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Child sexual abuse in the digital era : Rethinking legal frameworks and transnational law enforcement collaboration

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CHAPTER I: INTRODUCTION

I. BACKGROUND

'Last year, tech companies reported over 45 million online photos and videos of children being sexually abused – more than double what they found the previous year [...]. Twenty years ago, the online images were a problem; 10 years ago, an epidemic. Now, the crisis is at a breaking point' (The New York Times)¹

With access to and usage of it increasing dramatically over the past 20 years, the Internet has become an emerging realm for human interaction. Spanning across country borders, this gateway to a globalised world has provided people from all walks of society with incredible opportunities to connect and interact with each other. But the Internet is not only a platform for producing, accessing, sharing and retrieving information – it offers a distinct forum for criminals to operate in spaces that are increasingly difficult for law enforcement agencies to penetrate.

Criminal offences committed online range from acts against the confidentiality, integrity and availability of computer systems, to computer-related acts for financial or personal gains, and to the production, dissemination and possession of child sexual abuse material² or hate speech.³ While some forms of these offences were 'born' in the age of new technology, other offences such as child sexual abuse have always existed, but are now being committed in a different realm.⁴ This change of realm does not necessarily alter the underlying causes of child sexual abuse, though it has an impact on the dynamics and the effects on the victims.⁵ However, it is important to note that child sexual abuse is not committed either solely online or solely offline. As many cases involving child sexual abuse material begin with a contact offence, there is constant exchange and interaction between online and offline abuse, and between the digital and the analogue world.⁶ Understanding this close interrelation between online and offline child sexual abuse is crucial, as it not only has an impact on the regulation, investigation and prosecution of such offences, but also makes it clear that the impact of child

¹ Michael H Keller/Gabriel J.X. Dance, *The Internet is overrun with images of child sexual abuse. What went wrong?*, New York Times, 28th September 2019, available at: <https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html> (accessed 20 October 2019).

² The term 'child pornography' has been widely criticised as it creates the impression that 'pornography' and 'child pornography' are closely related, hence suggesting that the child could give consent to the production of such material (see Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, A/HRC/28/56 (22 December 2014), para. 29; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015, pp. 9–10); in line with ECPAT, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, Bangkok 2016, and consistent with the language used in CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156 (10 September 2019), para. 5, this study recommends the use of the term 'child sexual abuse material' instead of 'child pornography'.

³ UNODC, *Comprehensive Study on Cybercrime Draft – February 2013*, New York 2013, p. 16.

⁴ UNICEF, *The State of the World's Children 2017*, New York 2017, p. 76; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, p. 8; UNICEF, *Child Safety Online. Global Challenges and Strategies*, New York 2012, p. 13.

⁵ Victims of child sexual abuse material offences oftentimes face great difficulties in 'closing the chapter', as they are continuously exposed to abuse and exploitation through the circulation of their material, see Najat M'jid Maalla, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, A/HRC/12/23 (13 July 2009), pp. 10 *et seq.*; ITU, *Guidelines for Policy-makers on Child Online Protection*, Geneva 2009, p. 19; Alisdair A. Gillespie, *Child Pornography. Law and Policy*, London 2011, pp. 31–33; UNICEF, *The State of the World's Children 2017*, p. 76.

⁶ Sonia Livingstone/Jessica Mason, *Sexual rights and sexual risks among youth online*, London 2015, p. 22; Daniel Kardefelt-Winther/Catherine Maternowska, *Addressing violence against children online and offline*, Nature Human Behaviour (2019).

sexual abuse and related material on the victim is always real and 'analogue', regardless of the realm in which it is committed.

To focus on the discourse on the regulation, investigation and prosecution of online child sexual abuse material, it seems reasonable to argue that there is a general consensus about the harmfulness of child sexual abuse whether committed online or offline. However, what is distinctive about the discourse on online child sexual abuse is that it is characterised by a set of dichotomies.

The first is the contrast between the global and national level. While online child sexual abuse is a global problem that requires a global response, a comprehensive legal framework needs to be in place at a national level. International law plays a crucial role in setting a minimum standard for national lawmakers. Given that the regulation at national level might be influenced by various factors, including constitutional rights, perceptions around sexuality, and other cultural and societal dynamics, there is an inherent risk that national legislation is not aligned with the international standard. This is particularly problematic as online child sexual abuse, much as with other offences committed online, is transnational in most cases. The alignment of national legislation across country borders is crucial to enable transnational law enforcement collaboration. Therefore, although the problem is global, central issues for enabling a global response are decided upon at a national level. Another dichotomy is between the discourse around sexual abuse, on the one hand, and sexual autonomy, on the other. While pornographic material clearly depicting child sexual abuse is an obvious case for criminalisation, the line between sexual abuse and sexual autonomy is less straightforward in cases where the causality between the material and the harm to children is less obvious.

