].The amendment was confirmed by Chetty (n 7).

¹¹⁸ Films and Publications Amendment Bill B61 – 2003 (FPAB 2003).

- (iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation'.¹¹⁹

The FPAB 2003 is a complete overhaul of the 1999 FPA and can be regarded as a response to the growing increase of arrests of child pornographers in South Africa and the relaxed sentences provided for in 1999 FPA.¹²⁰ In response to this, the FPAB has increased sentence on conviction from five to ten years.¹²¹ Furthermore, child pornography has been recognised as one of the ways in which a child can be sexually exploited.¹²²

Additionally, the acts of producing, distributing and possession will henceforth be counted as separate counts. Thereby creating a situation whereby a convict can be sentenced to 30 years imprisonment.¹²³

It is worthy to note that the South African government in recognising that child pornography on the Internet is an international crime has included the principle of 'extra territorial jurisdiction' in the FPAB 2003.¹²⁴ In essence, any South African found to have committed any offence under the FPAB 2003 could be tried by the country where he/she committed the offence, upon the written consent of the Director of Public Prosecution. The effect of this is that the long-winded process of extradition will be done away with.

Furthermore, ISP's are mandated to register with the Board and can be prosecuted for failing to report any image or sites displaying child pornography on the Internet.¹²⁵ This can be regarded as a multi-layered legal response to the problem of child pornography on the Internet.

Arguably, the definition offered by the FPAB 2003 is inclusive and this is demonstrated with the use of the words 'however created'. In terms of mode of creation and dissemination, the FPAB 2003 definition can be said to be the most comprehensive definition in Africa as it takes into consideration the various aspects of child pornography which includes creation and the conduct and purpose, which has been identified as sexual exploitation. The definition also encompasses

¹¹⁹ FPAB 2003, section 1 (a).

¹²⁰ FPA, section 30

¹²¹ FPAB 2003, section 30.

¹²² FPA, section 1 (a) (iii).

¹²³ Chetty, I (n 7 above).

¹²⁴ FPAB, section 30A.

¹²⁵ FPAB, section 27A. See also Legal Brief Africa 'New laws to deal with increase in child pornography' available at <<http://www.legalbrief.co.za/article.php>> [accessed on 12 Oct.04].

written materials and it is argued that this is an improvement in comparison to the non-African national laws identified above.¹²⁶

It should be noted that the effect of not having a definition, which targets the Internet as a means of transmission 'poses a formidable challenge for courts and law enforcement officials'.¹²⁷ Most especially, judicial officers are reluctant to convict persons for offences that are not specifically provided for in the laws. This was the situation in the United Kingdom before the enactment of the CJPOA.¹²⁸ Prior to the amendment of the PCA by the CJPOA, the PCA and the CJA were the two laws outlawing and criminalizing child pornography in the UK. However, these two laws failed to address the means of transmission and what constitutes child pornography. This created a problem for the judiciary in the first two cases involving the transmission and possession of child pornography via the Internet in the UK.¹²⁹

It is safe then to conclude that no single phrase or definition can best capture or anticipate the differences and developments in each circumstance. Especially with the speed at which Information Technology is fast developing, no definition can be termed adequate or complete. Be that as it may, the African States who are parties to the Optional Protocol are failing in their obligations as contained in international instruments to take adequate legislative measures to prohibit the production and distribution of child pornography via any means, especially the Internet.

3.4 Child pornography in the courts

3.4.1 United States (US)

In interpreting the laws dealing with child pornography and its production, possession and distribution via the Internet, the 6th Circuit Court in *United States v. Thomas*¹³⁰ held that the argument that computer transmissions are not included within the terms of the federal statute is invalid because the statute uses such terms as transports, distribution, picture, image and electrical transmission and therefore clearly indicates that the legislative intent of Congress was to encompass child pornography no matter what form was used to transport the material.¹³¹

¹²⁶ FPA (1996), section 28 (1).

¹²⁷ See Healy (n 2 above)1.

¹²⁸ See Akdeniz (n 8 above) 12.

¹²⁹ Akdeniz [n 8 as above] 13. Christopher Sharp and Martin Crumpton became the first persons to be fined and jailed respectively for cases involving child pornography and the Internet.

¹³⁰ 74 F. 3d 701 (6th Cir. 1996).

¹³¹ For a comprehensive discussion of the American cases on child pornography, see Walkers IV, M G & Harrel, J (1997) 'Child Pornography on the Internet' available at <<http://gsulaw.gsu.edu/lawand/papers/sp97/waters.html>> [accessed on 3 September 04].

