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

Witting, S.K.

Citation

Witting, S. K. (2020, June 11). *Child sexual abuse in the digital era : Rethinking legal frameworks and transnational law enforcement collaboration*. Retrieved from <https://hdl.handle.net/1887/96242>

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Author: Witting, S.K.

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

Issue Date: 2020-06-11

CHAPTER VI: TRANSNATIONAL BY DEFAULT: CONTEXTUALISING CROSS-BORDER LAW ENFORCEMENT COLLABORATION IN ONLINE CHILD SEXUAL ABUSE CASES

Abstract

Combatting child sexual abuse on the Internet requires a high level of harmonisation of both substantive and procedural laws, as online child sexual abuse is transnational by default. In order to prosecute and investigate online child sexual abuse across country borders, states heavily rely on extraterritorial jurisdiction clauses as well as informal and formal law enforcement collaboration channels. This paper analyses existing channels in the OPSC, Budapest Convention and Lanzarote Convention, particularly against the background of the recently published 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), and provides for concrete guidance on how to ensure that the best interests of the child in the investigation and prosecution of transnational crimes such as online child sexual abuse is the primary consideration.

This Chapter has been submitted for publication to the International Journal of Children's Rights.

I. TRANSNATIONAL BY DEFAULT: ONLINE CHILD SEXUAL ABUSE RESPECTS NO BORDERS

Anna is a seven-year-old girl who was born and lives in the Netherlands as a Dutch national together with her father, a German national. On a family holiday to Canada, her father, together with a Canadian family friend, takes a video of them jointly sexually abusing Anna and uploads it to an open-source website. The website is hosted on an American server. Ever since, the video has been downloaded thousands of times. Law enforcement officials in South Africa find the material on a computer they seize from a suspected child sex offender, who possessed the material for private use only, and manage to identify Anna. Anna's father, the Canadian family friend and the South African client are arrested.

This case study is fictitious, but children worldwide share Anna's destiny. While sexual abuse used to be restricted to the homes and communities where children live, with the advent of the Internet and increased globalisation they are at risk of sexual exploitation not only by people in their surroundings but, increasingly, by offenders far afield who use the realm of the Internet.¹

Combating child sexual abuse on the Internet requires a high level of harmonisation of both substantive and procedural laws, as such abuse is transnational by default: while the transnational nature of child sexual abuse material used to be the exception before the advent of the Internet, it is now the rule. In order to follow this shift in offending behaviour and avoid the creation of 'safe havens', countries require harmonised legal mechanisms to facilitate the investigation and prosecution of offences beyond their territorial borders.² Inasmuch as the harmonisation of substantive laws is hampered by varying constitutional, moral and ethical concerns at a national level,³ so procedural law in many cases also fails to provide for harmonised standards in adjudicating and investigating cybercrime.⁴ Traditionally, the power to investigate and prosecute offences, including the claiming of jurisdiction, was tied to the territory of each state. This territoriality principle is founded in the protection of state sovereignty, a core value protected under international customary law.⁵ If a state intends to claim jurisdiction outside its territory or investigate an offence in the territory of another state, special bilateral mechanisms are required to ensure that sovereignty of the other state is not violated.⁶

¹ UNICEF, *State of the World's Children*, New York 2017, p. 71.

² UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, New York 2013, p. 60.

³ While the role of international law traditionally is to set a minimum standard for national legislators, international treaties dealing with the regulation of child sexual abuse material provide varying standards (Alisdair A. Gillespie, *Cybercrime. Key Issues and Debates*, Oxon 2019, p. 238), which makes it difficult for countries who ratified various instruments to decide which standard to adhere to (Alisdair A. Gillespie, *Child pornography in international law* in: Ethel Quayle/Kurt M. Ribisl (eds.), *Understanding and Preventing Online Child Sexual Exploitation and Abuse*, Oxon 2012, p. 74); for a comprehensive discussion of emerging forms of online child sexual abuse such as virtual child sexual abuse material and self-generated imagery and the relevant international legal instruments, see Chapter II and III or Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 1*, *Computer and Telecommunications Law Review*, Issue 3 (2018); Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 2*, *Computer and Telecommunications Law Review*, Issue 4 (2018); Sabine K. Witting, *Regulating bodies: the moral panic of child sexuality in the digital era*, *Critical Quarterly for Legislation and Law*, Vol. 1 (2019).

⁴ Miriam F. Miquelon-Weismann, *The Convention on Cybercrime: A Harmonized Implementation of International Penal Law: What Prospects for Procedural Due Process?*, *Journal for Computer & Information Law*, Vol. 32 (2005), p. 335.

⁵ Cedric Ryngaert, *The Concept of Jurisdiction in International Law* in: Alexander Orakhelashvili, *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham 2015, p. 51; Anna-Maria Osula, *Transborder access and territorial sovereignty*, *Computer Law and Security Review*, Vol. 31 (2015), p. 722; UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, p. 184.

⁶ *Ibid.*, pp. 184–185.

In the realm of the Internet, these principles are complicated by the architecture itself of the cyberspace. As the Internet knows no borders, crimes are naturally committed across numerous jurisdictions. Perpetrators can easily hide their identities, and the evidence they leave (if any) is highly ephemeral and easily removed, altered or hidden.⁷ As will be discussed below, determining whether an offence was committed in or outside a state's territory is increasingly difficult. In Anna's case, was the online child sexual abuse offence committed on the territory of Canada, seeing as the material was uploaded there? Or in the US, which was the location of the server onto which the material was uploaded? As for the investigation of the offences, are Dutch law enforcement authorities allowed to conduct open-source investigation of the American server, or is this considered an extra-territorial activity that could violate US sovereignty and that hence requires US consent? Given the volatile nature of digital evidence, which channels could the Netherlands leverage to obtain such evidence expeditiously yet while obeying Dutch law of evidence rules so as to ensure the admissibility of the evidence in Dutch courts? In summary, the key questions that need to be answered are:

- Does the country have jurisdiction? What happens if more than one country claims jurisdiction?
- If the country requires investigative support from another country, how can such collaboration be facilitated in a timely and efficient manner? If the country needs to extradite, how can this be accomplished?
- How can transnational law enforcement mechanisms take the specific considerations of child victims into account?

To facilitate such transnational law enforcement collaboration, states depend largely on both formal and informal collaboration channels. While informal collaboration mechanisms are based on transnational police networks or peer-to-peer police support,⁸ formal collaboration channels are rooted in bi- and multilateral mutual legal assistance and extradition agreements, which play a key role in ensuring that evidence can be obtained outside a state's territory.⁹ The most important international instruments to facilitate such collaboration in the area of online child sexual abuse are the UN Convention on the Rights of the Child's Optional Protocol on the sale of children, child prostitution and child pornography (OPSC), the Council of Europe Convention on Cybercrime (hereafter Budapest Convention) and the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (hereafter Lanzarote Convention). All three Conventions not only provide guidance to states on the regulation of online child sexual abuse,¹⁰ but also include provisions on jurisdiction, mutual legal assistance, extradition and other transnational law enforcement mechanisms. This highlights the importance that transnational collaboration mechanisms have in combating online child sexual abuse effectively.

Therefore, this Chapter aims to analyse the comprehensiveness and effectiveness of the transnational law enforcement mechanisms contained in the abovementioned international instruments. Anna's case will assist in understanding the complexities of jurisdiction, mutual legal assistance and extradition in instances of online child sexual abuse. The OPSC, Budapest Convention and Lanzarote Convention have been chosen for this analysis, as the OPSC is the most ratified Convention dealing specifically with child sexual abuse material, the Lanzarote Con-

⁷ Roderic Broadhurst, *Developments in the global law enforcement of cyber-crime*, Policing: an international Journal of Police Strategies and Management, Vol. 29 (2006), p. 431; Jan-Jaap Oerlemans, *Investigating cybercrime*, Amsterdam 2017, p. 1.

⁸ UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, pp. 208–209.

⁹ UNODC, *Manual on Mutual Legal Assistance and Extradition*, New York 2012, p. 19.

¹⁰ For a comparative analysis of the child sexual abuse material offences in the OPSC, Budapest Convention and Lanzarote Convention, see UNICEF, *Regulation of Child Online Sexual Abuse. Legal Analysis of International Law & Comparative Legal Analysis*, Windhoek 2016.

vention, the most recent child protection convention with a focus on child sexual abuse material, and the Budapest Convention, the most ratified international cybercrime treaty.¹¹ Furthermore, this Chapter aims to identify specific considerations in transnational law enforcement with regard to cases of online child sexual abuse and provide recommendations on how a child-centred approach to transnational law enforcement can contribute to ensuring that the best interests of the child are the paramount consideration throughout the formal justice process.

