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

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SUMMARY

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With access to and usage of it increasing dramatically over the past 20 years, the Internet has become an emerging realm for human interaction. With children constituting one-third of Internet users worldwide, this realm offers endless opportunities to learn, connect, and interact. But the Internet is not only a platform for producing, accessing, sharing and retrieving information – it offers a distinct forum for criminals to operate in spaces that are increasingly difficult for law enforcement agencies to penetrate. Criminal offences committed online range from acts against the confidentiality, integrity and availability of computer systems, to computer-related acts for financial or personal gains, and to the production, dissemination and possession of child sexual abuse material or hate speech. While some forms of these offences were 'born' in the age of new technology, other offences such as child sexual abuse have always existed but are now being committed in a different environment.

To focus on the discourse on the regulation, investigation and prosecution of online child sexual abuse material, there is a general consensus about the harmfulness of child sexual abuse whether committed online or offline. However, what is distinctive about the discourse on online child sexual abuse is that it is characterised by a set of dichotomies. The first is the contrast between the global and national level. While online child sexual abuse is a global problem that requires a global response, a comprehensive legal framework needs to be in place at a national level. Another dichotomy is between the discourse around sexual abuse, on the one hand, and sexual autonomy, on the other. While pornographic material clearly depicting child sexual abuse is an obvious case for criminalisation, the line between sexual abuse and sexual autonomy is less straightforward in cases where the causality between the material and the harm to children is less obvious. Furthermore, there is a dichotomy between the need to develop binding legal standards, both nationally and internationally, and constantly evolving technical capacities. While the development of legal standards can be a cumbersome process at a national as well as international level, the technical environment is in constant expansion. This leads to an inherent risk of a wild goose chase in regulating cybercrime, as the legal framework might be outdated once enacted. Lastly, there is a dichotomy between child protection and the protection of the rule of law. There is a tendency, borne of the sheer horrendousness of child sexual abuse material, to justify the infringement of the rule of law and fair-trial principles if it assists – or at least seems to assist – the fight against online child sexual abuse. The ends therefore often justify the means, notwithstanding the impact that deterioration of the rule of law has on criminal justice in the long run, including violence against children.

With the abovementioned dichotomies guiding the investigation, this study aims to critically analyse emerging aspects of the international and national regulation, investigation and prosecution of online child sexual abuse material from a child-rights and rule-of-law-based approach. Firstly, it investigates the regulation of online child sexual abuse material where the relation between the material and the harm to children is not patently clear and where child protection concerns need to be balanced with the protection of human rights such as freedom of expression. This includes the regulation of virtual child sexual abuse material and material depicting persons made to appear as minors. With no unanimous scientific evidence proofing increased risk of harm to real children, the study explores how international law as well as national legislators, including the US, Canada, Japan and South Africa, strike the balance between child protection on the one hand, and freedom of expression concerns on the other. It will be shown that there is indeed a sufficient justification for the criminalisation of such material: the sexual objectification of children, whether real or virtual, through the eroticisation of inequality or a constructed equality is a sufficient argument to acknowledge the harm caused to children *in abstracto.* However, to balance competing interests, the scope of criminalisation should be determined by harm-based rather than strictly idealistic criteria. Therefore, the production and possession of self-generated virtual child sexual abuse material as well as the depiction of virtual 'child-like', non-human subjects should be excluded from the range of criminal provisions.

Further, the study examines the emerging phenomenon of consensually self-produced pornographic material (commonly referred to as 'sexting' material) between adolescents. In an attempt to protect children, consensual 'sexting' between minors is in some countries categorised as the production and dissemination

of child sexual abuse material, leading to the prosecution of the children concerned as sex offenders. 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. By analysing legislation and case law from the US, Canada, Germany and South Africa, this study investigates the need for a balance between child protection, on the one hand, and the child's right to privacy, on the other. This 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.

Secondly, the study investigates the difficulties of leveraging international law in order to strengthen the national legal framework relating to the criminalisation of online child sexual abuse material, which it does by analysing the influence of international law on national legislation and the balancing of child-protection with rule-of-law concerns in that context. Given that the majority of legal research in the area of regulating online child sexual abuse material focuses on North American, European or Asian countries, this study draws attention to an African country, Namibia, in which children's safety online has emerged on the national child protection agenda over the past few years. Despite having ratified the UN Convention on the Rights of the Child's Optional Protocol on the sale of children, child prostitution and child pornography (OPSC), Namibia has so far failed to comprehensively criminalise the production, dissemination, possession and accessing of child sexual abuse material. Given the urgent need to rectify the situation, the study considers how the OPSC can be leveraged to fill the gap in national legislation through direct application of the OPSC in national courts. 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, 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.

Thirdly, the study shifts the focus to procedural aspects, in particular the authority of law enforcement in investigating and prosecuting online child sexual abuse material, with the focus placed on the investigative powers given to law enforcement agencies both at national as well as transnational level. The study is informed by an acute awareness of the need for technology-savvy legislation that simultaneously serves the best interests of the child as well as a national legal standard aligned with international law. When discussing investigative powers and transnational law enforcement collaboration in the context of cybercrime, the academic discourse largely fails to focus on the child as a highly vulnerable victim and to consider how this specific vulnerability impacts investigations. The lack of putting the child at the centre of the intervention becomes clear when examining the investigative powers of police under German law in the context of infiltration of child sexual abuse fora on the dark web. The infiltration of child sexual abuse fora on the dark web is a key investigation strategy in combating online child sexual abuse worldwide, the aim being to identify perpetrators and rescue children from ongoing abuse and exploitation. Following the *do ut des* principle ('I give, so that you may give'), the dissemination of child sexual abuse material is the currency required to gain access to these fora: new users are accepted only after they share child sexual abuse material with the forum administrators. In the past years, Germany debated whether police should be legally authorised to disseminate child sexual abuse material in such cases. Proposals included the dissemination of virtual child sexual abuse material as well as actual child sexual abuse material, with the consent of the depicted child. 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.

Lastly, the study explores the efficiency and effectiveness of transnational law enforcement collaboration mechanisms in various international treaties. Both the determination of jurisdiction and the conduct of transnational law enforcement collaboration in online child sexual abuse cases are complicated affairs due to the architecture of cyberspace. As the Internet knows no borders, crimes are typically committed across

numerous jurisdictions. Perpetrators can conceal their identities, and the evidence they leave behind (if any) is highly ephemeral and easily removed, altered or hidden. Efficient and effective transnational law enforcement collaboration is therefore crucial, which calls for a strong international legal framework that upholds the best interests of the child as primary consideration. Against this background, the study examines extra-territorial jurisdiction, jurisdictional conflicts, mutual legal assistance and extradition clauses in the OPSC, the Council of Europe Convention on Cybercrime (Budapest Convention), and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention). 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. Moving on to mutual legal assistance and extradition mechanisms, the study submits that such mechanisms are either cyber-specific and efficient, or victim-sensitive and insufficient. 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.

In conclusion, this study provides recommendations on how the above-mentioned dichotomies should be navigated in the context of the emerging aspects of the international and national regulation, investigation and prosecution of online child sexual abuse material. 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 provides a 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. Instead, it is submitted that the identified competing discourses constitute the realm in which the regulation, investigation and prosecution of online child sexual abuse offences operate. Therefore, in order to solve these complex legal issues, the answer to the problem statement is not straightforward and unambiguous, but lies in the identification and subsequent navigation of discourses as elaborated above, founded in the rule of law and in the principle of the best interests of the child. 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.