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

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This study revolves around international and national regulation, investigation and prosecution of emerging aspects of online child sexual abuse material. With regard to regulation, the study focused on aspects in which the causal connection between the material and the harm to children is not patently clear - virtual child sexual abuse material, pornographic material depicting persons made to appear as minors, and consensually produced and possessed 'sexting' material between adolescents for their private use only. Further, the study investigated the potential for leveraging international law to strengthen the regulation of online child sexual abuse material in 'developing countries'. It then shifted the focus to investigation and transnational law enforcement collaboration in online child sexual abuse cases, analysing the dissemination of child sexual abuse material for investigative purposes as well as the efficiency and effectiveness of international legal collaboration mechanisms in online child sexual abuse cases.

Against this background, the problem statement was formulated as follows:

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

To answer this problem statement, three Research Questions were formulated and examined in Chapters II–VI. The following sections will answer the problem statement by providing the key findings of the research; lastly, some concluding remarks will be made.

I. KEY FINDINGS FOR RESEARCH QUESTIONS

The problem statement has been specified by three Research Questions and the latter examined in five substantive Chapters (Chapters II–VI) using a mixed methodology of doctrinal legal research, comparative legal analysis and interdisciplinary legal research. The key findings will be discussed in this Chapter.

A. Research Question 1

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

Research Question 1 targets the regulation of emerging issues pertaining to the definition of child sexual abuse material. It entails investigating whether forms of child sexual abuse material for which a direct causal link between the material and harm to children is not inherently obvious should be included in the definition of criminal provisions pertaining to such material. The focus is on virtual child sexual abuse material and pornographic material depicting persons made to appear as minors, as well as consensually self-produced pornographic material between adolescents.

Chapter II explores the international and national response to the criminalisation of virtual child sexual abuse material and pornographic material depicting persons made to appear as minors. While the US and Japan are supporting the decriminalisation of such material based on the lack of unanimous scientific evidence for harm to children and freedom-of-speech considerations, Canada and South Africa endorse its criminalisation, as they acknowledge a reasonable apprehension of harm to real children.

This study argues that the scientific proof which the US and Japan invoke is an inappropriate valuation standard. Scientific proof focusing on the behaviour of child sexual abuse offenders is difficult to obtain, and claiming that only unanimous scientific evidence could justify the criminalisation of such material renders this valuation standard inappropriate. Applying instead the valuation standard of reasonable harm for children suggested by the Canadian Supreme Court and South African Constitutional Court, this study

argues that the justification for the criminalisation of such material lies in the normalisation of sexual abuse and exploitation of children.

Applying the feminist discourse around adult pornography in the 1970s and 1980s, the study submits that any form of child sexual abuse material produces and reproduces the narrative of children as sexual objects. Depending on whether the child is depicted as consenting or non-consenting partner in the sexual activity, the material produces and reproduces the eroticisation of a constructed equality, or the eroticisation of inequality respectively. It is therefore submitted that the sexual objectification of children, whether real or virtual, is a sufficient argument to acknowledge the harm caused to children *in abstracto.* Although the criminalisation of such material is generally endorsed, it has to be limited to material which is actually shared with others. As the sharing of such material and the normalisation of child sexual abuse is a catalyst of harmful thought only if such thought is *communicated* with others, virtual child sexual abuse material which is produced and thereafter possessed purely for private purposes has to be excluded from the reach of the criminal provision. The different treatment of the same content is justified on the basis of its potential harm through normalisation of the sexualisation of children. As long as the material is a mere expression of thought, whether materialised or not, the criminal law reaches its boundary: thoughts need to be free – no matter what the quality of the thought. Same applies to material depicting virtual 'child-like', non-human subjects, as the harm described as the eroticisation of inequality/constructed equality in the context of children falls away in such cases. Only through such a differentiation can freedom of speech and child protection be proportionally balanced.

Chapter III explores international and national responses to the emerging phenomenon of consensually self-produced pornographic material (commonly referred to as 'sexting' material) between adolescents. In an attempt to protect children from abuse and exploitation, consensual 'sexting' between minors is in some countries categorised as production and dissemination of 'child pornography', leading to the potential prosecution of the children involved as sex offenders. Arguments in favour of the criminalisation of such behaviour are based on the risks associated with teenage sexting and the deterrent effect of such legislation. However, the underlying dynamics in these arguments are that children are perceived as 'innocent beings' who must be protected at all costs against premature 'sexualisation'. The moral panic about child sexuality in the digital era is hence the real driver of the criminalisation.