II. (EXTRA)TERRITORIAL JURISDICTION

Before exploring the jurisdiction clauses in the OPSC, Budapest Convention and Lanzarote Convention, this Chapter briefly introduces the concept of jurisdiction. Analyses of the treaty-specific jurisdiction clauses will be followed by a discussion of the determination of intra- and extra-territoriality and the dissolution of jurisdictional conflicts by applying the 'rule of reason'.

A. The concept of jurisdiction

To understand the concept of jurisdiction, it is crucial to grasp its interlinkages with the principle of state sovereignty, which is protected under customary international law.¹² The principle of sovereignty entails that states shall not 'interfere in any form or for any reason whatsoever in the internal and external affairs of other States'.¹³ The principle is expressed in various forms of jurisdiction, i.e. jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce.¹⁴ Jurisdiction to prescribe covers a state's power to regulate the actions and activities of certain people by law, policy or administrative act, while the jurisdiction to adjudicate means a state's power to submit certain persons or entities to its courts. Lastly, the jurisdiction to enforce entails a state's power to enforce its laws through means of executive or administrative acts, i.e. compel compliance or punish non-compliance.¹⁵ In summary, the power to regulate, adjudicate and enforce is at the core of a state's 'internal affair'.

As sovereignty in the context of the Westphalian bent of the international legal order is derived from the notion of territorially separate nation states, the predominant factor in determining the reach of a state's sovereignty is its territory.¹⁶ Therefore, jurisdiction is generally based on two principles: territoriality and extra-territoriality.¹⁷ As extra-territorial jurisdiction potentially violates the sovereignty of another state, the default rule is that extra-territorial jurisdiction can only be exercised if there is a specific permissive rule.¹⁸ There are various approaches on how to establish extra-territorial jurisdiction. The most important component is the link to the asserting state, which can be established in different ways. For example, an asserting state

¹¹ The 2000 United Nations Convention against Transnational Organized Crime covers only transnational offences committed by an organised criminal group (arts. 2, 3). As online child sexual abuse offences can, but do not always, form part of organised crime, this Convention will be excluded.

¹² UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, p. 184.

¹³ See art. 1 of the UN General Assembly, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States*, A/RES/36/103 (9 December 1981).

¹⁴ Ryngaert, *Research Handbook on Jurisdiction and Immunities in International Law*, pp. 15–17; Osula, *Transborder access and territorial sovereignty*, p. 721.

¹⁵ Dan Svantesson/Felicity Gerry, *Access to extraterritorial evidence: The Microsoft cloud case and beyond*, *Computer Law and Security Review*, Vol. 31 (2015), p. 480; Susan W. Brenner/Bert-Jaap Koops, *Approaches to Cybercrime Jurisdiction*, *Journal of High Technology Law*, Vol. 4 (2004), pp. 5–6; Osula, *Transborder access and territorial sovereignty*, p. 721.

¹⁶ 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); Ryngaert, *Research Handbook on Jurisdiction and Immunities in International Law*, p. 51; Osula, *Transborder access and territorial sovereignty*, p. 722.

¹⁷ Gillespie, *Cybercrime. Key Issues and Debates*, p. 290.

¹⁸ Kolossa, *The charm of jurisdictions: a modern version of Solomon's judgment?*.

justifies a link to its home country based on the nationality of either the offender ('active personality principle') or the victim ('passive personality principle'), the state's interest in protecting its country from a national threat ('protective principle'), or its interest in relying on universal jurisdiction for a small number of 'international crimes'.¹⁹ As online child sexual abuse is not generally recognised as international crime and does not pose a national threat to states,²⁰ this Chapter will focus only on the active and passive personality principle.

Although the range of a state's extra-territorial jurisdiction is ultimately determined at a national level, international conventions such as the OPSC, Budapest Convention and Lanzarote Convention provide guidance on the range of jurisdiction clauses by which to establish a harmonised approach that respects state sovereignty and balances it against the states' interests to investigate and prosecute offences which affect them.

B. Jurisdiction clauses in relevant international conventions

This section will provide an overview of the nature and range of jurisdiction clauses in the OPSC, Budapest Convention and Lanzarote Convention.

1. Article 4 of the OPSC

Article 4 of the OPSC provides for a territorial and extra-territorial jurisdiction provision in cases of article 3(1) OPSC offences, i.e. sale of children, child prostitution and child pornography.

a) *Wording and interpretation*

Article 4(1) prescribes that 'each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, when the offences are committed in its territory or on board a ship or aircraft registered in that State'. Article 4(1) of the OPSC therefore establishes territorial jurisdiction, including ships or aircrafts registered in the concerned state. The term 'shall' shows that this is an obligatory clause for all state parties.

Article 4(2) of the OPSC extends the range of jurisdiction to offences committed outside the state's territory. The clause states:

Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, in the following cases:

- (a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory;
- (b) When the victim is a national of that State.

The term 'may' indicates that this extension to extra-territorial jurisdiction cases is merely optional for state parties. The extra-territorial jurisdiction clause encompasses both the active and passive personality principle. Additionally, it extends the active personality principle to persons who merely have their habitual residence in the state party, without being citizens. This

¹⁹ Alisdair A. Gillespie, *Child Pornography. Law and Policy*, London, 2011, p. 304; Ryngaert, *Research Handbook on Jurisdiction and Immunities in International Law*, p. 51; for an in-depth analysis of the various forms of jurisdictions, see Danielle Ireland-Piper, *Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law*, *Melbourne Journal of International Law*, Vol. 13 (2012), pp. 131 *et seq.*

²⁰ Gillespie, *Child Pornography. Law and Policy*, p. 305.

extension is somewhat questionable, as a resident does not profit from the benefits and protections extended to citizens by their home state. While it is justifiable that a resident needs to obey the laws and rules of his or her host state while being on its territory, it seems less justifiable that the same applies if he or she is in a third country.²¹

Applying this to the case study, this would mean that the Netherlands could claim jurisdiction over Anna's father even though he is a German national and committed the offence while in Canada, merely because he resides permanently in the Netherlands. Although this construction evidently aims to avoid any jurisdictional loopholes particularly in the case of travelling sex offenders, it holds the risk that countries artificially extend their jurisdiction and impose their laws on citizens of other countries.

Following the *aut dedere aut iudicare* principle,²² article 4(3) of the OPSC states that

each State Party shall also take such measures as may be necessary to establish its jurisdiction over the abovementioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.

This means that a state that does not want to extradite one of its citizens for an offence he or she committed abroad has to establish jurisdiction over this offence.²³ Applying this to the case study, Germany could not refuse extradition of Anna's father while he is on German territory to either the Netherlands or Canada, while at the same time not establishing jurisdiction over the offence under German law. The clause effectively limits the optional character of article 4(2) of the OPSC, as it forces a member state to apply the active personality principle if it refuses to extradite one of its nationals.²⁴ However, the clause again aims to close any loopholes in jurisdictional matters arising in transnational child sexual abuse cases. Lastly, article 4(4) of the OPSC states that 'this Protocol does not exclude any criminal jurisdiction exercised in accordance with internal law'. This co-existence of jurisdiction based on international and national law reinforces the strong link between state sovereignty and jurisdiction, stressing the right of every state to regulate jurisdiction in its own way.

Although the jurisdiction clause in the OPSC is comprehensive, it excludes cases of attempt and complicity (regulated in art. 3(2) OPSC) by referring only to article 3(1) of the OPSC. Further, the optional character of the extra-territorial jurisdiction clause in article 4(2) carries the inherent risk of creating jurisdictional gaps and loopholes. Therefore, gaps and loopholes remain for matters of jurisdiction in the prosecution of sale of children, child prostitution and 'child pornography' offences.

b) *The CRC Committee's Guidelines on the implementation of the OPSC*

Given that the OPSC was adopted in 2000, it is clear that the provisions aiming to protect children from all forms of exploitation and abuse are at risk of failing to live up to the realities that children face in a highly digitalised and globalised world. Acknowledging the need to provide an interpretation of the OPSC which is in line with today's realities of child sexual abuse and exploitation, the CRC Committee recently published its Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of

²¹ Arguing that the assertion of jurisdiction over residents is in violation of international law, Ireland-Piper, *Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law*, p. 131; Gillespie, *Child Pornography. Law and Policy*, pp. 305 et seq.