Furthermore, there is a dichotomy between the need to develop binding legal standards, both nationally and internationally, and constantly evolving technical capacities. While the development of legal standards can be a cumbersome process at a national as well as international level, the technical environment is in constant expansion. This leads to an inherent risk of a wild goose chase in regulating cybercrime, as the legal framework might be outdated once enacted. Lastly, there is a dichotomy between child protection and the protection of the rule of law. There is a tendency, borne of the sheer horrendousness of child sexual abuse material, to justify the infringement of the rule of law and fair-trial principles if it assists – or at least seems to assist – the fight against online child sexual abuse. The ends therefore often times justify the means, notwithstanding the impact that deterioration of the rule of law has on criminal justice in the long run, including violence against children.

This study has been inspired by the ever-evolving interplay between upholding the rule of law and enforcing the principle of the best interests of the child in a context where there is an urgent need to conceptualise child sexual abuse in the digital era. Aiming to resolve the above dichotomies, the study seeks to bring together two competing discourses: that of the evolving cyberworld, with its ever-emerging forms of online child sexual abuse and complex *modus operandi* that challenge law as a regulatory instrument and the efficiency of law enforcement; and that of child protection interests, where the focus is on upholding of the best interests of the child whether in an analogue or digital context.

II. AIM AND RELEVANCE OF THE STUDY

The overall aim of this study is to critically analyse emerging aspects of the international and national regulation, investigation and prosecution of online child sexual abuse material from a child-rights and rule-of-law-based approach. With the abovementioned dichotomies guiding the investigation, the aim of this study is threefold.

First, it aims to investigate the regulation of online child sexual abuse material where the relation between the material and the harm to children is not patently clear and where child protection concerns need to be balanced with the protection of human rights such as freedom of expression and the maintenance of the rule of law. In the spirit of finding global answers for a global phenomenon, this study aims to analyse the legal considerations – with a focus on constitutional issues – from a comparative point of view, both with regard to national as well as international legal standards. While it has to be acknowledged that there are strong moral, religious and cultural dimensions to the regulation of a sexual offence such as the production, dissemination and possession of online child sexual abuse material, the regulation is further influenced by the complex interplay between international law and national legislation as well as the wild goose chase involved in drafting legislation and trying to keep up with technological development. Hereby, the study aims to stress the importance of considering children as actors and not as subjects in this discourse, considering that protection is not a purely passive concept for children. The review and analysis of national and international standards from different legal systems and regional contexts aims to complement the current, mainly national-centred, legal discourse with a transnational, interdisciplinary perspective.

Secondly, the study aims to investigate the difficulties of leveraging international law in order to strengthen the national legal framework relating to the criminalisation of online child sexual abuse material, which it does so by analysing the influence of international law on national legislation and the balancing of child-protection with rule-of-law concerns in that context. Given that the majority of legal research in the area of regulating online child sexual abuse material focuses on North American, European or Asian countries, this study draws attention to an African country in which children's safety online has emerged on the national child protection agenda over the past few years. While the comprehensive criminalisation of offences pertaining to child sexual abuse material is therefore a priority, specific consideration needs to be given to upholding the rule of law and fair-trial principles.

Thirdly, the study aims to examine the authority of law enforcement in investigating and prosecuting online child sexual abuse material, with the focus placed on the investigative powers given to law enforcement agencies both at national as well as transnational level. The study is informed by an acute awareness of the need for technology-savvy legislation that simultaneously serves the best interests of the child while upholding the rule of law as important modifier. On the one hand, when discussing investigative powers and transnational law enforcement collaboration in the context of cybercrime, the academic discourse largely omits to focus on the child as a highly vulnerable victim and to consider how this specific vulnerability impacts on investigations. Special child safeguarding mechanisms in regulating investigative powers are thus often missing. On the other hand, as is illustrated by the lack of concrete procedural provisions in the CRC Committee's Guidelines on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2019), the legal discourse led by child-rights scholars lacks the specialised cyber-specific awareness needed to investigate online child sexual abuse. Aspiring to marry cybercrime-specific issues with child protection expertise, this study aims to contribute to the development of standards and instruments that are efficient and effective in the cyber context yet always put the best interests of the child victim first.