In the case of the US, constitutional challenges have been brought against the CDA, COPA and the CPPA. As stated earlier in the discussion on the US laws, the CDA was the first legal response to the problem of child pornography on the Internet. However, this piece of legislation was challenged in the *ACLU v. Reno* case.¹³² Intended to protect minors from unsuitable internet material, the CDA criminalized the intentional transmission of "obscene or indecent" messages as well as the transmission of information which depicts or describes "sexual or excretory activities or organs" in a manner deemed "offensive" by community standards.¹³³ After being enjoined by a District Court from enforcing the above provisions, except for the one concerning obscenity and its inherent protection against child pornography, Attorney General Janet Reno appealed directly to the Supreme Court. The Supreme Court held that the CDA violated the First Amendment because its regulations amounted to a content-based blanket restriction of free speech.¹³⁴

The same fate was meted out to the COPA in the *ACLU v Reno Janet*.¹³⁵ The COPA was declared unconstitutional. It was held that access to the websites, which the COPA sought to regulate, cannot be restricted based on the nature of the Internet.¹³⁶

The above cases represent the current situation in the US. The current law dealing with child pornography on the Internet, namely the CPPA has also been challenged.¹³⁷ The US Supreme Court held that the prohibitions of sections 2256(8) (B) and 2256(8) (D) are 'overbroad and unconstitutional' because it infringed on the freedom of speech which cannot be banned merely because it tends to encourage unlawful acts.¹³⁸

Therefore, as it stands now, the three important laws regulating child pornography on the Internet have been declared unconstitutional and the criteria for making a perpetrator liable will be if the publication is harm based. Therefore a perpetrator in the US will be tried under the US Federal Code 18 ss2256.

¹³² *ACLU v. Reno* 929 F. Supp. 824 (E.D. Pa. 1996); also known as *Reno v. ACLU* 521 U.S. 844 (1997).

¹³³ CDA, section 502.

¹³⁴ EPIC 'U.S. Supreme Court Strikes Down CDA' available at <http://www.epic.org/free_speech/CDA/> [accessed on 12 October 04].

¹³⁵ *ACLU v Reno Janet* (2000) 99 – 1324.

¹³⁶ ACLU 'In victory for online speech' available at <<http://www.aclu.org/privacy/privacy.cfm?ID=16025&c=252>> [accessed on 12 October 04].

¹³⁷ *Ashcroft V. American Civil Liberties Union* (03-218) 322 F.3d 240.

¹³⁸ *Ashcroft V. American Civil Liberties Union* (supra) para 6—2. See also 'Child Pornography Prevention Act Struck Down!' available at < http://www.wiredsafety.org/news/parry/april_17_2002.html> [accessed on 12 October 04]; Mills (n 102) 39.

3.4.2 United Kingdom (UK)

In the *Birmingham University* case¹³⁹, Alban Fellows, 27, of Birmingham and Stephen Arnold, 25, of Milton Keynes were charged and sentenced under the Protection of Children Act 1978, Obscene Publications Act 1959, and the CJPOA 1994. The materials discovered were thousands of pictures stored in the computer system of youngsters engaged in obscene acts. These materials could be accessed through the Internet across the world. The judge ruled that the computerised images could be legally regarded as photographs and the case set a legal precedent that a pornographic computer image was, in law, the same as a photograph. Owen J. told Fellows that his sentence was intended to act as a deterrent to others considering using the computer information network to circulate pornography.¹⁴⁰

According to the judgement, downloading an indecent photograph from the Internet was "making a copy of an indecent photograph" since a copy of that photograph had been caused to exist on the computer to which it had been downloaded.

In 1999, the Court of Appeal in the case of *R v Jonathan Bowden*¹⁴¹ held that the downloading and/or printing out of computer data of indecent images of children from the Internet was capable of amounting to an offence within the meaning of the section 1 (1) (a) of the PCA 1978.

The implications of this judgement were extensive. Not only did it confirm that those downloading indecent images from the Internet were breaking the law, it also meant that law enforcement officers committed the same offence when they made a copy of the contents of suspects' computer disks. This led to the amendments to the Protection of Children Act by the Sexual Offences Act 2003 to create a statutory defence where it was necessary "to make the photograph or pseudo-photograph for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings".¹⁴²

¹³⁹ *R v Fellows & Arnold* (1997) 1 CAR 244.

¹⁴⁰ Akdeniz, Y 'Cases and Materials related to Child Pornography on the Internet' available at <<http://www.cyber-rights.org/reports/child.htm>> [accessed on 3 September 04].

¹⁴¹ [2000] 2 All ER 418.

¹⁴² UK Sexual Offences Act 2003, section 46. See also Wikiverse 'R V Bowden 1999' <<http://r-v-bowden-1999.wikiverse.org/>> [accessed on 12 October 04]. See also *R v Graham Westgarth Smith and Mike Jayson* CA, [2002] EWCA Crim 683, (No. 2001/00251/Y1), 7 March 2002; Akdeniz Y 'Court of Appeal Clarifies The Law On Downloading From the Web' <http://www.cyber-rights.org/documents/smith_jayson.pdf> [accessed on 12 October 04].

3.4.3 South Africa

In the case of Africa, there are very few prosecutions arising out of investigations of child pornography on the Internet. The reasons for this could vary from lack of appropriate laws in place to prosecute, to situations where the person apprehended is no longer connected to the Internet but had downloaded the images from the Internet. In the case of South Africa where there is a law in place, the reason for this could be lack of adequate training for law enforcement officers in dealing with such issues.