Leveraging the rights-based approach to teenage sexuality formulated in the South African Constitutional Court case *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another,* [2013] ZACC 35, the study argues that the criminalisation of teenage sexuality in the online space through 'sexting' cannot be justified based merely on the potential risks for minors. Such criminalisation may lead to expressions of teenage sexuality such as 'sexting' being driven underground, thereby hampering parental guidance on safe 'sexting' and leading to a deterioration of help-seeking behaviour by teenagers. This study argues that the general criminalisation of children for consensual sexual exploration in the online space is counterproductive to the child protection objective. Instead, a rights-based approach to consensual 'sexting' between minors, and hence a decriminalisation of such conduct paired with a focus on comprehensive sexuality education, allows for an appropriate balancing of sexual autonomy and child protection concerns.

Based on the above deliberations in Chapter II and III, this Research Question has to be answered separately for virtual child sexual abuse material and pornographic material depicting persons made to appear as minors, on the one hand, and teenage 'sexting' material, on the other. With the former, it is clear that the criminalisation of such material infringes on freedom of speech, which is protected as a constitutional or human right under relevant national legal frameworks and international law. However, when considering whether such infringement can be justified, the argument of normalising sexual abuse and exploitation of children through the legal acceptance of such material generally outweighs and justifies the infringement on freedom of speech. Therefore, the Research Question has to be answered positively with regard to the criminalisation of virtual child sexual abuse material and pornographic material depicting persons made to appear as minors, with the exception of material produced and possessed solely for private use as well as depictions of virtual 'child-like', non-human subjects. In the case of teenage 'sexting' material, the study argues that it is necessary to address the issues with children's rights as a reference and starting-point, taking into account rights such as freedom of expression and rights to privacy and other rights dealing with a person's sexuality or sexual expression. Acknowledging a child's limitations when it comes to its expression of sexuality, the criminalisation of teenage 'sexting' does not prevent risk from turning into harm and is hence not a suitable instrument to protect children. Against this background, in the case of teenage 'sexting', the Research Question has to be answered negatively.

The adverse answers to the Research Question at hand prompt the question whether these findings do not pose a contradiction. How can the criminalisation of child sexual abuse material which lacks an obvious link between the depiction and the harm to children be justified for one type of material, but be considered disproportionate for the other? The study argues that there is no contradiction in these findings as firstly, there is an inherent difference in the material's actual harm to children on the one hand, and in the creation of risk of harm to children on the other hand. Further, it is submitted that one type of material is causing a conflict between rights of different rightsholders and the other type of material a conflict between rights of rightsholders within the same protected group. With regards to the first argument, it is submitted that virtual child sexual abuse material and material depicting persons made to appear as minors indeed pose direct harm to children *in abstracto*, whereas 'sexting' material does only create a risk of harm for children. In this context, it is referred back to the importance of differentiating between risk and harm. As discussed, the risk of harm can be considerably reduced for consensual 'sexting' between minors through educative means as proposed by the CRC Committee's guidelines. Therefore, 'sexting' has to be accepted as a manageable risk for adolescents, which in turn does not justify its criminalisation.

Secondly, there is an inherent difference with regards to the affected rights and rightsholders. With regards to the first category of material, virtual child sexual abuse material and material depicting persons made to appear as minors, it is submitted that this material creates a conflict between the child's right to protection from sexual abuse and exploitation and the person's right to freedom of expression who produces or consumes such material. In contrast, consensual 'sexting' is a conflict between the child's right to protection from sexual abuse and exploitation and – again - the child's right to privacy, freedom of expression and other relevant rights concerned with sexual exploration and expression. While the former conflict hence affects the rights of different stakeholders, the latter creates a conflict between the rights within the same group of rights holders, i.e. children, and hence ultimately between a child's right to protection on the one, and to autonomy on the other hand. In order to solve this conflict between protection and autonomy, the principle of evolving capacities has to be considered. The CRC Committee defines the principle of evolving capacities as described in article 5 CRC as 'an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights'.[1] This principle is hence crucial in ensuring a proportionate balance between recognising children as active agents in their own lives while also being entitled to protection.[2] Consequently, this study submits that applying the principle of evolving capacities in the context of consensual 'sexting' between minors must lead to the decriminalisation of such material, while at the same time acknowledging the need for preventative measures which ensure risk does not turn into harm. In this context, the CRC Committee recommends 'engaging adolescents in the identification of potential risks and the development and implementation of programmes to mitigate them [as this] will lead to more effective protection'.[3]

In conclusion, these differing outcomes for Research Question 1 exemplify the complexity of the regulation of child sexual abuse material. Upon analysing the different approaches taken in international and national legislation, and contextualising the arguments in feminist theory, it is clear that the protection concerns and the affected human rights must be delicately balanced through proportionate legislation acknowledging the child's evolving capacities and pursuing the realisation of the best interests of the child.