III. PROBLEM STATEMENT AND RESEARCH QUESTIONS

Problem statement

As noted above, the overall aim of this study is to critically analyse emerging aspects of the international and national regulation, investigation and prosecution of online child sexual abuse material from a child-rights and rule-of-law-based approach. Therefore, the problem statement is as follows:

How can the international and national regulation, investigation and prosecution of emerging characteristics of online child sexual abuse material embrace the competing discourses of a cyber-specific yet child-sensitive offence?

The regulation, investigation and prosecution of online child sexual abuse material is currently debated in two interlinked yet separate contexts. While the categorisation of online child sexual abuse material as a computer-content-related offence makes it part of the broader cyber-crime discourse,⁷ it is, due to the underlying contact offence, also discussed in the field of child protection and violence against children. However, the two discourses operate in disconnected realms, which significantly affects the relevance, efficiency and effectiveness of the approaches taken in the national and international regulation, investigation and prosecution of online child sexual abuse material.

In particular, with regard to the criminalisation of certain acts pertaining to online child sexual abuse material, it has to be recognised that such material touches not only on the core of child protection concerns but equally on internationally and nationally guaranteed human rights such as freedom of expression.⁸ A similar tension manifests itself in the area of investigating and prosecuting online child sexual abuse material, where law enforcement, on the one hand, adopts swift, efficient and cyber-specific investigation and prosecution approaches that need, on the other hand, to be balanced against considerations of the rule of law, fair trial and the best interests of the child.

Research Questions

In line with the problem statement above, this study aims to answer three Research Questions. Given that this is a PhD by publication, they have been formulated with a view to being answered by specific Chapters, with the interconnectedness of the themes being acknowledged by means of cross-references between the Chapters. The Research Questions are set out below.

Research Question 1:

Can the criminalisation of emerging issues in online child sexual abuse material, such as the depiction of virtual children, pornographic material depicting persons made to appear as minors, and consensual sexting material produced amongst minors for their private use, be justified, given that the relation between the material and immediate harm to actual children is not inherently obvious?

⁷ UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, p. 16.

⁸ *Ibid.*, p. 109.

This Research Question is answered mainly by Chapter II ('The 'grayscale' of child sexual abuse material: Of *mangas*, avatars and schoolgirls') and Chapter III ('Regulating bodies: The moral panic of child sexuality in the digital era'). Aspects of this Research Question are discussed further in Chapter IV ('Leveraging international law to strengthen the national legal framework on child sexual abuse material in Namibia') and Chapter V ('*Do ut des*: Disseminating online child sexual abuse material for investigative purposes?').

Research Question 2:

Noting the important role that international law plays in guiding national legislators in the regulation of online child sexual abuse material, how can 'developing states' strengthen their national legal frameworks by leveraging international law?

This Research Question focuses on the difficulties of leveraging international law to strengthen the national legal framework in 'developing countries', as exemplified by the Namibian law reform efforts in the field of online child sexual abuse material, and is addressed in Chapter IV ('Leveraging international law to strengthen the national legal framework on child sexual abuse material in Namibia'). Relevant aspects of Chapters II and V are integrated into the discussion in Chapter IV.

Research Question 3:

How can international and national legal frameworks governing investigation and prosecution mechanisms be strengthened to ensure that law enforcement responds effectively and efficiently to online child sexual abuse material in a child-sensitive manner?

This Research Question is addressed primarily in Chapters V and VI ('Transnational by default: Contextualising cross-border law enforcement collaboration in online child sexual abuse cases'). Aspects of Chapters II and III have been included to answer the Research Question.

IV. METHODOLOGY

Three different methodologies were applied to answer these Research Questions. With the focus varying according to the topic of each Chapter, this PhD employs doctrinal legal research, comparative legal research (both in international and national law), and interdisciplinary legal research (chiefly involving psychology, sociology and feminist theory) as its methodologies.

