

Leveraging International Law to Strengthen the National Legal Framework on Child Sexual Abuse Material in Namibia

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Abstract

With the gazetting of the Regulations of the Child Care and Protection Act 3 of 2015, on 30 January 2019, a crucial regulatory piece of children's rights in Namibia has finally been operationalised. However, the Act insufficiently addresses new emerging online offences against children such as the possession and distribution of child sexual abuse material, and hence leaves a considerable gap in the protection of children's rights. As the Namibian Constitution follows a monist approach to international law, this article argues that the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography can be directly applied to complement the national legal framework to prosecute cases of possessing and disseminating child sexual abuse material, while upholding fair-trial principles.

Keywords: Child sexual abuse; International children's rights; Child online safety; Optional Protocol to the CRC on the sale of children, child prostitution and child pornography; Namibia; Child Care and Protection Act

Introduction

Child sexual abuse and exploitation is a major concern worldwide. With the increasing access and usage of the internet, child sexual abuse and exploitation are no longer restricted to homes, schools and communities. The use of Information and Communication Technology (ICT) by perpetrators increases their access to a wide pool of potential victims as children and adolescents below the age of eighteen years constitute one-third of internet users worldwide.¹ The production, dissemination, and possession of child sexual abuse material, also known as ‘child pornography’, is a common form of how children are victimised in the online space. The term ‘child pornography’ has been widely criticised as it creates the impression that ‘pornography’ and ‘child pornography’ are closely related, hence suggesting that the child could give consent to the production of such material.² Therefore, this article will use the term ‘child sexual abuse material’.

The internet has further facilitated new forms of online child sexual abuse. Made-to-order services allow the perpetrator to request the production of content specific to the age, gender and race of the child, depending on the perpetrator’s sexual preferences.³ Live streaming of online child sexual abuse is another emerging form, whereby perpetrators can buy access to the live stream to observe the abuse in real time.⁴

At international level, Article 34 of the Convention on the Rights of the Child (CRC)⁵ protects children from all forms of sexual exploitation and abuse. This provision in the CRC is augmented by the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography⁶ (OPSC), which is the first international instrument to explicitly criminalise ‘child pornography’ offences. At regional level, the African Union (AU) has acknowledged the need to provide African states with guidance on the criminalisation of online child sexual abuse offences. The African Charter on the Rights and Welfare of the Child (ACRWC)⁷ prohibits the use of children in pornographic activities,

¹ UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children* (New York 2015) x; UNICEF, *The State of the World’s Children 2017* (New York 2017) 1.

² Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography* (A/HRC/28/56 2014) para 29; ECPAT, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse* (Bangkok 2016) 38–40; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children* (2015) 9–10; CRC Committee, *Guidelines regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, CRC/C/156 (10 September 2019) para 5.

³ UNODC (n 1) 21.

⁴ *ibid* 22–23.

⁵ UN Convention on the Rights of the Child adopted on 20 November 1989.

⁶ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography adopted on 25 May 2000.

⁷ African Charter on the Rights and Welfare of the Child adopted on 1 July 1990.

performances and materials.⁸ More specifically, the AU Convention on Cyber Security and Personal Data Protection (ACCS)⁹ criminalises the production, possession and distribution of ‘child pornography’ through a computer system.¹⁰

Acknowledging online child sexual abuse as an emerging threat for all AU member states, the AU has further put the topic on the political agenda. The AU held a Continental Consultation on Combatting Online Child Sexual Exploitation¹¹ under the theme ‘Protecting Children from Abuse in the Digital World’ in March 2019 in Addis Ababa. In her welcoming remarks, the African Union Commission Director of Social Affairs, Cisse Mariama Mohamed, noted that ‘the rise of information and communication technologies had made it easier and more efficient for sex offenders to produce, access, and distribute child sexual abuse material’ and called upon all delegates to take immediate action.¹² The AU will further assess the threat of online child sexual abuse in nineteen African countries, which, due to their easy access to internet services, are deemed to be at high risk.¹³ Zooming into southern Africa, the Southern African Development Community (SADC) drafted Model Legislation on Computer Crime and Cybercrime, which criminalises the production, offering, distribution, procurement, possession and accessing of ‘child pornography’ through a computer system.¹⁴ This shows the broad commitment on regional and international level to ensure that children all over the world are protected from any form of sexual abuse and exploitation.

Namibia has recently joined the African and international community in its fight against online child sexual abuse. With the gazetting of the Regulations of the Child Care and Protection Act 3 of 2015 (CCPA) on 30 January 2019, a crucial regulatory piece of children’s rights in Namibia has finally been operationalised.¹⁵ Amongst others, the Act creates new offences relating to children, such as child trafficking, certain forms of child labour and ‘child pornography’. Unfortunately, the CCPA only criminalises the creation

⁸ Article 27(1)(c) of the African Charter on the Rights and Welfare of the Child.

⁹ AU Convention on Cyber Security and Personal Data Protection adopted on 27 June 2014.

¹⁰ Article 29(3) of the African Union Convention on Cybersecurity and Personal Data Protection.

¹¹ Held on 6 March 2019 at the African Union Conference Centre in Addis Ababa, see <<https://au.int/en/pressreleases/20190306/african-union-continental-consultation-combatting-online-child-sexual>> accessed 23 March 2019.

¹² See official press release at <<https://au.int/en/pressreleases/20190306/african-union-continental-consultation-combatting-online-child-sexual>> accessed 24 March 2019.

¹³ Muluhne Gebre, ‘African Union Set to Assess Threat of Online Child Sexual Exploitation in 19 Countries’ *7D News* (6 March 2019) <<https://7dnews.com/news/african-union-set-to-assess-threat-of-online-child-sexual-exploitation-in-19-countries>> accessed 24 March 2019.

¹⁴ Article 13 in International Telecommunication Union, ‘SADC Model Law on Computer Crime and Cybercrime (HIPSSA)’ (Geneva 2013) <<https://www.itu.int/en/ITU-D/Cybersecurity/Documents/SADC%20Model%20Law%20Cybercrime.pdf>> accessed 24 March 2019.