In the *De Reuck* case¹⁴³, the accused was arrested and charged with the offence of possessing of child pornography. The accused alleged he had possessed the images for research purposes. However, the medium through which the accused possessed the images were not disclosed to the Constitutional Court.¹⁴⁴ The court noted that

'[m]oreover, since child pornography is frequently being imported via the Internet and possessed on computers, the ease with which such possessors may become distributors at the touch of a button, as it were, should be taken into account'.¹⁴⁵

It is arguable that he had possessed the images on the Internet one because the images were not only film images but also virtual images. Also, if the purpose for which De Reuck possessed the images was to show the availability of child pornography on the Internet, it makes more sense that such collection was from the source he was trying to prove. Therefore, there is a high probability that he had obtained the images from the Internet.

Other prosecutions have also been undertaken in respect of child pornography but in most cases, the fact suggests that the images were found in video footages, digital movie clips, photographic slides and still images.¹⁴⁶

3.5 Sentences for child pornography

With respect to the sentences meted out to offenders convicted of possessing, producing and distributing child pornography on the Internet, there are considerable variations in the different jurisdiction. For instance, in the US, the UK and in Germany, the sentences have ranged between 5 years to 15 years imprisonment. Whereas, so far in Africa, persons convicted of offences relating to child pornography have been sentenced to pay fines or to sentences less than 5 years

¹⁴³ *De Reuck* (supra).

¹⁴⁴ Though in a document, he informed the regional court after the Constitutional Court decision that he wanted to use the images for the purpose of compiling a documentary on "the availability of such material on the internet". See News 24 'Child porn: De Reuck fined' available online at <http://www.news24.com/News24/South_Africa/News>[accessed on 11 oct.04].

¹⁴⁵ Langa J in *De Reuck's case* citing Van Bueren, "The constitutional rights of children" (2003) *Amicus Curiae* Issue 46 at para 30.

¹⁴⁶ The biggest bust in the Western Cape, South Africa involving possession of child pornography led to the arrest of William John Creasey, who was later found guilty in the Wynberg regional court of possession of child pornography, and nine counts of indecent assault on young boys available at <www.news24.co.za> 'Teacher guilty on porn charges' [accessed on 11 October 04].

imprisonment. While the reason for this can be attributed to the lack of laws dealing with the issue, one can also argue the unwillingness on the part of the government to provide for stricter penalties because child pornography on the Internet is seen as a western problem rather than a pressing African problem.

For example in the *De Reuck's* case, he was finally fined a sum of R24,000 after pleading guilty to two counts of possessing child pornography, with part of the fine conditionally suspended.¹⁴⁷

3.6 Conclusion

It seems therefore, that though there are legal responses in forms of international instruments and national laws, these cannot remain the only panacea to the problem. The problem of child pornography on the Internet concerns numerous stakeholders and they have also strived to combat the problem. However, recognition that the laws should not be the only response, non-legal responses was developed. The next chapter will deal with the non-legal responses.

¹⁴⁷ See News24 (n 143 above).

CHAPTER 4

NON-LEGAL RESPONSES TO CHILD PORNOGRAPHY ON THE INTERNET

4.1 Introduction

The previous chapter highlighted the legal responses to child pornography on the Internet. Although the value of laws cannot be underrated, laws should not be the only solution to such crimes against children.

The inability of laws to effectively deal with child pornography on the Internet has given rise to non-legal responses. In practice, most of these non-legal responses are sometimes nationally initiated but internationally operated; nevertheless, some are also internationally initiated but executed on a national level.

This chapter will explore a variety of non-legal responses that are categorised into investigations, responses by intergovernmental organisations and NGO's and technical responses.

4.2 Investigations

Most of the investigations that have been undertaken in response to child pornography on the Internet have been internationally motivated but nationally prosecuted. A great deal of the cases that comprise the jurisprudence on child pornography on the Internet began by way of investigations carried out by INTERPOL.¹⁴⁸

Created in 1923, INTERPOL is the world's largest international police organization. It has a standing working group on offences against minors and the standing working group has included in its work a definition for child pornography.¹⁴⁹ INTERPOL's involvement in the investigation of offences against children began in 1989 following the adoption of the CRC. Currently, INTERPOL has a database of about 250,000 images that it has collected and the database has continued to add value to investigations of many law enforcement operations worldwide. By the end of 2003, a database of 238 victims had been established, an improvement on the 140 figure for 2002.¹⁵⁰

¹⁴⁸ INTERPOL members currently stand at 182 with 51 African countries. Data available at <<http://www.interpol.int/Public/ICPO/Members>> [accessed on 11 October 04].

¹⁴⁹ INTERPOL defines child pornography as an image 'created as a consequence of the sexual exploitation or abuse of a child. It can be defined as any means of depicting or promoting the sexual exploitation of a child, including written or audio material which focuses on the child's sexual behaviour or genitals'. See also Fournier de Saint Maur, A 'International Cooperation in Law Enforcement' in Arnaldo (n 36) 119.