B. Research Question 2

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

Research Question 2 investigates how 'developing states' can leverage international law to strengthen their national legal framework pertaining to child sexual abuse material, while upholding the rule of law.

In this regard, Chapter IV uses Namibia as a case study to exemplify how international law can be leveraged to strengthen the national legal framework pertaining to child sexual abuse material. Namibia has

[1] CRC Committee, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20 (6 December 2016), para. 18.
[2] UNICEF Innocenti, *The evolving capacities of the child*, Florence 2005, p. 3.
[3] CRC Committee, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20, para 19.

ratified the OPSC and follows a monist approach to international law. The national legal framework provides for insufficient criminalisation of offences pertaining to child sexual abuse material. The Publications Act and the Communications Act criminalise content by using generic terms such as 'undesirable' or 'obscene, lewd ad filthy material' respectively, without providing a clear definition of the term 'child sexual abuse material'. Further, in its Child Care and Protection Act 3 of 2015 (CCPA), Namibia has criminalised the production of child sexual abuse material, albeit that the possession and dissemination of such material remain legal. In considering the direct application of international law such as the OPSC in the national legal framework, specific consideration has to be paid to the fair-trial principles set out in article 12 of Namibian Constitution, which require that 'no person shall be tried or convicted for any criminal offence or on account of an act or omission which did not constitute a criminal offence at the time when it was committed […]'.

Drawing upon the experience of Rwanda and the DRC in leveraging international law to close loopholes in their national criminal law in cases of genocide and crimes against humanity, it is argued that the anchor for the prosecution needs to lie in national legislation, i.e. the CCPA, which can then be expanded by the direct application of international law. With this approach, the gap in the national legal framework can be closed by upholding the rule of law and respecting fair-trial principles. Given that the CCPA already criminalises certain offences pertaining to child sexual abuse material, and states in its preamble that due consideration has to be given to international law in the interpretation and application of this Act, the will of the legislator clearly endorses the expansion of the CCPA in view of the OPSC. Therefore, such an approach is compatible with the fair-trial principles set out in article 12 of the Namibian Constitution, as the possession and dissemination of child sexual abuse material constitutes a criminal offence in the national legal framework through the relevant provisions in the CCPA, interpreted in the light of the OPSC.

The reader might wonder why this study pays such specific and detailed attention to the appropriate reflection of rule of law concerns within the child sexual abuse context, given that Namibia ratified the OPSC and hence seems to be supportive of strengthening its efforts to combat online child sexual abuse anyway. The reason for this specific attention is twofold: firstly, the proportionate balancing between child online safety, and cybercrime more broadly, and rule of law concerns is at considerable risk in many African countries. Secondly, there is a general suspicion by several African states towards international criminal law. With regards to the first point, human rights organisations observed with concern that the cybercrime legislation, which often includes provisions on online child sexual abuse material, tends to sacrifice rule of law and fair trial aspects – which are not strongly institutionalised to start with - in the name of (perceived) cybersecurity. Besides individual reports on relevant national legislations[4], this risk also becomes apparent on the AU level. Article 31(3) of the African Convention on Cybersecurity and Personal Data Protection furnishes judges with broad powers to investigate alleged cybercrime offences, including surveillance, interception, and preservation and seizure of digital evidence, as long as such intervention is 'useful in establishing the truth'. This expansion of judicial power creates the risk of overreach, especially in countries where the judiciary is not independent from the political actors.[5] Cybercrime legislation is therefore prone to being instrumentalised by political actors to crack down on the rights of citizens, political opposition and minority groups by diluting the rule of law. Against this background, the study submits that the protection of the rule of law in the context of cybercrime, including issues around online child sexual abuse, needs to be paramount and hence requires substantive consideration, to ensure that no precedence for a lax interpretation of the rule of law is set in this fragile context. Secondly, the relationship between African states and international criminal law is – to say the least – complicated. After the AU's call for mass withdrawals from the International Criminal Court (hereafter ICC)[6], the dissatisfaction of African states with