²² UNODC, *Manual on Mutual Legal Assistance and Extradition*, p. 50.

²³ UNICEF Innocenti, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, Florence 2009, p. 13.

²⁴ *Ibid.*

children, child prostitution and child pornography (hereafter the Guidelines), aiming thereby to enable better implementation of the OPSC.²⁵

With regard to jurisdiction, the CRC Committee in the Guidelines encourages state parties to extend jurisdiction to victims with habitual residence in member states.²⁶ This recommendation is modelled on the jurisdiction clause in article 25 of the Lanzarote Convention, which will be discussed below. Furthermore, state parties are encouraged to abolish the principle of double criminality and establish universal jurisdiction over offences under the OPSC.²⁷

During the drafting stage of the guidelines, the CRC Committee invited interested parties to provide written submissions on the Draft Guidelines.²⁸ Austria, among others, criticised the recommendation to extend the range of jurisdiction clauses to cover universal jurisdiction, as this could lead to an extensive violation of the principle of state sovereignty.²⁹ Although the expansion of universal jurisdiction beyond crimes such as genocide, crimes against humanity and war crimes to 'ordinary crimes' is not as uncommon as it may seem,³⁰ such broad jurisdiction does not solve the issue of cumbersome transnational law enforcement collaboration during the investigation stage. Austria therefore argued that state parties are sufficiently equipped with the existing jurisdiction regimes.³¹ In regard to the differentiation between the jurisdiction to adjudicate and to enforce, the CRC Committee indeed seems to conflate the two terms, as the section on jurisdiction refers to 'investigate and prosecute'.³² It has to be recognised that the jurisdiction to investigate extra-territorially is not governed by article 4 of the OPSC, but can only be facilitated by formal and informal law enforcement collaboration mechanisms: universal jurisdiction does not mean universal investigation. Despite these concerns of member states, the Committee in its final Guidelines maintained the section, 'encourag[ing] States parties to establish universal jurisdiction for all offences covered by the Optional Protocol'.³³

Further, during the drafting stage the Czech Republic criticised the recommendation to abolish the double criminality standard,³⁴ as this seems to be inadequate particularly in cases of the passive personality principle (i.e. jurisdiction based on the nationality of the victim), as the offender might not have been familiar with the legal framework in the country of the victim's origin. This argument clearly needs to be rejected, as it gives a free pass to travelling sex offenders. While it is evident that the sexual offences laws vary in different countries, it seems fair to assume that people are generally aware that child sexual abuse and exploitation, in whatever form, might be considered illegal. As will be discussed below, article 25(4) of the

²⁵ 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. 1 and 9.

²⁶ *Ibid.*, para. 83.

²⁷ *Ibid.*, para. 84 and 87.

²⁸ For the draft Guidelines, see CRC Committee, *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 – Draft '0' – February 2019*, Geneva 2019, para. 1 and 11, available at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGuidelinesOPs.aspx> (accessed 4 August 2019).

²⁹ Government of Austria, *Austrian comments on the DRAFT 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, available at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGuidelinesOPs.aspx> (accessed 6 August 2019); Government of Japan, *Japan's Comments on the Draft 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, para. 28, available at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGuidelinesOPs.aspx> (accessed 6 August 2019).

³⁰ According to Amnesty International, *Universal Jurisdiction – A preliminary survey of legislation around the world. 2012 Update*, London 2012, p. 13, 47.1% of UN member states have provided their courts with universal jurisdiction over ordinary crime.

³¹ Government of Austria, *Austrian comments on the DRAFT 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.

³² 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. 80 and 82.

³³ *Ibid.*, para. 87.

³⁴ The double criminality standard means that the conduct has to be considered a criminal offence in both the requesting and the requested state. See UNODC, *Manual on Mutual Legal Assistance and Extradition*, p. 69.

Lanzarote Convention abolishes the double criminality requirement for offences typically committed by travelling sex offenders, as it risks considerable loopholes in the prosecution of such offences. Although the Guidelines appreciate the necessity of such abolition in the context of travelling sex offenders, they demand the abolishment of the double criminality standard for all offences criminalised under the OPSC.³⁵

As mentioned above, it has to be noted that the abolishment of double criminality in the Lanzarote Convention is clearly limited to offences typically committed by travelling sex offender. For example, article 25(4) exempts the production of 'child pornography' from the double criminality standard but not the dissemination, possession or procuring of such material, as these are not typical offences committed by travelling sex offenders. As the double criminality standard in the context of jurisdiction aims to respect the law of the state in whose territory the crime was committed and ultimately avoid potential violation of this state's sovereignty by taking its laws into account, it might have been more balanced to adopt a limited abolition of double criminality in the Guidelines.

In summary, the Guidelines aim to interpret the OPSC in the light of the great technological development of the past two decades and strengthen the jurisdiction regime in transnational child sexual abuse cases. Concerns raised about universal jurisdiction and double criminality were not addressed in the final version of the Guidelines. Whether the latter have seized the opportunity to guide member states on child-centred jurisdiction, especially in regard to resolving jurisdictional conflicts will be discussed below.

2. Article 22 of the Budapest Convention

The 2001 Budapest Convention is the most ratified cybercrime treaty, with 64 state parties from in- and outside Europe.³⁶ The Convention contains a comprehensive set of provisions on substantive and procedural criminal law, while additionally addressing international cooperation as key element of the Convention. This strong commitment to international collaboration is highlighted in the preamble, which declares that 'an effective fight against cybercrime requires increased, rapid and well-functioning international cooperation in criminal matters'.³⁷ As article 9 of the Budapest Convention includes a detailed provision on 'child pornography', the jurisdiction clause in article 22 is also applicable in online child sexual abuse cases.

Article 22(1)(a)–(c) establishes jurisdiction over offences committed in the territory of a member state, on board a ship flying the flag of that party, or on board an aircraft registered under the laws of that party. Article 22(1)(d) extends jurisdiction to offences committed outside its territory, if the offence was committed 'by one of its nationals, and if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State'.

In contrast to the OPSC, the extra-territorial jurisdiction clause in the Budapest Convention is fairly limited. It does not acknowledge the passive personality principle and makes the active personality principle dependent on double criminality. While linking extra-territorial jurisdiction to the fulfilment of the double criminality standard is common in some countries,³⁸ it leaves a potential loophole in particular for travelling sex offenders. Given the wide variation

³⁵ 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. 84–85.

³⁶ See charts of signatures, ratifications and accessions available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures> (accessed 20 January 2019).

³⁷ Preamble, Budapest Convention.

³⁸ Geoff Gilbert, *Responding to International Crime*, Leiden 2006, p. 109.

in standards of criminalising online child sexual abuse offences,³⁹ this extra-territorial jurisdiction clause creates the risk that offenders could go unpunished, in particular when committing an offence in a country with no or limited cyber-specific legislation. Additionally, according to article 22(2), state parties may reserve the right not to apply article 22(1)(b)–(d). Although article 22(4) states that ‘this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with its domestic law’, this leaves a considerable gap for asserting extra-territorial jurisdiction for state parties.

Lastly, article 22(5) addresses the issue of jurisdictional conflict. With the possibility of more than one country claiming jurisdiction over a cybercrime case, the Budapest Convention provides guidance on how to solve jurisdictional conflict. It states that ‘when more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution’. The range of this provision and the solution of jurisdictional conflicts more broadly will be discussed below.

3. Article 25 of the Lanzarote Convention

The 2007 Lanzarote Convention is the most recent international convention with a focus on protecting children against sexual exploitation and abuse. With a total of 46 ratifications or accessions,⁴⁰ its support from the international community lags far behind that of the OPSC. However, as the Convention was adopted in 2007, it takes into account recent developments in the production and dissemination of child sexual abuse material and so is in some regards more comprehensive than the OPSC.⁴¹ It adopts a holistic approach by providing for a comprehensive set of preventive and responsive measures. As for the latter, the Convention addresses both substantive and procedural law, as well as international cooperation. As online child sexual abuse is included in the substantive law chapter (art. 20), the jurisdiction clause in article 25 is applicable to these cases.

