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

Witting, S.K.

CHAPTER IV: LEVERAGING INTERNATIONAL LAW TO STRENGTHEN THE NATIONAL LEGAL FRAMEWORK ON CHILD SEXUAL ABUSE MATERIAL IN NAMIBIA

Abstract

With the gazetting of the regulations of the Child Care and Protection Act 3 of 2015 on 30 January 2019, a crucial regulatory piece of children's rights in Namibia has finally been operationalised. However, the Act insufficiently addresses newly emerging online offences against children, such as the possession and distribution of child sexual abuse material, and leaves a considerable gap in the protection of children's rights. As the Namibian Constitution follows a monist approach to international law, this article argues that the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography could be applied directly to complement the national legal framework in prosecuting cases of possession and dissemination of child sexual abuse material while at the same upholding fair-trial principles.

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I. INTRODUCTION

Child sexual abuse and exploitation is a major concern worldwide. With access to and usage of the Internet increasing, child sexual abuse and exploitation is no longer restricted to homes, schools and communities. The use of Information and Communication Technology (ICT) by perpetrators expands their access to a wide pool of potential victims, as children and adolescents below the age of 18 years constitute one-third of Internet users worldwide.[1] The production, dissemination, and possession of child sexual abuse material is a common means by which children are victimised in the online space. The Internet has facilitated new forms of online child sexual abuse material. Made-to-order services allow the perpetrator to request the production of content in which the age, gender and race of the child are specified according to the perpetrator's sexual preferences.[2] Live-streaming of online child sexual abuse is another emerging form, one in which perpetrators can buy access to the live stream to observe the abuse in real time.[3]

At the international level, article 34 of the Convention on the Rights of the Child (CRC)[4] protects children from all forms of sexual exploitation and abuse. This provision in the CRC is augmented by the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography,[5] (OPSC), which is the first international instrument to explicitly criminalise 'child pornography' offences. At the regional level, the African Union (AU) has acknowledged the need to provide African states with guidance on the criminalisation of online child sexual abuse offences. The African Charter on the Rights and Welfare of the Child (ACRWC)[6] prohibits the use of children in pornographic activities, performances and materials.[7] More specifically, the AU Convention on Cyber Security and Personal Data Protection (ACCS)[8] criminalises the production, possession and distribution of 'child pornography' through a computer system.[9]

Recognising that online child sexual abuse is an emerging threat for all AU member states, the AU has also put it on the political agenda. The AU held a Continental Consultation on Combatting Online Child Sexual Exploitation[10] under the theme 'Protecting Children from Abuse in the Digital World' in March 2019 in Addis Ababa. In her welcoming remarks, the AU Commission Director of Social Affairs, Cisse Mariama Mohamed, noted that 'the rise of information and communication technologies had made it easier and more efficient for sex offenders to produce, access, and distribute child sexual abuse material', and called upon all delegates to take immediate action.[11] The AU will, moreover, assess the threat of online child sexual abuse in 19 African countries, which due to their easy access to Internet services are deemed to be at high risk.[12] Turning to southern Africa, the Southern African Development Community (SADC) drafted Model Legislation on Computer Crime and Cybercrime, which criminalises

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[1] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children,* New York 2015, p. x; UNICEF, *The State of the World's Children 2017,* New York 2017, p. 1.
[2] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children,* p. 21.
[3] *Ibid.,* pp. 22–23.
[4] Adopted on 20 November 1989.
[5] Adopted on 25 May 2000.
[6] Adopted on 1 July 1990.
[7] Art. 27(1)(c) African Charter on the Rights and Welfare of the Child.
[8] Adopted on 27 June 2014.
[9] Art. 29(3) African Union Convention on Cybersecurity and Personal Data Protection.
[10] Held on 6 March 2019 at the African Union Conference Centre in Addis Ababa, see https://au.int/en/pressreleases/20190306/african-union-continental-consultation-combatting-online-child-sexual (accessed 23 March 2019).
[11] See official press release here: https://au.int/en/pressreleases/20190306/african-union-continental-consultation-combatting-online-child-sexual (accessed 24 March 2019).
[12] Muluhne Gebre, *African Union Set to Assess Threat of Online Child Sexual Exploitation in 19 Countries,* 7D News, 6 March 2019, available at: https://7dnews.com/news/african-union-set-to-assess-threat-of-online-child-sexual-exploitation-in-19-countries (accessed 24 March 2019).

the production, offering, distribution, procurement, possession and accessing of 'child pornography' through a computer system.[13] This shows the broad commitment at regional and international level to ensure children all over the world are protected from any form of sexual abuse and exploitation.

Namibia recently joined the African and international community in its fight against online child sexual abuse. With the gazetting of the regulations of the Child Care and Protection Act 3 of 2015 (hereafter CCPA) on 30 January 2019, a crucial piece of law on children's rights in Namibia has finally been operationalised.[14] Among other things, the Act creates new offences relating to children, such as child trafficking, certain forms of child labour and 'child pornography'. Unfortunately, the CCPA criminalises only the creation of such material and various supporting acts; it neither defines the term 'child pornography', nor criminalises the possession or distribution of child sexual abuse material, and hence leaves a considerable legal gap in the protection of children in Namibia.

This article argues that the gap can be closed by leveraging international law such as the OPSC, which Namibia ratified on 16 April 2002. The OPSC clearly defines the term 'child pornography' and criminalises 'producing, distributing, disseminating, importing, exporting, offering, selling or possessing child pornography [for the above purposes]'.[15] As article 144 of the Namibian Constitution[16] stipulates that international treaties shall form part of the law of Namibia, it is argued that the OPSC can be used to complement the provision in the CCPA, while upholding fair-trial principles as set out in article 12 of the Constitution. Little or no research has been done on leveraging article 144 to strengthen the national legal framework in the area of criminal law. This Chapter aims to start a conversation on this important topic and strengthen Namibia's approach to compliance with its international obligations.

After providing an overview of the emerging forms of online child sexual abuse globally as well as in Namibia, the article will point out the significant gaps in the existing Namibian legal framework on combating the dissemination and possession of online child sexual abuse material. Thereafter, it is argued that on the grounds of the position of international law in the Namibian Constitution, the OPSC can be leveraged to strengthen the national legal framework on online child sexual abuse material. The Chapter in particular proves that such an approach does not violate fair-trial principles as set out in article 12 of the Namibian Constitution, and to this end compares similar legal cases successfully prosecuted in the Democratic Republic of Congo (DRC) and Rwanda.