¹⁵⁰ INTERPOL (2003) 'INTERPOL at work, 2003' available at <<http://www.interpol.int/Public/ICPO/GeneralAssembly/AGN73/Reports>> [accessed on 11 October 04].

The contribution of INTERPOL to the various responses to child pornography on the Internet has culminated in the success of several operations, which have subsequently led to various prosecutions and convictions. In 2003, INTERPOL embarked on *Operation Landslide*. This operation was carried out by members of INTERPOL and it resulted in the arrests of 5,000 individuals and further arrests are expected.¹⁵¹ Notably, the most publicised operation was Operation Cathedral, which exposed the Wonderland Club.¹⁵² This operation is relevant to the study because two African nationals operating from Africa were identified as members of the club. The African nationals were from South Africa and Egypt. Unfortunately, there are no records of any arrest in Africa despite these identifications. INTERPOL defended this non-cooperation with some countries by stating that the countries lacked 'the technical capability to take part'.¹⁵³ This shows a weakness in internationally initiated investigations. It should be noted that the positive effect of such cooperation with African states may be lost if there are no laws in place [as is the case now] in the African country to try the apprehended perpetrator.

However, despite INTERPOL's successes, there has been some criticism of its *modus operandi*. Particularly the database that has been established has been regarded as detrimental to the victims of child pornography. This is because identified victims could be further traumatised knowing that their personal data is not destroyed and has been saved for reference purposes.¹⁵⁴

Examples of African initiated investigations, which has led to arrests, includes the arrest of a 46 year-old company manager on 5 October 2004 in South Africa. He was arraigned before the Springs Magistrate Court, East Rand, South Africa. He was charged with possession of child pornography using his computer.¹⁵⁵ In August 2004, two senior government officials were arrested after a long and intensive investigation and consultation with the Director for Public Prosecution, South Africa. The police had received information that certain government employees were distributing child pornography using the internal email system and acted on the information.¹⁵⁶

¹⁵¹ INTERPOL < <http://www.interpol.int/Public/news> > [accessed on 11 October 04]. Recent successes of investigations and arrests were two instances of 10 individuals arrested in Switzerland after a comprehensive search of 400 premises.

¹⁵² See Carr (n 3 above) 29.

¹⁵³ Carr (as above).

¹⁵⁴ Save the Children Europe Group (n 31 above) 16.

¹⁵⁵ SABC 'East Rand man in court for child porn' October 05, 2004 available at <http://www.sabcnews.com/south_africa/crime1justice> [accessed on 12 October 04].

¹⁵⁶ Independent Online (iOL) 'KZN govt officials held on child porn charges' available at <<http://www.iol.co.za/index.php>> [accessed on 12 October 04].

4.3 Responses by Inter-governmental Organisations (IGO's) and NGO's

This discussion will centre round efforts by the inter-governmental organisations (IGO) to cooperate with NGO's and other actors in order to find a solution to the problem of child pornography on the Internet. The second part of the discussion will also explore some of the activities of NGO's in dealing with the problem.

4.3.1 IGO

(I) UNICEF

In addition to INTERPOL, the United Nations Children's Fund (UNICEF) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) are at the forefront of ensuring the protection of children's rights. UNICEF in cooperation with ECPAT and the NGO group of the CRC convened the First World Congress against Commercial Sexual Exploitation of Children held in Stockholm, Sweden (First Congress) in August 1996. There were 1,879 participants from 119 countries. One of the great concerns shared at the conference was the challenge posed by the Internet to exacerbate the problem of child pornography.¹⁵⁷

At the Congress, governments were urged to develop a National Action Plan involving the relevant sectors. The end result of the First Congress was the Stockholm Agenda for Action (Stockholm Agenda). The Stockholm Agenda aims to highlight existing international commitments and to identify priorities for action and to assist in the implementation of relevant instruments.

The Stockholm Agenda also seeks to deal with issues such as coordination and cooperation at the international, regional, national and local levels. Other areas include prevention, protection, recovery and reintegration and child participation. Another important decision that arose from the First Congress was the need for States to develop a National Action Plan (NAP). The purpose of the NAP was to ensure the implementation of the Agenda of Action of the First Congress.

In furtherance of this, the European Commission has launched the Safer Internet Action Plan (Europe Plan), covering the period of 1999-2002. The objective of the Europe Plan included looking at creating a safer environment through the promotion of hotlines, encouragement of self-regulation and codes of conduct, developing filtering and rating systems, facilitation of international agreement on rating systems and awareness raising amongst parents, teachers and children. The Europe Plan has hitherto been planned for 2005-2008 and has been submitted for a decision and adoption by the European Council and parliament.¹⁵⁸

¹⁵⁷ ECPAT 'World Congress' available at <<http://www.ecpat.com/eng/csec/worldcongress/index.asp>> [accessed on 7 October 04].

¹⁵⁸ Save The Children Europe Group (n 30 above)16.