Article 25(1) establishes jurisdiction for offences committed on a party’s territory, on board a ship flying the flag of that Party, on board an aircraft registered under the laws of that party, by one of its nationals or by a person who has his or her habitual residence in its territory. Regarding the last component, article 25(3) allows state parties to make reservations. Further, the state parties ‘shall endeavour’ to extend jurisdiction to offences which are committed against one of its nationals or a person who has his or her habitual residence in its territory. This is in line with the proposal of the CRC Committee in the Guidelines discussed above. However, it has to be noted that this extension to the passive personality principle and residents of a party’s territory is a recommendation rather than a mandatory standard such as that in article 25(2) (‘shall endeavour’).⁴²

To combat offences typically committed in the context of sex tourism, article 25(4) states that in cases of production of ‘child pornography’, among others, parties shall ensure that the double criminality standard is not applicable. As discussed above, this is in line with the recommendation made by the CRC Committee in its Guidelines. Complementing the abolition of double criminality in offences typically committed in the context of sex tourism, article 25(6) makes it obligatory for parties to ensure that its jurisdiction is not dependent on a report from

³⁹ For an overview of differing legal standards, see UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, pp. 100–103.

⁴⁰ See charts of signatures, ratifications and accessions available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures> (accessed 20 January 2020).

⁴¹ See, for example, the exemption of consensual sexting between minors from the scope of the ‘child pornography’ provision in art. 20(3) Lanzarote Convention; for further analysis of the exemption clause, see Chapter III and Witting, *Regulating bodies – the moral panic of child sexuality in the digital era*, p. 5–34.

⁴² Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, Strasbourg 2007, para. 170.

the victim or a denunciation from the state in which the offence was committed. This should ensure that in a situation where the state in which the offence was committed is not willing or able to investigate the matter, the state whose national committed the offence can still claim jurisdiction. Apart from the *aut dedere aut iudicare* clause in article 25(7), the Convention in its article 25(8) states that in case of more than one state claiming jurisdiction over a case, the states shall, where appropriate, consult to determine the most appropriate location of jurisdiction. This will be discussed in more detail below.

In summary, article 25 avails a comprehensive set of provisions to expand extra-territorial jurisdiction in regard to both the active and passive personality principle, including to offenders and victims who are merely habitual residents. The additional provisions applicable to offences typically committed in cases of travelling sex offenders show that the Lanzarote Convention responds adequately to the transnational nature of child sexual abuse and exploitation with regard to jurisdiction.

C. Determining (extra)territoriality in cyberspace

As discussed above, jurisdiction was traditionally based on the notion of territorial sovereignty. If an offence took place within a country's borders, territorial jurisdiction was established. While it is relatively easy to determine whether cattle had been stolen on the one or the other side of a border, the nature of cyberspace significantly complicates the determination of intra- and extra-territoriality.⁴³ As will be shown, the *sui generis* character of cyberspace leads to the effect that basically every country can claim jurisdiction over a cybercrime offence even though the link may seem fairly remote.

One way in which many countries establish a link between the offence and their territory is to ascertain the location of the act(s).⁴⁴ In attempting to locate where the act of disseminating child sexual abuse material took place in the case study,⁴⁵ one could argue that the material was uploaded in Canada and therefore that the act took place on Canadian territory. On the other hand, the act was initiated in Canada but only completed once the material actually reached the end user. As such, this would enable the South African authorities, among all the other countries in which the material was accessed, to claim jurisdiction. Furthermore, as the content was uploaded to an American server, and given that processing of the data is key to both initiating and completing the dissemination of the material, it could be argued that the substantial part of the act took place in the US. Given that the location of the act is ultimately determined by national courts when interpreting the jurisdiction clause in national legislation, it is fair to say that Canada, the US, South Africa and all other countries in which the material was accessed could claim territorial jurisdiction over Anna's case. This demonstrates that a single location is in most cases not determinable.

Apart from using the location of the act to determine territoriality, countries in their national legislation use the location of the computer, the location of the persons involved, or simply the harmful effect on their territories to determine territorial jurisdiction.⁴⁶ Adding extra-territorial jurisdiction claims based on the active and passive personality principle to the above territorial

⁴³ Some have attempted to draw parallels between cyberspace, the high seas and outer space to determine national territory and 'international water'. However, these attempts have failed, as cyberspace is – unlike the high seas and outer space – not a global common, as it is 'man-made, fully intangible, [and] highly changeable'. See Kolossa, *The charm of jurisdictions: A modern version of Solomon's judgment?*; Alisdair A. Gillespie, *Jurisdiction issues concern online child pornography*, *International Journal of Law and Information Technology*, Vol. 20 (2012), pp. 155-156.

⁴⁴ Brenner/Koops, *Approaches to Cybercrime Jurisdiction*, pp. 10 *et seq*; UNODC, *Comprehensive Study on Cybercrime Draft – February 2013*, pp. 192–194.

⁴⁵ The contact offence and the production of child sexual abuse material clearly took place on Canadian territory. These offences need to be separated from the dissemination of child sexual abuse material online through uploading.

⁴⁶ Brenner/Koops, *Approaches to Cybercrime Jurisdiction*, pp. 10 *et seq*; UNODC, *Comprehensive Study on Cybercrime Draft – February 2013*, pp. 192–194.

jurisdiction claims, Canada, America, South Africa, Germany, the Netherlands and all other countries in which the material depicting Anna's sexual abuse was accessed or downloaded could claim jurisdiction over the case. The sheer magnitude of the (legitimate) jurisdiction claims is rooted in the fact that, ultimately, states can regulate jurisdiction as extensively as they wish. The notion of respect for other countries' sovereignty is not a limiting factor at a national level, and hence national legislation cannot be measured against any conflicting superior law. Even international law such as the OPSC, Budapest Convention and Lanzarote Convention acknowledge that their proposed jurisdiction clauses do not undermine existing clauses in national legislation. This strong protection of jurisdictional discretion should be welcomed, as a jurisdictional gap seems unlikely, but it could also lead to jurisdictional conflicts. These will be discussed in the next section.

D. Jurisdictional conflicts

Given the various sources of jurisdictional claims in the area of online child sexual abuse offences, jurisdictional conflicts seem inevitable. As mentioned above, both the Budapest and the Lanzarote Convention contain clauses on jurisdictional conflict. According to article 22(5) of the Budapest Convention, parties shall, where appropriate, consult with a view to determine the most appropriate jurisdiction. As the wording indicates, this obligation is not absolute, but depends on the specific case.⁴⁷ The jurisdictional conflict clause in the Lanzarote Convention is worded and interpreted similarly.⁴⁸ This generic clause unfortunately does not give sufficient guidance on how to concretely resolve jurisdictional conflicts, as guiding factors are missing.

Accordingly, the 'rule of reason' has been introduced to solve jurisdictional conflicts in cyber-crime cases.⁴⁹ The 'rule of reason' entails that the valid assertion of jurisdiction will only be lawful if exercised reasonably, i.e., after State courts and regulators have balanced the different interests involved in a transnational situation before establishing their jurisdiction, and – quite probably – applying their own law. Ultimately, the 'rule of reason' aims at 'identifying the State with the strongest connection, in terms of contacts or interests, with the situation'.⁵⁰ The obvious flaw in this 'rule of reason' is its subjectivity. What is considered the strongest connection in a specific case can and will be interpreted differently by various states.⁵¹ Further, given that the rule will be interpreted by the judiciary and that the subject matter touches on political questions regarding foreign relations and hence on the core business of the executive, it could cause unease within the different branches of government against the background of the separation of power.⁵²

This shows that there is a clear need for internationally agreeable factors to guide negotiations between states in determining the closest link to the case.⁵³ Given that cases dealing with online child sexual abuse material produce highly traumatised (child) victims, it is submitted that the 'rule of reason' in such cases should not necessarily aim to establish which state has the closest link to the offence, but rather which state can best serve the interests of the child victim. Child-centred factors aiming at putting the best interests of the child victim at the centre of the negotiations will therefore be discussed below.

⁴⁷ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, Strasbourg 2001, para. 239.

⁴⁸ See art. 25(8) Lanzarote Convention and Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para. 175.

⁴⁹ Rynjaert, *Research Handbook on Jurisdiction and Immunities in International Law*, p. 56.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, p. 57.

⁵² *Ibid.*; another, more practical proposal to solve jurisdictional conflicts is based on the fact that jurisdiction is only valuable if it is enforceable. As enforceability requires custody over the suspect, this should be determining factor for solving jurisdictional conflicts. See Alisdair A. Gillespie, *Cybercrime. Key Issues and Debates*, Oxon 2019, pp. 299 – 300.