II. ONLINE CHILD SEXUAL ABUSE IN NAMIBIA

A. Emerging forms of online child sexual abuse

The Internet has offered a new and comparably safe realm for offenders to sexually abuse and exploit children. With many countries, including Namibia, not comprehensively criminalising online child sexual abuse,[17] the lack of capacity in digital forensics, the insufficiency of transnational law enforcement mechanisms, the use of cryptocurrencies for money transfers, and

[13] Article 13 SADC Model Law on Computer Crime and Cybercrime, available at: https://www.itu.int/en/ITU-D/Cybersecurity/Documents/SADC%20Model%20Law%20Cybercrime.pdf (accessed 24 March 2019).
[14] Child Care and Protection Act 3 of 2015, available at: https://laws.parliament.na/annotated-laws-regulations/law-regulation.php?id=473 (accessed 24 March 2019).
[15] Article 3(1)(c) OPSC.
[16] 'Namibian Constitution' is the official short title of the Constitution of the Republic of Namibia, see art. 148 Namibian Constitution.
[17] See Chapter II. B.

the ease of hiding one's traces on the Internet[18], many offenders with a sexual interest in children face little risk of investigation and prosecution.[19] While the Internet has created new forms of child sexual abuse, such as live-streaming, it also facilitates a continuum between offline – that is, contact – child sexual abuse and online child sexual abuse.[20]

A prominent form of such an online-offline continuum is the production, dissemination, possession and accessing of child sexual abuse material. Perpetrators produce visual, written or audio documentation of the contact sexual abuse of a child, and disseminate such material over the Internet. New trends in online child sexual abuse include made-to-order content as well as live-streaming of online child sexual abuse.[21] Both forms allow the perpetrator to direct the sexual abuse according his or her own sexual preferences, including the selection of the child as well as the form of sexual abuse perpetrated against the child.[22] Victims of online child sexual abuse suffer additional and enduring victimisation from the awareness that offenders unknown to them will use images of their abuse.[23] Therefore, victims oftentimes face great difficulties in 'closing the chapter', as they are continually exposed to abuse and exploitation through the circulation of their material and live in constant anxiety that someone will recognise or expose them.[24]

It is unknown how many websites, fora and peer-to-peer networks containing online child sexual abuse material exist worldwide.[25] A good indication of the magnitude of the problem is the annual report published by the Internet Watch Foundation (IWF), a UK-based organisation working with law enforcement and industry worldwide to remove child sexual abuse material from the Internet.[26] In 2018, the IWF received about 223,000 reports and confirmed that approximately 105,000 URLs contained child sexual abuse material. Seventy-eight per cent of the depicted children are girls, and 23 per cent of the material showed sexual activity between adults and children, including rape or sexual torture. Forty per cent of the material depicted children 10 years or younger, with 1 per cent depicting children below the age of 2 years.[27] These numbers are shocking, and keeping in mind that these are merely the figures relating to material reported to the IWF, one can only imagine the actual magnitude of the online abuse and exploitation that children suffer worldwide.

With Namibia's Internet connectivity standing at approximately 36.8 per cent in 2017,[28] it is not surprising that anecdotal evidence points to an increased number of incidents of online child sexual abuse in the country. To assess the extent of the problem and create the evidence base

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[18] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, p. 21; on the use of virtual currencies for child sex offending online see Yvonne Nouwen, *Virtual Currency Uses for Child Sex Offending Online in Online Child Sexual Exploitation: An Analysis of Emerging and Selected Issues*, ECPAT International Journal, Issue 12 (2017), pp. 4–11.

[19] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, pp. 18-19.

[20] ECPAT, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, Bangkok 2016, pp. 19–22; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, p. 8.

[21] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, pp. 21-23; for an in-depth analysis of life-streaming of online child sexual abuse, see Andrea Varrella, *Live Streaming of Child Sexual Abuse: Background, Legislative Frameworks and the Experience of the Philippines*, ECPAT International Journal, Issue 12 (2017), pp. 47–58; WeProtect Global Alliance, *Global Threat Assessment 2019*, London 2019, p. 33.

[22] ECPAT, *Trends in online child sexual abuse material*, Bangkok 2018, p. 7.

[23] Najat M'jid Maalla, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, A/HCR/12/23 (13 July 2009), pp. 10 *et seq.*

[24] *Ibid.*; ITU, *Guidelines for Policy-makers on Child Online Protection*, 2009, p. 19; Ateret Gewirtz-Meydana et al., *The complex experience of child pornography survivors*, Child Abuse and Neglect, Vol. 80 (2018), p. 244; Alisdair A. Gillespie, *Child Pornography. Law and Policy*, London 2011, pp. 31–33; UNICEF, *The State of the World's Children 2017*, p. 76.

[25] ECPAT, *Trends in online child sexual abuse material*, p. 8.

[26] See https://www.iwf.org.uk.

[27] Internet Watch Foundation, *Once upon year: Annual Report*, Cambridge 2018, available at: https://www.iwf.org.uk/sites/default/files/reports/2019-04/Once%20upon%20a%20year%20-%20IWF%20Annual%20Report%202018.pdf, pp. 18-19 (accessed 20 January 2020).

[28] ITU estimate 2017, available at: https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx (accessed 7 July 2019).

for prevention and response interventions, the Government of the Republic of Namibia, with the support from UNICEF, commissioned an 'Explanatory research study on knowledge, attitudes and practices of Information and Communications Technology' in 2016.[29] Only 7 per cent of participants said they had never accessed the Internet before.[30] In terms of negative experiences, 31 per cent of the surveyed children reported that they had received sexually explicit images of people they did not know, and 29 per cent had seen online child sexual abuse material.[31]

These figures changed the previously common narrative that online child sexual abuse is not a real threat for children in Namibia and prompted the government and civil society to joint action to ensure that children in Namibia are safe online.[32] As an important first step, it was recognised that the current legal framework in Namibia does not sufficiently criminalise all forms of online child sexual abuse material and hence requires reform.[33] The gaps in the current national legal framework are discussed in the following Chapter.

B. Gaps in the national legal framework

As indicated above, the national legal framework only sporadically addresses online child sexual abuse and exploitation. The sole legislation referring directly to 'child pornography' is the CCPA. Its section 234(1)(d) provides that it is a criminal offence to 'induce, procure, offer, allow or cause a child to be used for purposes of creating child pornography whether for reward or not'.