[4] For Tanzania, see Article 19, *Tanzania: Cybercrimes Act upheld in further blow to free expression*, 15 March 2017, available at: https://www.article19.org/resources/tanzania-cybercrimes-act-upheld-in-further-blow-to-free-expression/ (accessed 17 May 2020); for Zimbabwe, see Newsday, *Army to monitor social media*, 3 March 2020, available at: https://www.newsday.co.zw/2020/03/army-to-monitor-social-media/ (accessed 17 May 2020); for Kenya, see Mercy Muendo, *Kenya's new cybercrime law opens the door to privacy violations, censorship*, The Conversation, 29 May 2018, available at: https://theconversation.com/kenyas-new-cybercrime-law-opens-the-door-to-privacy-violations-censorship-97271 (accessed 17 May 2020); for Egypt, see ANND/Civicus, *Egypt: "Cyber crime" law another massive blow for freedom of expression*, 10 September 2018, available at: https://www.civicus.org/index.php/media-resources/news/3449-egypt-cyber-crime-law-another-massive-blow-for-freedom-of-expression (accessed 17 May 2020).

[5] Mailyn Filder, *The African Union Cybersecurity Convention: A Missed Human Rights Opportunity*, Council on Foreign Relations, 22 June 2015, available at: https://www.cfr.org/blog/african-union-cybersecurity-convention-missed-human-rights-opportunity (accessed 17 May 2020); Tom Jackson, *Can Africa fight Cybercrime and preserve Human Rights?*, BBC News, 10 April 2015, available at: https://www.bbc.com/news/business-32079748 (accessed 17 May 2020).

[6] AU Assembly, *Decision On The International Criminal Court (ICC)Doc. EX.CL/1006(XXX)*, AU Assembly Doc. Dec.622(XVIII), *available at* https://www.au.int/web/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf (accessed 17 May 2020).

the Rome Statute and its execution became clearly visible.[7] The reason for this dissatisfaction is complex and is at least partly routed in a rejection of a 'Western-imposed' international legal regime. While it is clear that there are considerable differences between the Rome Statute and the OPSC, they have in common that they provide for criminal provisions which can be directly applied to the citizens of the member states. With Namibia being amongst the countries endorsing the AU's call for a mass withdrawal[8], it is clear that any direct application of criminal provisions contained in international law requires a substantiated justification. Stressing the fact that the application of the OPSC is anchored in the CCPA therefore aims to counter any political arguments which could present the OPSC as yet another 'Western-imposed' legal regime. It is against this background that the direct application of international law in this context requires in-depth deliberation from a rule of law angle.

In conclusion, Chapter IV shows how international law can be leveraged to strengthen the national legal framework in the context of child sexual abuse material in 'developing countries'. The prosecution of such offences based on the direct application of international law, albeit through being anchored in an already existing provision in the national legislation, is a helpful first step in strengthening the national legal framework. Given that in the case of Namibia the OPSC is the only international treaty it has ratified in this area, a more substantial provision on child sexual material should still be enacted, considering the shortcomings of the definition and the catalogue of offences in the OPSC.

Although the possibility of direct application is limited to countries with a monist approach to international law, it has to be acknowledged that international law also plays a crucial role in guiding the national legislator by setting minimum standards for criminal provisions, in particular in countries following a dualist approach. However, states should be cautious about relying solely on international law when drafting national legislation, as international law such as the OPSC often will have been developed years ago and might not provide for a legal standard that responds to emerging forms of online child sexual abuse in the second decade of the 21st century. That being said, the guiding character of international law for national law-making processes, in particular in 'developing countries', is recognised.

C. Research Question 3

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

Research Question 3 shifts the focus from the regulation of online child sexual abuse material to procedural aspects such as the investigation and prosecution of such offences. It examines how the need for efficient and effective law enforcement mechanisms, including transnational collaboration, can be strengthened while upholding the rule of law and the principle of the best interests of the child.

As seen in Chapter V, the infiltration of child sexual abuse fora on the dark web is a key investigation strategy in combating online child sexual abuse, the aim being to identify perpetrators and rescue children from ongoing abuse and exploitation. With regard to the dissemination of virtual child sexual abuse material, such dissemination is criminalised under German law, and it seems hypocritical to trivialise such an act because it is initiated by police.

As regards the dissemination of 'real' child sexual abuse material, the proposal seems to operate on the basis that the depicted child has meanwhile reached the age of majority and can legally give consent to such an operation. Even if the person gives initial consent, the impact of knowing that the material is being circulated cannot be predicted. As the damage in such a situation is irreversible, it is questionable whether informed consent can ever be given. The problem is compounded if the person depicted in the material is still a child when asked to give consent to its dissemination. Whether a child can legally give such consent is highly questionable, given the immense impact on the overall wellbeing of the child.

