

# Regulation of Child Online Sexual Abuse

## Legal Analysis of International Law & Comparative Legal Analysis



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# Regulation of Child Online Sexual Abuse

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ACPA	Anti Child-Pornography Act of 2009
ACRWC	Africa Convention on the Rights and Welfare of the Child
ACCS	African Union Convention on Cyber Security and Personal Data protection
APA	Anti-Pornography Act 2014
AYC	African Youth Charter
BC	Budapest Convention
CCA	Cybercrime and Computer Related Matters Act 2007
CCPA	Child Care and Protection Act, No. 3 of 2015
CLAA	Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007)
CMA	Computer Misuse Act, 2011
CRC	Convention on the Rights of the Child
ETCB	Electronica Transactions and Cybercrime Bill
EU	European Union
FPA	Film and Publications Act (Act 65 of 1996)
ICTs	Information and Communications Technology
ILO	International Labor Organization
ITU	International Communication Union
LC	Lanzarote Convention
OPSC	Optional Protocol on sale of children, child prostitution and child pornography
PA	Publications Act, No. 42 of 1947
SADC	Southern African Development Community
StGB	Strafgesetzbuch (German Penal Code)

I am pleased to present Namibia's first comprehensive research study on legislative reform in the field of Child Online Protection: "Regulation of Child Online Sexual Abuse – Legal Analysis of International Law and Comparative Legal Analysis". This research study addresses legal issues around child online protection and the herewith related risk of becoming a victim of online sexual exploitation, in particular child pornography or online grooming.

The research study "Regulation of Child Online Sexual Abuse – Legal Analysis of International Law and Comparative Legal Analysis", was developed through a combination of desk research and consultations with stakeholders in Namibia and neighbouring countries including South Africa.

Funded through the generous support from the UK Government, this research is an important milestone in the legal analysis on the emerging online dimension of sexual exploitation and abuse of children, a largely unexplored legal territory in most countries around the world.

The study addresses the legal gaps on child online sexual exploitation and abuse, and provides a comprehensive look into the latest trends in legislative reform in this field, the developing international standards and national legislative progress in selected countries across the world.

The report serves as a supplementary guideline for lawmakers in Namibia and the world and guide legislative reform on child pornography and grooming offences online.

Through reviewing various international and regional instruments, such as the UN Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the African Charter on the Rights and Welfare of the Child, the research provides an insight into the opportunities and challenges in regulating the complex and rapidly developing field of child online sexual exploitation and abuse, looking closely at international definitions on child pornography and grooming and the related catalogue of offences.

We know online child sexual abuse is a global problem which requires global solutions. It is therefore imperative for national legal frameworks to be aligned with international standards and the regulations of other countries in order to facilitate transnational collaboration and prosecution. Regulations in place in South Africa, Botswana, Philippines, Uganda, Germany and Canada have been closely reviewed.

The report provides recommendations on how to regulate child online sexual offences and suggests on the potential law that could be used to incorporate key elements and the catalogue of offences.

As the Government of the Republic of Namibia is in the process of drafting the Electronic Transactions and Cybercrime Bill, with a specific provision on online child sexual exploitation and abuse (e.g. child pornography), the recommendations in this research study will help guide the scope of these provisions as well as the catalogue of offences. It is hoped that this will lead to the drafting of innovative legislation which is in line with the highest international standards, while always reflecting and taking into account the Namibian context.

It is our collective hope that the findings herein will assist Namibia to put in place the type of legislation that will allow Namibia's children to use the Internet wisely and safely without fear of online sexual exploitation and abuse.



Micaela Marques de Sousa  
UNICEF Namibia Country Representative

Since the penetration of telecommunications technology became a reality in Namibia, access and usage of information based devices such as computers and cell phones, has increased tremendously.

While only 6.5 % of the population was using the internet in 2009, statistics based on International Telecommunication Union ITU estimate show a marked increase in usage to about 15 % in 2014. The Government of the Republic of Namibia has made digital connectivity one of its national goals in the Harambee Prosperity Plan, with 80% of the population of Namibia and 80% of all primary and secondary schools to be covered by broadband services by 2020.

Information based technologies have yielded enormous positive potential for Namibians, in the way people conduct their social and economic lives, and yet these technologies are posing great threats to the safety of children – both online and offline. A recent survey found that in Namibia, only 7% of children do not have access to the Internet or a feature phone. This opens up a world of possibility for them, but also puts them at potential risk of harm, including cybercrimes affecting children.

Taking advantage of the possibility to conceal true identities and locations, cybercriminals access personal information including name, age, home address and bank details that children provide online. Among these criminals, perpetrators of child sexual abuse and exploitation regularly use online forums to lure children into child pornography and sexual grooming activities. In addition, children themselves put them and others at risk by posting and sharing information and pictures that are meant to stay private.

The Government of the Republic of Namibia has recognised the need to bring these perpetrators to justice and ensure the protection of children from harm. Legislative reform is an important first step towards this and the development the Draft Electronic Transactions and Cybercrime Bill is one of the first major step to achieve this.

This important legislative framework is tailored to prevent and respond to the different forms of cybercrimes through measures such as the prosecution of predators both nationally and internationally.

The Draft Electronic Transactions and Cybercrime Bill, which has been drafted under the leadership of the Ministry of Information and Communication Technology and being finalised by the Ministry of Justice, will include a provision on online child pornography. This provision is closing gaps in the current legislative framework in Namibia and provides for a comprehensive provision on child pornography that does not only criminalise the production, but also the possession and accessing of child pornography content. The current draft provision has been broadly informed by this report.

This report presents key recommendations on the urgent and decisive actions needed to prevent and address issues related to the violations of children's rights via internet. The recommendations are informed by in-depth analysis of various international and regional instruments such as UN Convention on the Rights of the Child (CRC), the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OPSC), the ILO Convention No. 182 (Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour), the African Charter on the Rights and Welfare of the Child (ACRWC) and the African Youth Charter (AYC).

A comparative legal analysis of six countries, namely South Africa, Botswana, Philippines, Uganda, Germany and Canada, has also been done to guide the development of this model legislation. Therefore, Namibia's legislation can serve as a role model for legislative drafting in this field in Africa and beyond.

Combating child online sexual abuse requires the collaboration of a broad variety of stakeholders, and can only be accomplished when everyone contributes its share. The legislative reform forms part of broader reform to protect children from online sexual exploitation and abuse as part of the #WeProtect Children Online Initiative, spearheaded by the Ministry of Information and Communications Technology, the Ministry of Gender Equality and Child Welfare, the Ministry of Justice and the Ministry of Safety and Security, UNICEF, partners from the civil society and the telecommunications companies, with funding support from the Government of the United Kingdom.

The recommendations being made through this analysis, are an encouraging start to pursue legal reform in this emerging child protection risk, and create a future in which Namibian children are safe online and can benefit from the positive elements that the internet has to offer.



Mr. Mbeuta Ua-Ndjarakana  
Permanent Secretary  
Ministry of Information and Communication Technology

## Introduction and Problem Statement

This Legal Analysis provides a series of recommendations on how to address the legislative gaps and weaknesses in the current legislative framework dealing with online child pornography and grooming in Namibia.

Emerging issues in the field of child protection are closely connected to the rise in accessibility and usage of information and communication technologies (ICTs). The use of technology and the accessibility to internet services have increased worldwide. There is an acknowledgement of the need to address the upcoming dangers related to technology which impose new risks for the exploitation and abuse of children, as perpetrators exploit the use of modern communication technologies to facilitate child sexual abuse. Therefore, states have to develop tailor-made instruments to tackle the specific dangers related to the use of ICTs by children.

An exploratory research study on knowledge, attitudes and practises of ICT use and online protection risks by adolescents in Namibia<sup>1</sup> conducted in 2016 showed that 68% of respondents reported having seen sexual content they did not wish to see, while 31% had been sent sexually explicit images of people they didn't know, and 29% had seen child sexual abuse material online. These findings reveal that violence and exploitation of children in Namibia frequently have an online component and contribute to creating an unsafe environment for children.

Even though the data findings are alarming, there is currently no legislation in place in Namibia which comprehensively criminalises child pornography. The aim of this legal analysis is therefore to identify the international standards in this field, what Namibia can learn from other countries and which recommendations can be made, taking into account the context of Namibian legislation. Therefore, the recommendations on the regulation of child pornography and grooming are in line with the highest international standards and take into account challenges encountered and lessons learnt in other countries. The recommendations aim to inform current legislation under development in the field of online child pornography and grooming.

## International Law

Namibia has signed and ratified various international instruments, which compel states to take action to protect children from various forms of exploitation. Namibia is member state to the UN Convention on the Rights of the Child (CRC)<sup>2</sup>, the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OPSC)<sup>3</sup>, the ILO Convention No. 182 (Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour)<sup>4</sup>, the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>5</sup> and the African Youth Charter (AYC)<sup>6</sup>.

Most relevant for the regulation of child pornography is the OPSC, which provides for a comprehensive definition of 'child pornography' and a broad catalogue of offences. However, the definition does not cover

<sup>1</sup>Government of the Republic of Namibia/UNICEF, *Exploratory research study on knowledge, attitudes and practices of ICT use and online protection risks by adolescents in Namibia, 2016.*

<sup>2</sup>Ratified on 30 Sep 1990.

<sup>3</sup>Ratified on 16 Apr 2002.

<sup>4</sup>Ratified on 15 Nov 2000.

<sup>5</sup>Ratified on 23 Jul 2004.

<sup>6</sup>Ratified on 17 Jul 2008.

virtual child pornography or the case in which the actor is made to appear to be a minor. Furthermore, the mere possession of child pornography without the intention of using the material for the purposes of producing, distributing, disseminating, importing, exporting, offering or selling the material are not covered by the provision. The OPSC also does not criminalise accessing child pornography material without downloading it.