The first significant error of this piece of legislation is its lack of a definition of the term 'child pornography'.[34] It is not clear what the term 'child pornography' covers, for example whether it encompasses virtual child sexual abuse material, persons made to appear as minors, or erotic posing.[35] Besides the lack of a definition, the Act criminalises only the creation of child sexual abuse material and various supporting acts.[36] This leaves a considerable gap in the legal framework, as the possession, dissemination and accessing ('streaming') of child sexual abuse material is the centrepiece of the entire market: platforms such as Childs Play[37] and Elysium[38] have made millions by offering a marketplace to disseminate, download and stream child sexual

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[29] UNICEF, *Voices of children: An exploratory research study on knowledge, attitudes and practices of information and communication technology (ICT) use and online safety risks by children in Namibia*, Windhoek 2016; the study sampled 739 children between the ages of 13 and 17 years from urban and rural areas in five regions in Namibia.
[30] *Ibid.*, p. 27.
[31] *Ibid.*
[32] See, for example, Ngaevarue Katjangua, *Namibian children risk online exploitation*, New Era, 29 June 2017, available at: https://neweralive.na/posts/namibian-children-risk-online-exploitation (accessed 2 July 2019); Lahja Nashuuta, *Namibia Save Haven for Cybercriminals*, All Africa, 7 February 2018, available at: https://allafrica.com/stories/201802070287.html (accessed 2 July 2019); Jemima Beukes, *Child porn ex-cop faces 40 charges*, Namibian Sun, 6 May 2020, available at: https://www.namibiansun.com/news/child-porn-ex-cop-faces-40-charges2020-05-05 (accessed 13 May 2020).
[33] See, for example, The Namibian, *Nam joins world to combat child online sexual abuse*, 3 March 2016, available at: https://www.namibian.com.na/148055/archive-read/Nam-joins-world-to-combat-child-online-sexual-abuse (accessed 2 July 2019); New Era, *Legal framework strengthened to deter child sexual abuse online*, 2 March 2016, available at: https://neweralive.na/posts/legal-framework-strengthened-deter-child-sexual-abuse-online (accessed 2 July 2019).
[34] ECPAT, Global Data Base – National Legal Framework protecting children from sexual exploitation online (Namibia), available at: https://globaldatabase.ecpat.org/country/namibia/#2.1 (accessed 23 June 2019).
[35] UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, Windhoek 2016, p. 31; UNICEF, *Increasing legal protection for children from sexual exploitation and abuse in Namibia*, Windhoek 2016, p. 8.
[36] *Ibid.*
[37] Håkon F. Høydal/Einar Otto Stangvik/Natalie Remøe Hansen, *Breaking the Dark Net: Why the police share abuse pics to save children*, VG News, 7th October 2017, available at: https://www.vg.no/spesial/2017/undercover-dark-web/?lang=en (accessed 23 June 2019).
[38] Michael Nienaber, *German police make arrests over massive child pornography website*, Reuters News, 6 July 2017, available at: https://www.reuters.com/article/us-germany-sexcrimes/german-police-make-arrests-over-massive-child-pornography-website-idUSKBN19R0VD?il=0 (accessed 23 June 2019).

abuse material.[39] By not criminalising the dissemination, possession and accessing of child sexual abuse material, Namibia is at risk of becoming a safe haven for platforms such as these and tolerating the re-victimisation of hundreds of thousands of children worldwide through the further distribution and viewing of their ordeals.[40]

Apart from the CCPA, the Publications Act 42 of 1972 (hereafter Publications Act) prohibits the production, possession and distribution of 'undesirable' publications. According to its section 47, a publication is 'undesirable' if it is considered offensive or harmful to public morals. Even though it might be assumed that online child sexual abuse material would be considered 'undesirable' *per definitionem,* the lack of a specific definition of online child sexual material makes it impossible to predict its range.[41] Furthermore, the prescribed range of the sentence for contravention of section 8(1)(b) of the Publications Act is either a fine of not more than 1,000 rands (approximately 70 USD) or imprisonment for a period not exceeding six months.[42] This range of sentence is clearly not appropriate for a sexual offence such as the possession and distribution of online child sexual abuse material. Keeping in mind that some offenders possess millions of child sexual abuse images,[43] it is evidently unsatisfactory that such an offender only faces a maximum of 6 months' imprisonment.

Further, the Communications Act 8 of 2009 (hereafter Communications Act) makes it a criminal offence to 'make[s], create[s], solicit[s] or initiate[s] the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person'. Similar to the interpretation of the term 'undesirable' in the Publications Act, terms such as 'obscene', 'filthy' or 'indecent' are open to interpretation and hence do not set a clear standard for the criminalisation of child sexual abuse material. Further, the term 'solicit' does not include the downloading, possession or streaming of such material, and hence leaves a considerable gap. Even though the range of sentence is higher than in the Publications Act, with imprisonment for a period not exceeding five years or to a fine not exceeding N$20 000 (approximately 1350 USD) or to both such fine and such imprisonment, it can be doubted whether this range is appropriate for a sexual offence involving children.

Lastly, the classification of possession and dissemination of online child sexual abuse material as a sexual offence – in contrast to a general criminal provision such as stipulated in the Publications and in the Communications Act – is necessary in the light of section 238 of the CCPA. The latter sets out the requirements in respect of persons who work with children. This section provides that a person convicted of certain offences should not be employed in management or operation of an institution providing welfare services to children, have direct access to children at such institution, or become a caregiver or adoptive parent. It is crucial to note that one of the offences listed under the section is the manufacture, distribution or possession of pornography. The distribution and possession of an 'undesirable' publication is, however, not listed. Therefore, there is an inherent risk that if only the Publication or the Communications

[39] Regarding victim protection and rule of law concerns of undercover investigations on such child pornography fora, see Chapter V of this study or Sabine K. Witting, *Do ut des: Disseminating online child sexual abuse material for investigative purposes?,* Journal of Universal Computer Science, Proceedings of the Central European Cybersecurity Conference 2018, Article No. 14 (November 2018).

[40] Arguing that gaps in the legal framework and ill-equipped institutions in the developing work make them specifically attractive for perpetrators, Ann Skelton/Benyam Mezmur, *Technology changing @ a Dizzying Pace: Reflections on Selected Jurisprudence of the UN Committee on the Rights of the Child and Technology*, Peace Human Rights Governance, Vol. 3 (2019), p. 281.

[41] UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, p. 31; UNICEF, *Increasing legal protection for children from sexual exploitation and abuse in Namibia*, p. 8.

[42] See Section 43 Publications Act, No. 42 of 1972.

[43] Richard Wortley/Stephen Smallbone, *Internet Child Pornography: Causes, Investigation, and Prevention*, Santa Barbara 2012, p. 31.