A. Doctrinal legal research

Doctrinal legal research involves so-called 'black-letter law', and seeks to determine what the applicable laws are and interpret legal texts.⁹ The law is considered 'an internal, self-sustaining

⁹ Mike McConville, *Research Methods for Law*, Edinburgh 2007, p. 4.

set of principles'.¹⁰ The aim of the methodology is to 'systemise, rectify and clarify' legal questions pertaining to a topic by adopting various analytical approaches to authoritative texts.¹¹ Ultimately, the aim is to identify improvements in the relevant normative framework.¹² Normative sources, such as statutory texts and binding case law, as well as other authoritative sources, such as scholarly writing and non-binding sources such as commentaries and *travaux préparatoires*, form the basis of the doctrinal legal research methodology applied here.

Normative sources for the various Chapters stem both from international law as well as national law. As for international law, the Chapters analyse and interpret various sources of international and regional law, including the UN Convention on the Rights of the Child (CRC)¹³ and its Optional Protocol on the sale of children, child prostitution and child pornography (OPSC),¹⁴ the Council of Europe Convention on Cybercrime (hereafter Budapest Convention),¹⁵ the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (hereafter Lanzarote Convention),¹⁶ and the African Union (AU) Convention on Cyber Security and Personal Data Protection (ACCS).¹⁷ National legislation consists of statutory texts as well as case law from the US, Canada, Germany, Japan, South Africa, Namibia, Rwanda and the Democratic Republic of Congo (DRC). Each Chapter will explain why the sources of international and national law have been selected to answer the Research Question at hand. The selection of the abovementioned countries is also discussed in the section below on comparative legal analysis.

The review of scholarly writing has been an essential basis for formulating and answering the Research Questions at hand. As will be discussed below, the focus is not only on legal scholarly writing, but on research that embraces the interdisciplinary aspects of child sexual abuse. Other sources of interpretation and analysis of international law are General Comments from human rights treaty bodies, guidelines for interpretation of international law, the submissions of Special Rapporteurs and reports. Lastly, non-academic publications from international organisations such as UN agencies have been examined to complement legal academic discourse with global policy documents.

B. Comparative legal research

Today's globalised world is characterised by a high level of 'interlinkage and interdependence' across all levels of society.¹⁸ A major example of such interlinkage, as well as of the difficulties of legal conceptualisation associated with it, is the Internet. Even though the physical infrastructure of the Internet is built upon states' territories,¹⁹ it spans across country borders: cybercrime in general, and online child sexual abuse in particular, is not confined to a state's territory. Quite the opposite – due to the transnational nature of the Internet, online child sexual abuse is in most cases a transnational offence. Online child sexual abuse is hence a global

¹⁰ *Ibid.*; see also Matyas Bodig, *Legal Doctrinal Scholarship and Interdisciplinary Engagement*, *Erasmus Law Review*, Vol. 8 (2015), p. 46.

¹¹ *Ibid.*

¹² Andria Naude Fourie, *Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research*, *Erasmus Law Review*, Vol. 3 (2015), p. 96.

¹³ Adopted 20 November 1989, entered into force 2 September 1990.

¹⁴ Adopted 25 May 2000, entered into force 18 January 2002.

¹⁵ Adopted 8 November 2001, entered into force 1 July 2004.

¹⁶ Adopted 25 October 2007, entered into force 1 July 2010.

¹⁷ Adopted 27 June 2014, not yet entered into force.

¹⁸ Kh N Bekhruz, *Comparative Legal Research in an Era of Globalization*, *Journal of Comparative Law*, Vol. 5 (2010), p. 94.

¹⁹ Stephan Kolossa, *The charm of jurisdictions: a modern version of Solomon's judgment?*, *Voelkerrechtsblog*, 5 June 2019, available at: <https://voelkerrechtsblog.org/the-charm-of-jurisdictions-a-modern-version-of-solomons-judgment/> (accessed 1 August 2019).

problem that requires a global answer. As will be discussed in depth in Chapter VI, the alignment of national legislation with an internationally agreed standard is prerequisite for enabling transnational law enforcement collaboration.

However, even if an internationally agreed standard exists, the nature of online child sexual abuse as a sexual offence might have a pronounced impact on the translation of such a standard into national legislation. Sexual offences are an area of law strongly influenced by the moral, cultural and religious factors peculiar to each national context.²⁰ This ultimately affects the translation of international law into national legislation, as the predominant national narrative on the 'right' approach to addressing child sexual abuse might not be in line with the international standard. Given that these arguments touch deeply on countries' considerations with regard to constitutional rights and principles, it is important to understand how they have been brought to bear in justifying the scope of protection in the respective country context. This serves a three-pronged objective: while it gives insight into the reasons for (non-) integration of an international standard into national law, it might also highlight national legislation which exceeds the international standard and can hence be used as best practice examples for other countries. Lastly, it provides insight into aspects of international standards that may be incompatible with the constitutional considerations in many country contexts and could hence put the spotlight on issues in urgent need of revision.