¹⁵ Child Care and Protection Act 3 of 2015 <<https://laws.parliament.na/annotated-laws-regulations/law-regulation.php?id=473>> accessed 24 March 2019.

of such material and various supporting acts but neither defines the term ‘child pornography’ nor criminalises the possession or distribution of child sexual abuse material, and hence leaves a considerable legal gap in the protection of children in Namibia.

This article argues that this gap can be closed by leveraging international law such as the OPSC, which Namibia ratified on 16 April 2002. The OPSC clearly defines the term ‘child pornography’ and criminalises ‘producing, distributing, disseminating, importing, exporting, offering, selling or possessing child pornography for any of the above purposes.’ As article 144 of the Namibian Constitution¹⁶ stipulates that international treaties shall form part of the law of Namibia, it is argued that the OPSC can be used to complement the provision in the CCPA, while upholding fair-trial principles as set out in article 12 of the Namibian Constitution. Little or no research has been done in attempting to leverage article 144 to strengthen the national legal framework in the area of criminal law. This article aims to start a conversation on this important topic and strengthen Namibia’s approach to comply with its international obligations.

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

Online Child Sexual Abuse in Namibia

Emerging Forms of Online Child Sexual Abuse

The internet has offered a new and comparatively safe realm for offenders to sexually abuse and exploit children. With many countries, including Namibia, not comprehensively criminalising online child sexual abuse,¹⁷ the lack of capacity in digital forensics and insufficient transnational law enforcement mechanisms, the use of cryptocurrencies for money transfers and the ease of hiding one’s traces on the internet, many offenders with a sexual interest in children face minimum risk of investigation

¹⁶ ‘Namibian Constitution’ is the official short title of the Constitution of the Republic of Namibia, see art 148.

¹⁷ See next section ‘Gaps in the National Legal Framework.’

and prosecution.¹⁸ While the internet has created new forms of child sexual abuse, such as live streaming, it also facilitates a continuum between offline, ie contact child sexual abuse, and online child sexual abuse.¹⁹

A prominent form of such an online-offline continuum is the production, dissemination, possession and accessing of child sexual abuse material. Perpetrators produce visual, written or audio documentation of the contact sexual abuse of a child, and disseminate that material over the internet. New trends in online child sexual abuse include made-to-order content as well as live-streaming of online child sexual abuse.²⁰ Both forms allow the perpetrator to direct the sexual abuse towards his or her own sexual preferences, including the selection of the child as well as the form of sexual abuse perpetrated against the child.²¹ Victims of online child sexual abuse suffer additional and continuous victimisation from the awareness that offenders unknown to them will use images of their abuse.²² Therefore, victims often face great difficulties in ‘closing the chapter’, as they are continuously exposed to abuse and exploitation through the circulation of their material and live in constant anxiety that someone will recognise or expose them.²³

It is unknown how many websites, fora and peer-to-peer networks containing online child sexual abuse material exist worldwide.²⁴ A good indication of the magnitude of the problem is the annual report published by the Internet Watch Foundation (IWF), a UK-based organisation working with law enforcement and industry worldwide to remove child sexual abuse material from the internet.²⁵ In 2018, IWF received around 223 000 reports and confirmed that approximately 105 000 URLs contained child sexual abuse material. Seventy-eight per cent of the depicted children are girls, and twenty-three per cent of the material showed sexual activity between adults and children

¹⁸ UNODC (n 1) 21; on the use of virtual currencies for child sex offending online see Yvonne Nouwen, ‘Virtual Currency Uses for Child Sex Offending Online in Online Child Sexual Exploitation: An Analysis of Emerging and Selected Issues’ (2017) 12 ECPAT Intl J 4–11.

¹⁸ UNODC (n 1) 18–19.

¹⁹ ECPAT, *Terminology Guidelines* (n 2) 19–22; UNODC (n 1) 8.

²⁰ UNODC (n 1) 21–23; for an in-depth analysis of live-streaming of online child sexual abuse see Andrea Varrella, ‘Live Streaming of Child Sexual Abuse: Background, Legislative Frameworks and the Experience of the Philippines’ (2017) 12 ECPAT Intl J 47–58.

²¹ ECPAT, *Trends in Online Child Sexual Abuse Material* (Bangkok 2018) 7.

²² Najat M’jid Maalla, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography* 07/2009 (UN Doc. A/HCR/12/23) 10 *et seq.*

²³ *ibid*; ITU, *Guidelines for Policy Makers on Child Online Protection* (ITU 2009) 19; Ateret Gewirtz-Meydana, Wendy Walsha, Janis Wolaka and David Finkelhora, ‘The Complex Experience of Child Pornography Survivors’ (2018) 80 *Child Abuse and Neglect* 244; Alisdair Gillespie, *Child Pornography: Law and Policy* (Routledge-Cavendish 2011) 31–33; UNICEF, *The State of the World’s Children 2017* (2017) 76.

²⁴ ECPAT (n 21) 8.

²⁵ See <<https://www.iwf.org.uk>>.

including rape or sexual torture. Forty per cent of the material depicted children ten years or younger, with one per cent depicting children below the age of two years.²⁶ These numbers are shocking. Keeping in mind that these are merely the figures relating to material which was reported to the IWF, one can only imagine the actual magnitude of the online abuse and exploitation children suffer worldwide.

With Namibia's internet connectivity standing at approximately 36.8 per cent in 2017,²⁷ it is not surprising that anecdotal evidence pointed towards an increased number of incidents of online child sexual abuse in Namibia. In order to assess the magnitude of the problem and create the evidence base for prevention and response interventions, the Government of the Republic of Namibia, with support from UNICEF, commissioned an 'Exploratory Research Study on Knowledge, Attitudes and Practices of Information and Communications Technology' in 2016.²⁸ Only seven per cent of participants stated that they had never accessed the internet before.²⁹ In terms of negative experiences, thirty-one per cent of the surveyed children reported that they had received sexually explicit images of people they did not know, and twenty-nine per cent had seen online child sexual abuse material.³⁰

These figures changed the previously common narrative that online child sexual abuse is not a real threat for children in Namibia and has prompted the government and civil society to joint action to ensure children in Namibia are safe online.³¹ As an important first step, it was recognised that the current legal framework in Namibia does not sufficiently criminalise all forms of online child sexual abuse material, and hence requires reform.³² The gaps in the current national legal framework will be discussed in the following section.