These gaps in both definition and catalogue of offences have been addressed in the Council of Europe Convention on Cybercrime ('Budapest Convention') and the Council of Europe Protection of Children against Sexual Exploitation and Sexual Abuse ('Lanzarote Convention'). Even though these instruments have not been signed/ratified by Namibia, they provide valuable guidelines to harmonise and apply an internationally comparable standard to national legislation. This is particularly significant as cybercrime tends to be a transnational crime, and state parties are dependent on international collaboration in order to guarantee comprehensive investigation and prosecution of these crimes. This collaboration is significantly easier when the national legislation is harmonised and aligned with international standards.

The Lanzarote Convention is also the only regional instrument that is tackling the emerging problem of 'sexting' between minors in relation to child pornography offences. The term is a combination of the words 'sex' and 'texting' and concerns the digital recording of sexually suggestive or explicit images and texts and distribution thereof by cell phone messaging, internet messenger, social networks et al. The consensual sharing of nude or semi-nude pictures between minors can be subsumed under the child pornography provision, this has resulted in children in some countries being prosecuted as child pornography offenders. Such a prosecution has to be avoided as it does not serve the best interest of the child, which is always the guiding principle in the field of child protection. The child pornography provisions are intended to protect children from sexual exploitation by adults,

not vilify or turn them into sex offenders. The Lanzarote Convention introduces an exemption clause for the cases in which minors who have reached the age of consent are possessing or producing child pornography with their consent and only for private use. This exemption clause allows for a full exemption of minors with regard to consensual sexting but also does not create a loophole for perpetrators and hence provides for a practicable solution to the problem of 'sexting' between minors.

Therefore, the definition and the catalogue of offences of the OPSC should be complemented by the regulation in the Budapest Convention and the Lanzarote Convention.

With regards to grooming, Art 23 Lanzarote Convention and Art 6 EU Directive on Child Exploitation 2011/92/EU provide for a model legislation. Although both instruments are not binding for Namibia, they can serve as best practices for the regulation of this online offence. Both instruments criminalise the grooming of children via ICTs in order to engage in sexual activities with a child who has not reached the age of sexual consent or for the production of child pornography. Furthermore, it is required that there has to be any material act leading to an actual meeting. Only if this stage is passed, the act is considered as a grooming offence.

## Comparative Legal Analysis

In order to identify challenges and bottlenecks with the regulation of child pornography and grooming in other countries, the legal analysis also took into account the legislation of six countries. The countries focused on for the comparative analysis are South Africa, Botswana, Uganda, the Philippines, Germany and Canada. These countries have been selected with regard to their progressive and comprehensive legislation in the area of child pornography and grooming and partly because of their comparable socio-economic level.

With regards to the definition, the legislation in South Africa and Germany provides the highest standards as it is in line with OPSC, Budapest Convention and Lanzarote Convention, but also criminalises erotic posing (nude or semi-nude pictures in sexually suggestive postures but not showing the genitals of the child). In South Africa, Botswana and the Philippines, besides the actions criminalised under the OPSC, the mere possession and accessing of child pornography material is considered an offence.

This comparative legal analysis shows that some countries are exceeding the standards of the OPSC, even though most of them (except for Germany) are not bound by the higher protection standards of the Lanzarote and the Budapest Convention.

With regard to the problem of 'sexting' between minors, only Germany tackles this issue by introducing an exemption clause aligned with the Lanzarote Convention and hence serves as best practice for the drafting process in Namibia. As there has been a broad discussion about the exact wording of the exemption clause in Germany, this discussion can be leveraged to inform the draft legislation in Namibia.

With regard to grooming, the comparative analysis of South African, Philippine and German legislation shows that in contrast to the Lanzarote Convention, no 'material act leading to such a meeting' is required.

As stated above, it is crucial to align the legislation in the field of cybercrime with other countries in order to facilitate the transnational prosecution process. Therefore, the comparative legal analysis provides for best practices that Namibia should take into account with regards to new legislation.

## Gap Analysis of Namibian law

The only legislation directly addressing child pornography is the Child Care and Protection Act, No. 3 of Act. Even though the Act is criminalising child pornography, the provision is not sufficient and not consistent with international law. The CCPA does not define the term "child pornography". The provision itself is too narrow as it only criminalises the creation of child pornography and various support actions to the creation of child pornography, but fails to criminalise distributing, disseminating, importing, exporting, offering, selling and possessing of child pornography.

With regards to grooming, section 14 (c) of the Combating of Immoral Practices, Act 21 of 1980, criminalises solicitation of children under specific circumstances. Even though it is not specifically mentioning grooming via ICTs, the provision is broad enough to also be applicable in the online space. The wording is comparable to the legislation in South Africa, the Philippines and Germany and hence does not require 'a material act leading to such a meeting'.

Especially in the field of child pornography, there is a significant gap in the current legislation. As the provision in the Child Care and Protection Act does not live up to the minimum standards of the OPSC, Namibia is violating its international obligations in this field. As Namibia is currently developing legislation on cybercrimes, it is now an opportune time to draft a legislation which does not only meet the mandatory international standards, but also considers best practices from other legislations and regional convention.

## Recommendations for Namibia

The recommendations for Namibia with regard to the criminalisation of child pornography are structured in Definition, Catalogue of Offences and Exemption Clause:

The definition of the term child pornography should include the following components:

- **Material:** Any depiction, no limitation to visual depiction;
- **Subject:** Minors (definition of "child"), virtual pornography, persons made to appear to be minors;
- **Conduct:** real or simulated sexually explicit conduct, depiction of the sexual parts of a child for primarily sexual purposes, nude or semi-nude depiction of a child in an unnatural or sexually suggestive posture.

The Catalogue of Offences should include the following components with regard to child pornography:

- Producing;
- offering or making available;
- distributing or transmitting;
- procuring for oneself or for another person;
- possessing;
- knowingly obtaining access.

An exemption clause with the following components has to be included in the legislation:

- Possession and production of child pornography;
- Minors who have reached the age of consent are involved;
- Content possessed and produced with their consent and only for private use.

With regard to grooming, solicitation children via ICTs might have to be incorporated either in the respective provision in the Combating of Immoral Practices Act or in the Draft Electronic Transactions and Cybercrime Act. In this case, also the alignment of the provision with the Lanzarote Convention should be considered in order to avoid the already debated problems arising from the omission of the element 'a material act leading to such a meeting'.

## A. Rationale and background

As technology is on the rise and the accessibility to internet services has increased tremendously worldwide over the last 15 years, there has been an emerging need to address upcoming dangers related to technology, imposing new risks for the exploitation and abuse of children. The adoption of modern communication technologies has brought about a steep increase in child online sexual abuse. The emerging online risk for children require states to put in place measures related to the use of Information and Communication Technologies (ICTs) by children. By ratifying international treaties for the (online) protection of children's rights, Namibia has committed to fulfil and implement these international obligations in order to provide universal and comprehensive protection for all children in Namibia.

The number of individuals using the internet in Namibia has increased significantly over the last 5 years. In 2009, only 6.5 % of the Namibian population was using the internet while it is already 14.84 % in 2014 (ITU estimate).<sup>7</sup> Due to the increased usage of ICTs, especially via mobile phones, wireless internet and cybercafés, children are more and more in contact with the online world in Africa. African children are becoming common users of the internet and ICTs and are therefore exposed to online specific risks. The risk for online exploitation increases especially for children which are already vulnerable due to their unstable situation within family and society. An exploratory research study on knowledge, attitudes and practises of ICT use and online protection risks<sup>8</sup> conducted in 2016 in Namibia showed that only 7% of the children surveyed have never accessed the internet. 68% of children surveyed, reported having seen sexual content online, which they did not wish to see. 31% of the surveyed children had received sexually explicit images of people they did not know, and 29% had seen child pornography content.<sup>9</sup> In total, only 47% of children reported that they spoke to their parents/caregivers about their online experiences, and what they do online. This reveals that also in the online world, violence and exploitation of children is a striking problem in Namibia.

Effective child online protection requires tailor-made instruments in order to meet the specific dangers of ICTs and internet usage. In contrast to the offline world, there are specific online aspects which aggravate the vulnerability of children: persistence, searchability, replicability, and invisible audiences.<sup>10</sup> As all network activities are recorded and content that was put online once is difficult to be utterly removed, the persistence of this content imposes the risk of repeated violation of children's rights and makes it more difficult for victims to psychologically close the chapter of abuse. Furthermore, internet search tools make it easier to find prohibited or abusive content. Also specific persons can be found easily online and be targeted by perpetrators. The replicability of prohibited or abusive content imposes an additional psychological burden on child victims. Especially for victims of child pornography it is very difficult to move on as they know that the abusive content has probably been shared and copied many times and is therefore still accessible for other perpetrators: the abuse will always continue.<sup>11</sup> The invisibility of the audience imposes a high risk for children with regard to online communication but also to a successful prosecution of perpetrators. The online sphere provides anonymity which emboldens offenders. Possible Perpetrators perceive their online activities as less risky than offline behaviour because they believe there is less of a chance that law

<sup>7</sup> ITU Data available: <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.

<sup>8</sup> Government of the Republic of Namibia/UNICEF, *Exploratory research study on knowledge, attitudes and practices of ICT use and online protection risks by adolescents in Namibia, 2016*.

<sup>9</sup> Globally there is a debate on the term "child pornography" as opposed to the more broadly accepted term "child sexual abuse material". Child pornography may create the impression that "pornography" and "child pornography" are closely related and hence implies that the child could give consent to "child pornography". However, "child pornography" is always considered child abuse material and therefore no consent can be given. Nevertheless, in international law and also in many national legislations, the term "child pornography" is still prevalent. Therefore, this legal advocacy brief will use the term "child pornography" as it is still the term used in most legal documents.