It is against this background that comparative legal analysis has been selected as a suitable research methodology for this study. Given that online child sexual abuse requires not only a national but global response, understanding the underlying factors influencing national legislation is crucial. Overall, the selection of countries for the comparative legal analysis has been influenced by a variety of factors, including the relevance of the discourse in the national legal framework; the existence of supreme court or constitutional court cases on the topic; the discourse on the translation of international law into the respective legal frameworks; equal representation of common law, civil law and hybrid systems; and the need for equal representation of countries from different cultural, societal and development contexts. As noted, countries selected for comparative legal research include the US, Canada, Germany, Japan, South Africa, Namibia, Rwanda and the DRC.

C. Interdisciplinary legal research

Interdisciplinarity refers to approaches that combine research findings and methods from various disciplines.²¹ Interdisciplinary legal research, more specifically, is research that acknowledges the relevance of other disciplines to particular questions and thus includes input from them to establish a legal argument.²² It has to be recognised that the development, application and interpretation of a legal framework is constantly influenced by extra-legal information that impacts on its normative content.²³ Particularly in the area of sexual offences, the different interpretation of concepts such as sexual autonomy becomes apparent, and hence the contextual appreciation of such underlying dynamics is vital in order to be in a position to formulate a holistic response to these phenomena.

²⁰ Joachim Renzikowski, *Primat des Einverständnisses? Unerwünschte konsensuelle Sexualitäten*, in Ulrike Lembke (edit.), *Regulierungen des Intimen. Sexualität und Recht im modernen Staat*, Wiesbaden 2017, p. 198.

²¹ Fourie, *Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research*, p. 97.

²² *Ibid.*

²³ Bodig, *Legal Doctrinal Scholarship and Interdisciplinary Engagement*, p. 49.

As mentioned, the regulation of child sexual abuse is strongly influenced by the moral, cultural and religious considerations predominant in a particular national context. To better understand the influence of these extra-legal factors on the normative framework,²⁴ sociological insights gleaned from the perspective of feminist theory have been incorporated into the Chapters of this study. These insights are centred on the notion that questions of power are inherent to the field of sexual offences,²⁵ either with regard to defining sexual deviancy or pertaining to acknowledging sexual autonomy of a certain group of people. Feminist theory is applied in order to identify how systems of power and oppression interact with each other and how they are produced and reproduced in the regulation of sexual offences. Applying feminist theory in this context does not necessarily entail looking only at structures of oppression in regard to girls and women; it entails considering all groups of people suffering under an imbalance of power, such as children.

Furthermore, with regard to both substantive and procedural law, it is necessary to consider the psychological impact of regulatory framework decisions as well as investigation techniques, jurisdictional conflicts and transnational law enforcement collaboration on the victim. This study infuses its legal argument with psychological research with a view to ensuring that the drafting and the application of the legal framework follows a victim-centred approach. This means in essence that the victim's experience of the criminal justice system should not lead to re-victimisation and secondary trauma but promote healing and closure.

Given the nature of child sexual abuse as a cross-cutting topic amongst various disciplines, the analysis of the regulatory framework is incomplete if it is restricted purely to doctrinal legal research. Embracing the concept of socio-legal research, this study adopts an interdisciplinary approach in the spirit of seeing the law as a 'parasitic discipline'.²⁶

V. SCOPE AND LIMITATIONS

Bearing in mind the aim and questions of the study, this section highlights the scope and limitations of the research.

This study was undertaken between 1 September 2017 and 30 September 2019. Given that this is a PhD by publication and that the Chapters have been drafted and published consecutively, attention is drawn to the debate around the use of the term child pornography, 'child pornography' and child sexual abuse material. Although the term 'child pornography' has been widely criticised since 2014,²⁷ the CRC Committee has only in 2019 acknowledged that 'terms such as 'child pornography' and 'child prostitution', are gradually being replaced [as] these terms can be misleading and insinuate that a child could consent to such practices, undermining the gravity of the crimes or switching the blame onto the child'.²⁸ Accordingly, the CRC Committee, in its *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156, 2019, officially recommended

²⁴ *Ibid.*, p. 44.