In Africa, out of all the African states that participated in the First Congress, South Africa was the first to implement the outcome of the deliberations. South Africa's 'willingness to take appropriate steps to implement the outcome of the deliberations' was declared by President Mandela.¹⁵⁹ South Africa in 1999 developed its NAP on Children, which 'undertakes to meet the World Congress call for the survival, protection, development and participation of children'.¹⁶⁰

The First Congress was followed up with the Second World Congress on Commercial Sexual Exploitation of Children (Second Congress) in Yokohama, Japan from 17 to 20 December 2001. Like its predecessor, it was jointly organised by UNICEF, ECPAT and the NGO group for the CRC. The major outcome of the Second Congress was the re-commitment to the Stockholm Agenda for Action, which was reiterated in the Yokohama Global Commitment, 2001.

The objectives of the Second Congress was to enhance political commitment to the implementation of the Stockholm Agenda, review the progress made since 1996, share experiences and expertise, identify the main gaps or impeding areas and strengthen the follow-up process of the First Congress. In particular, the Yokohama Global Commitment, in dealing with the issue of child pornography via the Internet is committed to taking adequate measures to address prejudicial aspects of new technologies, which includes the Internet.¹⁶¹

Further, the Second Congress provided a platform for governments at the regional level to express their interest and commitment to the Stockholm Agenda.¹⁶² The Second Congress also brought together all the Declarations and Plan of Actions that had been adopted at the regional level to protect children against sexual exploitation. An important contribution of these congresses was that it created awareness on the problem.

(II) Other cooperation

Recently, on 9 September 2004, Microsoft South Africa, INTERPOL and the International Centre for Missing and Exploited Children (ICMEC) hosted a round-table discussion on combating child pornography on the Internet. The theme of the round-table was 'No To Computers Facilitated Crimes against Children'. The round-table coincided with the final session of training given to 73 police officers from 12 countries on identifying and investigating child pornography on the Internet

¹⁵⁹ 'Mandela Message To The World Congress In Stockholm' cited in Van der Westhuizen 'The child's right against exploitation in the form of pornography on the Internet: A South African perspective' 50.

¹⁶⁰ Van der Westhuizen (n 159 as above). See also ECPAT Database 'South Africa' <http://www.ecpat.net/eng/Ecpat_inter/projects/monitoring/online_database/countries.asp>[accessed on 12 October 04].

¹⁶¹ ECPAT (n 157 above).

¹⁶² ECPAT (n 157 above) 3,050 individuals' participated and 159 governments were represented at the Congress.

by INTERPOL. The main purpose of the meeting was to raise the concerns of the impact of the Internet on child pornography and to develop international networks in Africa to combat the problem.

4.3.2 NGO's

(I) End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT)

ECPAT's former name End Child Prostitution in Asian Tourism was changed in 1996 to reflect the organisation's geographic expansion and broader mandate.¹⁶³ ECPAT is a non-governmental organisation with the sole mandate of combating child prostitution, child pornography and trafficking in children for sexual purposes. The biggest thrust of the work of ECPAT lies in lobbying national governments to put in place adequate protection systems against sexual exploitation of children and to empower local groups through grass-roots projects to combat the problem.¹⁶⁴

In 1998, ECPAT International in conjunction with INTERPOL organised an expert meeting on Child Pornography on the Internet. The expert meeting brought together service providers, law enforcers and non-governmental organisations to discuss the actions already taken and the possibilities of a more global and coordinated response to the phenomenon. ECPAT's relevance to Africa is shown by the involvement of African NGO's in the implementation of its objectives.

(II) Internet Watch Foundation (IWF)

IWF came into existence in 1996 following an agreement between the UK government, police and the Internet Service Provider industry that a partnership approach was needed to tackle the distribution of child pornography online in the UK. The IWF works with other organisations to assist all the Internet users and create awareness on the dangers of the Internet as well as tools and techniques for minimising those problems.

Due to the global nature of the Internet, 99% of all child abuse content accessed by UK Internet users is hosted outside the country; the IWF has had to have an international dimension to its work.¹⁶⁵ Essentially the IWF provides a hotline for the public to report images of child pornography

¹⁶³ ECPAT 'History of ECPAT' available at <http://www.ecpat.net/eng/Ecpat_network/history.asp>[accessed on 10 Oct. 04]. Currently, the 'ECPAT network consists of 71 groups in 64 different countries by 2004. All of these groups are independent organisations or coalitions working against commercial sexual exploitation of children. As of September 2004, the distribution of ECPAT groups was as follows: Western Europe: 15 groups; Eastern Europe: 8 groups; Africa: 12 groups; Asia: 17 groups; The Pacific: 3 groups; North America: 3 groups; Latin America: 11 groups; Middle East and North Africa 2 groups'.

¹⁶⁴ ECPAT (n 157 above).

¹⁶⁵ IWF 'General 2004' <<http://www.iwf.org.uk/about/overview/index.html#>> [accessed on 12 October 04].

on the Internet and IWF in turn work with law enforcement agencies in the UK and abroad to have the content removed and the potential offenders traced.