²⁶ Internet Watch Foundation, 'Once upon a Year: Annual Report' (IWF 2018), 18–19.

²⁷ ITU, 'Statistics' <<https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>> accessed 7 July 2019.

²⁸ UNICEF Namibia, *Voices of Children: An Exploratory Research Study on Knowledge, Attitudes and Practices of Information and Communication Technology (ICT) Use and Online Safety Risks by Children in Namibia* (Windhoek 2016); the study sampled 739 children between the age of thirteen and seventeen years from urban and rural areas in five regions in Namibia.

²⁹ *ibid* 27.

³⁰ *ibid*.

³¹ See for example Ngaevuarue Katjangua, 'Namibian Children Risk Online Exploitation' *New Era* (29 June 2017) <<https://neweralive.na/posts/namibian-children-risk-online-exploitation>> accessed 2 July 2019; Lahja Nashuuta, 'Namibia Save Haven for Cybercriminals' *All Africa* (7 February 2018) <<https://allafrica.com/stories/201802070287.html>> accessed 2 July 2019.

³² See for example Nampa, 'Nam Joins World to Combat Child Online Sexual Abuse' *The Namibian* (3 March 2016) <<https://www.namibian.com.na/148055/archive-read/Nam-joins-world-to-combat-child-online-sexual-abuse>> accessed 2 July 2019; Editorial Staff, 'Legal Framework Strengthened to Deter Child Sexual Abuse Online' *New Era* (2 March 2016) <<https://neweralive.na/posts/legal-framework-strengthened-deter-child-sexual-abuse-online>> accessed 2 July 2019.

Gaps in the National Legal Framework

As indicated above, the national legal framework only sporadically addresses online child sexual abuse and exploitation. The only legislation directly referring to ‘child pornography’ is the Child Care and Protection Act 3 of 2015. Section 234(1)(d) of CCPA provides that it is a criminal offence to ‘induce, procure, offer, allow or cause a child to be used for purposes of creating child pornography whether for reward or not.’ The first significant error of this piece of legislation is the lack of a definition of the term ‘child pornography’.³³ It is not clear what the term ‘child pornography’ covers, for example whether it encompasses virtual child sexual abuse material, persons made to appear as minors, or erotic posing.³⁴ Besides the lack of a definition, the Act only criminalises the creation of child sexual abuse material and various supporting acts.³⁵ This leaves a considerable gap in the legal framework, as the possession, dissemination and accessing (‘streaming’) of child sexual abuse material is the centrepiece of the entire market: platforms such as ‘Childs Play’³⁶ and ‘Elysium’³⁷ have made millions by offering a marketplace to disseminate, download and stream child sexual abuse material.³⁸ By not criminalising dissemination, possession and accessing of child sexual abuse material, Namibia is at risk of becoming a safe haven for platforms such as ‘Childs Play’ and ‘Elysium’, and tolerates the re-victimisation of hundreds of thousands of children worldwide through the further distribution and viewing of their ordeals.

Apart from the CCPA, Publications Act 42 of 1974 (Publications Act), prohibits the production, possession and distribution of ‘undesirable’ publications. According to section 47 of the Publications Act, a publication is ‘undesirable’ if it is considered offensive or harmful to public morals. Even though it might be assumed that online child sexual abuse material would be considered to be ‘undesirable’ *per definitionem*, the lack of a specific definition for online child sexual material makes it impossible to predict its

³³ ECPAT Global Database, ‘National Legal Framework Protecting Children from Sexual Exploitation Online (Namibia)’ <<https://globaldatabase.ecpat.org/country/namibia/#2.1>> accessed 23 June 2019.

³⁴ UNICEF Namibia, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis* (Windhoek 2016) 31; UNICEF Namibia, *Increasing Legal Protection for Children from Sexual Exploitation and Abuse in Namibia* (Windhoek 2016) 8.

³⁵ *ibid.*

³⁶ Håkon Høydal, Einar Otto Stangvik and Natalie Remøe Hansen, ‘Breaking the Dark Net: Why the Police Share Abuse Pics to Save Children’ *VG News* (7 October 2017) <<https://www.vg.no/spesial/2017/undercover-darkweb/?lang=en>> accessed 23 June 2019.

³⁷ Michael Nienaber, ‘German Police make Arrests over Massive Child Pornography Website’ *Reuters News* (6 July 2017) <<https://www.reuters.com/article/us-germany-sexcrimes/german-police-make-arrests-over-massive-child-pornography-website-idUSKBN19R0VD?il=0>> accessed 23 June 2019.

³⁸ Regarding victim protection and rule-of-law concerns of undercover investigations on such child pornography fora, see Sabine Witting, ‘Do ut des: Disseminating Online Child Sexual Abuse Material for Investigative Purposes?’ *Journal of Universal Computer Science* (Proceedings of the Central European Cybersecurity Conference, November 2018).

range.³⁹ Further, the prescribed range of sentence for contravention of section 8(1)(b) Publications Act is either a fine of not more than R1000 (approximately USD 70) or imprisonment for a period not exceeding six months.⁴⁰ This range of sentence is clearly not appropriate for a sexual offence such as the possession and distribution of online child sexual abuse material. Keeping in mind that some offenders possess millions of child sexual abuse images,⁴¹ it is clearly unsatisfactory that such an offender only faces a maximum of six months imprisonment in Namibia under the Publications Act.

Furthermore, section 117(1)(c) of the Communications Act 8 of 2009 makes it a criminal offence to make, create, solicit or initiate ‘the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person.’ Similar to the interpretation of the term ‘undesirable’ in the Publications Act, terms such as ‘obscene’, ‘filthy’ or ‘indecent’ are open to interpretation and hence do not set a clear standard for the criminalisation of child sexual abuse material. Further, the term ‘solicit’ does not include the downloading, possession or streaming of such material, and hence leaves a considerable gap. Even though the range of sentence is higher than in the Publications Act, with imprisonment for a period not exceeding five years or a fine not exceeding N\$20 000 (approximately USD 1350) or both such fine and such imprisonment, it is doubtful whether this range is appropriate for a sexual offence involving children.