Act is applied to sanction the dissemination and possession of online child sexual abuse material, perpetrators could fall through the cracks in terms of section 238 of the CCPA and still be deemed fit to work with children.

In summary, the national legal framework in Namibia touches upon only certain matters such as the production of child sexual abuse material; does not provide for a definition of 'child pornography'; and if it should be considered a criminal offence under the Publications or the Communications Act, does not provide for a sufficient range of sentence. Therefore, the current legal framework in Namibia is insufficient to effectively combat the dissemination, possession and accessing of child sexual abuse material.[44]

III. INTERNATIONAL LAW ON ONLINE CHILD SEXUAL ABUSE IN NAMIBIA

Given the gaps above in the legal framework, the question arises whether international law, such as the OPSC, could be leveraged to criminalise the possession and dissemination of child sexual abuse material. This Chapter will first discuss the protection standards in both Namibia and the OPSC,[45] and thereafter argue that international law, in particular the OPSC, can be directly applied in Namibian courts to prosecute online child sexual abuse offenders, while upholding fair-trial principles.

A. Online child sexual abuse in the ACCS

With the adoption of the ACCS, the AU has taken an important step towards tackling the threat of cybercrime in Africa. After its approval by the AU Executive Council in 2013, the ACCS was adopted on 27 June 2014. So far, only five states, namely Namibia, Guinea, Mauritius, Ghana and Senegal, have ratified the Convention.[46] According to article 26, the Convention shall enter into force 30 days after the date of the receipt of the fifteenth instrument of ratification. Therefore, although Namibia ratified the Convention on 25 January 2019, and is hence its second-latest member, the Convention has no legal effect yet, as the minimum number of 15 member states has not been reached yet.

[44] In line with the recommendations from the ECPAT Global Database, available at: https://globaldatabase.ecpat.org/country/namibia/#2.6 (accessed 6 July 2019).

[45] As an analysis of non-binding international standards exceeds the scope of this Chapter, this Chapter will focus only on legally binding international standards, such as the ACCS and the OPSC. Namibia has not ratified the Council of Europe Convention on Cybercrime ('Budapest Convention') and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ('Lanzarote Convention'); as such, these will be omitted. For an overview of relevant international and regional standards on online child sexual abuse, see UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*.

[46] See status of ratification here (latest version of 28 June 2019): https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection (accessed 20 January 2020).

It is against this background that this article will not focus on the ACCS[47] but rather on international law currently having legal effect in Namibia, such as the OPSC.[48]

B. Online child sexual abuse in the OPSC

Article 2 of the OPSC defines 'child pornography' as 'any 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 primarily sexual purposes'. Although the term 'child' is not defined in the OPSC, the definition of the main convention, the CRC, applies, and hence defines the term as 'every person under the age of 18 years'.[49] The OPSC only criminalises content depicting actual children and hence excludes virtual 'child pornography' or persons who are made to appear as minors.

With regard to the criminalised conduct, article 3(1)(c) of the OPSC states:

> Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organized basis: […] Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Art. 2.

This shows that the OPSC criminalises not only the production of 'child pornography', but also the dissemination and possession of such material.[50] Together with the definition of the term 'child pornography', the OPSC avails a basic set of criminal provisions to combat child sexual abuse material.

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[47] In case the ACCS reaches the 15 ratifications necessary for it to enter into force, the analysis below provides a brief overview of the strengths and weaknesses of the ACCS in relation to online child sexual abuse material. Art. 1 ACCS defines the term 'child pornography' as:

> […] any visual depiction, including any photograph, film, video, image, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:
> a) The production of such visual depiction involves a minor;
> b) Such visual depiction is a digital image, computer image, or computer-generated image where a minor is engaging in sexually explicit conduct or when images of their sexual organs are produced or used for primarily sexual purposes and exploited with or without the child's knowledge;
> c) Such visual depiction has been created, adapted or modified to appear that a minor is engaging in sexually explicit conduct.

According to art. 1, the term 'child' or 'minor' means every human being below the age of 18 years in terms of the ACRWC and CRC. The definition of 'child pornography' only covers visual depictions and hence excludes audio or written content. Further, it covers not only the visual depiction of actual children, but also computer-generated images (also called virtual 'child pornography') as well as persons who are made to appear as minors.
The catalogue of offences in art. 29(3)(1) ACCS is as follows:

> State Parties shall take the necessary legislative and/or regulatory measures to make it a criminal offence to:
> a) Produce, register, offer, manufacture, make available, disseminate and transmit an image or a representation of child pornography through a computer system;
> b) Procure for oneself or for another person, import or have imported, and export or have exported an image or representation of child pornography through a computer system;
> c) Possess an image or representation of child pornography in a computer system or on a computer data storage medium.

Therefore, the ACCS criminalises various actions such as production, dissemination and possession of child sexual abuse material, but does not extend to the accessing ('streaming') of such material.

[48] Upon entering into force, the same line of arguments set forth for the direct application of the OPSC can be applied in the context of the ACCS.

[49] See art. 1 CRC; UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, p. 12.

[50] Even though not the mere possession of 'child pornography', as deliberated in Chapter II.

C. Closing the gaps in the national legal framework through direct application of the OPSC?

Given the abovementioned limitations of the national legal framework in Namibia, the OPSC, particularly with regard to the definition of 'child pornography' and the criminalisation of dissemination and possession of such material, provides for a greater protection standard than the Namibian legal framework. Therefore, the question arises whether the OPSC could be leveraged to strengthen the legal framework. This section explores the role of international law in the Namibian Constitution and how the OPSC can be directly applied in Namibian courts. Such direct application will be balanced against fair-trial principles as guaranteed under article 12 of the Namibian Constitution.

1. Direct applicability of human rights law in Namibian courts

International law does not predetermine its position in the national legislation of each member state and leaves this decision to the national constitutions.[51] Generally speaking, states take either a dualist or a monist approach to international law.[52] In a dualist system, the national and the international legal order are regarded as two separate legal systems.[53] In order to make international law applicable in the national legal system, the international treaty in question has to be translated by way of domestic legislation through an Act of Parliament.[54] Without domestication, international law has no force or effect in such a country. In monist systems, international law and national legislation are considered as one legal system, which means that international law automatically forms part and parcel of the national legal system upon ratification or accession.[55] Hence, there is generally no need to domesticate the international treaty through an Act of Parliament to make it applicable in the member state.