<sup>10</sup> ITU, *Guidelines for Policy Makers on Child Online Protection, 2009*, p. 15.

<sup>11</sup> ITU, *Guidelines for Policy Makers on Child Online Protection, 2009*, p. 19.

enforcement will identify them. It might encourage them to look for more graphic and violent content than they would offline.<sup>12</sup>

Especially in the field of child pornography, access to internet and ICTs has significantly increased the sexual exploitation of children. Video streaming makes it possible for offenders to access live child abuse taking place at distance and witness it via webcams. As material can also increase their access levels or social status in online networks or be used as a currency for accessing other child sexual abuse images, this can drive “non-contact offenders”, who may initially only be interested in viewing child sexual abuse images, to become “contact offenders” and actively abuse children. Even though not everyone accessing child pornography is a perpetrator in real life, research shows that people accessing child abuse material are more likely to become offenders in real life.<sup>13</sup> Victims of online child sexual abuse suffer additional victimisation from the awareness that offenders unknown to them will use images of their abuse.<sup>14</sup>

In order to prosecute online child sexual abuse, the Government of the Republic of Namibia intends to regulate cybercrime targeting child abuse online. As the Government is currently involved in drafting a Electronic Transactions and Cybercrime Bill, provisions focusing on online child sexual abuse shall be incorporated in the new bill. As online child sexual abuse is a global problem, it requires global solutions. Therefore, it is decisive that the national legal framework is aligned with the regulations in other countries. Special focus has to be paid to the legal enforcement mechanisms as the perpetrator can act from any location worldwide. Namibia has to comply with international standards and enact corresponding national laws in order to ensure that perpetrators are not only identified but also prosecuted beyond and despite country borders.

Hence, this report aims to provide Namibia with an extensive legal analysis of international law and comparative analysis of best practices and bottlenecks occurring in other countries. After conducting a gap analysis of the current Namibian legislation on child online protection, recommendations on regulation for online child offences and possible legislation to incorporate these recommendations will be presented, aiming to serve the best interest of the child and provide comprehensive child online protection while taking into account future developments of the ICT sector in Namibia.

## B. Child Pornography

### I. International Law

Main objective of this analysis is to identify recommendations for Namibia on how to regulate child online sexual abuse. Namibia signed and ratified several international and regional treaties, which oblige Namibia to enact national legislation in the respective field which is consistent with the international and regional standards.

Namibia is member state to the:

- UN Convention on the Rights of the Child (CRC),<sup>15</sup>
- Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OPSC),<sup>16</sup>
- ILO Convention No. 182 (Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour),<sup>17</sup>
- African Charter on the Rights and Welfare of the Child (ACRWC),<sup>18</sup> and
- African Youth Charter (AYC).<sup>19</sup>

According to Art 144 Namibian Constitution, “international agreements binding upon Namibia under this constitution shall form part of the law of Namibia”. Therefore, Namibia follows the monist approach on international law which means that both national and international law ultimately regulate the behaviour of the individual and hence do not require national legislation in order to be directly applicable.<sup>20</sup> However, it is important that Namibia also enacts national legislation which is consistent with international law. First of all, in cases of conflict, national legal orders take a subordinate position and hence Namibia should ensure that national legislation is consistent with international standards in order to avoid a conflict of law.<sup>21</sup> Furthermore, international treaties are largely drafted in vague and general terms and hence might require legal specification.<sup>22</sup> An analysis of Namibian courts has shown that international human rights treaties do not have an effect on national legal processes.<sup>23</sup> Even if international treaties shall be directly applicable in domestic law cases according to the Constitution, it is not the current practise in Namibia. This tremendously mitigates the effectiveness of human rights protection. A “translation” of international treaties into domestic law hence increases the effectiveness of human rights implementation and ensures the protection standards are respected within the Namibian jurisdiction.

Other treaties regulating cybercrime and child online protection in particular, not signed or ratified by Namibia, are:

- Budapest Convention: Council of Europe, Convention on Cybercrime (BC),
- Lanzarote Convention: Council of Europe, Protection of Children against Sexual Exploitation and Sexual Abuse (LC), and
- African Union Convention on Cyber Security and Personal Data Protection (ACCS).

Even though these instruments have not been signed/ratified by Namibia and are therefore not binding, it is important - especially in the field of cybercrime - to aim a highly harmonized and internationally comparable standard with regard to national legislation. As cybercrime tends to be a transnational crime, all states are dependent on international collaboration in order to guarantee a comprehensive prosecution of these crimes. This collaboration is significantly easier when the national legislation is harmonized and aligned. Therefore, international treaties which have not been signed/ratified by Namibia can serve as a model legislation and hence influence the national legislation indirectly. However, for the purposes of this report, only positive deviance compared to the binding instruments will be included in the analysis. Positive deviance in this context means that the non-binding instrument sets a higher protection standards, e.g. by providing a more comprehensive definition of “child pornography”. Negative deviances, hence the declaration of a lower protection standard compared to the binding instruments, will not be considered as the member state would otherwise violate its obligations set by the binding treaty.

Ultimately, the inclusion of both binding and non-binding instruments has great potential to foster a higher efficiency and harmonisation of national laws.

<sup>12</sup>European Commission, *Global Alliance against Child Sexual Abuse Online, Report – December 2013, Brussels 2013*, p. 2 et seq.

<sup>13</sup>ITU, *Guidelines for Policy Makers on Child Online Protection, 2009*, p. 19.

<sup>14</sup>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)*, p. 10 et seq.

<sup>15</sup>Ratified on 30 Sep 1990.

<sup>16</sup>Ratified on 16 Apr 2002.

<sup>17</sup>Ratified on 15 Nov 2000.

<sup>18</sup>Ratified on 23 Jul 2004.

<sup>19</sup>Ratified on 17 Jul 2008.

<sup>20</sup>Tshosa, Onkemetse, *The status of international law in Namibian national law. A critical appraisal of the constitutional strategy*, Namibia Law Journal, Volume 2, Issue 1, 2010, p 4; Dausab, Yvonne, *International law vis-à-vis municipal law. An appraisal of Article 144 of the Namibian Constitution from a human rights perspective in: Constitutional Democracy in Namibia - A Critical Analysis After Two Decades*, p. 266.

<sup>21</sup>Tshosa, Onkemetse, *The status of international law in Namibian national law. A critical appraisal of the constitutional strategy*, Namibia Law Journal, Volume 2, Issue 1, 2010, p 5; Dausab, Yvonne, *International law vis-à-vis municipal law. An appraisal of Article 144 of the Namibian Constitution from a human rights perspective in: Constitutional Democracy in Namibia - A Critical Analysis After Two Decades*, p. 265.

<sup>22</sup>Tshosa, Onkemetse, *The status of international law in Namibian national law. A critical appraisal of the constitutional strategy*, Namibia Law Journal, Volume 2, Issue 1, 2010, p 21.

<sup>23</sup>Dausab, Yvonne, *International law vis-à-vis municipal law. An appraisal of Article 144 of the Namibian Constitution from a human rights perspective in: Constitutional Democracy in Namibia - A Critical Analysis After Two Decades*, p. 263.

## 1. Art 34 CRC

Art 34 CRC regulates the protection of children from all forms of sexual abuse and sexual exploitation:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.

For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

According to Art 1 CRC, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Art 34 does neither describe the exact measures to be undertaken by the state parties nor provide a definition of the term “child pornography”. However, it has to be noted that the most important international children’s rights instrument explicitly addresses child pornography, identifies it as sexual exploitation and requires the member states to undertake various measures to combat child pornography.

## 2. Art. 2, 3 OPSC

Art 2 c) OPSC defines child pornography as follows:

*Child pornography means 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.*

The term “child” is not defined in the OPSC, but as it is an optional protocol to the CRC, the definition is aligned with the respective provision in the CRC and therefore includes every person under the age of 18 years.

This definition is very comprehensive as it also includes non-visual depictions, such as text and sound. However, the definition does not cover virtual child pornography or the case in which the actor is made to appear to be a minor.<sup>24</sup> Virtual pornography is the production on the Internet of morphed or blended artificially created images of children involved in sexual activities.<sup>25</sup> The realism of such images creates the illusion that children are actually involved. The term “simulated” does not aim to cover virtual pornography; it rather refers to the sexual conduct, which can be real or simulated.

Even if this definition covers most pornographic content, nude or semi-nude pictures in sexually suggestive postures but not showing the genitals of the child (so called “erotic posing”) are not covered. The term “erotic posing” includes deliberately posed pictures of fully, partially clothed or naked children in sexualised or provocative poses. In contrast, “explicit erotic posing”, which describes pictures emphasising genital areas, where the child is either naked, partially clothed or fully clothed, are covered by the provision.<sup>26</sup>

With regard to the criminalised conduct, Art 3 1) c) OPSC defines the conduct to be criminalised by the state parties as follows:

*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 provision covers a variety of actions related to child pornography. However, the mere possession without the intention of using the material for the purposes of distributing, disseminating etc. and accessing child pornography is not covered. With regard to knowingly viewing/accessing child pornography without downloading it (e.g. streaming, live streaming), these offences are not explicitly included in the catalogue and are therefore not deemed to be an international standard under the OPSC. However, one could argue that viewing/accessing child pornography can be subsumed under the term “possession” due to the fact that viewing pictures online includes the copying of images into computer memory and/or temporary internet cache files or the website automatically initiates a downloading process – often without the knowledge of the offender.<sup>27</sup> However, in some cases, the received information is not buffered but is discarded straight after transmission due to the technical configuration of the streaming process and is therefore neither copied nor saved. These cases are not covered by the provision due to a lack of “possession” of child pornography.