⁵³ Brenner / Koops, *Approaches to Cybercrime Jurisdiction*, p. 42.

III. MUTUAL LEGAL ASSISTANCE AND EXTRADITION

Once a state has established its jurisdiction to adjudicate, it starts the investigation of the online child sexual abuse case at hand. Due to the transnational nature of such offences, the state might be dependent on gathering evidence located outside its territory. As discussed previously, the jurisdiction to investigate is rooted in the principle of sovereignty of states.⁵⁴ Therefore, if state A intends to investigate a crime on the territory of state B, state B needs to generally give consent to such an investigation.⁵⁵

The volatile nature specifically of digital evidence requires a prompt and efficient transnational law enforcement mechanism to obtain such consent.⁵⁶ Such a mechanism is key to ensuring that online child sexual abuse offences are investigated beyond, and despite, country borders. Traditionally, such transnational collaboration is facilitated by mutual legal assistance (hereafter MLA) and extradition requests. MLA in criminal matters is defined as 'a process by which States seek and provide assistance in gathering evidence for use in criminal cases'.⁵⁷ Extradition in turn is

the formal process by which one jurisdiction asks another for the enforced return of a person who is in the requested jurisdiction and who is accused or convicted of one or more criminal offences against the law of the requesting jurisdiction.⁵⁸

In view of the volatile nature of such evidence, on the one hand, and the delay in obtaining such evidence caused by formal requests, on the other, the state's interest in protecting its sovereignty often clashes with the need for speedy and efficient transnational procedures. Therefore, law enforcement relies not only on traditional MLA and extradition requests, but a variety of informal or accelerated means to obtain extra-territorial evidence. Given the *sui generis* character of cyberspace, and with it the conflation of intra- and extra-territoriality, this Chapter will explore how formal and informal collaboration mechanisms are regulated in the OPSC, Budapest and Lanzarote Convention.

A. Introduction to mutual legal assistance and extradition mechanisms

MLA and extradition regimes are in most countries governed by a two-pronged system comprising national legislation and bi- or multilateral treaties. While national legislation sets out the domestic procedure for facilitating the requests, many countries require a bi- or multilateral treaty regulating and legitimising such requests at a transnational level with the requesting or receiving state.⁵⁹ This dual legal regime of MLA and extradition poses significant challenges to state collaboration, as it puts the threshold for satisfying the legal requirements of both states fairly high. Seeing as it is extremely cumbersome for a state to enter into bilateral agreements

⁵⁴ *Ibid.*, pp. 5–6; Susan W. Brenner, *Cybercrime and the Law: Challenges, Issues, and Outcomes*, Boston 2012, p. 171.

⁵⁵ Oerlemans, *Investigating cybercrime*, p. 57; for an in-depth analysis of trans-border access and breach of sovereignty, see Osula, *Transborder access and territorial sovereignty*, pp. 725 *et seq.*

⁵⁶ Anna-Maria Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, Masaryk University Journal of Law and Technology, Vol. 9 (2015), p. 46.

⁵⁷ UNODC, *Manual on Mutual Legal Assistance and Extradition*, p. 19.

⁵⁸ *Ibid.*, p. 41.

⁵⁹ *Ibid.*, pp. 21–22; if there is no treaty in place, a requesting country is entirely dependent on the willingness of the requested law enforcement authority, see Oerlemans, *Investigating cybercrime*, p. 63.

with any other state,⁶⁰ the value of MLA and extradition clauses in multilateral treaties such as the OPSC and Budapest and Lanzarote Convention cannot be overstated.

Furthermore, the traditional MLA and extradition processes were developed in the 1970s, that is to say before the era of cybercrime.⁶¹ Therefore, they might not be tailored for such an ever-changing field, as they do not take the volatile nature of digital crime scenes into account. Formal processes in particular in the area of MLA take a long time and are cumbersome. It can take months and years to obtain crucial evidence needed for an ongoing investigation.⁶² Given that in online child sexual abuse cases the depicted child might be under continuous threat of further abuse and exploitation, the situation places immense pressure on law enforcement.

As mentioned, further bottlenecks are the varying legal standards at national level regarding the requirements and processes of MLA and extradition requests. Although an analysis of national level legislation exceeds the scope of this Chapter, it is important to note that national legislation applicable to MLA and extradition in cybercrime cases exists in two-thirds of countries in Africa, Asia and Oceanica as well as nearly all the countries in Europe.⁶³ However, most of it is not cyber-specific.⁶⁴ Keeping in mind that the majority of countries are not part of cyber-specific multilateral treaties, the execution of specialised cybercrime investigation is considerably hampered.⁶⁵ Moreover, the capacity at national level to execute such requests, particularly in conducting cyber-specific investigation and evidence collection, varies greatly between countries and adds a further barrier in the executing stage.⁶⁶

Even though this introduction might paint a grim picture of the status of MLA and extradition regimes in the area of cybercrime in general and online child sexual abuse in particular, there is an urgent need to conceptualise existing regimes and rethink traditional concepts in order to make them suitable for investigating online child sexual abuse cases. Against this background, the next section will analyse the range and challenges of MLA and extradition clauses in the OPSC, Budapest and Lanzarote Convention. We will also explore child-centred standards that in the execution of such requests ensure a child-friendly and victim-oriented criminal justice procedure.

B. MLA and extradition in relevant international conventions

This section will analyse the MLA and extradition regulations in the OPSC, Budapest Convention and Lanzarote Convention. While the OPSC and Lanzarote Convention contain only skeletal extradition and MLA clauses, the Budapest Convention provides for a comprehensive and cyber-specific set of collaboration regimes.

1. Articles 5-7 and 10 of the OPSC

MLA and extradition are regulated in articles 5-7 and 10 of the OPSC. This section will analyse the wording and interpretation of the relevant provisions and discuss their expansion to cases of mere possession and accessing of online child sexual abuse material.

⁶⁰ UNODC, *Manual on Mutual Legal Assistance and Extradition*, pp. 21.

⁶¹ Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, p. 46.

⁶² Philip J. Pullen, *Nail in the MLAT Coffin: Examining Alternatives Solutions to the Current Mutual Legal Assistance Treaty Regime in International Cross-Border Data Sharing*, *North Carolina Journal of International Law*, Vol. 44 (2018), p. 4; Jean-Baptiste Maillart, *The limits of subjective territorial jurisdiction in the context of cybercrime*, ERA Forum 2019, p. 384; Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, p. 51.

⁶³ UNODC, *Comprehensive Study on Cybercrime Draft - February 2013*, p. 200.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, p. 202.

⁶⁶ *Ibid.*, p. 143.

a) *Wording and interpretation*

Article 5(1) of the OPSC states that offences referred to in article 3(1) shall be considered extraditable offences in existing extradition treaties and be included as extraditable offences in future extradition treaties. The reference to article 3(1) of the OPSC shows that this should not apply to attempts to commit and complicity in committing ‘child prostitution’, sale of children and ‘child pornography’ offences, as this is regulated in article 3(2) of the OPSC.⁶⁷ However, the CRC Committee encourages state parties to extend the application of extradition provisions to article 3(2) OPSC offences.⁶⁸ Article 5(2) of the OPSC provides that in the event that a state party makes extradition dependent on the existence of an international treaty, the OPSC shall serve as legal basis for such an extradition request. Given that 176 states have ratified the OPSC,⁶⁹ the provision can facilitate extradition between these states, subject to their respective domestic legislation. Additionally, where a state does not make extradition dependent on the existence of a treaty, the state party should recognise article 3(1) OPSC offences as extraditable offences according to article 5(3) of the OPSC. Article 5(5) concludes with the *aut dedere aut iudicare* principle.⁷⁰

When it comes to MLA requests, the provisions in the OPSC are generic. Article 6(1) prescribes that state parties shall ‘afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings, [...] including assistance in obtaining evidence’. In terms of article 7 of the OPSC, they shall provide for the seizure or confiscation of goods and proceeds. Nevertheless, it seems unlikely that data could be subsumed under the terms ‘goods’ or ‘proceeds’, with the result that a key source of evidence in online child sexual abuse cases is not covered by this provision. Finally, article 10(1) of the OPSC requires states to ‘take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the [...] investigation, prosecution and punishment’ of article 3(1) OPSC offenders. This should extend to law enforcement and judiciary, as well as to partnerships set up with the private sector and civil society organisations to develop technological solutions to improve investigation and prosecution.⁷¹ The OPSC provides for a strong extradition regime but a very generic MLA one. The deficiencies in its MLA provisions can be seen as an indication that, the time of the drafting of the protocol in the 1990s, the phenomenon of online child sexual abuse offences had only recently come to light.⁷²

b) *Expansion to mere possession and accessing?*

Given the importance of these regimes to online child sexual abuse cases, the CRC Committee in its Guidelines envisions a strengthening of some of the generic provisions.⁷³ However, one major gap in the Guidelines is the non-applicability of the OPSC extradition and MLA provisions to cases of mere possession and accessing of child sexual abuse material. This is not criminalised by article 3(1)(c) of the OPSC (‘producing, distributing, disseminating, importing, exporting, offering, selling or possessing [child pornography] for the above purposes’).⁷⁴ In our

⁶⁷ UNICEF Innocenti, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, p. 14.