²⁵ Eleanor K Bratton, *The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, New Mexico Law Review, Vol. 17 (1987), p. 93.

²⁶ See Anthony Bradney, *Law as a Parasitic Discipline*, Journal of Law and Society, Vol. 25 (1998), pp. 71-84.

²⁷ See Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, A/HRC/28/56, para. 29; ECPAT, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, pp. 38 *et seq.*; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, pp. 9-10.

²⁸ CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156, para. 5.

pay[ing] attention to the Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse for guidance regarding the terminology to be used in the development of legislation and policies addressing the prevention of and protection from the sexual exploitation and sexual abuse of children.²⁹

This 'gradual replacement' of the term is reflected in the different academic articles underlying the Chapters of this study, which – depending on their date of publication – have evolved from using the term child pornography as a matter of course, to placing it in inverted commas as 'child pornography' and, lastly, using the term 'child sexual abuse material'. This inconsistency therefore is a symptom of the evolving discourse on correct terminology, one that has been concluded by the CRC Committee's endorsement of the Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse, which recommend the term 'child sexual abuse material'.³⁰ During the compilation of this study as one comprehensive piece, it was decided to move away from plainly using the term child pornography, but to refer to 'child pornography' as well as child sexual abuse material instead. The reason why the terminology has not been completely revised after the CRC Committee Guidelines were published, is that the legislation analysed in this study uses the term 'child pornography'. Therefore, the term 'child pornography' is used in the context of the legal framework. However, when referring to child sexual abuse material outside a strictly legal context, this term is used instead.

With regard to the scope of the study, it has to be acknowledged that the production, dissemination, possession and accessing of child sexual abuse material is only one amongst various forms of online child sexual abuse and exploitation. Other forms include sexual harassment, sexual solicitation and grooming, sextortion and exploitation through prostitution³¹, child trafficking and child-sex tourism.³² Given the host of issues to be considered when discussing the regulation, investigation and prosecution of the abovementioned forms of online child sexual abuse and exploitation, this study elects to focus only on offences pertaining to child sexual abuse material. Further, it has to be noted that generic aspects of child sexual abuse material have already been comprehensively analysed both at an international and national level. As such, this study focuses on instances in which the causal connection between the material and the harm to actual children is not inherently obvious, on the regulation of child sexual abuse material in the Global South and transnational law enforcement collaboration.

Although this study examines international standards as well as the national legal frameworks in a variety of legal systems and cultural contexts, its primary focus is on Northern America, Europe and Africa. Given that in some countries and regions child sexual abuse material is not considered a distinct offence but is subsumed under a general prohibition of pornography, whether depicting adults or children,³³ these countries or regions do not lend themselves to answering the Research Questions of this study. Moreover, given the abundant academic discourse on online child sexual abuse in Northern America and Europe, and considering that the Budapest and Lanzarote Convention were drafted largely with the input from European states, the study draws upon the relevant academic discourse in these regions.

As for the focus on Africa, it serves a twofold objective. First, it is important to reflect on the challenges and opportunities pertaining to the regulation, investigation and prosecution of

²⁹ *Ibid.*

³⁰ ECPAT, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, p. 40.

³¹ 'Exploitation for prostitution' or 'exploitation in prostitution' is the preferred terminology to refer to 'child prostitution', see *ibid.*, p. 30.

³² UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, pp. 8 *et seq.*

³³ See, for example, the League of Arab States Convention on Combating Information Technology Offences, 2010.

child sexual abuse material in the Global South.³⁴ With Internet usage in these countries having increased dramatically in the past 10 years,³⁵ appropriate legislation is only now being formulated, oftentimes while grappling with limited financial and technical capacity. At the same time, the narrative of child online safety is at risk of being hijacked in order to establish far-reaching investigative procedural powers in the area of cybercrime, which go far beyond a state's proclaimed interest in protecting children online. Shifting the focus to these dynamics often prevalent in the Global South is therefore important to reflect a truly international discourse. Secondly, Africa is a region which in the past few years has made considerable efforts to curb online child sexual abuse and exploitation. This is exemplified both by the adoption of the AU Convention on Cyber Security and Personal Data Protection on 27 June 2014 and by the AU's current project, 'Strengthen regional and national capacity and action against Online Child Sexual Exploitation in Africa'.³⁶ Given that Namibia recently ratified the latter convention,³⁷ it has been selected as a case study to showcase the complex relationship between international law and national legal standards in regulating child sexual abuse material in a developing context.