In addition, States parties may undertake any action or adopt any measure necessary to ensure full protection of children.<sup>28</sup> The Committee on the Rights of the Child likewise encourages the state parties to prohibit mere possession of child pornography.<sup>29</sup> The member states should have compelling interests in protecting the physical and psychological well-being of minors and in destroying the market for the exploitative use of children by penalising those who possess and view the offending materials.<sup>30</sup> However, the state parties are not obliged to undertake these measures as the recommendations of the CRC Committee are not binding for the member states<sup>31</sup>. The statements of the CRC Committee should be taken serious though as they serve as guidelines for the highest standard of child protection and should therefore be implemented at the earliest convenience.

## 3. ILO Convention No. 182

The ILO Convention No. 182 does not provide for a definition of the term “child pornography” but declares the “use, procuring or offering of a child [...] for the production of pornography or for pornographic performances” as one of the “worst forms of child labour” (see Art 3 b) ILO Convention No. 182). According to Art 6 ILO Convention No. 182,

*“Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.”*

According to Art 2 ILO Convention No. 182, the term “child” shall apply to all persons under the age of 18. ILO Convention No. 182 only prohibits the production of child pornography and various support actions to the production of child pornography. Therefore, the Convention lags far behind the regulatory content of Art. 2, 3 OPSC.

<sup>24</sup>ITU, *Understanding cybercrime: Phenomena, challenges and legal responses*, September 2012, p. 170.

<sup>25</sup>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), p. 7.

<sup>26</sup>Terminology according to the COPINE (Combating Paedophile Information Networks in Europe) scale.

<sup>27</sup>UNODC, *Comprehensive Study on Cybercrime*, New York 2013, p. 103.

<sup>28</sup>General Principal regulated in Art 4 CRC.

<sup>29</sup>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), p. 9.

<sup>30</sup>Rothmann, Jennifer, *Getting what they are owed: restitution fees for victims of child pornography*, 17 *Cardozo J.L. & Gender*, p. 339.

<sup>31</sup>Mechlem, Kerstin, *Treaty Bodies and the Interpretation of Human Rights*, *Vanderbilt Journal of Transnational Law*, Volume 42/2009, p. 945 et seq.

#### 4. Art 27 ACRWC

Art 27 ACRWC reads as follows:

*States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:*

- (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;*
- (b) the use of children in prostitution or other sexual practices;*
- (c) the use of children in pornographic activities, performances and materials.*

According to Art 2 ACRWC, the term “child” shall apply to all persons under the age of 18. The wording of Art 27 ACRWC is very similar to Art 34 CRC and hence, reference is made to the explanatory notes regarding Art 34 CRC.

#### 5. Art 23 AYC

Art 23 AYC only makes reference to child pornography with regard to girls and women. The state parties are obliged to:

*“Enact and enforce legislation that protect girls and young women from all forms of violence, genital mutilation, incest, rape, sexual abuse, sexual exploitation, trafficking, prostitution and pornography.”*

There is neither a definition of the term “child pornography” nor of the actions to be criminalised by the member states. Furthermore, the provision misjudges that also boys are victims of child pornography and therefore need adequate legal protection.

#### 6. Art 9 BC

Even though the Budapest Convention has not been signed/ratified by Namibia, it can serve as

a model legislation and be a source for best practices.

Regarding the definition of the term “child pornography”, Art 9 (2) BC states:

*“For the purpose of paragraph 1 above, the term “child pornography” shall include pornographic material that visually depicts:*

- a) a minor engaged in sexually explicit conduct;*
- b) a person appearing to be a minor engaged in sexually explicit conduct;*
- c) realistic images representing a minor engaged in sexually explicit conduct.”*

According to Art 9 3) BC, the term “minor” shall include all persons under the age of 18. However, the parties may require a lower age limit, which shall not be less than 16 years of age. In this regard, the convention leaves it to the disposition of the member states by legalizing child pornography if the acting child is at least older than 16 years. According to section 99 BC (Explanatory Report)<sup>32</sup>, the term “pornographic material” in paragraph 2 is governed by national standards pertaining to the classification of materials as obscene, inconsistent with public morals or similarly corrupt. Therefore, material having an artistic, medical, scientific or similar merit may be considered not to be pornographic.

With regard to section 9 (2) b) and c), the BC standard goes beyond the OPSC standards as it also includes pornography which is either virtual or just pretends to show minors engaged in sexually explicit conduct.

It is important to note that the term “sexually explicit conduct” is aligned with the definition in the OPSC. The term “sexually explicit conduct” covers not only images depicting children engaged in sexual activities with other children or with adults, but also lewdly depicting naked

children with an emphasis on sexualizing the child.<sup>33</sup> According to section 100 BC (Explanatory Report), ‘sexually explicit conduct’ covers at least real or simulated: a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between minors, or between an adult and a minor, of the same or opposite sex; b) bestiality; c) masturbation; d) sadistic or masochistic abuse in a sexual context; or e) lascivious exhibition of the genitals or the pubic area of a minor. Hence, as in the definition of child pornography in Art. 2 OPSC, mere “erotic posing” is not covered by the definition.

In contrast to the definition in the OPSC, Art 9 (2) BC limits the applicability to visual depiction and therefore excludes any other depiction of child pornography, such as audio or text.

With regard to the offences, Art 9 (1) BC states:

*Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:*

- a) producing child pornography for the purpose of its distribution through a computer system;*
- b) offering or making available child pornography through a computer system;*
- c) distributing or transmitting child pornography through a computer system;*
- d) procuring child pornography through a computer system for oneself or for another person;*
- e) possessing child pornography in a computer system or on a computer-data storage medium.*

Even though the wording of the different actions is slightly different (e.g. “offering”, “selling”), the standard of protection of OPSC and BC is largely aligned. However, in contrast to the OPSC, the mere possession of child pornography is criminalised.

The strong focus on highlighting the online abuse by naming “through a computer system” as requirement speaks to the fact that child pornography has shifted from the offline to the online world. However, Art 9 (1) a) BC is problematic as it only criminalises the production of child pornography for the purpose of its distribution through a computer system. In other words, if the child pornography is only produced for private use or distributed in non-electronic form, Art 9 (1) a) BC is not applicable.

The sentence “when committed intentionally and without right” is new to the range of international standards. The term “committed intentionally” is redundant as the subjective matter of fact in criminal law requires some form of intention anyway as this is one of the basic principles of criminal law.

The term “without right” needs some further clarification. In order to protect the individual rights (e.g. freedom of expression, freedom of arts), any conduct should not be defined as “child pornography” if it serves a reasonable purpose and is not used for sexual arousal. That is not the case if the material lacks serious literary, artistic, political, or scientific value for minors.<sup>34</sup> Furthermore, if the act is carried out by a law enforcement agency within an investigation, it should be exempted from the applicability of the child pornography provision.<sup>35</sup> Whether the depiction can be considered as having an artistic, political or scientific merit or has already passed the threshold to child pornography has to be decided on a case-by-case basis.

<sup>33</sup>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), p. 8.

<sup>34</sup>Council of Europe, *Budapest Convention Explanatory Report*, Section 103.

<sup>35</sup>UNODC, *Comprehensive Study on Cybercrime*, New York 2013, p. 196.

## 7. Art 20 LC

Art 20 LC has a more narrow definition of the term “child pornography” compared to Art 9 BC.

According to Art 20 (2) LC,

*“[...] the term “child pornography” shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes.”*

According to Art 3 a) LC, the term “minor” shall include all persons under the age of 18. The definition is aligned with the OPSC, but with the limitation to visual depiction. Therefore, in contrast to Art 2 OPSC, audio or text are not covered by the definition. Furthermore, virtual pornography and pornography depicting a person who was made to appear like a minor are not covered. The definition of the term “sexually explicit conduct” in section 143 Lanzarote Convention (Explanatory Report)<sup>36</sup> is aligned with section 100 Budapest Convention (Explanatory Report). Hence, “erotic posing” pictures are not covered by the definition.

The offences concerning child pornography are almost completely aligned with the provision in the Budapest Convention. However, Art 20 LC is more holistic as it does not only criminalise the conduct related to the use of a computer system. Furthermore, an additional offence is added in Art 20 (1) f) LC:

*[...] knowingly obtaining access, through information and communication technology, to child pornography.*

This additional offence completes the catalogue of offences in the Budapest Convention and explicitly criminalises the mere obtaining access to child pornography. Hence, this provision also covers the streaming of child pornography without downloading it. It enables law enforcement

agencies to prosecute offenders in cases where they can prove that the offender opened a website, but they cannot prove that the offender also downloaded content. These evidentiary problems mostly occur when the offender is using encryption technology to protect downloaded files on his storage media.<sup>37</sup> Art 20 (1) LC therefore provides the most comprehensive catalogue of offences relating to child pornography. Furthermore, in comparison to Art. 9 BC, Art 20 (1) LC does not limit the applicability of the provision to ICTs and hence covers acts that are not related to computer networks.

Art 20 (3) LC is deemed very innovative and progressive as it contains an exemption clause for the offences stated in Art 20 (1) LC:

*Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material [...] involving children who have reached the age set in application of Article 18, paragraph 2, where these images are produced and possessed by them with their consent and solely for their own private use.*

This provision can be regarded as reaction to an arising problem in many countries which enacted child pornography provisions: the criminalization of consensual “sexting” between minors. The term is a combination of the words “sex” and “texting” and concerns the digital recording of sexually suggestive or explicit images and distribution by cell phone messaging, internet messengers, social networks et al.<sup>38</sup> As the consensual sharing of nude or semi-nude pictures between minors can be subsumed under the child pornography provision, it hence allows for the prosecution of minors as child pornography offenders. As an example, if a 17 year old girl sends her boyfriend (with his consent) a semi-nude picture of herself via WhatsApp (Cell Phone Messenger), they can both be prosecuted for child pornography offences: the girl for producing and making child

pornography available, the boy for the possession of child pornography. The child pornography provision proposed under international law therefore can lead to the prosecution of minors for a behaviour which has to be regarded as normal behaviour of children exploring their sexuality.