Regarding the relationship between international law and national legislation, article 144 of Namibian Constitution states: 'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.' As the wording of article 144 does not require an Act of Parliament to make international law part of the law of Namibia, the country is following a 'monist approach' to international law and hence regards international law as an integral part of its legal system.[56] Monists claim that there is no

[51] Arguing that the question of monism and dualism should be settled by each country through a legal instrument and that the constitution of a country is the best legal instrument for solving that question, D.J. Devine, *The Relationship between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia*, Case Western Reserve Journal of International Law, Vol. 26 (1994), p. 299.
[52] Joseph G. Starke, *Monism and dualism in the theory of international law*, London/Melbourne 1936, p. 66; Francois-Xavier Bangamwabo, *The implementation of international and regional human rights instruments in the Namibian legal framework* in: Nico Horn/Anton Bösl (eds.), *Human Rights and the Rule of Law in Namibia*, Windhoek 2009, p. 166; John Dugard, *International Law: A South African Perspective*, Cape Town 2011, p. 42.
[53] Dugard, *International Law: A South African Perspective*, p. 42; Starke, *Monism and dualism in the theory of international law*, p. 66, arguing that in case of conflict between international law and municipal law, the court must apply municipal law.
[54] Onkemetse Tshosa, *The status of international law in Namibian national law: A critical appraisal of the constitutional strategy*, Namibian Law Journal, Vol. 2 (2010), p. 5.
[55] Michelle Barnard, *Legal reception in the AU against the backdrop of the monist/dualist dichotomy*, Comparative and International Law Journal of Southern Africa, Vol. 48 (2015), p. 154, stating that in the monist system, international law is superior to national law and that national law should thus always conform to the requirements of international law.
[56] Yvonne Dausab, *International law vis-à-vis municipal law: An appraisal of Article 144 of the Namibian Constitution from a human rights perspective* in: Anton Bösl/Nico Horn/André du Pisani (eds.), *Constitutional democracy in Namibia: A critical analysis after two decades*, Windhoek 2010, p. 266; Tshosa, *The status of international law in Namibian national law: A critical appraisal of the constitutional strategy*, p. 11; Devine, *The Relationship between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia*, p. 301.

need for further enabling legislation when applying international law to the domestic legal scenario.[57]

However, it has to be acknowledged that the first half-sentence of article 144 of the Namibian Constitution raises possible exceptions to that rule: the general rule of direct applicability of international law does not apply if 'otherwise provided by this Constitution or Act of Parliament'. Therefore, the Constitution or an Act of Parliament can limit the direct applicability of international law. This exception reflects the position of the Namibian Constitution as the supreme law of the country and in terms of an Act of Parliament, the supremacy of the will of the people, as expressed by the Namibian legislature. The OPSC is an international agreement and as such automatically forms part of Namibian law. As neither the Constitution nor an Act of Parliament state anything to the contrary, there is no limitation to the principle of direct applicability regarding the OPSC.

One might argue that such direct application of international law circumvents the role of the National Assembly as primary legislative organ, as set out in article 63(1) of the Namibian Constitution. However, it has to be noted that the National Assembly has the power and function in terms of article 63(2)(e) of the Constitution to decide whether or not to accede to international agreements and to agree to the ratification of or accession to international agreements that have been negotiated and signed by the President. Hence, the will of the people is duly reflected in the treaties ratified by the state.

The position that, according to article 144, international law automatically forms part of Namibian law, has been confirmed in Supreme Court decisions. In *S v Mushwena and Others,*[58] the Court ruled:

> As a matter of fact, as I have shown […] the International Covenant on Civil and Political Rights and the U.N. Covenant and Protocol Relating to Refugees, have become part of Public international law and by virtue of art. 144, [have] become part of the law of Namibia. The whole process of taking the accused prisoner and handing them over to Namibian officials, was also in conflict with the aforesaid principles and rules of public international law.

In *Government of the Republic of Namibia & Others v Mwilima & Others*,[59] the Court ruled:

> The Namibian Parliament acceded to this Covenant on 28 November 1994. It also, on the same date, acceded to the First and Second Optional Protocols. […] According to article 63(2)(e) read with article 144, international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'. From this it does not follow that the said article is now part of the Constitution of Namibia but being part of the law of Namibia it must be given effect. […] As was pointed out by Mr Smuts, the state not only has an obligation to foster respect for international law and treaties as laid down by article 96(d) of the Constitution, but it is also clear that the International Covenant on Civil and Political Rights is binding upon the state and forms part of the law of Namibia by virtue of article 144 of the Constitution.

[57] Devine, *The Relationship between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia*, p. 301.
[58] *SA4/04, SA4*/04 [2004] NASC 2 (21 July 2004).
[59] *AHRLR 127* (NaSC 2002).

The *Mwilima* case shows that in case the domestic legal framework does not provide sufficient protection for a citizen, due consideration should be given to international law to close this gap.[60]

2. Direct applicability of international criminal law in Namibian courts and the fair-trial principles of article 12 of the Namibian Constitution

Although the above-cited case law confirms the direct applicability of international treaties in the domestic legal framework, it has to be acknowledged that these court decisions are dealing with human rights treaties that aim to strengthen unconditionally the legal position of rights-holders. However, it has to be taken into account that the criminal law elements of the OPSC may lead to a different assessment. While criminal law provisions, whether derived from international or national law, aim to protect the rights of the victim, they limit the rights of the accused: the accused stands the risk of being convicted, followed by deprivation of liberty or the obligation to pay a fine. Because of this subsequent effect of limiting the rights of the accused during criminal procedure, the OPSC can be directly applied in Namibian courts only if such an application does not lead to a violation of the rights of the accused, in particular the fair-trial principles laid out in article 12 of the Namibian Constitution. The latter guarantees all persons the right to a fair trial. Particularly important for the question at hand is article 12(3), which states:

> No person shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time the offence was committed.

The principle set out in article 12(3) of the Namibian Constitution states that, first, there needs to be a law criminalising the specific conduct at the time it took place, and, secondly, that the penalty prescribed needs to remain within the range of sentence. The latter inherently includes the notion that a penalty must be prescribed in the first place. Only if both conditions are fulfilled does a specific law meet the standards of the principle of legality (*nullum crimen sine lege*), which is a core value, a human right and a fundamental defence in criminal prosecution.

With regard to the criminalisation of the distribution and possession of online child sexual abuse material, there are two potential legal grounds constituted under the CCPA and the OPSC. However, both provisions have potential shortfalls. While the CCPA as an Act of Parliament contains both a catalogue of offences as well as a prescribed penalty, it criminalises only the production of 'child pornography'. On the other hand, the OPSC provides a definition and a complete catalogue of offences but lacks a penalty provision. In order to have a complete 'set' that meets the fair-trial requirements set out in article 12 of the Namibian Constitution, both provisions need to be combined. Therefore, the crucial question is: will articles 2 and 3 of the OPSC be read in conjunction with section 234 of the CCPA, or vice versa?