With regard to transnational law enforcement collaboration, it has to be acknowledged that issues such as jurisdictional conflicts, mutual legal assistance and extradition are discussed mainly in the broad context of cybercrime offences. Therefore, this study has selected emerging research aspects pertaining specifically to online child sexual abuse as a form of content-related cybercrime,³⁸ aiming to enrich the cybercrime discourse with a child-centred perspective. In this context, it also becomes apparent that the gravity of the offence has the potential to blind legislators and policy-makers and induce them into justifying considerable infringements of the rule of law and fair-trial principles in the name of child protection. This issue is explicitly dealt with a view to ensuring proportionality between child-protection concerns and the rule of law. With regard to jurisdictional conflicts, mutual legal assistance and extradition, this study concentrates only on relevant provisions in international treaties, in particular the OPSC, Budapest Convention and Lanzarote Convention.

VI. OUTLINE OF THE STUDY

The thesis is presented in seven Chapters, along with this introduction (Chapter I) and a conclusion (Chapter VII). All the substantive Chapters originated as individual articles that were either published or submitted for publication in academic journals. To answer the Research Questions above, the study follows the outline below.

³⁴ Identifying a gap in research on children's rights in the digital era in the Global South, Sonia Livingstone/Monica E. Bulger, *A Global Agenda for Children's Rights in the Digital Era. Recommendations for Developing UNICEF's Research Strategy*, Florence 2013, p. 23.

³⁵ According to an ITU estimate available at: <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (accessed 27 October 2019), 794 million people in 'developing countries' were using the Internet in 2008, a number which had risen to 2,868 billion by 2018.

³⁶ See official press release from the first Continental Consultation on Combatting Online Child Sexual Exploitation held on 6–7 March 2019 in Addis Abeba, available at: <https://au.int/en/pressreleases/20190306/african-union-continental-consultation-combatting-online-child-sexual> (accessed 24 October 2019).

³⁷ Ratified on 25 January 2019. For a full listing of the status of signatures, ratifications and accessions, see <https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection> (accessed 20 October 2019).

³⁸ UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, p. 4.

Chapter II: The ‘grayscale’ of child sexual abuse material: Of *mangas*, avatars and school-girls³⁹

Adopting a comparative legal approach utilising both international and national law, Chapter II explores the international and national response to the criminalisation of pornographic material depicting virtual children or persons made to appear as minors. A strong focus is on balancing freedom of speech and artistic freedom, on the one hand, and child protection concerns, on the other.

While the US and Japan defend the non-criminalisation of such material by arguing that there is no scientific evidence of immediate harm to actual children and hence that freedom of expression must prevail, Canada and South Africa deem such material potentially damaging for actual children and hence endorse its criminalisation. This study submits that scientific proof is barely ever unanimous in this complex area of research and thus not appropriate as a valuation standard. Using feminist theory in regard to the debate around criminalisation of adult pornography in the 1970s and 1980s, this article explores whether ‘virtual’ child sexual abuse material or material depicting persons made to appear as minors should be criminalised on the ground that it contributes to harmful societal attitudes towards children as sexual objects.

Chapter III: Regulating bodies: The moral panic of child sexuality in the digital era⁴⁰

Chapter III examines international and national responses to the emerging phenomenon of consensually self-produced pornographic material (commonly referred to as ‘sexting’ material) between adolescents. With access to the Internet having increased, children’s sexual explorative behaviour has expanded into the online space. While this has led to a global revival of the moral panic around child sexuality, such panic is often fuelled by concerns about children’s sexual abuse and exploitation in the context of child sexual abuse material. In an attempt to protect children, consensual ‘sexting’ between minors is in some countries categorised as the production and dissemination of child sexual abuse material, leading to the prosecution of the children concerned as sex offenders. The right to be protected from sexual abuse and exploitation is hence the dominant narrative. By analysing legislation and case law from the US, Canada and Germany, this study investigates the need for a balance between child protection, on the one hand, and the child’s right to privacy, on the other.