Against this background, Art 20 (3) LC offers the opportunity to member states to include this exemption clause in their national legislation in order to prevent the prosecution of minors for consensual sexting under the child pornography clause. However, this provision is only applicable if the children involved have reached the age of consent to engage in sexual activities (Art 18 (2) LC). This exemption clause takes into account the reality in many countries: children are having sex, and they also engage in sexual behaviour which is channelled through the new communication technologies.<sup>39</sup> The objective of the child pornography regulations, namely to protect the child from exploitation and abuse, would be taken ad absurdum if the subject of the protection clause, the child, would be turned into the offender for exploring its sexuality.

## 8. Art. 29 3. 1. ACCS

The ACCS has been adopted by the African Union, but has not been ratified by any member state yet. As Namibia is most likely to ratify this Convention and is then legally obliged to implement its provisions, the provisions on child pornography should be taken into consideration.

The definition in Art 1 ACCS is aligned with the definition in the Budapest Convention:

*Child pornography means any visual depiction, including any photograph, film, video, image, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:*

- a) the production of such visual depiction involves a minor;*
- b) such visual depiction is a digital image, computer image, or computer generated image where a minor is engaging in sexually explicit conduct or when images of their sexual organs are produced or used for primarily sexual purposes and exploited with or without the child’s knowledge;*
- c) such visual depiction has been created, adapted, or modified to appear that a minor is engaging in sexually explicit conduct.*

The definition therefore covers only the visual depiction of sexually explicit conduct, but extends the definition to virtual child pornography and pornography which depicts persons who appear to be minors. With regard to the offences, Art. 29 3.1. ACCS states:

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

- a) Produce, register, offer, manufacture, make available, disseminate and transmit an image or a representation of child pornography through a computer system;*
- b) Procure for oneself or for another person, import or have imported, and export or have exported an image or representation of child pornography through a computer system;*
- c) Possess an image or representation of child pornography in a computer system or on a computer data storage medium.*

<sup>36</sup>Council of Europe, *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse – Explanatory Report*, 2007.

<sup>37</sup>ITU, *Understanding cybercrime: Phenomena, challenges and legal responses*, September 2012, p. 197.

<sup>38</sup>Crofts/Lee, ‘Sexting’, *Children and Child Pornography*, *Sydney Law Review*, Vol. 35:85, 2013, p. 85.

<sup>39</sup>Crofts/Lee, ‘Sexting’, *Children and Child Pornography*, *Sydney Law Review*, Vol. 35:85, 2013, p. 103.

Despite the different wording, the content of child pornography offences is aligned with the Budapest Convention. Hence, reference is made to the explanatory notes regarding Art 9 BC.

## 9. SADC Model Legislation

The SADC Model Legislation is a regional activity carried out under the HIPSSA project (“Support for the Harmonization of ICT policies in Sub-Saharan Africa”). The Model Legislation seeks to provide guidance on the regulation of cybercrime and hence contains a provision on child pornography.

Even though the model legislation is no international contract and hence is not binding for the SADC states, it can serve as an example of how to draft child pornography provisions in the Southern African context.

The term “child pornography” is defined as follows:

*Child pornography means pornographic material that depicts presents or represents:*

- (a) a child engaged in sexually explicit conduct;*
  - (b) a person appearing to be a child engaged in sexually explicit conduct; or*
  - (c) images representing a child engaged in sexually explicit conduct; this includes, but is not limited to, any audio, visual or text pornographic material.*
- A country may restrict the criminalisation by not implementing (b) and (c).*

The definition meets all international standards as the term “sexually explicit conduct” does also cover the depiction of sexual parts of a child. However, “erotic posing” is not covered by the definition.

The catalogue of offences is aligned with Art 20 (1) Lanzarote Convention, with the difference that it is limited to the use of computer systems.

## II. Comparative Legal Analysis

After examining the international standards for the regulation of child pornography, the focus shall be directed to a comparative analysis. The principal purpose of comparative legal studies is to diversify the pool of solutions for a national legal problem by borrowing best practices from other countries. However, this does not mean that these solutions from other countries are better or more functional in the respective national system: whether the respective solution is the best for the country can only be determined by contextualizing the solution approach to the legal, political and social circumstances in the country.<sup>40</sup> Therefore, the objective of the research is to identify examples of well-drafted legislation which can guide Namibia on the regulation of child online protection. Furthermore, bottlenecks shall be identified and hence problems which occurred in other countries can be avoided.

The countries focused on for the comparative analysis are South Africa, Botswana, Uganda, the Philippines, Germany and Canada. These countries have been selected with regard to their progressive and comprehensive legislation in the area of child pornography and partly because of their comparable socio-economic level.

### 1. South Africa

Child pornography is regulated in two laws in South Africa: section 24B Films and Publications Act (Act 65 of 1996) and section 20 Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007).

#### a. Films and Publications Act (abbr.: FPA)

Section 1 FPA defines the term “child pornography” as follows:

*“child pornography” includes any image, however created, or any description of*

*a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being, under the age of 18 years —*

- (a) engaged in sexual conduct;*
- (b) participating in, or assisting another person to participate in sexual conduct; or*
- (c) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.*

This definition is very comprehensive as it combines all elements proposed in various international definitions. Not only visual depiction, but any description like text and audio is covered. Furthermore, virtual pornography (“however created”) or persons made to appear under the age of 18 years are included. As the definition offers a catch-all provision in subsection (c), “erotic posing” images are covered as well. The description of sexual conduct or engagement or participation is exhaustive.

Regarding the offences, section 24B FPA states:

- Any person who —*
- (a) unlawfully possesses;*
  - (b) creates, produces or in any way contributes to, or assists in the creation or production of;*
  - (c) imports or in any way takes steps to procure, obtain or access or in any way knowingly assists in, or facilitates the importation, procurement, obtaining or accessing of; or*
  - (d) knowingly makes available, exports, broadcasts or in any way distributes or causes to be made available, exported, broadcast or distributed or assists in making available, exporting, broadcasting or distributing, any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children,*
- shall be guilty of an offence.*

Despite the fact that all the criminal actions are consistent with international law and even the mere possession and accessing of child pornography is criminalised, all these offences are only related to child pornography material in a film, game or publication. The term “publication” is defined in section 1 FPA as follows:

- (a) any newspaper, book, periodical, pamphlet, poster or other printed matter;*
- (b) any writing or typescript which has in any manner been duplicated;*
- (c) any drawing, picture, illustration or painting;*
- (d) any print, photograph, engraving or lithograph;*
- (e) any record, magnetic tape, soundtrack, or any other object in or on which sound has been recorded for reproduction;*
- (f) computer software which is not a film;*
- (g) the cover or packaging of a film; and*
- (h) any figure, carving, statue or model;*
- (i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet.*

<sup>40</sup>Eser, *Funktion, Methoden und Grenzen der Strafrechtsvergleichung* (engl.: *Objectives, methods and limits of comparative legal analysis in criminal law*)

This definition does not – contrary to the common understanding of the term “publication” – require the distribution or selling of a depiction or an intention to do so. Therefore, the provision meets highest international standards.

#### b. Criminal Law (Sexual Offences and Related Matters) Amendment Act

According to section 1 (1) Criminal Law (Sexual Offences and Related Matters) Amendment Act (abbr.: CLAA) defines “child pornography” as follows:

*“child pornography” means any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not, including any such image or description of such person*

- (a) engaged in an act that constitutes a sexual offence;*
- (b) engaged in an act of sexual penetration;*
- (c) engaged in an act of sexual violation;*
- (d) engaged in an act of self-masturbation;*
- (e) displaying the genital organs of such person in a state of arousal or stimulation;*
- (f) unduly displaying the genital organs or anus of such person;*
- (g) displaying any form of stimulation of a sexual nature of such person’s breasts;*
- (h) engaged in sexually suggestive or lewd acts;*
- (i) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;*
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;*
- (k) showing or describing such person –*
  - (i) participating in, or assisting or facilitating another person to participate in; or*

*(ii) being in the presence of another person who commits or in any other manner being involved in, any act contemplated in paragraphs (a) to (j); or*  
*(l) showing or describing the body, or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under 18 or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or group or categories of persons.*

This definition meets the highest standard of protection and is comparably comprehensive to section 1 FPA. The sexual explicit conduct is described in a more detailed manner compared to other definitions. This might make it easier for the courts to decide whether a scenario constitutes child pornography, however, some terms are very broad (e.g. “engaged in sexually suggestive or lewd acts”) and hence other more specific terms are redundant. Due to the broad definition in (l), “erotic posing” images are covered by the definition. It is interesting to note that it is irrelevant whether the depiction is used for the stimulation of erotic or aesthetic feelings.

Regarding the catalogue of offences, section 20 CLAA states:

*A person (“A”) who unlawfully and intentionally uses a child complainant (“B”) with or without the consent of B, whether for financial or other reward, favour or compensation to B or to a third person (“C”) or not –*

- (a) for purposes of creating, making or producing;*
- (b) by creating, making or producing; or*
- (c) in any manner assisting to create, make or produce, any image, publication,*

*depiction, description or sequence in any manner whatsoever of child pornography, is guilty of the offence of using a child for child pornography.*

Section 20 CLAA limits the scope of offences to the creation, making and production of child pornography and the assistance to these actions. This provision hence is not comprehensive as it does not take into account that distribution, making available or possession of child pornography is as harmful for the child as the production of the abusive depiction as it continuously violates the child’s rights and creates a market for the production of more child pornography content.