Lastly, the classification of possession and dissemination of online child sexual abuse material as a sexual offence—in contrast to a general criminal provision such as section 8 of the Publications Act or section 117 of the Communications Act—is necessary in light of section 238 of the CCPA. Section 238 of the CCPA sets out the requirements in respect of certain persons who work with children. This section provides that a person convicted of certain offences should not be employed in management or operation of an institution providing welfare services to children, have direct access to children at such an institution, or become a caregiver or adoptive parent. It is crucial to note that one of the offences listed under this section is the manufacture, distribution or possession of pornography. The distribution and possession of an ‘undesirable’ publication is, however, not listed. Therefore, there is an inherent risk that if only the Publications Act and the Communications Act are applied to sanction the dissemination and possession of online child sexual abuse material, perpetrators might fall through the cracks in terms of section 238 and could still be deemed fit to work with children.

³⁹ UNICEF Namibia, *Regulation* (n 34) 31; UNICEF Namibia, *Increasing* (n 34) 8.

⁴⁰ See s 43 Publications Act 42 of 1974.

⁴¹ Richard Wortley and Stephen Smallbone, *Internet Child Pornography: Causes, Investigation, and Prevention* (Praeger 2012) 31.

In conclusion, the national legal framework in Namibia only touches upon certain aspects such as the production of child sexual abuse material. It does not provide a definition of ‘child pornography’ and if it should be considered a criminal offence under the Publications Act or the Communications Act, does not provide for a sufficient range of sentence. Therefore, the current legal framework in Namibia is insufficient to effectively combat the dissemination, possession and accessing of child sexual abuse material.⁴²

International Law on Online Child Sexual Abuse in Namibia

Given the gaps in the legal framework pointed out above, the question arises whether international law, such as the OPSC, could be leveraged to criminalise the possession and dissemination of child sexual abuse material. This section will first discuss the protection standards in both Namibia and the OPSC,⁴³ and further argue that international law, in particular the OPSC, can be directly applied in Namibian courts to prosecute online child sexual abuse offenders, while upholding fair-trial principles.

Online Child Sexual Abuse in the African Convention on Cyber Security (ACCS)

With the adoption of the ACCS, the AU has taken an important step towards tackling the threats of cybercrime in Africa. After the approval by the AU Executive Council in 2013, the ACCS was adopted on 27 June 2014. So far, only eight states, namely Namibia, Ghana, Guinea, Mauritius, Senegal, Rwanda, Angola and Mozambique have ratified the Convention.⁴⁴ According to Article 26 of the ACCS, the Convention shall enter into force thirty days after the date of the receipt of the fifteenth instrument of ratification. Therefore, even though Namibia ratified the Convention on 25 January 2019, the Convention has no legal effect yet, as the minimum number of fifteen member states has not been reached.

⁴² In line with the recommendations from the ECPAT Global Database <<https://globaldatabase.ecpat.org/country/namibia/#2.6>> accessed 6 July 2019.

⁴³ As an analysis of non-binding international standards exceeds the scope of this article, this article will only focus on legally binding international standards, such as the ACCS and the OPSC. Namibia has not ratified the Council of Europe Convention on Cybercrime (so-called ‘Budapest Convention’) or the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (so-called ‘Lanzarote Convention’), hence these will be omitted. For an overview of relevant international and regional standards on online child sexual abuse see UNICEF Namibia, *Regulation* (n 34).

⁴⁴ See status of ratification here (latest version of 20 May 2019) <<https://au.int/sites/default/files/treaties/29560-sl-AFRICAN%20UNION%20CONVENTION%20ON%20CYBER%20SECURITY%20AND%20PERSONAL%20DATA%20PROTECTION.pdf>> accessed 23 June 2019.

It is against this background that this article will focus not on the ACCS,⁴⁵ but rather on international law currently having legal effect in Namibia, such as the OPSC discussed below.⁴⁶

Online Child Sexual Abuse in the OPSC

As Namibia has not ratified any relevant international instruments apart from the OPSC,⁴⁷ this article will only discuss how the OPSC addresses the phenomenon of online child sexual abuse.⁴⁸

Article 2 of the OPSC defines ‘child pornography’ as ‘any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.’ Even though the term ‘child’ is not defined in the OPSC, the definition of the main convention, the

⁴⁵ In case the ACCS reaches the necessary fifteen ratifications to enter into force, the analysis below provides for a brief overview of the strengths and weaknesses of the ACCS in relation to online child sexual abuse material. Article 1 of the ACCS defines the term ‘child pornography’ as:

‘[...] any visual depiction, including any photograph, film, video, image, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

The production of such visual depiction involves a minor;

Such visual depiction is a digital image, computer image, or computer-generated image where a minor is engaging in sexually explicit conduct or when images of their sexual organs are produced or used for primarily sexual purposes and exploited with or without the child’s knowledge;

Such visual depiction has been created, adapted or modified to appear that a minor is engaging in sexually explicit conduct.’

According to Article 1, the term ‘child’ or ‘minor’ means every human being below the age of 18 years in term of the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of the Child respectively. The definition of ‘child pornography’ only covers visual depictions, hence excludes audio or written content. Further, it covers not only the visual depiction of actual children, but also computer-generated images (also called ‘virtual child pornography’) as well as persons who are made to appear as minors.

The catalogue of offences in Article 29(3)(1) ACCS is as follows:

‘State Parties shall take the necessary legislative and/or regulatory measures to make it a criminal offence to:

Produce, register, offer, manufacture, make available, disseminate and transmit an image or a representation of child pornography through a computer system;

Procure for oneself or for another person, import or have imported, and export or have exported an image or representation of child pornography through a computer system;

Possess an image or representation of child pornography in a computer system or on a computer data storage medium.’