3. Excursus: Lessons from DRC and Rwanda

To answer this complex question, it is useful to explore how other countries in the region have dealt with similar legal constellations. As no other country in the African region has discussed the issue specifically with regard to online child sexual abuse material, we propose to draw a comparison with the prosecution of genocide and crimes against humanity in the aftermath of the atrocities committed in the DRC and Rwanda. As it is not primarily relevant what the criminal offence is but rather that a criminal offence based on international law has been leveraged

[60] Dausab, *Constitutional democracy in Namibia: A critical analysis after two decades* (2010), p. 283.

to strengthen the national legal framework, we believe such a comparison is appropriate and relevant in guiding the Namibian approach to direct applicability of international criminal law. This is particularly important in balancing such direct application with fair-trial principles.

The DRC and Rwanda struggled to end the era of impunity for perpetrators of genocide and crimes against humanity committed during civil war. As the legal framework in the two countries was fragmented and did not provide a sufficient legal basis to prosecute these offences, domestic courts in both countries directly applied provisions from international criminal law in order to deliver justice to the victims, finding such direct application not to be in violation of fair-trial principles.

Case law from the DRC

From 1998 to 2003, the DRC was consumed by a regional conflict described as 'Africa's World War'.[61] Beginning with the genocide of the Tutsi population in Rwanda,[62] a total of eight African countries became involved on opposite sides of the conflict.[63] During this period, widespread and systematic human rights violations took place, including sexual violence committed against women, men and children. Millions of Congolese civilians lost their lives in atrocities committed both by rebels and members of the DRC army.[64]

The DRC ratified the Rome Statute on 11 April 2002.[65] Since 1994, it has followed a monist system, i.e. international treaties form part of the national legal framework upon ratification.[66] Against this background, it is clear that the Rome Statute, upon ratification in 2002, became immediately part and parcel of the national legal system. At the time that atrocities such as war crimes and crimes against humanity were committed, the domestic legal framework, in the form of the Military Code and the Criminal Code, regulated these offences only in a fragmentary way.[67] One of the first cases that leveraged the Rome Statute was the *Songo Mboyo*

[61] Dunia P. Zongwe, *Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo*, Israel Law Review, Vol. 26 (2013), p. 249.
[62] Milli Lake, *Ending Impunity for Sexual and Gender-Based Crimes: The International Criminal Court and Complementarity in the Democratic Republic of Congo*, African Conflict and Peacebuilding Review, Vol. 4 (2014), p. 8.
[63] Zongwe, *Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo*, p. 249.
[64] *Ibid*.; Lake, *Ending Impunity for Sexual and Gender-Based Crimes: The International Criminal Court and Complementarity in the Democratic Republic of Congo*, pp. 8–9; for a detailed description on the history of the conflict, see Rebecca Bowman, *Lubanga, the DRC and the African Court: Lessons learned from the first International Criminal Court case*, African Human Rights Law Journal, Vol. 7 (2007), pp. 414 *et seq*.
[65] See a full listing of the status of signature, ratification, and accession of the Rome Statute at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en (accessed 19 February 2019).
[66] Ovo Catherine Imoedemhe, *The Complementarity Regime of the International Criminal Court: National Implementation in Africa*, Cham 2017, p. 96; see art. 112 of the Constitutional Act of Transition (1994), art. 193 of the Transitional Constitution of the Democratic Republic of Congo of 4 April 2003, arts. 215 and 216 of the Constitution of the Democratic Republic of Congo of 18 February 2006: 'Duly concluded international treaties shall, upon publication, prevail over Acts of Parliament', as translated in Zongwe, *Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo*, Israel Law Review (2013), p. 254; similar translation in Avocats sans Frontières, *Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo*, Brussels 2009, para. 115, available at: https://asf.be/wp-content/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf (accessed 24 February 2019); original text in French: 'Les traités et accords internationaux régulièrement conclus ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque traité ou accord, de son application par l'autre partie', available at: https://www.wipo.int/edocs/lexdocs/laws/fr/cd/cd001fr.pdf (accessed 24 February 2019).
[67] Imoedemhe, *The Complementarity Regime of the International Criminal Court: National Implementation in Africa*, pp. 96–97.

case,[68] also referred to as the *Eliwo* case,[69] in which the courts applied the Rome Statute for the first time to convict soldiers of mass rape and sexual violence as crimes against humanity.[70] The court made use of the Rome Statute's definition of crimes against humanity with regard to rape, as it is clearer and more comprehensive than the offence under national law.[71] Further, the application of the Rome Statute also allowed the court to impose sentences as set out under article 77 of the Rome Statute, thereby avoiding the death penalty as stipulated under domestic law.[72]

Other cases, such as the *Massabo* case,[73] used the Rome Statute to complement domestic law provisions that lacked sanctions. Under the Military Penal Code, the war crime offence did not contain a sentence.[74] To fill this 'omission', the courts in *Massabo* simply applied the sentence as set out in article 77 of the Rome Statute.[75] Mindful of the principle of legality and the potential implications of applying the Rome Statute as a sentencing guideline, the *Massabo* court clearly stated that 'the ratification by the DRC of the [Rome] Statute included it as part of the arsenal of laws of the DRC subject to the primacy of international law and in accordance with the monist legal tradition'.[76]

Case law from Rwanda

After the genocide in 1994, Rwanda faced tremendous challenges in prosecuting perpetrators in domestic courts, particularly due to a highly fragmented legal framework.[77] Genocide, crimes against humanity and war crimes did not form part of the Penal Code at the time these offences were committed on a large scale in Rwanda.[78] Criminalising them after they had been committed would have violated the principle of legality, as the law would have been considered *ex post facto* legislation.[79] To avoid the violation of such a key element of the *nulla poena sine lege* doctrine, which is enshrined in the 1991 Constitution,[80] the government leveraged the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (hereafter

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[68] Mbandaka Military Garrison Court, RPA 615/2006 (April 12, 2006), French version available at: https://www.droitcongolais.info/files/4.30.-TMG_BDK,-Jgt-du-12-avril-2006,-complot-militaire.pdf (accessed 24 February 2019).

[69] Songo Mboyo is the name of the location where the crimes were committed, whereas Eliwo Ngoy is the name of the first accused See Mbandaka Military Garrison Court, RPA 615/2006 (April 12, 2006), French version available at: https://www.droitcongolais.info/files/4.30.-TMG_BDK,-Jgt-du-12-avril-2006,-complot-militaire.pdf (accessed 24 February 2019).