#### c. Aggravating circumstances for mentally disabled persons

It is interesting to note that all sexual offences are repeatedly regulated in special provisions focusing on mentally disabled persons (e.g. section 26: Using persons who are mentally disabled for pornographic purposes or benefiting therefrom). Section 1 (1) CLAA defines mentally disabled persons as

*“a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was –*

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;*
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;*
- (c) unable to resist the commission of any such act; or*
- (d) unable to communicate his or her unwillingness to participate in any such act.”*

This provisions takes into account that mentally disabled persons are more vulnerable with regard to sexual abuse and often cannot process the abuse. Therefore, they need special protection. Even though the provisions on sexual offences against mentally disabled persons do not indicate a higher range of sentence, as there is no range of sentence indicated in general, it can be assumed that courts are held to assess these offences as a more severe act and hence adjust the sentence accordingly.

#### d. Best Practices

Especially with regard to the definition of “child pornography” in both South African legislations, South Africa can serve as a role model as it provides the highest protection standard. With regard to the catalogue of offences, only section 24B FPA meets the highest international standards and hence serves as an example for comprehensive legal drafting.

Even though the provision on the abuse of mentally disabled persons as aggravating circumstances is not specific on children, assessing the abuse of mentally disabled children as aggravating circumstances should be considered in the Namibian legislation due to their high level of vulnerability.

However, South Africa did not tackle the issues of sexting between minors and a possible prosecution as child pornography offenders. There have been cases of minors being charged for child pornography with regard to (consensual) sexting.<sup>41</sup> Therefore, the South African Law Reform Commission is currently working on an amendment of various child protection provisions.<sup>42</sup> The objective is inter alia to make the provisions more comprehensive and to gather all provisions in one bill. In the issues paper, sexting between minors and the possible prosecution as child pornography offender are discussed.<sup>43</sup> Further development in this regard has to be awaited.

<sup>41</sup>Badenhorst, Charmain, *Legal responses to cyberbullying and sexting in South Africa*, Center for Justice and Crime Prevention, CJCP Issue Paper No. 10, 2011, p. 6 et seq.

<sup>42</sup>South African Law Reform Commission, *Issues Paper No. 30: Pornography and Children*, 2015.

<sup>43</sup>South African Law Reform Commission, *Issues Paper No. 30: Pornography and Children*, 2015, p 71 et seq.

## 2. Botswana

### a. Cybercrime and Computer Related Matters Act 2007

Section 16 Cybercrime and Computer Related Matters Act 2007 (abbr.: CCA) defines the term “child pornography” as follows:

*“child pornography” includes material that visually or otherwise depicts-*  
*(i) a child engaged in sexually explicit conduct;*  
*(ii) a person who appears to be a child engaged in sexually explicit conduct; or*  
*(iii) realistic images representing a child engaged in sexually explicit conduct.*

Other relevant definitions are:

*“child” means a person who is under the age of 14 years.*

*“sexually explicit conduct” means any conduct, whether real or simulated, which involves-*

- (i) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between children, or between an adult and a child, of the same or opposite sex;*
- (ii) bestiality;*
- (iii) masturbation;*
- (iv) sadistic or masochistic sexual abuse; or*
- (v) the exhibition of the genitals or pubic area of a child.*

The definition of the terms “child pornography” and “sexually explicit conduct” meet the standards set by international law. The definition of the term “sexually explicit conduct” has been extracted from section 100 Budapest Convention (Explanatory Report) and section 143 Lanzarote Convention (Explanatory Report). Even if this definition covers a variety of child pornography content, nude or semi-nude pictures in sexually suggestive postures but not showing the genitals of the child are not

covered. E.g., lascivious bikini pictures in a sexually suggestive posture are not covered by this definition.

However, the definition of the term “child” is highly problematic. Only children under the age of 14 are deemed as victims of “child pornography”. This excludes a wide range of potential victims from the legal protection (14 – 17 years old children). Even though the objective of this definition might have been the alignment of the age of consent to sex and the age for child pornography, there is a fundamental difference between sex and child pornography and the nature of the consent: child pornography always means child sexual exploitation (often for commercial purposes). Even though this current provision has the positive side effect that sexting cases between minors cannot be prosecuted as child pornography, these cases are the exemption and should therefore be dealt with in an exemption clause. The general rule must be that all children under 18 years are protected by the child pornography provision as they cannot give consent to exploitative conduct.<sup>44</sup>

Despite the definition of the term “child”, the definition of the terms “child pornography” and “sexually explicit conduct” are sufficient.

*A person who-*

- (a) publishes child pornography or obscene material relating to children through a computer or computer system;*
- (b) produces child pornography or obscene material relating to children for the purpose of its publication through a computer or computer system;*
- (c) possesses child pornography or obscene material relating to children in a computer or computer system or on a computer data storage medium;*
- (d) publishes or causes to be published an advertisement likely to be understood as conveying that the advertiser*

*distributes or shows child pornography or obscene material relating to children; or*  
*(e) accesses child pornography or obscene material relating to children through a computer or computer system,*  
*commits an offence and shall be sentenced to a minimum fine of P40,000 but not exceeding P100,000, or to imprisonment for a minimum term of two years but not exceeding three years, or to both.*

According to the definition in section 16 1) (a) CCA, “publish” means also to make content available by any means or distribute content. For the sake of clarity, all different actions constituting child pornography should be named explicitly. Furthermore, only the production for the purpose of its publication is criminalised and hence, production of child pornography for the mere private use is not covered. It has to be positively noted that also the mere possession and accessing of child pornography are criminalised and therefore these provisions meet the highest international standard.

### b. Best Practices

Despite the definition of the term “child” and the related limited scope of application, the catalogue of offences is in line with the Lanzarote Convention and the definition of the term “child pornography” even meets international standards. However, erotic posing pictures are not covered by the definition. Furthermore, the catalogue of offences is problematic as it only criminalises the production of child pornography for the purpose of its distribution through a computer system.

## 3. Philippines

The Philippines is among the top ten countries with rampant cyber pornographic activities involving mostly boys and girls aged 10-14 years.<sup>45</sup> Hence, the government decided to enact a comprehensive legislation, the Anti-Child Pornography Act of 2009 (abbr.: ACPA), in order to combat all sectors of child pornography.

### a. Definition

The relevant definition for the child pornography provisions provided for in section 3 ACPA states as follows:

*“Child” refers to a person below eighteen (18) years of age or over, but is unable to fully take care of himself/herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.*

*For the purpose of this Act, a child shall also refer to:*

- (1) a person regardless of age who is presented, depicted or portrayed as a child as defined herein; and*
- (2) computer-generated, digitally or manually crafted images or graphics of a person who is represented or who is made to appear to be a child as defined herein.*

“Child pornography” refers to any representation, whether visual, audio, or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means, of child engaged or involved in real or simulated explicit sexual activities.

<sup>44</sup>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), section 55.

<sup>45</sup><http://www.gmanetwork.com/news/story/344345/news/nation/phl-among-top-producers-of-child-pornography-international-task-force-says>

“Explicit Sexual Activity” includes actual or simulated -

(1) As to form:

(i) sexual intercourse or lascivious act including, but not limited to, contact involving genital to genital, oral to genital, anal to genital, or oral to anal, whether between persons of the same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadistic or masochistic abuse;

(5) lascivious exhibition of the genitals, buttocks, breasts, pubic area and/or anus; or

(6) use of any object or instrument for lascivious acts.

A similar approach as in the South African legislation is the definition of the term “child”, as it does not only cover persons under the age of 18 years but also persons over this age who are “unable to fully take care of himself/herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition”. In contrast to the South African legislation, the Philippine legislation includes both mentally and physically disabled persons. Even though the approach is commendable, it is technically not sound to include physically or mentally disabled persons in the definition of the term “child”. It is more accurate to regulate that the sexual abuse of disabled children is considered as aggravating circumstances with regard to the respective offence and enact a separate aggravating ground for adults with physical or personal disabilities with regard to the respective sexual offence.

The other definitions cover all relevant elements to provide a fully comprehensive definition: any depiction, real or simulated, minors, virtual pornography and persons who appear to be minors are covered. However, as the definition of the term “explicit sexual activity” is similar to the definition in section 100 Budapest Convention (Explanatory Report) and section 143 Lanzarote Convention

(Explanatory Report), semi-nude or nude posing pictures which do not show the genitals, buttocks, breasts, pubic area and/or anus of the child (“erotic posing”) are not covered.

The definition in the Philippine legislation meets all international standards and should hence serve as an example for the drafting of the Namibian legislation. Nevertheless, special consideration should be given to the inclusion of “erotic posing” pictures.

#### b. Offences

According to section 4 ACPA, the offences with regard to child pornography are stated as follows:

*It shall be unlawful for any person:*

(a) *To hire, employ, use, persuade, induce or coerce a child to perform in the creation or production of any form of child pornography;*

(b) *To produce, direct, manufacture or create any form of child pornography;*

(c) *To publish offer, transmit, sell, distribute, broadcast, advertise, promote, export or import any form of child pornography;*

(d) *To possess any form of child pornography with the intent to sell, distribute, publish, or broadcast:*

*Provided that possession of three (3) or more articles of child pornography of the same form shall be prima facie evidence of the intent to sell, distribute, publish or broadcast;*

(e) *To knowingly, willfully and intentionally provide a venue for the commission of prohibited acts as, but not limited to, dens, private rooms, cubicles, cinemas, houses or in establishments purporting to be a legitimate business;*

(f) *For film distributors, theaters and telecommunication companies, by themselves or in cooperation with other*

*entities, to distribute any form of child pornography;*

(g) *For a parent, legal guardian or person having custody or control of a child to knowingly permit the child to engage, participate or assist in any form of child pornography;*

(h) *To engage in the luring or grooming of a child;*

(i) *To engage in pandering of any form of child pornography;*

(j) *To willfully access any form of child pornography;*

(k) *To conspire to commit any of the prohibited acts stated in this section. Conspiracy to commit any form of child pornography shall be committed when two (2) or more persons come to an agreement concerning the commission of any of the said prohibited acts and decide to commit it; and*

(l) *To possess any form of child pornography.*

As this provision contains different offences, the analysis will be split up in different groups.