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

⁴⁶ Upon entering into force, the same line of arguments set forth for the direct application of the OPSC can be applied in the context of the ACCS.

⁴⁷ Ratified on 16 April 2002.

⁴⁸ For an overview of relevant international instruments and their regulatory content on online child sexual abuse, see UNICEF Namibia, *Regulation* (n 34) 10–18.

CRC, applies, and hence defines the term as ‘every person under the age of 18 years.’⁴⁹ The OPSC only criminalises content depicting actual children, hence excludes ‘virtual child pornography’ or persons who are made to appear as minors.

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

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

This clearly shows that the OPSC does not only criminalise the production of ‘child pornography’, but also the dissemination and possession of such material for the above-mentioned purposes. Together with the definition of the term ‘child pornography’, the OPSC provides a solid criminal provision with regard to online child sexual abuse material.

Closing the Gaps in the National Legal Framework through Direct Application of the OPSC

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

Direct Applicability of Human Rights Law in Namibian Courts

International law does not predetermine its position in the national legislation of each member state and leaves this decision to the national constitutions.⁵⁰ Generally speaking, states take either a dualist or a monist approach to international law.⁵¹ In a

⁴⁹ See Article 1 CRC; UNICEF Namibia, *Regulation* (n 34) 12.

⁵⁰ Arguing that the question of monism and dualism should be settled by each country through a legal instrument and that the constitution of a country is the best legal instrument for solving that question, DJ Devine, ‘The Relationship between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia’ (1994) 26 Case Western Reserve J of Intl L 299.

⁵¹ Joseph Starke, ‘Monism and Dualism in the Theory of International Law (1938)’ in Stanley Paulson, *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford University Press 1999) 66; Francois-Xavier Bangamwabo, ‘The Implementation of International and Regional Human Rights

dualist system, the national and the international legal order are regarded as two separate legal systems.⁵² In order to make international law applicable in the national legal system, the international treaty in question has to be translated by way of domestic legislation through an Act of Parliament.⁵³ Without domestication, international law has no force or effect in such a country. In monist systems, international law and national legislation are considered as one legal system, which means that international law automatically forms part of the national legal system upon ratification/accession.⁵⁴ Hence, there is generally no need to domesticate the international treaty through an Act of Parliament to make it applicable in the member state.

Regarding the relationship between international law and national legislation, article 144 of the Namibian Constitution states:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

As the wording of article 144 does not require an Act of Parliament in order to make international law part of the law of Namibia, Namibia is following a ‘monist approach’ to international law, and hence regards international law as an integral part of the Namibian legal system.⁵⁵ Monists claim that there is no need for further enabling legislation when applying international law to the domestic legal scenario.⁵⁶

However, it must be acknowledged that the first half of the sentence of article 144 poses possible exceptions to that rule. The general rule of direct applicability of international law does not apply if ‘otherwise provided by this Constitution or Act of Parliament.’ Therefore, the Constitution or an Act of Parliament can limit the direct applicability of international law. This exception reflects the position of the Namibian constitution as supreme law of the country and, in terms of an Act of Parliament, the supremacy of the

Instruments in the Namibian Legal Framework’ in Nico Horn and Anton Bösl (eds), *Human Rights and the Rule of Law in Namibia* (Macmillan 2009) 166; John Dugard, *International Law: A South African Perspective* (Juta 2011) 42.

⁵² Dugard (n 51) 42; Starke (n 51) 66, arguing that in case of conflict between international law and municipal law, the court must apply municipal law.

⁵³ Onkemetse Tshosa, ‘The Status of International Law in Namibian National Law: A Critical Appraisal of the Constitutional Strategy’ (2010) 2 Namibian LJ 5.

⁵⁴ Michelle Barnard, ‘Legal Reception in the AU against the Backdrop of the Monist/Dualist Dichotomy’ (2015) XLVIII CILSA 154, stating that in the monist system, international law is superior to national law, thus national law should always conform to the requirements of international law.

⁵⁵ Yvonne Dausab, ‘International Law vis-à-vis Municipal Law: An Appraisal of Article 144 of the Namibian Constitution from a Human Rights Perspective’ in Anton Bösl, Nico Horn and André du Pisani (eds), *Constitutional Democracy in Namibia: A Critical Analysis after Two Decades* (Macmillan 2010) 266; Tshosa (n 53) 11; Devine (n 50) 301.

⁵⁶ Devine (n 50) 301.

will of the people, as expressed by the Namibian legislature. The OPSC is an international agreement, and as such, automatically forms part of Namibian law. As neither the Constitution nor an Act of Parliament states anything to the contrary, there is no limitation to the principle of direct applicability regarding the OPSC.

One might argue that such a direct application of international law circumvents the role of the National Assembly as primary legislative organ as set out in article 63(1) of the Namibian Constitution. However, it must be noted that the National Assembly has the power and function in terms of article 63(2)(e) of the Constitution to decide whether to accede to international agreements and to agree to the ratification of or accession to international agreements which have been negotiated and signed by the President. Hence, the will of the people is duly reflected in the treaties ratified by the state.

The position that, according to article 144, international law forms automatically part of Namibian law, has been confirmed in Supreme Court decisions. In *S v Mushwena and Others*⁵⁷ the Court ruled:

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

In *Government of the Republic of Namibia & Others v Mwilima & Others*,⁵⁸ the court ruled:

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

⁵⁷ SA4/04, SA4/04 [2004] NASC 2 (21 July 2004).

⁵⁸ AHRLR 127 (NASC 2002).

The *Mwilima* case shows that, in case the domestic legal framework does not provide sufficient protection for a citizen, due consideration should be given to international law to close this gap.⁵⁹

Direct Applicability of International Criminal Law in Namibian Courts and the Fair-Trial Principles of Article 12 of the Namibian Constitution

Even though the above-cited case law confirms the direct applicability of international treaties in the domestic legal framework, it has to be acknowledged that these court decisions are dealing with human rights treaties which aim to unconditionally strengthen the legal position of rights holders.