IWF has been successful in holding ISP's accountable for the information passed via their medium. In 2003, IWF identified 510,000 indecent photographs of children carried on newsgroups through the UK's UseNet infrastructure. Access to the newsgroups was stopped upon the orders of IWF to the relevant ISP.¹⁶⁶

4.4 Technical responses

The technical responses discussed below are responses from the Internet industry, NGO's and government. They can be broadly categorized into software, parental guidelines and hotlines.

4.4.1 Software

In response to the use of the Internet to distribute child pornography, ISP's developed software, which serves as a type of parental guidance and control on what children can access on the Internet. Usually, the software is able to detect obscene materials or pornographic sites and shield the Internet user from accessing such sites. Some of the software function to the extent that parents can monitor the time their children spends on the Internet.¹⁶⁷

However, the criticisms levelled against the software, for instance, have included the fact that the software may ultimately block all kinds of websites irrespective of its content from the child, thereby resulting in an infringement on the right of the child to receive and impart information that is necessary for his/her development. Furthermore, Carr has noted that children are more Internet-literate and computer-literate than their parents and are able to by-pass the security measures put in place by their parents.¹⁶⁸ He further posits that 'none of the software is perfect and it would be wrong if parents thought of it as being a substitute for sound advice and appropriate supervision'.¹⁶⁹

4.4.2 Awareness programmes for parents and children

Furthermore, ISP's and NGO's also have various online awareness programmes and resources on how to keep the Internet safe for kids. In South Africa, MWEB is the foremost ISP providing

¹⁶⁶ IWF <<http://www.iwf.org.uk/government/page.52.127.htm>> [accessed on 12 October 04].

¹⁶⁷ Examples of these software's include Internet Explorer 6 Content Advisor, MSN 9 Parental Controls, Net Nanny Safe Search, Cyber Nannies, Parental Filter.

¹⁶⁸ Carr (n 3 above) 35.

¹⁶⁹ Carr (n 3 as above) 25.

Internet access to homes in South Africa and Nigeria. Given that a large percentage of the subscribers are residential, MWEB has also set up internal procedures to carry out the 'notice and take down procedure' as stipulated in the Electronic and Communications Act (ECA).¹⁷⁰ MWEB has also made available parental guidance services on its portal in order that parents can exercise control over what their minor children have access to. This is a voluntary service that parents choose to employ which restricts access to a number of predetermined subjects that are on certain websites.

However, in terms of the advice, guidance and resources offered to parents online, it may become ineffective if the parents for whom the advices are meant can not access the Internet for lack of know-how.

Childline is a NGO based in South Africa with a toll free hotline for reporting child abuse such as child pornography on the Internet.¹⁷¹ Between December 2000 and November 2001, 67,474 total calls were received. Childline operates a call centre for anonymous reporting child pornography sites. The information is passed on to the South African Police Service for investigation. Other child pornography activities include therapy for child victims who were either exposed or used for making child pornography. Childline also runs therapy sessions for perpetrators and run programmes on responsible use of the Internet for children and parents.¹⁷²

4.4.3 Hotlines

In June 1996 the first Internet child pornography hotline was established in the Netherlands by concerned individuals in the industry and among users, with the support of the police. After the First World Congress in Stockholm Save The Children also started its first hotline and within the first two years, they received more than 6,000 reports.¹⁷³ A large percentage of hotlines are facilitated by INHOPE.¹⁷⁴ The hotlines send reports to the relevant country of origin and this ensures that action is taken to investigate and remove the illegal materials. A hotline has been described as:

¹⁷⁰ Electronics and Communications Act No. 25, Government Gazette, 62 No. 23708. ECA requires that ISP's to take down certain contents on notice.

¹⁷¹ The hotline number is +27 08000 55555. Other African generated websites where abuses such as child pornography on the Internet could be websites reported include www.speakout.org.za, www.volunteerchildnetwork.org.za.

¹⁷² Childline <<http://www.childline.org.za/>>.

¹⁷³ Save The Children Europe Group (n 31 above) 9.

¹⁷⁴ The INHOPE Association, formed in 1999 in a bid to facilitate co-operation between Internet Hotline providers. Its mission is to eliminate child pornography from the Internet and protect young people from harmful and illegal uses of the Internet. See History of INHOPE available < <http://www.inhope.org/en/about/history.html> > [accessed on 10 Oct. 04].

'an initiative responding to illegal material on the Internet (especially child pornography) which receives reports from users and has formal procedures for responding which may include notifying industry and or law enforcement'¹⁷⁵.

The characteristics of a hotline are availability, reliability and transparency.¹⁷⁶ The hotline procedure entails that the person who detects the image on the Internet sends a report to the hotline mailing address. The operators of the hotline then invite the content provider to remove the content. This information is passed internationally and upon refusal by the poster to remove such content, action may be taken against the poster. In a case whereby the operators of the hotline are able to detect the ISP hosting the site, newsgroups or bulletin boards, the ISP is advised to remove the images.