First of all, section 4 (b), (c), (d), (i), (j) and (l) ACPA are in line with international standards regarding the catalogue of offences. Special attention has to be paid to the differentiation of section 4 (d) and (l) ACPA. Section 4 (d) ACPA deals with the possession of child pornography with the intention to sell, distribute, publish or broadcast. If the perpetrators lacks this intention, he or she can still be sentenced with the mere possession of child pornography according to section 4 (l) ACPA. The differentiation makes sense as the range of sentence differs between the two offences according to section 15 ACPA: the sentence for an offence like section 4 (d) ACPA is higher than for the mere possession of child pornography. In the overall assessment, section 4 (b), (c), (d), (i), (j) and (l) ACPA meet the highest international standard.

Section 4 (a) ACPA states that it is unlawful for any person to hire, employ, use, persuade, induce or coerce a child to perform in the creation or production of any form of child pornography. This offence has to be qualified as an abstract endangerment offence. This means that the offence does not require that the action of the perpetrator causes actual harm to the victim or infringes the legally protected right, hence causes a criminal “success”. The mere endangerment of the legally protected right is already conflicting with the legal order and therefore has to be criminalised. The hiring of a child in order to produce child pornography does not cause any harm to the child if the perpetrator never reaches the level of actually using the child for the production of child pornography. Hence, the criminalised action (hiring of a child in order to use it for the production of child pornography) and the actual violation of the child’s right (use of the child for the production of child pornography) are two different offences under the Philippine legislation. This differentiation is problematic as section 15 (b) sets the same range of sentence for section 4 (a) and section 4 (b) ACPA. This might violate the principle of proportionality. As an abstract endangerment offence such as section 4 (a) ACPA does not violate and harm the potential victim to the same extent as the actual offence (production of child pornography), there has to be a differentiation in the range of sentence. Otherwise, the provision might be declared unconstitutional.

Section 4 (e) ACPA criminalises the provision of a venue for the commission of prohibited acts. This section is redundant as this conduct is already covered by the regular criminal rules of support actions. Furthermore, the provision lacks legal certainty as it does not specify the “prohibited acts”. Even though it most likely refers to other acts enumerated in section 4 ACPA, the law is not precise enough in this regard.

Section 4 (f) ACPA is redundant as the distribution of child pornography is already criminalised in section 4 (c) ACPA and there is no recognisable added value to make a special provision for film distributors, theatres and telecommunication companies.

Section 4 (g) ACPA criminalises the permission of a parent/guardian for the child to engage, participate or assist in any form of child pornography. This provision is also redundant as this offence is already covered as an accessory by omission. As the parent/guardian has the legal responsibility to protect the child from exploitation and harm, he or she fails this responsibility by permitting the child to engage, participate or assist in any form of child pornography and hence omits his or her legally required protective action.

Section 4 (k) ACPA is also drafted as an abstract endangerment offence. However, it does not face the same constitutional concerns as section 4 (a) ACPA, as section 15 (h) ACPA states a significantly lower range of sentence compared to the other offences. Nevertheless, it is questionable whether criminalising the mere conspiracy to commit any of the prohibited acts stated in this section is in line with the legal system. As the conspiracy to commit murder for example is usually not a crime as it is seen as mere preparatory action, it is contradictory within the legal system to criminalise the conspiracy to a less invasive crime.

#### c. Aggravating circumstances

Section 5 regulates syndicated child pornography and section 15 (a) ACPA provides for the highest range of sentence for this offence within child pornography offences. Syndicated crimes are viewed as aggravating circumstances as it increases the likelihood and range of a violation of the legal order and takes into account the dangers of group dynamics.

Furthermore, the penalty in its maximum duration shall be imposed if the perpetrator is a parent, ascendant, guardian, step parent or collateral relative or any person having control or moral ascendancy of the child (section 16 (a) ACPA). The increase of sentence is justified in this case as children place particular trust in these persons and hence children more vulnerable to their negative influence. Furthermore, the maximum penalty shall be imposed if the offender is a public officer or

employee (section 16 (d) ACPA). The maximum penalty is justified in this case as public officers and employees are representing the rule of law and hence enjoy particular trust.

#### d. Best Practices

By analysing the Philippine legislation, it gets clear that the drafters intended to provide the highest standard of protection for children and hence aimed for a broad regulation. Even though some of the provisions are redundant, the definition and the catalogue of offences meets the highest international standard. Especially the provisions on aggravating circumstances should be considered for the Namibian draft.

However, the provisions do not address “erotic posing” and do not tackle the problem of criminalising minors with regard to sexting.

### 4. Uganda

In 2014, Uganda enacted the Anti-Pornography Act. Even though child pornography was already prohibited according to various provisions, the government aimed to provide a comprehensive regulation of pornography related offences. As the other provisions are still in force, they will also be considered for the analysis.

#### a. Anti-Pornography Act, 2014

The Anti-Pornography Act (abbr.: APA) does not provide for a specific definition on child pornography, but declares the definition of the term “pornography” applicable (section 14 (2) APA):

*“pornography” means any representation through publication, exhibition, cinematography, indecent show, information technology or by whatever means, of a person engaged in real or stimulated explicit sexual activities or any representation of the sexual parts of a person for primarily sexual excitement.*

This definition is equal to Art 2 c) OPSC, however, the definition does not specifically refer to children. Section 2 APA defines the term “child” as every person below the age of eighteen years.

The catalogue of offences in section 14 (1) APA criminalises following conduct:

*A person who produces, participates in the production of, traffics in, publishes, broadcasts, procures, imports, exports or in any way abets pornography depicting images of children, commits an offence and is liable on conviction to a fine not exceeding seven hundred and fifty currency points or imprisonment not exceeding fifteen years or both.*

This provision does not meet international standards as it does not criminalise the possession and the accessing of child pornography. Furthermore, it narrows the application scope to “images”. Hence, video, text and sound are not included.

#### b. Computer Misuse Act, 2011

Section 23 Computer Misuse Act, 2011 (abbr.: CMA) regulates child pornography as follows:

- (1) A person who-
  - (a) produces child pornography for the purposes of its distribution through a computer;
  - (b) offers or makes available child pornography through a computer;
  - (c) distributes or transmits child pornography through a computer;
  - (d) procures child pornography through a computer for himself or herself or another person; or
  - (e) unlawfully possesses child pornography on a computer, commits an offence.
- (2) A person who makes available pornographic materials to a child commits an offence.
- (3) For the purposes of this section “child pornography” includes pornographic material that depicts-
  - (a) a child engaged in sexually suggestive or explicit conduct;
  - (b) a person appearing to be a child engaged in sexually suggestive or explicit conduct; or
  - (c) realistic images representing children engaged in sexually suggestive or explicit conduct.
- (4) A person who commits an offence under this section is liable on conviction to a fine not exceeding three hundred and sixty currency points or imprisonment not exceeding fifteen years or both.

*This provision equals almost entirely the provision in Art 9 BC. Hence, reference is made to the explanatory notes regarding Art 9 BC. The only difference is that section 23 (3) CMA does not limit the scope of applicability to visual depictions, but covers all pornographic material.*

#### c. Best Practices

It is interesting to note that the act which intends to provide a comprehensive regulation of pornography related offences fails the international standard and is poorly drafted compared to the earlier provision in the Computer Misuse Act.

Even though section 23 CMA covers many aspects of child pornography, it does not include mere erotic posing pictures and does not tackle the issue of sexting between minors.

## 5. Germany

Child and adolescent pornography is regulated as two separate offences in the German Penal Code (§184 b and §184 c StGB).<sup>46</sup> The differentiation between child and adolescent pornography only has an impact on the range of sentence – the definition and the catalogue of offences have been largely aligned.

As Germany has ratified the Lanzarote Convention and is hence obliged to “translate” these standards into national law, the definition and the catalogue of offences is in line with these standards. These two provisions have been amended lately (25 January 2015) and hence, there is no official translation of §184 b and §184c StGB. Therefore, this analysis will focus on the exemption clause, which is based on Art 20 (3) Lanzarote Convention and has been transferred into national law. During the drafting of the amendments, the exemption clause and its challenges have been discussed intensively and the outcomes of these discussions can be helpful for the drafting of a Namibian exemption clause.

### a. Wording of exemption clause

The basis of this translation is the official translation of the version of § 184c StGB<sup>47</sup> before the amendment in 2015. The exemption clause in § 184c (4) StGB stipulates as follows:

*Section 1 Nr. 3 [production of adolescent pornography], also in connection with section (5) [attempt], and section 3 [possession or making available adolescent pornography] shall not apply to acts of persons related to adolescent pornography produced by them solely for their own private use and with consent of the person therein depicted.*

<sup>46</sup>StGB is the abbreviation for “Strafgesetzbuch”, which is the German Penal Code.

<sup>47</sup>[https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html)

<sup>48</sup>In German law, the teleological interpretation is one method to explore the true meaning of a legal provision. It is asking for the actual purpose behind the respective provision and hence provides the judiciary with ‘background information’ and a framework on how a provision should be interpreted.