Further, the proposal raises serious questions about its compatibility with the rule of law. Giving police the authority to commit criminal offences effectively puts law enforcement above the law. The importance of

[7] Priya Pillai, *The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability*, American Society of International Law, available at: https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court (accessed 17 May 2020).
[8] Kaure, Alexactus, *The ICC – When is Namibia going to exit?*, The Namibian, 28 February 2017, available at: https://www.namibian.com.na/161803/archive-read/The-ICC-When-is-Namibia-Going-to-Exit (accessed 17 May 2020).

the rule of law and the indispensability of norms such as human rights cannot be overemphasised. Such police operations could also lead to a violation of fair-trial principles, as they potentially amount to entrapment or enticement to criminal offences. In conclusion, the study submits that the proposed authority for police to disseminate child sexual abuse material for investigative purposes holds a tremendous risk of re-traumatisation for the affected child, violates the rule of law and, depending on the circumstances of the case, leads to entrapment and enticement.

Chapter VI then explores the efficiency and effectiveness of transnational law enforcement collaboration mechanisms in various international treaties. Focusing on the analysis of extra-territorial jurisdiction, jurisdictional conflicts, MLA and extradition clauses in the OPSC, Lanzarote Convention and Budapest Convention, it becomes apparent that these mechanisms are insufficient in addressing emerging issues around transnational law enforcement collaboration in online child sexual abuse cases.

With regard to extra-territorial jurisdiction clauses, jurisdictional conflicts are inadequately dealt with at the international level. Given that such conflicts will occur in many online child sexual abuse cases, this study proposes that the 'rule of reason' currently applied to solve jurisdictional conflicts in cybercrime should not focus on the closest connection to a state's territory but needs to establish which state can best serve the interests of the child victim. Important aspects to be factored in such a 'rule of reason' test are the child's identity and needs, the community and family in which the child operates, as well as the child-friendliness of the criminal justice system.

Moving on to MLA and extradition mechanisms, the study submits that such mechanisms are either cyber-specific and efficient, or victim-sensitive and insufficient. 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 less child-friendly. Given this gap in responding adequately to online child sexual abuse offences, there is an urgent need to marry child protection with cybercrime expertise in order to create standards and instruments that are efficient in the cyber-context but that always put the best interests of the child victim first.

Research Question 3 analyses the international and national legal frameworks governing investigation and prosecution mechanisms relevant for child sexual abuse offences online. As has been seen in Chapter V, a sense of powerlessness in combating online child sexual abuse material can lead to proposals for legal reform that – upon in-depth analysis – do not contribute to the well-being of the victims and put important principles such as the rule of law and fair-trial principles at risk. The rule of law and fair-trial principles are crucial gatekeepers in avoiding disproportionate expansion of law enforcement capacity in aid of political feel-good. Furthermore, the cyber-specific and child-centred discourses need to be brought together, as otherwise the mechanisms are either not operable for *online* child sexual abuse offences or ignore the fact that this form of cybercrime creates highly traumatised, vulnerable (child) victims, who require dedicated attention throughout the justice process. National and transnational law enforcement mechanisms need to triangulate the best-interests-of-the-child principle with upholding the rule of law and cyber-specific investigation mechanisms in order to effectively and efficiently respond to online child sexual abuse cases. This study acknowledges that the efficiency specifically of transnational law enforcement collaboration mechanisms cannot be solely measured on the basis of the existence of a sufficient legal framework. It is clear that these mechanisms encounter considerable hurdles in their application. In order to move away from a solely national or regional focus of states in developing online child sexual abuse prevention and response strategies, the CRC Committee recommends States parties 'to support national and international alliances to protect children from sale and sexual exploitation and to ensure effective cooperation in the investigation and prosecution of criminal networks and perpetrators'.[9]

To put this proposal to action, the CRC Committee's Guidelines would have been the optimal opportunity to exemplify such a 'married' approach at the international level, but unfortunately this has been missed. The study therefore recommends the initiation of the drafting of transnational guidelines focusing on investigation and transnational law enforcement collaboration in online child sexual abuse cases, guidelines that could be drafted as an appendix to the CRC Committee's Guidelines.

[9] 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. 113.