There have been considerable successes with the advent of the hotlines and these successes range from thousands of reports made, thousands of images removed from the Internet to intelligence gathering that has led to arrests and subsequent prosecutions.¹⁷⁷

In 2002, the South African Deputy Minister of Home Affairs proposed setting up a hotline for the public at the Film and Publication Board.¹⁷⁸ This was again confirmed at the round-table on 'No to Computer Facilitated Crimes Against Children' held in South Africa.¹⁷⁹

One of the setbacks to the hotline initiative has been identified as situations where the country of origin of the images does not have the necessary law to charge the offender with. Another setback of the hotline can also be lack of commitment, technical know-how or man power on the part of the country of origin to either investigate or prosecute the offender. Also, Internet users could misuse the hotlines and send reports of images that are not necessarily child pornography but which they find offensive to their moral or religious views.¹⁸⁰

¹⁷⁵ Williams, N (2001) 'Hotlines role in Children protection Online' available at <<http://www.iajapan.org/hotline/unicef>> [accessed on 10 Oct. 04].

¹⁷⁶ Williams (n 175 above).

¹⁷⁷ INHOPE Second Report (2004) available at <http://www.inhope.org/doc/inhope_report_2004.pdf> [accessed on 10 Oct. 04]. According to the report, 90,820 96,217 images were reported and submitted respectively.

¹⁷⁸ Films and Publication Board 'Proposed FPB Hotline For Reporting Child Abuse Images' available at <<http://www.fpb.gov.za/pressrel/10oct2002.html>> [accessed on 15 October 04].

¹⁷⁹ Joan van Niekerk informed the audience at the 'No To Computer Facilitated Crimes Against Children' that the Deputy Minister of Home Affairs convened a meeting at which there was a commitment to establish a hotline for child pornography.

¹⁸⁰ Akdeniz (n 8 above) 30.

On the other hand, the positive effectiveness of the use of hotlines was evidenced in the case of *Operation Hamlet*.¹⁸¹ In this case, a stepfather and his wife have been charged with sexually abusing their 11 year old daughter and distributing pictures of the abuse over the Internet. The photo and video images were traded with members of a network of abusers on the Internet. Effective use of hotlines enhanced police identification of 35 children in 9 different countries who were used to produce videos and still images for members of this particular network.¹⁸²

4.5 Conclusion

As shown in this chapter, Africa though lagging behind is beginning to take steps and has shown willingness to protect children's rights and prevent violations wherever they may occur. However, to keep up with the development pace of ICT's, Africa needs to take steps peculiar the issue of child pornography on the Internet.¹⁸³ The next chapter will conclude the study and recommend important steps for combating the problem of child pornography on the Internet in Africa.

¹⁸¹ Save The Children Europe Group (n 31) 23.

¹⁸² Save The Children Europe Group (n 31 as above).

¹⁸³ The circumstance of Africa in this regard is peculiar because of the danger that Africa is exposed to as a developing continent.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusion

Child pornography on the Internet is a crime that violates the rights of the most vulnerable in society; children. It is the depiction of the act of sexual abuse. This is a violation of article 34 of the CRC. The rights of children that child pornography violates also include the right to privacy, dignity and freedom of expression. The Internet has transformed the production of child pornography and it is becoming an increasingly significant factor in child sexual exploitation. The nature of the Internet has allowed for an expansion of the child pornography industry as well as the magnitude of violations. This expansion has placed an onerous task on government, law enforcement agencies, the Internet industry and the civil society.

To counter this problem, both legal and non-legal responses have been developed. The legal responses include international instruments and national laws promulgated specifically to deal with the issue of child pornography on the Internet. This study has shown that some of these national laws have been subjected to judicial scrutiny. This confirms that the regulation of the Internet is a hot debate because there is a risk of arbitrary regulation by government, particularly if the only means of regulation is to be through the enactment of legislation.¹⁸⁴

As has been stated in the previous chapter, following deliberations, proposals from experts and experience sharing on the problem, non-legal responses were developed to boost the process of addressing child pornography on the Internet.¹⁸⁵

It is within this context that Africa needs to act in order to ensure that African children are protected against this technological scourge. In the light of the above, the following recommendations are proposed to African governments, NGO's, the Internet industry, parents and children.

5.2 Recommendations

The overall recommendation is that Africa should develop a multi-layered; stakeholder inclusive approach to solving the problem. Generally, there is a need for further research and awareness creation on the problem. Recommendations that are specific to the various role players follow:

¹⁸⁴ Maher (n 95 above).

¹⁸⁵ Akdeniz (n 8 above) 24.

African States

First, South Africa has taken the lead in responding to the problem, therefore, a good start for other African states who are not parties/signatory to the Optional Protocol will be to strive to ratify it. This will ultimately show the commitment of African states to combat the problem on an international scale.

Secondly, African states that have ratified the Optional Protocol should take adequate steps to criminalize child pornography on the Internet in order to keep pace with IT developments all around the globe. In addition, to promote the spirit of international cooperation expressed in the Optional Protocol, African states should express their commitment to the Europe Convention.