⁶⁸ 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. 89.

⁶⁹ For a full list of ratifications and accessions, see <http://indicators.ohchr.org> (accessed 19 August 2019).

⁷⁰ 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. 88.

⁷¹ *Ibid.*, para. 111.

⁷² UNICEF Innocenti, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, p. viii.

⁷³ See, for example, concrete proposals for international cooperation 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, para. 109.

⁷⁴ See in-depth deliberations on this issue in Chapter II.

case study, the South African client who downloaded Anna's material possessed it only for his private use, hence not 'for the above purposes', which include distributing, disseminating, importing, exporting, offering, or selling it. On the basis of the wording of the extradition and MLA clauses in articles 5(1) and 6(1) of the OPSC, any extradition or MLA request extended to South African authorities could not be based on the OPSC. The same applies to the live-streaming of child sexual abuse material, as the accessing of material without possession for further purposes is not covered either by article 3(1) of the OPSC.⁷⁵ Given in particular that live-streaming of child sexual abuse is an emerging trend,⁷⁶ the OPSC leaves a considerable gap for extradition and MLA requests in such cases.

It is recommended that, to prioritise the principle of the best interests of the child in article 3(1) of the CRC, the MLA and extradition provisions in articles 5–7 and 10 of the OPSC be interpreted as covering not only article 3(1) OPSC offences, but also the attempt to commit and complicity in committing such offences, as set out in article 3(2) of the same, as well as the mere possession and accessing of child sexual abuse material.

2. Articles 23–35 of the Budapest Convention

The Budapest Convention is the only international treaty with cyber-specific MLA and extradition provisions.⁷⁷ Chapter III (International cooperation) contains extradition provisions and a wide range of MLA ones that apply even where no MLA treaty exists between the parties. Specific provisional MLA regulations are complemented by a 24/7 network for speedy mutual assistance among parties. As in-depth discussion of the MLA provisions exceeds the scope of this Chapter, this section focuses on articles 23–25 of the Budapest Convention, in addition to which it offers a brief overview of the further MLA provisions in articles 26–35.

Article 23 outlines three general principles of international cooperation. First, it should be provided 'to the widest extent possible'. Secondly, the scope of the provisions in Chapter III are not limited to the offences set out in the substantive criminal law provisions (arts. 2–12) but apply to 'criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence' (with the exception of articles 24, 33 and 34). The wording extends the applicability of Chapter III excessively, as it applies to any offence involving a computer system or data, or any form of electronic evidence.⁷⁸ This broad range of application, and therewith flexibility of interpretation, allows for an evolving applicability of the provisions, dynamically following the latest developments in the area of cybercrime. Lastly, the parties shall co-operate 'in accordance with the provisions of this chapter and through the application of relevant international instruments on international cooperation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic laws'.

⁷⁵ Art. 3(1)(c) OPSC does not criminalise the accessing of child sexual abuse material and hence leaves a considerable gap for live-streaming of child sexual abuse material; even though the CRC Committee in its Guidelines acknowledges live-streaming as emerging trend (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. 2), it is surprising that it fails to consequently recommend the criminalisation of 'accessing' child sexual abuse material (see 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. 65, only recommending the criminalisation of 'mere possession').

⁷⁶ ECPAT, *Trends in online child sexual abuse material*, Bangkok 2018, p. 29; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015, pp. 22–23.

⁷⁷ Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, p. 49.

⁷⁸ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, para. 243; for an argument that the broad range of the Budapest Convention does not safeguard the proportionality of the intervention, see Hosuk Lee-Makiyama, *A Multilateral Legal Assistance Protocol: Preventing Fragmentation and Re-territorialisation of the Internet*, ECIPE Policy Briefs No. 9/2013, p. 6; for criticism of outsourcing the general proportionality standard to domestic law while providing for intrusive procedural measures at the international level, see Miquelon-Weismann, *The Convention on Cybercrime: A Harmonized Implementation of International Penal Law: What Prospects for Procedural Due Process?*, pp. 355 *et seq.*

This confirms the principle that any existing international or national cooperation mechanism shall not be superseded by the Budapest Convention.⁷⁹

The extradition clause in article 24 is, according to paragraph 1, only applicable to offences established in articles 2–11 of the Budapest Convention, and only if they are punishable with a minimum sentence of one year under the law of both parties concerned. Article 24(2) requires that state parties include these offences as extraditable offences in any existing and future extradition treaty. According to article 24(3), state parties can use the Budapest Convention as a legal basis for extradition if a party makes extradition conditional on the existence of an international treaty. Further, extradition shall be subject to the conditions provided for by the law of the requested party or by applicable extradition treaties (art. 24(5)), while the *aut dedere aut iudicare* principle is embedded in article 24(6).⁸⁰ Lastly, article 24(7) requires all state parties to communicate the name and address of the authority in charge of making and receiving extradition requests. This aims to ensure the smooth and timely processing of extradition requests, particularly where there is no extradition treaty between the parties involved.⁸¹

Over and above these generic extradition and MLA clauses, the Budapest Convention provides a set of additional MLA clauses focusing on MLA in the absence of an MLA treaty (arts. 27–28), MLA regarding provisional measures (arts. 29–30) and MLA regarding investigative powers (arts. 31–34). Articles 27 and 28 apply only if there is no other MLA regime between the parties that could be utilised for the request. The drafters of the Budapest Convention decided against the establishment of a general MLA regime that could be applied in the absence of an existing treaty, arguing this could lead to confusion among parties about competing MLA regimes.⁸² However, to provide state parties with an instrument for rapid response in ‘emergency’ situations, articles 27 and 28 provide for rules and procedures on the request and execution of MLA requests outside an existing MLA regime, with the matters covered including the imposition of conditions, grounds of refusals, confidentiality of requests, limitation of use, and direct communication.⁸³

Furthermore, in articles 29 and 30 the Budapest Convention sets out provisional measures for the preservation of data, which take the volatile nature of digital evidence into account.⁸⁴ Notably, a requested party can expedite the preservation of computer data stored in its territory while the requesting party is preparing the official MLA request, this to ensure that the data is not altered, removed or deleted.⁸⁵ Lastly, articles 31–34 avail a comprehensive set of MLA provisions regarding investigative powers, including the accessing of stored computer data on another party’s territory (art. 31), transborder access to stored computer data without consent or where publicly available (art. 32), real-time collection of traffic data (art. 33), and interception of content data (art. 34). The provisions aim to strike a balance between the protection of state sovereignty and the need for prompt and efficient transborder investigation of cybercrime.

In view of its broad set of extradition and MLA provisions, the Budapest Convention is clearly tailored to the specific needs of addressing cybercrime. In order to further strengthen the MLA regime in the Budapest Convention, the Council of Europe in 2017 started the process of drafting a second additional protocol to the Convention, which focuses – inter alia - on developing simplified MLA procedures, facilitate direct cooperation between judicial authorities in MLA

⁷⁹ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, para. 244.

⁸⁰ *Ibid.*, para. 251.

⁸¹ *Ibid.*, para. 252.

⁸² *Ibid.*, para. 262.

⁸³ *Ibid.*, para. 264 and 275.

⁸⁴ Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, p. 50.

⁸⁵ Council of Europe, *Explanatory Report to the Convention on Cybercrime*, para. 282; according to Amalie M. Weber, *The Council of Europe’s Convention on Cybercrime*, Berkeley Technology Law Journal, Vol. 18 (2003), p. 434, procedural errors in the preservation of the data can still be rectified before the data is officially handed over.

requests and establish joint investigations and investigation teams.⁸⁶ In conclusion, the Budapest Convention remains the only international cybercrime treaty with cyber-specific MLA and extradition provisions, even though some of its provisions might be outdated by now.