[70] International Center for Transitional Justice, *Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court*, May 2014, available at: https://www.ictj.org/publication/democratic-republic-congo-impact-rome-statute-and-international-criminal-court (accessed 24 February 2019).

[71] Imoedemhe, *The Complementarity Regime of the International Criminal Court: National Implementation in Africa*, p. 98.

[72] Zongwe, *Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo*, p. 261.

[73] This case is also referred to as *Bongi* case. The differing case names originate from the full name of the accused 'Blaise Bongi Massabo', as retrieved from full case citation in Zongwe, *Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo*, p. 262, n. 85.

[74] *Ibid.*, pp. 264-265: the *Massabo* court applied art. 77 Rome Statute out of concern for a potential violation of the principle of legality, arguing that the Military Penal Code has only a generic sentencing provision.

[75] *Ibid.*, p. 264; Avocats sans Frontières, *Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo*, para. 18.

[76] Patryl I. Labuda, *Applying and 'misapplying' the Rome Statute in the Democratic Republic of the Congo* in: Christian de Vos, Sara Kendall, Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge 2015, p. 424; Avocats sans Frontières, *Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo*, para. 18.

[77] Jean Bosco Mutangana, *Domestic Justice Mechanisms: perspectives on referred cases to Rwanda*, 2014, p. 3, available at: http://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/v-domestic-justice-mechanisms-mutangana.pdf (accessed 3 March 2019).

[78] *Ibid.*

[79] *Ibid.*

[80] See art. 12 (3) 1991 Constitution.

Genocide Convention).[81] With Rwanda following a monist system, the Genocide Convention formed part of its domestic legal framework since its ratification on 12 February 1975.[82]

In order to bridge the gap between the Rwandan Penal Code, which only criminalises constitutive acts, and the Genocide Convention, which clearly defines genocide and crimes against humanity but lacks penalties for these offences, Rwanda enacted the Organic Law No. 08/1996 of 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990[83] (hereafter Organic Law). Article 1 Organic Law came up with the so-called dual incrimination approach.[84] This acknowledges that any prosecutions must be based on the offences and their penalties set out in the Rwandan Penal Code,[85] but should allow for an 'upgrade' in both the categorisation of offences as well as the sentence. In a first step, the judges assess whether the conduct constitutes an offence under the Penal Code. In a second step, the judge determines whether the conduct simultaneously constitutes the crime of genocide or a crime against humanity under the Genocide Convention.[86] In such a case, the penalties set in the Penal Code apply, except that they are aggravated depending on the level of involvement of the accused in the act of genocide or crimes against humanity.[87] This shows that the prosecution of perpetrators of genocide or crimes against humanity is primarily based on the Rwandan Penal Code, which is then modified based on international law.[88]

4. Lessons for Namibia

In summary, both the DRC and Rwanda provide for workable solutions to directly apply international criminal law in domestic courts, while respecting the fair-trial principles.

In the Congolese case, *Songo Mboyo,* the definition of the crimes in the national legal framework were complemented by the Rome Statute, whereas in *Massabo*, the range of sentences contained in the Rome Statute was used to complement the definition of war crimes in national legislation. Rwanda based the prosecution of the *génocidaires* on the Rwandan Penal Code, while leveraging international law to expand its scope of application with regard to the criminalised conduct through the Organic Law. This approach ensures that the Rwandan interest in the prosecution of the *génocidaires* is balanced against rule-of-law considerations.

This shows that the prosecution in neither the DRC nor Rwanda based its case solely on international criminal law – national legislation was always used as a basis for either the elements of crime, the range of sentence, or – in the case of Rwanda - even both. Therefore, international

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[81] Sam Rugege/ Aimé M. Karimundam, *Domestic Prosecution of International Crimes: The Case of Rwanda* in: Gerhard Werle/Lovell Fernandez/Moritz Vormbaum (eds.), *Africa and the International Criminal Court*, The Hague 2014, pp. 86–87.

[82] According to art. 5 Genocide Convention, 'Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III'. Because of this explicit wording in the Genocide Convention, the Convention cannot – even in monist countries – be considered self-executing (William A. Schabas, *Genocide in International Law. The Crime of Crimes*, Cambridge 2009, p. 405; Jan Wouters/Sten Verhoeven, *The domestic prosecution of genocide*, Working Paper No. 55 (2010), p. 4.).

[83] Available at: https://www.refworld.org/docid/3ae6b4f64.html (accessed 4 March 2019).

[84] Mutangana, *Africa and the International Criminal Court*, pp. 86 *et seq*.

[85] See clear references to the Penal Code in art. 1 and art. 14 Organic Law.

[86] See art. 1 Organic Law; Rugege/Karimunda, *Africa and the International Criminal Court*, p. 87.

[87] See art. 14 Organic Law; Pietro Sullo, *Beyond genocide: Transitional justice and Gacaca courts in Rwanda*, The Hague 2018, p. 105.

[88] This approach has yielded mixed results in practice (Rugege/Karimunda, *Africa and the International Criminal Court*, p. 87). In some cases, such as *Prosecutor v Ukezimpfura Jean and Others* or *Prosecutor v Mvumbahe Denys and Others*, the courts correctly applied both international law and domestic legislation to argue their case. However, in other cases such as *Prosecutor v Hanyurwimfura Epaphrodite* and *Prosecutor v Karorero Charles and Others*, the courts based their charges mainly on domestic law without properly acknowledging the construct of the dual-incrimination approach set out in the Organic Law, thus potentially leading to a violation of the principle of legality.

criminal law played a complementary, rather than constitutive, role, thereby filling in the gaps of the national legal framework.

Coming back to the direct application of the OPSC for prosecuting the dissemination and possession of online child sexual abuse material, it is clear from the Rwandan and DRC experience that the OPSC alone cannot serve as the basis for the prosecution of online child sexual abuse perpetrators but that a 'hook' in the national legislation is required. The CCPA clearly serves as such a 'hook'; however, the question remains whether the CCPA should be interpreted in the light of the OPSC, leveraging its definition of the term' child pornography' and the more comprehensive catalogue of offences, or vice versa, meaning that the CCPA's range of sentence is merged with the definition and catalogue of offences from the OPSC.