Furthermore, there is a need for African states to acquire and maintain information and statistics on the issue of child pornography on the Internet. This should include legal and technical expertise necessary to understand the nature and extent of the problem. A good understanding of the problem, its extent, in addition to ratifying the Optional Protocol would be the stepping-stone to drafting national laws that will specifically deal with the issue.

One of the problems that were identified in the course of the study was the differences in the definition of child pornography. Another problem that could arise in dealing with the issue of child pornography via the Internet is the risk that some children may lose protection of the law.¹⁸⁶ This risk is attributed to the fact that the age of consent for sexual activity is usually lower than 18 (age for attaining majority) in many jurisdictions. The effect of this is that an image depicting sexual activity with a child between the age of 14 and 18 may be disregarded as constituting child pornography. Another risk is the difficulty in identifying whether the image is actually that of a child or not, especially in cases of children in the pre-pubescent stage.¹⁸⁷ This risk is aggravated by the fact that some children with physically developed signs of maturity may be regarded as adults. To tackle this problem, it would be useful for governments to harmonise national and international laws on the definition of a child and to provide special training for law enforcement officers. In the same vein, it is necessary for judicial officers to be trained in issues of children's rights and the impact of Internet thereon.

Child pornography on the Internet has been recognised as an international phenomenon. Therefore, African governments could deal with the issue of borders and national boundaries by agreeing to bilateral cooperation treaties and extradition treaties.

¹⁸⁶ Carr (n 3 above) 16.

¹⁸⁷ Rodriguez Ruben of the National Centre for Missing and Exploited Children confirmed this at the 'No To Computer Facilitated Crimes Against Children'.

Law enforcement agencies

The role of law enforcement in apprehending perpetrators has been extensively dealt with in chapter four. However, there is a need to standardise law enforcement procedures in Africa and beyond in order to deal with the international nature of the Internet.

Information Technology is a field that is continuously being developed, thereby creating new challenges for agencies and law enforcement. This raises the need for law enforcement agents in Africa to conduct and receive training specific to the child pornography on the Internet. In addition to this, international exchange of information is crucial to identifying victims and perpetrator and this requires that a strong alliance be formed with other law enforcement agencies all over the world. INTERPOL offers this opportunity and almost all the African countries are members of INTERPOL. INTERPOL is therefore enjoined to increase the training activities for African law enforcement agencies.

Civil society

In practise, awareness and education programmes coordinated and run by civil society have the effect of reaching many stakeholders. Therefore, while recognising the current efforts of NGO's in the area of child protection, there is still a further need for NGO's to strengthen their advocacy and lobbying skills in African states to ensure that the national laws are amended to deal with the current challenges posed by the Internet as regards child pornography.

Experience sharing will be a useful avenue, which can be explored by African civil society and supported by NGO's with expertise in the area such as ECPAT and Save the Children International. Another important challenge will be to establish and maintain hotlines in African countries. The hotlines will serve two purposes namely; reporting mechanisms for child pornography on the Internet and acting as a check and balance against individuals who report images which are not child pornography but which that particular person finds offensive. This check will help to protect the right to freedom of expression.

Internet industry

The codes of conduct already developed by the Internet industry should be improved on. There is a need for awareness programmes and safety tips to be made available both online and offline. This will ensure that the large percentage of African parents who do not have computers at home but often in the habit of giving their children money to surf the Internet at cyber café's can be made aware of the problem. Stakeholders in the Internet industry should strive to update law enforcement officers on the developments in the industry and offer training and cooperation.

Software developers should create software capable of being installed into every computer which performs the task of detecting child pornography. As recommended by Sheila Johnson¹⁸⁸, there is a need to use the Internet to combat the problem of child pornography on the Internet. Therefore, a scrolling marquis should be employed by website hosts, Usenets, Bulletin Boards and Chat rooms. The marquis should contain a warning to the Internet users on the danger and the benefits of the Internet.

Parents and children

Parents should monitor the activities of their children while on the Internet. However, this monitoring exercise should not in any way impede the right of the child to privacy and the right to information necessary for his/her development. This exercise is sanctioned by the CRC and the ACRWC, which provide that the exercise of a child's rights is subject to direction by parents and guardian.

Having analysed the harmful effect of child pornography on the Internet, children need to understand that contact should not be made with unknown persons on the Internet. The risk of such contact is that the unknown person may be a predator seeking to pick on a victim and groom the victim for future sexual abuse and exploitation. Children are further advised to report any online soliciting or illegal images to the relevant authority.

The problem is not the Internet per se, but the arbitrary use of the Internet. In reality, the Internet does not create new problems; it only tends to produce extreme versions of the problems. The time has come for African governments, the Internet industry and civil society to proactively deal with the pains (child pornography) and gains (trade and economic development, freedom of speech and expression) of the Internet in order to ensure the promotion and protection of fundamental human rights for all and sundry.

Word count 17,998 (including footnotes)

¹⁸⁸ Johnson, S 'Protect Our Children' available at <<http://www.microsoft.com/issues/essays/2004/04-21children.asp>> [accessed on 12 October 04].

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