However, it must be taken into account that the criminal law elements of the OPSC might lead to a different assessment. While criminal law provisions, whether derived from international or national law, aim to protect the rights of the victim, they limit the rights of the accused: the accused stands the risk of being convicted, followed by deprivation of liberty or the obligation to pay a fine. Because of this subsequent effect of limiting the rights of the accused during criminal procedure, the OPSC can only be directly applied in Namibian courts, if such an application does not lead to a violation of the rights of the accused, in particular the fair-trial principles laid out in article 12 of the Constitution.

Article 12 guarantees all persons the right to a fair trial. Particularly important for the question at hand is article 12(3), which states:

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

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

With regard to the criminalisation of the distribution and possession of online child sexual abuse material, there are two potential legal grounds constituted under the CCPA and the OPSC. However, both provisions face potential shortfalls. While the CCPA as an Act of Parliament contains both a catalogue of offences and a prescribed penalty, it

⁵⁹ Dausab (n 55) 283.

only criminalises the production of ‘child pornography’. On the other hand, the OPSC provides a definition and a complete catalogue of offences but lacks a penalty provision. In order to have a complete ‘set’ which meets the fair-trial requirements set out in article 12, both provisions need to be combined. Therefore, the crucial question is: will article 2 and 3 of the OPSC be read in conjunction with section 234 of the CCPA, or vice versa?

Excursus: Lessons from the DRC and Rwanda

In order to answer this complex question, it is useful to explore how other countries in the region have dealt with similar legal constellations. As no other country in the African region has discussed this issue specifically with regard to online child sexual abuse material, we propose to draw a comparison to the prosecution of genocide and crimes against humanity in the aftermath of the atrocities committed in the DRC and Rwanda. As it is not primarily relevant which criminal offence, but rather that a criminal offence based on international law has been leveraged to strengthen the national legal framework, we believe that such a comparison is appropriate and relevant to guide the Namibian approach to the direct applicability of international criminal law. This is in particular important regarding the balancing of such a direct application against fair-trial principles.

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

Case Law from the DRC

From 1998 to 2003, the Democratic Republic of the Congo (DRC) was consumed by a regional conflict that has also been labelled ‘Africa’s World War’.⁶⁰ Starting off with the genocide committed against the Tutsi population in Rwanda,⁶¹ a total of eight different African countries were involved on opposite sides of the conflict.⁶² During this period, widespread and systematic human-rights violations took place, including widespread sexual violence against women, men and children. Millions of Congolese

⁶⁰ Dunia Zongwe, ‘Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo’ (2013) 26 *Israel LR* 249.

⁶¹ Milli Lake, ‘Ending Impunity for Sexual and Gender-Based Crimes: The International Criminal Court and Complementarity in the Democratic Republic of Congo’ (2014) 4 *African Conflict and Peacebuilding Review* 8.

⁶² Zongwe (n 60) 249.

civilians lost their lives in atrocities committed by both rebels and members of the DRC army.⁶³

The DRC ratified the Rome Statute on 11 April 2002.⁶⁴ Since 1994, the DRC follows a monist system, ie international treaties form part of the national legal framework upon ratification.⁶⁵ Against this background, it is clear that the Rome Statute, upon ratification in 2002, became immediately part of the national legal system. At the time atrocities such as war crimes and crimes against humanity were committed, the domestic legal framework in the form of the Military Code and the Criminal Code only regulated these kinds of offences in a fragmented way.⁶⁶

One of the first cases which leveraged the Rome Statute was the *Songo Mboyo* case,⁶⁷ also referred to as *Eliwo* case,⁶⁸ in which the courts applied the Rome Statute for the first time to convict soldiers of mass rape and sexual violence as crimes against humanity.⁶⁹ The court made use of the Rome Statute's definition of crimes against humanity with regard to rape, as it is clearer and more comprehensive than the offence

⁶³ *ibid.*; Lake (n 61) 8–9; for a more detailed description on the history of the conflict, see Rebecca Bowman, 'Lubanga, the DRC and the African Court: Lessons Learned from the First International Criminal Court Case (2007) 7 African Human Rights LJ 414 *et seq.*

⁶⁴ See full list of signature/ratification/accession status of Rome Statute here: <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en> accessed 19 February 2019.

⁶⁵ Ovo Catherine Imoedemhe, *The Complementarity Regime of the International Criminal Court: National Implementation in Africa* (Springer 2017) 96; see art 112 of the Constitutional Act of Transition (1994), art 193 of the Transitional Constitution of the Democratic Republic of Congo of 4 April 2003, art 215 and 216 of the Constitution of the Democratic Republic of Congo of 18 February 2006: 'Duly concluded international treaties shall, upon publication, prevail over Acts of Parliament', as translated in Zongwe (n 60) 254; similar translation in Avocats sans Frontières, 'Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo' (March 2009) para 115 <https://asf.be/wp-content/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf> accessed 24 February 2019; original text in French: 'Les traités et accords internationaux régulièrement conclus ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque traité ou accord, de son application par l'autre partie' <<https://www.wipo.int/edocs/lexdocs/laws/fr/cd/cd001fr.pdf>> accessed 24 February 2019.

⁶⁶ Imoedemhe (n 65) 96–97.

⁶⁷ Mbandaka Military Garrison Court, RPA 615/2006 (12 April 2006), French version available at <https://www.droitcongolais.info/files/4.30.-TMG_BDK,-Jgt-du-12-avril-2006,-complot-militaire.pdf> accessed 24 February 2019.