II. KEY FINDINGS FOR PROBLEM STATEMENT

As mentioned in the introduction to this study and showcased in the above key findings of the Research Questions, it is clear that the international and national regulation, investigation and prosecution of emerging aspects of online child sexual abuse material are informed by the various dichotomies identified in the introduction: firstly, international vs. national law; secondly, child protection vs. autonomy; thirdly, development of regulatory frameworks vs. evolving technical capacities; and child online safety vs. rule of law. This study submits that in order to embrace and navigate the currently competing discourses of cyber-specific yet victim-sensitive regulation, investigation and prosecution, it is crucial that the dichotomies polarising the discourse, and with it the relevant reference points, are identified and contextualised. The dichotomies bring the regulatory questions into a conceptual framework which assists in determining the realm in which the discourse is held and the different poles which influence its navigation. Given that online child sexual abuse is an emotive topic that can trigger impulsive reactions from lawmakers and the general public alike, it is crucial to take a step back to identify the dynamics at play and formulate a well-balanced response that champions the best interests of the child.

One constant area of tension in the regulation, investigation and prosecution of online child sexual abuse offences is the interplay between international law and national legislation. As discussed above, the implementation of international standards at national level is often complex, given that online child sexual abuse as part of the overall regulatory area of sexual offences is exposed to culturally, societally or religiously influenced perceptions around sexuality. The influence of perceptions around sexuality is most apparent when the dominant narrative of children as mere subjects in need of protection, rather than as rights-holders, is challenged. To navigate such deep waters, it is helpful to refocus the discourse on children's rights first and foremost. As the South African Constitutional Court eloquently stated in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*, [2013] ZACC 35: 'At the outset it is important to emphasise what this is not about. It is not about whether children should or should not engage in sexual conduct.'[10] Such an approach assists in restructuring the discourse from one in which there is a generic perception of children as subjects of protection to one in which children are regarded as rights-holders with evolving capacities. Further, this dynamic also impacts the strengthening of the national legal framework through the direct application of international law. As has been shown above, international law is crucial in guiding national legislators, but can also be regarded as an alien and external concept. In such cases, careful navigation of this international-national dichotomy is required to strengthen the legal framework in the area of online child sexual abuse. Lastly, the dichotomy also becomes apparent in transnational law enforcement collaboration. Effective and efficient collaboration mechanisms do not only require aligned national legal frameworks, but furthermore a shift away from national- or regional-focused policing towards a true global response mechanism.

Furthermore, the special character of the production, dissemination and possession of online child sexual abuse material as content-related cybercrime impacts on the value of international law as a regulatory mechanism. Given the ever-evolving character of cyberspace, human behaviour in this realm also constantly changes and adapts. Noting both the risk that these developments can outpace international law and the requirement that international law provide the minimum standard for national lawmakers, it is crucial to be aware of the paradoxical role that international law plays in regulating online child sexual abuse. In this study, the challenge of creating legal frameworks which stand the test of time has become apparent in the context of criminalising virtual child sexual abuse material, given that this field is rapidly evolving and hence requires constant adaptation. Further, it impacts transnational law enforcement collaboration, as some states might not be able to follow the rapid developments which will have a negative impact on creating internationally comparable legal standards. As pointed out by the CRC Committee, states are therefore required to constantly monitor and reassess the relevance and appropriateness of their legal frameworks on online child sexual abuse.[11]

Moreover, the deterioration of the rule of law in the name of child online safety is a real threat in current debates. As exemplified in this study, special attention has to be paid to the risk of child protection concerns being instrumentalised in the broader discourse of police authority in investigating cybercrime. Given that

[10] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*, [2013] ZACC 35, para. 3.
[11] 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. 19.

debates around investigating online child sexual abuse often solicit an emotional, and not necessarily evidence-based, reaction, the study submits that there is a strong need for awareness of 'hidden agendas' that aim to weaken the rule of law. Although investigation techniques in online child sexual abuse cases differ from those in contact sexual offences, the maxim of putting the child's interests first and upholding the rule of law needs to be top of mind at all times. This study further shows that this dichotomy also impacts the direct application of international law to strengthen national legal frameworks. Even though there is an urgent need for the leveraging of the OPSC and other treaties, potential negative impacts on the rule of law and fair trial principles have to be duly taken into consideration. In this context, it is important to highlight that the concern of sacrificing the rule of law in the name of child protection is not only relevant in the context of one specific case, but more broadly on setting a precedence which serves as a blueprint to justify a deterioration of the rule of law in similar cases in the future.