3. Article 38 of the Lanzarote Convention

The international cooperation chapter in the Lanzarote Convention is fairly short and consists only of general principles and measures for international cooperation. Given that the Council of Europe has put a comprehensive set of MLA and extradition treaties in place,⁸⁷ the drafters felt there is no need to duplicate it.⁸⁸ While the reasoning is evidently that most of the parties to the Lanzarote Convention are also party to these MLA and extradition treaties, this creates a potential gap for state parties who ratify only the Lanzarote Convention.

Article 38(1) requires state parties to collaborate with each other to the ‘widest extent possible’ in the areas of prevention, protection and investigation concerning the offences enumerated in this Convention. Article 38(2) establishes a mechanism whereby victims can file a complaint before the competent authorities in their state of residence even if the offence were committed outside the territory of the state of residence; the state of residence may then decide whether it intends to take the case forward or instead refer it to the authorities in the country where the offence took place. This victim-friendly procedure aims to make it easier for victims to report offences under the Lanzarote Convention.⁸⁹ Furthermore, article 38(3) provides that if state parties require a bilateral treaty to facilitate MLA or extradition requests, they ‘may consider this Convention the legal basis for mutual legal assistance in criminal matters or extradition in respect of the offences established in accordance with this Convention’. The provision bridges the gap between state parties that are not otherwise interconnected through any of the above-mentioned or other MLA and extradition treaties.

IV. CHILD SPECIFIC CONSIDERATIONS IN TRANSNATIONAL LAW ENFORCEMENT

Both the determination of appropriate jurisdiction and the procedure of MLA and extradition in online child sexual abuse cases require that the states concerned apply a child-centred lens to all their proceedings.⁹⁰ As has been demonstrated, in view in particular of the best-interests principle, there is a strong need to resolve jurisdictional conflicts; by the same token, MLA and extraditions need to be carried out in a child-friendly and victim-centred manner. Accordingly, this section makes recommendations to facilitate transnational law enforcement collaboration in the area of jurisdiction, MLA and extradition in such a way as to avoid secondary traumatization of the child victim during criminal justice procedures and uphold the paramountcy of the best interests of the child.

⁸⁶ Council of Europe, *Terms of Reference for the Preparation of a Draft 2nd Additional Protocol to the Budapest Convention on Cybercrime*, Strasbourg 2017.

⁸⁷ For example the European Convention on Extradition (ETS 24), the European Convention on Mutual Assistance in Criminal Matters (ETS 30), their Additional Protocols (ETS 86, 98, 99 and 182), and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141).

⁸⁸ Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para. 253.

⁸⁹ Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para. 258–259.

⁹⁰ Stressing that the rights of the child should remain at the centre of every investigative process, UNICEF, *Child Safety Online. Global Challenges and Strategies*, New York 2012, p. 81.

A. The best interests of the child as key factor in jurisdictional conflicts

As discussed above, the ‘rule of reason’ is currently applied to resolve jurisdictional conflicts between states, the aim being to establish which state can reasonably claim the closest connection to an offence by applying territoriality as decisive factor. The CRC Committee in its Guidelines seems to follow this approach as well in declaring that ‘the State in which the offence was committed is primarily responsible for the investigation and prosecution of the offender’.⁹¹ Baring in mind the difficulties of determining *where* the offence was committed in the first place, and given that online child sexual abuse has a major impact on the physical and mental well-being of the child victim,⁹² the ‘rule of reason’ approach in such cases should focus not on what is the closest connection to a state’s territory but on which of the states could best serve the interests of the child victim. Avoiding secondary trauma caused by the criminal justice process is therewith the key consideration in advancing the best interests of the child.

Article 3(1) of the CRC states that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’. Similarly, article 30(1) of Lanzarote Convention requires ‘each Party [to] take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child’. The best interests of the child are a principle, a substantive right and a rule of procedure.⁹³ In terms of the latter, this means that in any decision-making process the impact of the decision on the child must be evaluated.

Against the background of solving jurisdictional conflicts, this section identifies factors that could guide states in determining which jurisdiction is the most suitable to serve the best interests of the offended child. What is suggested is an ecological approach that assesses the child’s situation holistically at an individual, family, community and societal level.⁹⁴ It therefore takes the child’s identity and needs as the starting-point, while also considering the situation of his or her family and community as well as the child-friendliness of the criminal justice system.⁹⁵ This approach also draws on factors the CRC Committee has enumerated to assist in determining the best interests of the child.⁹⁶ Which decision serves the best interests of the child must be determined on a case-by-case basis.⁹⁷ As such, the list of factors is not exhaustive and not all of them have to be considered in each and every case. The primary aim is to effect a mind-shift from a territory- to a child-focused ‘rule of reason’ test in jurisdictional conflicts.

1. The child’s identity and needs

The child’s identity should be at the core of any assessment of his or her best interests when determining the most reasonable place of jurisdiction. This includes taking cognisance of the

⁹¹ 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. 82.

⁹² Ateret Gewirtz-Meydana et al., *The complex experience of child pornography survivors*, Child Abuse and Neglect, Vol. 80 (2018), p. 244.

⁹³ CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14 (29 May 2013), para. 6.

⁹⁴ For the (socio-)ecological model see Daniel Kardefelt-Winther/Catherine Maternowska, *Addressing violence against children online and offline*, Nature Human Behaviour (2019); UNICEF, *The Child Witness: A Training Manual*, Windhoek 2019, p. 9.

⁹⁵ *Ibid.*

⁹⁶ See CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, para. 52–79.

⁹⁷ *Ibid.*, para. 32.

child's vulnerability and need for safety and protection.⁹⁸ Children who have experienced online sexual abuse might face considerable mental and physical consequences.⁹⁹ To stabilise them and assist in their recovery, a consistent and supportive environment is key. The need for this is heightened depending on the developmental stage of the child, as stability and consistency in the immediate environment are even more important for younger children than older ones. Furthermore, a child's general vulnerability plays a key role, for example if the child is living with a disability, or needs access to special medicines or medical services.¹⁰⁰

These factors come into play when determining the most suitable place of jurisdiction in that the assertion of jurisdiction outside the child's country of residency might mean that he or she is removed from his or her usual environment in order to participate in the criminal justice process abroad, either *in persona* or via teleconferencing or other technological means. This could have an adverse effect on the child's well-being. Removing the child from the usual environment might be interpreted by him or her as punishment, which could impair his or her confidence and, consequently, the quality of his or her statement.

Relating these factors to the case study, Anna's developmental stage and her strong need for consistency as a seven-year-old child needs to be taken into account. Further, given that the contact offence (i.e. sexual abuse) as well as the production and (at least partly) the dissemination of the child sexual abuse material took place on Canadian territory, and assuming that Canada would assert jurisdiction, Anna may feel as if she were being punished by being forced to return to (or at least collaborate with) the country where the abuse took place. This could have an overall negative impact on her willingness to participate in the criminal justice process and/or the quality of her testimony.

2. The role of family and community

Children's relationships with their families and communities are crucial factors in assessing which location of jurisdiction serves their best interests. A child's family and community are the environment in which the child understands, relates and associates. As the overall stability of this context influences the resilience of the child and the chances for recovering from the abuse, the consistency of the child's position in the family and the community needs to be considered. Many survivors of child sexual abuse wish to return to a sense of normality: they want to live lives like those of other children who have not been sexually abused.¹⁰¹ Access to health services, including psychological or therapeutic support, and access to education are considered part of the community environment and hence the structure of a child's daily life.¹⁰² Particularly in a context where the sexual abuse was committed by a family or community member and the child's relationship to these systems is therefore jeopardised, the child's reintegration and re-establishment of relationships and trust in family and community are key.¹⁰³ Healing the 'relational injury' is a precondition for re-establishing the child's ability to bond

⁹⁸ In line with factors set out by CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, para. 52–79.

⁹⁹ Devika Ghimire/Victoria M. Follette, *Revictimisation – Experiences related to Child, Adolescent and Adult Sexual Trauma* in: Melanie P. Duckworth/Victoria M. Follette, *Retraumatization: Assessment, Treatment, and Prevention*, New York 2012, p. 31; describing online child sexual abuse as a 'layering of harm', UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015, pp. 19–20; Gewirtz-Meydana et al., *The complex experience of child pornography survivors*, *Child Abuse and Neglect*, p. 244.

¹⁰⁰ CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, para. 75–76.