⁶⁸ Songo Mboyo is the name of the location where the crimes were committed, whereas Eliwo Ngoy is the name of the first accused, see Mbandaka Military Garrison Court *ibid.*

⁶⁹ International Center for Transitional Justice, 'Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court' (May 2014) <<http://www.ictj.org/sites/default/files/ICTJ-DRC-Impact-ICC-2010-English.pdf>> accessed 24 February 2019.

under national law.⁷⁰ Furthermore, the application of the Rome Statute also allowed the court to impose sentences as set out under Article 77 of the Rome Statute, thereby avoiding the death penalty as stipulated under domestic law.⁷¹

Other cases, such as the *Massabo* case,⁷² used the Rome Statute to complement domestic law provisions which lacked sanctions. Under the Military Penal Code, the war crime offence did not contain a sentence.⁷³ In order to fill this ‘omission’ in the Military Penal Code, the courts in *Massabo* simply applied the sentence as set out in Article 77 of the Rome Statute.⁷⁴ Being mindful of the principle of legality and the potential implications of applying the Rome Statute as a sentencing guideline, the *Massabo* court clearly stated: ‘the ratification by the DRC of the [Rome] Statute included it as part of the arsenal of laws of the DRC subject to the primacy of international law and in accordance with the monist legal tradition.’⁷⁵

Case Law from Rwanda

Rwanda faced tremendous challenges after the genocide to prosecute perpetrators in domestic courts, particularly due to a highly fragmented legal framework.⁷⁶ Genocide, crimes against humanity and war crimes did not form part of the Penal Code during the time these offences were committed on a large scale in Rwanda.⁷⁷

Criminalising these offences after they had been committed would have violated the principle of legality, as the law would have been considered *ex post facto* legislation.⁷⁸ In order to avoid the violation of such a key element of the *nulla poena sine lege* doctrine, which is enshrined in the 1991 Constitution,⁷⁹ the Government leveraged the

⁷⁰ Imoedemhe (n 65) 98.

⁷¹ Zongwe (n 60) 261.

⁷² This case is also referred to as the *Bongi* case. The differing case names originate from the full name of the accused ‘Blaise Bongi Massabo’, as retrieved from the full case citation in Zongwe (n 60) 262 fn 85.

⁷³ *ibid* 264–265: the *Massabo* court only applied Art 77 of the Rome Statute out of concern for a potential violation of the principle of legality, arguing that the Military Penal Code only includes a generic sentencing provision.

⁷⁴ *ibid* 264; *Avocats sans Frontières* (n 65) para 18.

⁷⁵ Patryl Labuda, ‘Applying and ‘Misapplying’ the Rome Statute in the Democratic Republic of the Congo’ in Christian de Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge 2015) 424; *Avocats sans Frontières* (n 65) para 18.

⁷⁶ Jean Bosco Mutangana, ‘Domestic Justice Mechanisms: Perspectives on Referred Cases to Rwanda’ (Paper presented at the International Symposium on the legacy of the ICTR, November 2014) 3 <<http://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/v-domestic-justice-mechanisms-mutangana.pdf>> accessed on 3 March 2019.

⁷⁷ *ibid*.

⁷⁸ *ibid*.

⁷⁹ See art 12(3).

1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).⁸⁰ With Rwanda following a monist system, the Genocide Convention formed part of the Rwandan domestic legal framework since its ratification by Rwanda on 12 February 1975.⁸¹

In order to bridge the gap between the Rwandan Penal Code, which only criminalises constitutive acts, and the Genocide Convention, which clearly defines genocide and crimes against humanity, but lacks penalties for these offences, Rwanda enacted the Organic Law 08/1996 of 1996 on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity committed since 1 October 1990⁸² (Organic Law). Article 1 of the Organic Law came up with the so-called dual incrimination approach.⁸³ This approach acknowledges that any prosecutions must be based on the offences and their penalties set out in the Rwandan Penal Code,⁸⁴ but should allow for an ‘upgrade’ on both the categorisation of offences and the sentence. In a first step, the judges assess whether the conduct constitutes an offence under the Penal Code. In a second step, the judges determine whether the conduct simultaneously constitutes the crime of genocide or a crime against humanity under the Genocide Convention.⁸⁵ In such a case, the penalties set in the Penal Code apply, except that they are aggravated depending on the level of involvement of the accused in the act of genocide or crimes against humanity.⁸⁶ This shows that the prosecution of perpetrators of genocide or crimes against humanity is primarily based on the Rwandan Penal Code, which is then modified based on international law.⁸⁷

⁸⁰ Sam Rugege and Aimé Karimunda, ‘Domestic Prosecution of International Crimes: The Case of Rwanda’ in Gerhard Werle, Lovell Fernandez and Moritz Vorbaum, *Africa and the International Criminal Court* (Springer 2014) 86–87.

⁸¹ According to Article 5 Genocide Convention, ‘Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.’ Because of this explicit wording in the Genocide convention, the Convention cannot—even in monist countries—be considered self-executive [William Schabas, *Genocide in International Law. The Crime of Crimes* (Cambridge 2009) 405; Jan Wouters and Sten Verhoeven, ‘The Domestic Prosecution of Genocide’ Leuven Centre for Global Governance Studies Working Paper No 55 (2010) 4].

⁸² Available at <<https://www.refworld.org/docid/3ae6b4f64.html>> accessed 4 March 2019.

⁸³ Mutangana (n 76) 4; Rugege and Karimunda (n 80) 86 *et seq.*

⁸⁴ See clear references to the Penal Code in art 1 and art 14 of the Organic Law.

⁸⁵ See art 1 of the Organic Law; Rugege and Karimunda (n 80) 87.

⁸⁶ See art 14 of the Organic Law; Pietro Sullo, *Beyond Genocide: Transitional Justice and Gacaca Courts in Rwanda* (Springer 2018) 105.

⁸⁷ This approach has yielded mixed results in practice [Rugege and Karimunda (n 80) 87]: In some cases, such as *Prosecutor v Ukezimpfura Jean and Others* or *Prosecutor v Myumbahe Denys and Others*, the courts correctly applied both international law and domestic legislation to argue their case. However, in other cases such as *Prosecutor v Hanyurwimfura Epaphrodite* and *Prosecutor v Karorero Charles and Others*, the courts based their charges mainly on domestic law, without properly acknowledging

Lessons for Namibia

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

In the Congolese case *Songo Mboyo*,⁸⁸ the definition of the crimes in the national legal framework was complemented by the Rome Statute, whereas in *Massabo*⁸⁹ the range of sentences contained in the Rome Statute was used to complement the definition of war crimes in national legislation. Rwanda based the prosecution of the *génocidaires* on the Rwandan Penal Code, while leveraging international law to expand its scope of application with regard to the criminalised conduct through the Organic Law. This approach ensures that the Rwandan interest in the prosecution of the *génocidaires* is balanced against rule of law considerations.