Lastly, the study showcased how the classic conflict between child protection and autonomy plays out in the digital context, and how the moral panic around child sexuality in the digital era risks the development of solutions which do not take the evolving capacities of adolescents into account. While this conflict is typical for issues around the regulation of sexual exploration of adolescents, it will also become apparent in other areas of children's rights in the digital era, for example in the context of setting a minimum age for registration on social media and gaming websites without parental approval. Further potential areas of conflict include the installation of tracking apps, which aim to protect children by tracking either their whereabouts, their web activities or both. While this study focused on the child protection-autonomy conflict in the context of consensual 'sexting' between minors, it is clear that this conflict will occur in numerous scenarios concerning children's rights in the digital era. As has been shown, it is important in this context not to get carried away by the risks which children might encounter in the online space, and instead focus on ensuring that their rights as enshrined in the CRC are interpreted in a digitally-adequate manner and any solutions take the evolving capacities of children into account.

This study has provided recommendations on how the conceptual framework as described in the dichotomies can be applied so the above conflicts are navigated with the best interests of the child as primary consideration. At the same time, it is clear that each and every country will have to find a solution to the above discourses within its own legal, political, social, cultural and religious realm. While this study can provide a certain framework or minimum standard within which countries should operate, it cannot provide black-and-white answers to emerging questions that apply widely to a variety of country contexts.

In conclusion, the identified competing discourses constitute the realm in which the regulation, investigation and prosecution of online child sexual abuse offences operate. The navigation of these discourses - exemplified by the Research Questions and the respective findings – is therefore transferrable to any other legal discourse involving the regulation, investigation and prosecution of online child sexual abuse offences, and – considering the above-mentioned examples - issues concerning children's rights in the digital era more broadly. identified competing discourses constitute the realm in which the regulation, investigation and prosecution of online child sexual abuse offences operate. The navigation of these discourses - exemplified by the Research Questions and the respective findings – is therefore transferrable to any other legal discourse involving the regulation, investigation and prosecution of online child sexual abuse offences, and – considering the above-mentioned examples - issues concerning children's rights in the digital era more broadly. The international and national regulation, investigation and prosecution of emerging aspects of online child sexual abuse material hence require constant identification, reflection and calibration of competing discourses, with a view to developing a cyber-specific yet victim-sensitive response that upholds the rule of law and takes a child-centred approach.

III. FINAL REMARKS

As mentioned in the introduction, 20 years ago the online images of child sexual abuse were a problem; 10 years ago, an epidemic; and now, a crisis which is at breaking-point.[12] As has been shown in this study, the regulation and transnational law enforcement collaboration with regard to emerging forms of online child

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

sexual abuse material pose complex legal questions to national legislators, and its regulation requires distinct expertise in both cybercrime as well as child protection and children's rights in general.

However, the reality is that many countries simply do not have this kind of expertise at hand, and additionally lack financial and technical resources to stand up to the emerging challenges in the area of online child sexual abuse and cybercrime more broadly.[13] As mentioned above, the role of international law is, against this background, more important than ever, as it gives countries at least a starting-point for the development of national legislation. Given the rapid development of cybercrime, regions have made ever-greater use of model legislation.[14] Although model legislation is not legally binding, it has the great advantage that it is a flexible instrument, one that can be adapted quickly to developments, as the amendment process is less cumbersome than in the amendment of international law. Although the CRC Committee's Guidelines have been criticised for their lack of guidance in the area of transnational law enforcement collaboration, the development of such guidelines per se is a step in the right direction. At the same time, it is important to acknowledge that due to the fast pace the digital world develops, the recommendations in the Guidelines might be outdated soon. Therefore, the CRC Committee is required to continuously update and develop its jurisprudence on the issue to ensure its recommendations speak to the reality on the ground.[15] Furthermore, it has to be noted that particularly in the complex area of online child sexual abuse material, meaningful international guidance would not only state how certain online offences against children should be regulated; equally important is to elaborate on the underlying contextual considerations, as the identification of the dichotomies – as has been shown above - is crucial to navigate the legal complexities around the regulation of online child sexual abuse material at a national level.

As with any form of child sexual abuse and exploitation, the regulation, investigation and prosecution of such offences is only one side of the coin. In order to avoid crossing the breaking-point and losing the fight against online child sexual abuse material, both prevention and response strategies have to be deployed concurrently. Prevention here means not only creating a safe online environment for children in which they can enjoy the many advantages the Internet has to offer, but more importantly making sure children are equipped with the skills to identify and adequately respond to risks, so these risks do not turn into harm. Digital literacy and comprehensive sexuality education, including sexual exploration in the online space, are hence important aspects of equipping children with the necessary skills to navigate the online space.