¹⁰¹ ECPAT/University of Bedfordshire, *Connecting the Dots: Supporting the Recovery and Reintegration of Children Affected by Sexual Exploitation*, Bangkok 2017, p. 15.

¹⁰² *Ibid.*, p. 83.

¹⁰³ In the general context of stability and child development, stating that 'the higher the levels of instability are within a family, the higher the levels of maladjustment that can be expected', Stephen Baldrige, *Family Stability and Childhood Behavioral Outcomes: A Critical Review of the Literature*, *Journal of Family Strengths*, Vol. 11 (2011), p. 9.

with others.¹⁰⁴ The process should not be constrained by removing the child from this context, even if it is only for a short period. In this context, the impact of interrupting the child's therapy or schooling needs to be considered as well. Further, it has to be noted that even if the child is accompanied by a trusted parent or caregiver when participating in the criminal justice process outside the country of residency, the exposure to a new environment, one possibly including a foreign language and culture, might have a negative impact on the child.

In Anna's case, the fact that her father was involved in the abuse would, almost needless to say, impact massively on the family situation. These negative effects on the stability and health of the family life require extensive reintegration and redefinition efforts by Anna and her family. This could also extend to the community in a broader sense. It means that removing Anna from this familiar context is even more difficult than otherwise, as the trust she had in her support structure is likely to have been broken by the intrafamily abuse.

3. Child-friendliness of the criminal justice system

Another factor to take into consideration when determining the most appropriate location of jurisdiction in online child sexual abuse cases is the child-friendliness of the criminal justice system at hand. As will be discussed further below, the child's experience in the criminal justice system can be improved significantly by measures such as meaningful and child-friendly court preparation, testifying via CCTV, the presence of an intermediary or support person, access to quality social welfare support, avoidance of direct confrontation with the alleged perpetrator, and the replacement of oral testimony with video or audio recordings.¹⁰⁵ Another factor is the speed of the justice system and the nature of pre- and post-trial care.¹⁰⁶

As these factors are based on national legislation, an in-depth analysis of the child-friendliness of the criminal justice system in Canada and other countries involved in the case study exceeds the scope of this Chapter. In practice, though, such an analysis would be crucial to determine which justice system creates the better environment for children to avoid secondary trauma.

4. Balancing the elements in the best interests assessment

As indicated earlier, the best interests of the child have to be determined on a case-by-case basis, depending on the individual experiences of the concerned child, the circumstances as well as the weight of each factor in the case. Naturally, some factors may contradict each other, for example in a situation where a country aiming to assert jurisdiction over a specific case has a more child-friendly justice system than the child's home country. In such a case, the child-friendliness of the justice system collides with the child's need for a stable and consistent environment.

Lastly, regardless of the age, the developmental level or any particular vulnerability of the child victim, the child's views need to be taken into consideration.¹⁰⁷ Children's right to participation, as guaranteed in article 12 of the CRC in the context of the criminal justice system,

¹⁰⁴ Sally Hunter, *Childhood Sexual Experiences: Narratives of Resilience*, Oxford/New York 2010, p. 169.

¹⁰⁵ UN Economic and Social Council, *Guidelines on justice in matters involving child victims and witnesses of crime*, E/CN.15/2005/L.2/Rev.1 (25 May 2005), para. 29–31; UNODC/UNICEF, *Handbook for Professionals and Policymakers on Justice Matters involving Child Victims and Witnesses of Crime*, New York 2005, pp. 49–88; 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. 97.

¹⁰⁶ *Ibid*; UNODC/UNICEF, *Training Programme on the Treatment of Child Victims and Child Witnesses of Crime for Prosecutors and Judges*, New York 2015, p. 100.

¹⁰⁷ CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, para. 53–54; UNODC, *Handbook for Professionals and Policymakers on Justice Matters involving Child Victims and Witnesses of Crime*, pp. 42–43.

includes the opportunity for them to express ‘their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process’.¹⁰⁸ This is particularly important in child sexual abuse cases, as having their voices heard assists children in regaining the control they were deprived of during the period of the sexual abuse.¹⁰⁹ In the words of the CRC Committee, the balancing of these interests should not only consider the

physical, emotional, educational and other needs at the specific moment of the decision, but also possible scenarios of the child’s development, and analyse them in the short and long term. In this context, decisions should assess continuity and stability of the child’s present and future situation.¹¹⁰

B. Child-friendly procedures in MLA and extradition procedures

Referring again to the case study, assuming that Canada would assert jurisdiction over Anna’s case, the Canadian police would have to collaborate with their Dutch counterparts in obtaining Anna’s statement and facilitating her testimony during the trial stage. If Canadian authorities leverage international collaboration clauses in the OPSC, Budapest or Lanzarote Convention for this purpose, the question arises whether the international conventions lay down any minimum standards on how Anna’s rights and interests as a child sexual abuse victim should be protected during the execution of the international collaboration request.

As for the OPSC, article 8 provides a detailed catalogue of measures state parties are to adopt to protect the rights and interests of children during the criminal justice process, including adopting procedures that recognise the specific needs of child victims and witnesses, providing appropriate support services during the criminal justice process, and allowing the views, concerns and needs of the child to be presented throughout the process. Based on article 8 of the OPSC, the United Nations Economic and Social Council Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes¹¹¹ detail child-friendly criminal procedures, for example the use of CCTV in courtrooms or video and audio recordings of statement. Similarly, article 31 of the Lanzarote Convention sets out general measures of protection in criminal justice proceedings, with articles 35 and 36 of the Lanzarote Convention even providing detailed minimum standards on interviewing child witnesses and appropriate criminal procedures for child sexual abuse and exploitation cases. In contrast, the Budapest Convention does not contain any provisions on safeguarding vulnerable victims during the criminal justice process. Given that the vast majority of articles in the Convention deal with procedural matters, this is somewhat surprising.

However, taking into account the above analysis of the range of extradition and MLA provisions, on the one hand, and the child safeguarding provisions, on the other, it is clear that both the OPSC and Lanzarote Convention lack cyber-specific or -appropriate international collaboration mechanisms, while providing for sufficient child safeguarding mechanisms during the

¹⁰⁸ UN Economic and Social Council, *Guidelines on justice in matters involving child victims and witnesses of crime*, E/CN.15/2005/L.2/Rev.1, para. 21.

¹⁰⁹ ECPAT/University of Bedfordshire, *Connecting the Dots: Supporting the Recovery and Reintegration of Children Affected by Sexual Exploitation*, p. 46.

¹¹⁰ CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, para. 84.

¹¹¹ UN Economic and Social Council, *Guidelines on justice in matters involving child victims and witnesses of crime*, E/CN.15/2005/L.2/Rev.1.

criminal justice procedure. As for the Budapest Convention, it does indeed provide a seemingly comprehensive set of cyber-specific MLA and extradition provisions, but without so much as mentioning the specific needs and concerns of vulnerable witnesses.

V. CONCLUSION

Anna's case - similar to many other cases of online child sexual abuse and exploitation - shows the complexity of (extra)territorial jurisdiction and law enforcement collaboration across country borders. Although territorial and extra-territorial jurisdiction clauses are included in the OPSC, Lanzarote Convention and Budapest Convention, it is clear that the devil lies in the detail. Unfortunately, the detail on determining jurisdiction and resolving jurisdictional conflicts is discussed mainly in the context of cybercrime offences in general and hence without taking the specific vulnerability of child sexual abuse victims into account.

Similarly, MLA and extradition provisions in the child-specific conventions, the OPSC and the Lanzarote Convention, are not informed by an appropriate level of cybercrime expertise and are too 'old-school' to cater for the circumstances of cybercrime investigations and the volatile nature of digital evidence. In turn, the Budapest Convention treats cybercrime broadly as an area of crime that does not typically produce vulnerable witnesses, a stance apparent from its lack of any victim-centred procedural provision whatsoever. As a result, international cooperation under the OPSC and Lanzarote Convention might be less efficient but more child-friendly, while international collaboration in the Budapest Convention might be more efficient but is less child-friendly.

It is argued that this is symptomatic of the academic and practical divide in the field of online child sexual abuse: the focus lies either on the 'child sexual abuse' or on the 'online' component. In the former, child protection takes centre-stage, while in the latter it is cybercrime issues. In view of this gap in the response to online child sexual abuse offences, there is an urgent need to marry child protection expertise with cybercrime expertise and thereby create standards and instruments that are efficient in the cyber context yet that always put the best interests of the child victim first. This is a task yet to be completed at the international level.