This shows that neither in the DRC nor in Rwanda the prosecution based its case solely on international criminal law—national legislation was always used as a basis for either the elements of crime, the range of sentence, or—in the case of Rwanda—even both. Therefore, international criminal law played a complementary, rather than a constituting role, filling in the gaps of the national legal framework.

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

Interpreting the CCPA in light of the OPSC

In order to expand its catalogue of offences, section 234 of the CCPA could be interpreted in light of the OPSC. This would have the advantage that the criminalisation is rooted in national legislation, with international law only expanding the range of applicability. In both the DRC and the Rwandan contexts, courts have emphasised the importance of basing their judgment on domestic law, which is then interpreted and expanded in light of and in line with international law. However, the disadvantage is that the wording of section 234 of the CCPA is excessively stretched to accommodate

the construct of the dual incrimination approach set out in the Organic Law, potentially leading to a violation of the principle of legality.

⁸⁸ See (n 68).

⁸⁹ See (n 73).

the possession and dissemination of online child sexual abuse material. The other option is to base the criminalisation on the OPSC, and ‘merge’ the definition and the catalogue of offences of the OPSC with the penalty provisions of section 234 of the CCPA. This has the advantage that both the definition and catalogue of offences of the OPSC broadly criminalise the production, possession and dissemination of online child sexual abuse material, but poses challenges with regard to the rule of law, as such a merger had initially not been foreseen by the legislator.

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

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

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

Furthermore, section 2(2) states:

The objects referred to in subsection (1) must be given due consideration in the interpretation and application of any provision of this Act.

Therefore, section 2(1)(c) evidently endorses the status of international law such as the OPSC and stresses that the CCPA aims to give effect to such international treaties. In section 2(2) it becomes clear that international treaties must be given due consideration in the interpretation and application of any provision of the CCPA. The will of the legislator hence clearly endorses the interpretation of the CCPA in light of international law, and therefore legitimises the interpretation of section 234 of the CCPA in light of the OPSC. This means that the term ‘child pornography’ in the CCPA can be defined in line with Article 2 of the OPSC, and that the catalogue of offences as set out in section 234 of the CCPA could be expanded to the distribution and possession of ‘child pornography’ material as stipulated in Article 3(1)(c) of the OPSC. As the CCPA itself calls for an interpretation in light of international law, and the OPSC forms part of the

domestic legal system, such approach is compatible with the *nullum crime sine lege* requirement in article 12 of the Namibian Constitution.

However, some would submit that the fact that the legislator did not use the opportunity to draft section 234 in line with the OPSC was a deliberate decision, and that the legislator intended to only criminalise the creation of child sexual abuse material, and not possession and dissemination. Following this line of argument, interpreting section 234 in light of and in line with the OPSC would clearly go against the will of the legislator. The authors would strongly disagree with such an interpretation and submit that the lack of a comprehensive ‘child pornography’ provision is a mere oversight of the legislator. It has to be noted that the Government of the Republic of Namibia only put child online safety concerns on the political agenda from 2016 onwards,⁹⁰ and that the text of the CCPA was largely developed well before that. Given that an object of the Act, as mentioned above, is to give effect to international conventions concerning the well-being of children, it is submitted that the interpretation of section 234 is not contradicting the will of the legislator.

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

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

Conclusion

This article is an attempt to show how international law can be leveraged to strengthen the national legal framework on online child sexual abuse material in monist systems, using Namibia as a case study. With the strong position of international law in the Namibian Constitution, this article advocates for putting international law to action, to ensure that the rights of all people, in particular the most vulnerable ones such as

⁹⁰ See for example the development of the UNICEF study (n 28).

children, are duly protected. With the legislative reform process being long and complex on national level, particularly in the field of cybercrime, countries struggle to enact child rights-based legislation in the emerging field of online child sexual abuse. Therefore, international law plays an even more important role in this area, as its direct application can increase the protection of children from all forms of online and offline sexual abuse.

However, in the case of Namibia, the authors submit that this solution is just temporary, and that strong national legislation on online child sexual abuse is still required, ‘on top’ of the CCPA and OPSC. Even though the application of section 234 of the CCPA in conjunction with the OPSC closes a legal loophole, it must be acknowledged that the definition of ‘child pornography’ in Article 2 of the OPSC⁹¹ as well as the catalogue of offences set out in Article 3 face limitations. First, Article 3 only criminalises possession of child sexual abuse material if it is for the purpose of further disseminating, selling or offering the material (‘possessing for the above purposes’), but not if the material is possessed solely for private use.⁹² Second, the OPSC does not criminalise accessing online child sexual abuse material, if the material is not downloaded and hence not in the ‘possession’ of the recipient.⁹³ As mentioned earlier, the accessing of child sexual abuse material through live-streaming services is an emerging trend, which requires urgent legislative response. This shows that law reform in Namibia is still required in the long run, in order to close current loopholes in the OPSC and to keep up with emerging trends in this field.⁹⁴

⁹¹ For an in-depth discussion on deficits in the definition of Article 2 of the OPSC with regard to virtual ‘child pornography’, see Sabine Witting, ‘The “Greyscale” of “Child Pornography”: Of Mangas, Avatars and School Girls: Part 1’ (2018) 3 Computer and Telecommunications LR 64, and UNICEF Namibia, *Regulation* (n 34) 12–13.

⁹² Sabine Witting, ‘Child Sexual Abuse in the Digital Era — Rethinking Legal Frameworks and Transnational Law Enforcement Collaboration’ (DPhil thesis, University of Leiden 2020) 19–20. Encouraging the state parties to nevertheless criminalise the mere possession of online child sexual abuse material, Najat M’Jid Maalla, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, 07/2009 (UN Doc. A/HCR/12/23) 9.

⁹³ UNICEF Namibia, *Regulation* (n 34) 12–13.

⁹⁴ For concrete proposals on legislative reform in the Namibian context, see UNICEF Namibia, *Regulation* (n 34) 32 *et seq.*

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