With regard to the response, it is crucial to highlight the role the private sector, in particular the ICT industry, plays in this area. Although global guidance has been developed to guide ICT stakeholders in their role in combating online child sexual abuse material,[16] it is important to keep in mind that although they play an important role in assisting law enforcement, they *are not* law enforcement. This means that ICT stakeholders cannot take over the role of law enforcement to identify whether certain material is illegal, but should rather assist law enforcement to gain access to potentially illegal material. This differentiation is crucial because the ICT stakeholders as private actors are, in contrast to law enforcement, not bound by the rule of law. Given the sensitivity around removing and taking down content from the Internet in the context of freedom of speech and access to information, national legislators should be conscious of the purely assistive yet pivotal role the ICT industry plays in investigating online child sexual abuse material.[17]

Lastly, on the 20 November 2019, the world celebrated the 30th anniversary of the CRC. When rethinking regulation and transnational law enforcement collaboration in the context of child sexual abuse in the digital era, it is crucial to conceptualise these issues in the broader discourse of children's rights in the digital

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[13] 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.

[14] See, for example, model law on cybercrime for the Caribbean (HIPCAR): https://www.itu.int/en/ITU-D/Cybersecurity/Documents/HIPCAR%20Model%20Law%20Cybercrimes.pdf (accessed 20 January 2020), Sub-Saharan Africa (HIPSSA): https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_data_protection.pdf (accessed 20 January 2020), and the Pacific Islands Countries (ICB4PAC): https://www.itu.int/en/ITU-D/Cybersecurity/Documents/ICB4PAC%20Skeleton%20Electronic%20Crime.pdf (accessed 20 January 2020).

[15] Skelton/Mezmur, *Technology changing @ a Dizzying Pace: Reflections on Selected Jurisprudence of the UN Committee on the Rights of the Child and Technology*, p. 296.

[16] See, for example, ITU, *Guidelines for Industry on Child Online Protection*, Geneva 2009, available at: https://www.itu.int/en/cop/Documents/guidelines-industry-e.pdf (accessed 11 November 2019).

[17] Especially if liability is linked to removal of illegal content, ISPs might tend to remove a disproportionally large amount of content, with a chilling effect on freedom of expression, see Karel Demeyer/Eva Lievens/Jos Dumortier, *Blocking and Removing Illegal Child Sexual Content: Analysis from a Technical and Legal Perspective*, Policy and Internet, Vol. 4 (2012), p. 14; advocating for strong partnerships with the private sector, 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. 41, 111.

era. Acknowledging that the children's rights contained in the CRC were developed in the context of an analogue reality, the reconceptualisation of such rights in the digital era is the starting-point for the development of any child-rights based prevention and response strategy for online child sexual abuse and exploitation.[18] The development of the CRC Committee's Guidelines is as such only the starting-point. At the time of this writing, the CRC Committee is drafting a General Comment on children's rights in relation to the digital environment, which aims

> to shape the interpretation and implementation of the Convention in a digital age, […] to strengthen the case for greater action and elaborate what measures are required by States in order to meet their obligations to promote and protect children's rights in and through the digital environment, and to ensure that other actors, including business enterprises, meet their responsibilities.[19]

This General Comment will hence create the conceptual framework for children's rights in the digital era and provide guidance for states on how to navigate not only prevention and response to online child sexual abuse material, but children's rights in the digital era more broadly.

In conclusion, this study ends with an appeal to all researchers, practitioners and law-makers tasked and entrusted with the protection of children's rights in the digital era to make meaningful child participation a central aspect of all their interventions. Given that many technical experts have not experienced a childhood in which technology is an everyday component of their interactions, learning processes and development, we need to reflect critically on our own limitations in speaking for and on behalf of children when developing strategies to ensure that children can reach their full potential both online and offline. In the spirit of the 30th anniversary of the CRC, listening to and learning from children is hence paramount in creating an online environment conducive and safe for children all over the world.

[18] Skelton/Mezmur, *Technology changing @ a Dizzying Pace: Reflections on Selected Jurisprudence of the UN Committee on the Rights of the Child and Technology*, p. 277.
[19] CRC Committee, *Concept Note for a General Comment on children's rights in relation to the digital environment*, available at: https://www.ohchr.org/EN/HRBodies/CRC/Pages/GCChildrensRightsRelationDigitalEnvironment.aspx (accessed 10 November 2019).