D. Interpreting the CCPA in the light of the OPSC

To expand its catalogue of offences, section 234 of the CCPA could be interpreted in the light of the OPSC. This would have the advantage that the criminalisation is rooted in national legislation, with international law only expanding the range of applicability. Both in the DRC and the Rwandan contexts, courts have emphasised the importance of basing their judgment on domestic law, which is then interpreted and expanded in view of and in line with international law. However, the disadvantage is that the wording of section 234 of the CCPA is excessively stretched to accommodate the possession and dissemination of online child sexual abuse material. The other option is to base the criminalisation on the OPSC and 'merge' the definition and catalogue of offences of the OPSC with the penalty provisions of section 234 of the CCPA. This has the advantage that both the definition and catalogue of offences of the OPSC broadly criminalise the production, possession and dissemination of online child sexual abuse material, but poses challenges with regard to the rule of law, as such a merger had not been foreseen initially by the legislator.

As a first step towards answering this question, it has to be acknowledged that the regulation of 'child pornography' offences in the OPSC and the CCPA do not present a conflict of norms. This is an important statement, as in case of a conflict of norms, the CCPA (enacted in 2015) would simply render the OPSC (ratified in 2002) inapplicable (*lex posterior derogat legi priori*). The provisions are not contradicting each other, but rather complement each other: both the OPSC and the CCPA criminalise the production of 'child pornography', but only the OPSC provides for a clear definition of the term and expands the catalogue of offences to the distribution and possession of it.

The complementarity of the OPSC and CCPA (and more importantly, the intent of the legislator to create such a complementarity) can be derived from section 2(1)(c) of the CCPA, which lays out the objectives of the CCPA:

> The objects of this Act are to […] give effect to Namibia's obligations concerning the well-being, development and protection of children in terms of the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and other international agreements binding on Namibia […].

Furthermore, section 2(2) of the CCPA states: 'The objects referred to in subsection (1) must be given due consideration in the interpretation and application of any provision of this Act.'

Therefore, section 2(1)(c) of the CCPA evidently endorses the status of international law such as the OPSC and stresses that the CCPA aims to give effect to such international treaties. In

section 2(2) of the CCPA, it becomes clear that international treaties must be given due consideration in the interpretation and application of any provision of the CCPA. The will of the legislator hence clearly endorses the interpretation of the CCPA in the light of international law, and therefore legitimises the interpretation of section 234 of the CCPA in view of the OPSC. This means that the term 'child pornography' in the CCPA can be defined in line with article 2 of the OPSC, and that the catalogue of offences as set out in section 234 of the CCPA could be expanded to the distribution and possession of 'child pornography' material as stipulated in article 3(1)(c) of the OPSC. As the CCPA itself calls for an interpretation in the light of international law, and the OPSC forms part of the domestic legal system, such an approach is compatible with the *nullum crime sine lege* requirement in article 12 of the Constitution.

However, some would submit that the fact that the legislator did not use the opportunity to draft section 234 of the CCPA in line with the OPSC was a deliberate decision, and that the legislator intended to criminalise only the creation of child sexual abuse material, not its possession and dissemination. Following this line of argument, interpreting section 234 of the CCPA in view of and in line with the OPSC would clearly go against the will of the legislator. The authors would strongly disagree with this interpretation and submit that the lack of a comprehensive 'child pornography' provision is a mere oversight of the legislator. It has to be noted that the Government of the Republic of Namibia only put online child safety concerns on the political agenda from 2016 onwards,[89] and that the text of the CCPA was largely developed well before that. Given that an object of the Act, as mentioned above, is to give effect to international conventions concerning the well-being of children, it is submitted that the interpretation of section 234 of CCPA does not contradict the will of the legislator.

Lastly, one could argue that the range of sentence prescribed in section 234(7) of the CCPA has been set for the production of 'child pornography' offences, and that the production of 'child pornography' justifies a higher range of sentence than the mere distribution or possession of already existing material. However, it has to be noted that the range of sentence set out in section 234(7) of the CCPA also applies for mere auxiliary conduct, such as inducing a child to be used for the creation of 'child pornography'. Furthermore, the CCPA does not prescribe a minimum sentence, and hence the presiding officer can take the specific circumstances of each case into account. It can therefore be argued that the range of sentence prescribed for production of 'child pornography' is also applicable for the dissemination and possession of 'child pornography' under article 3 of the OPSC.

In summary, the direct applicability of the OPSC according to article 144 of the Namibian Constitution, paired with the special position of international treaties in the CCPA, allows for an interpretation of the CCPA in view of the OPSC without violating fair-trial principles, in particular the *nullum crimen sine lege* doctrine as set out in article 12 of the Namibian Constitution.

IV. CONCLUSION

This article is an attempt to show how, using Namibia as a case study, international law can be leveraged to strengthen the national legal framework on online child sexual abuse material in monist systems. With the strong position of international law in the Namibian Constitution, this article advocates for putting international law into action to ensure that the rights of all people, in particular the most vulnerable ones such as children, are duly protected. With the legislative reform process being long and complex at the national level, particularly in the field of cybercrime, countries struggle to enact child-rights-based, comprehensive legislation in the

[89] See, for example, the development of the UNICEF study 'Voices of children: An exploratory research study on knowledge, attitudes and practices of information and communication technology (ICT) use and online safety risks by children in Namibia'.

emerging field of online child sexual abuse. As such, international law plays an evermore important role in this area, as its direct application can increase the protection of children from all forms of online and offline sexual abuse.

However, the authors submit that, in the case of Namibia, this solution is only temporary and that strong national legislation on online child sexual abuse is still required on top of the CCPA and OPSC. Although the application of section 234 of the CCPA in conjunction with the OPSC closes a legal loophole, it has to be acknowledged that the definition of 'child pornography' in article 2 of the OPSC[90] as well as the catalogue of offences set out in its article 3 have limitations. First, article 3 only criminalises possession if it is for the purpose of disseminating, selling or offering the material ('possessing for the above purposes'), but not if the material is possessed solely for private use.[91] Secondly, the OPSC does not criminalise accessing online child sexual abuse material if the material is not downloaded and hence not in the 'possession' of the recipient.[92] As mentioned earlier, accessing child sexual abuse material through live-streaming services is an emerging trend that requires urgent legislative response. This shows that law reform in Namibia is still required in the long run in order to close current loopholes in the OPSC and to keep up with trends in this field.[93]

[90] For an in-depth discussion of the deficits in the definition of art. 2 OPSC with regard to virtual 'child pornography', see Chapter II or Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 1*, p. 64, and UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, pp. 12–13.
[91] For further deliberation on this issue see Chapter II.
[92] UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, pp. 12–13.
[93] For concrete proposals on legislative reform in the Namibian context, see UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, pp. 32 *et seq*.