Chapter IV: Leveraging international law to strengthen the national legal framework on child sexual abuse material in Namibia⁴¹

Chapter IV discusses the difficulties in leveraging international law to strengthen the national legal framework, as exemplified by Namibian law reforms in the field of online child sexual abuse material in the context of the Child Care and Protection Act, No. 3 of 2015. Given the scarcity of academic literature on the regulation of online child sexual abuse material in the African context, this Chapter explores the challenges in balancing rule-of-law and child-protection considerations in a developing context.

Despite having ratified the OPSC, Namibia has so far failed to comprehensively criminalise the production, dissemination, possession and accessing of child sexual abuse material. Given the urgent need to rectify the situation, the Chapter considers how the OPSC can be leveraged to fill the gap in national legislation through direct application of the OPSC in national courts.

³⁹ Originally published over two issues in the *Computer and Telecommunications Law Review*, Issue 3 (2018), pp. 61–66, and *Computer and Telecommunications Law Review*, Issue 4 (2018), pp. 73–81.

⁴⁰ Originally published in the *Critical Quarterly for Legislation and Law*, Vol. 1 (2019), pp. 5–34.

⁴¹ Accepted for publication in the *Comparative and International Law Journal of Southern Africa*.

In view of Namibia's monist approach to international law, such direct application of international law is generally accepted. Drawing on the experience of Rwanda and the DRC in similar cases, this Chapter explores how the direct application of international law can be balanced against fair-trial and rule-of-law considerations in the Namibian context.

Chapter V: *Do ut des*: Disseminating online child sexual abuse material for investigative purposes?⁴²

Chapter V shifts the focus to procedural aspects of investigating online child sexual abuse. The infiltration of child sexual abuse fora on the dark web is a key investigation strategy in combating online child sexual abuse worldwide, the aim being to identify perpetrators and rescue children from ongoing abuse and exploitation. Following the *do ut des* principle ('I give, so that you may give'), the dissemination of child sexual abuse material is the currency required to gain access to these fora: new users are accepted only after they share child sexual abuse material with the forum administrators. Applying the *do ut des* principle serves a twofold objective. First, the administrators of the forum ensure confidentiality amongst the users, as every user has committed a criminal offence and disclosure would lead to self-incrimination. Secondly, it ensures that the prospective user is not a law enforcement officer: as most countries do not allow police to commit offences even during undercover operations, the *do ut des* principle creates an automatic filtering system warding against police infiltration.

Since 2018, Germany debated whether police should be legally authorised to disseminate child sexual abuse material in such cases. Proposals included the dissemination of virtual child sexual abuse material as well as actual child sexual abuse material, with the consent of the depicted child. Although such action contributes to the normalisation of child sexual abuse and potentially the continued traumatising of the depicted child, police may thereby be able to save other children from abuse and exploitation. The Chapter considers whether, and under what circumstances, such interventions 'for the greater good' justify the damage caused to the depicted child and children in general, and if they can be aligned with the rule of law.

Chapter VI: Transnational by default: Contextualising cross-border law enforcement collaboration in online child sexual abuse cases⁴³

Chapter VI explores the efficiency and effectiveness of transnational law enforcement collaboration mechanisms in various international treaties. Both the determination of jurisdiction and the conduct of transnational law enforcement collaboration in online child sexual abuse cases are complicated affairs due to the architecture of cyberspace. As the Internet knows no borders, crimes are typically committed across numerous jurisdictions. Perpetrators can conceal their identities, and the evidence they leave behind (if any) is highly ephemeral and easily removed, altered or hidden. Efficient and effective transnational law enforcement collaboration is therefore crucial, which calls for a strong international legal framework that upholds the best interests of the child as primary consideration.

Against this background, the Chapter examines extra-territorial jurisdiction, jurisdictional conflicts, mutual legal assistance and extradition clauses in the OPSC, Lanzarote Convention and Budapest Convention, the aim being to assess their sufficiency in the transnational investigation of online child sexual abuse offences. The Chapter focuses on appropriate mechanisms in the cyber-context and the ability to uphold the principle of the best interests of the child at all times. Special attention is paid to the CRC Committee's recently published Guidelines on the implementation of the OPSC (2019).

⁴² Originally published in the Journal for Universal Computer Science, Proceedings of the Central European Cybersecurity Conference 2018, art. 14.

⁴³ Submitted for publication in the International Journal of Children's Rights.

Chapter VII: Conclusion

Chapter VII answers the problem statement by distilling the key findings of Chapters II-VI and addressing the Research Questions. Lastly, some concluding remarks are made.