<sup>49</sup>Hilgendorf, Eric, Kommentierung zu § 184c StGB in: Satzger/Schluckebier/Widmaier, StGB Strafgesetzbuch Kommentar, 2014.

## b. Challenges

Mainly criticised was the fact that an adolescent sending a sexually suggestive picture can still be prosecuted, as only the production, but not the transferring of the picture is covered by the exemption clause.

Furthermore, if A takes a picture of B, and B later requests A to send him or her this pictures and he or she possesses this picture, the depicted person (!) can be prosecuted as adolescent pornography offender, as the provision only exempts the producer of the picture of prosecution. So only the person who is actually taking the picture is exempted from being prosecution related to possession and production, but not the person depicted, as he or she has not produced the picture (“shall not apply to acts of persons related to adolescent pornography produced by them”). This dubious result has been solved so far by the judiciary through a teleological interpretation<sup>48</sup>, which has however to be seen critical as the wording of the provision is insofar unequivocal.

A similar problem arises when A takes a picture of himself and sends it to B. B can still be prosecuted as child pornography offender, as the picture she possesses has not been produced by her, but by A.<sup>49</sup>

### c. Best Practices

Even though the wording poses some challenges on the exemption clause, the implementation of that clause into national law per se is highly commendable, especially because it mainly follows the wording of the exemption clause in Art 20 (3) Lanzarote Convention. However, the wording has to be reformulated in order to also cover the two scenarios described above.

## 6. Canada

With Bill C-13, an act amending the criminal code and other relevant laws, Canada introduced legislation to tackle the issue of cyberbullying and sexting. As the Canadian legislation is very comprehensive with regard to child pornography, the analysis will only focus on Canada’s approach on sexting.

### a. Legislative Background

Section 163.1 Criminal Code stipulates the child pornography offence. The section explicitly names defences to the offence in section 163.1 (6) Criminal Code, whereby consent of the depicted person is not considered a defence. In order to tackle cyberbullying issues, the Bill C-13 introduced a new criminal offence in section 162.1 Criminal Code, “Publication, etc., of an intimate image without consent”. This provision criminalises knowingly publishing, distributing, transmitting, selling, making available or advertising an “intimate image” of a person. According to section 162.1 (1), it is only considered a crime, if committed without consent of the depicted person.

### b. Sexting between minors

After the enactment of Bill C-13, sexting cases between minors have not to be necessarily considered as child pornography offences anymore. Prosecutors can decide on a case-to-case basis whether they consider the sharing of explicit pictures between minors as being so severe that it should be prosecuted as child pornography offence, or as the more moderate offence of section 162.1 Criminal Code. The reason behind offering an alternative is that even though pictures have been shared without consent of the depicted person, prosecuting the child as child pornography offender is unproportional with regard to the severity of the penalty and the associated stigma.<sup>50</sup>

As elaborated below in B. IV. 4. b., this approach is highly recommendable when it comes to secondary sexting (sharing of explicit pictures *without the consent* of the person depicted), as the offence is - from the perspective of the objective of the crime - closer related to harassment than to child pornography, as the intention is to humiliate and harass the person depicted.

However, this legislation does not offer an appropriate solution for primary sexting between minors (sharing of explicit pictures *with the consent* of the person depicted), as it leads to an unjustifiable contradiction. If the child depicted in the explicit picture gave consent to the distribution of the image, the perpetrator can only be charged as a child pornography offender, but not with the “milder” offence of section 162.1 Criminal Code: section 162.1. Criminal Code is - according to the explicit phrasing - only applicable if the depicted person did not give consent to the distribution. Hence, only section 163. 1 Criminal Code is applicable. This leads to the result, that cases of primary sexting (consensual) can only be prosecuted as child pornography offences, whereas in cases of secondary sexting (without consent), the prosecutors can choose whether the offence should be categorized as child pornography or as “publication of an intimate picture without consent”. As the child pornography provision contains a minimum sentence and is a far more severe crime (mandatory registration in the sex offender registry!)<sup>51</sup>, a child could end up being charged with the harsher sentence (child pornography), even though consent was given and hence the offence is far less infringing with regard to the rights of the victim.<sup>52</sup>

<sup>50</sup>Canadian Bar Association, Bill C-13, Protecting Canadians from Online Crime Act, Ottawa 2014p. 3.

<sup>51</sup>Library of Parliament, Legislative Summary of Bill C-13, Ottawa 2013, p. 7.

<sup>52</sup>Library of Parliament, Legislative Summary of Bill C-13, Ottawa 2013, p. 5.

Furthermore, there is no regulation in section 162.1 Criminal Code with regard to the age at which a minor can effectively give consent to such a depiction.<sup>53</sup>

### c. Best Practices

Even though introducing an alternative, “milder” offence for cases of secondary texting between minors is proportional and recommendable for Namibia, it has to be ensured that cases of primary sexting are not treated by the law as more intrusive crimes, as this would contradict the value of consent of the depicted person. Right now, it seems that the law rather punishes than privileges perpetrators acting with the consent of the depicted person.

Furthermore, if the consent of a depicted child is relevant for an offence, it is decisive that there is a reference to the regulation of age of consent. Sexual offences including children have to be aligned if it comes to effective consent in order to guarantee consistency within the legal system.

## III. Gap analysis regarding the regulation of child pornography in Namibian legislation

In order to assess the current legal situation on child pornography in Namibia, a gap analysis on the domestic legislation has to be conducted.

### 1. Art 15 (2) Namibian Constitution

Art 15 (2) of the Namibian Constitution states:

*Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development.*

Child pornography is deemed to be harmful to every child's physical, mental, spiritual, moral and social development and therefore, children are

entitled to be protected from this form of sexual exploitation. Child pornography also violates the child's right to liberty (Art 7), dignity (Art 8), privacy (Art 13), and expression (Art 21 (1) a Namibian Constitution). This shows that child protection is a priority within the Namibian legal system.

The exact definitions and offences can be found in the national legislation below.

### 2. Labour Act, No. 11 of 2007

Section 3 of the Labour Act, No. 11 of 2007, (Abbr. Labour Act) is regulating the prohibition and restriction of child labour:

- (1) *A person must not employ or require or permit a child to work in any circumstances prohibited in terms of this section.*
- (2) *A person must not employ a child under the age of 14 years.*
- (3) *In respect of a child who is at least aged 14, but under the age of 16 years, a person -*
  - (a) *must not employ that child in any circumstances contemplated in Article 15(2) of the Namibian Constitution [...].*

Therefore, Section 3 Labour Act is providing more details on the prohibition of child labour and also states the legal consequences for child employment in contrast with Art 15 (2) Namibian Constitution:

*It is an offence for any person to employ, or require or permit, a child to work in any circumstances prohibited under this section and a person who is convicted of the offence is liable to a fine not exceeding N\$20 000, or to imprisonment for a period not exceeding four years, or to both the fine and imprisonment.*

The Labour Act does not mention or much less defines the term “child pornography” and is

therefore not a sufficient provision to regulate child pornography comprehensively. However, it has to be regarded as an important first step in recognizing child pornography as a crime.

### 3. Child Care and Protection Act, No. 3 of 2015/Draft Regulations

The Child Care and Protection Act, No. 3 of 2015, (abbr. CCPA) makes provision for the combatting of child pornography in Section 234 (1) (d):

*A person may not induce, procure, offer, allow or cause a child to be used for purposes of creating child pornography, whether for reward or not.*

Unfortunately, there is no definition of the term “child pornography” in the CCPA. The provision itself is insufficient as it only criminalises the creation of child pornography and various support actions to the creation of child pornography. Therefore, distributing, disseminating, importing, exporting, offering, selling and possessing of child pornography are not covered.

So far, the Draft Regulations CCPA do not reference child pornography. Even though such a reference is possible as the CCPA is making provision for child pornography, such a provision in the Draft Regulations CCPA can only specify what is already in the CCPA, but not add substantive content which has no “hook” in the CCPA. Hence, a definition of child pornography in the Draft Regulation CCPA might be unusual, but still acceptable, as the CCPA regulates child pornography. However, a further inclusion of criminalised conduct such as distributing, disseminating etc. in the Draft Regulation CCPA is not possible as there is no “hook” regarding these actions in the CCPA.

Therefore, the CCPA is not consistent with the international standards and the deficit in the CCPA can also not be eliminated by adding provisions to the Draft Regulation CCPA.

### 4. Publications Act, No. 42 of 1974

The Publications Act, No. 42 of 1974, (abbr.: PA) provides control over various publications. Section 8 prohibits the production, distribution, importation or possession of certain publications or objects. This requires that the publication is either “undesirable” or is prohibited under Section 9 (2) PA (“undesirable publication”). Section 27 (2) PA criminalises the exhibition, publication and possession of prohibited or not approved films.

Section 47 defines the term “undesirable” as – amongst others - offensive or harmful to public morals. Even though child pornography can be subsumed under this term, there is no clear definition of the term “child pornography” as required by international law and hence, the regulation in the Publications Act, No. 42 of 1974, is not sufficient.

### 5. Indecent and Obscene Photographic Matter Act, No. 37 of 1967

This Act makes it an offence to possess indecent or obscene photographic matter. Although still technically on Namibia's law books, it has no force, because the High Court of Namibia declared section 2(1) of the Act unconstitutional and found that the remainder of the Act was not severable. Therefore, this law is effectively defunct.

<sup>53</sup>Library of Parliament, Legislative Summary of Bill C-13, Ottawa 2013, p. 5.

## IV. Recommendations for Namibia

The international analysis and the comparative legal analysis provide Namibia with a broad overview of the regulatory options with regard to child pornography. Namibia has now the unique chance to draft a provision which combines the high standards of international law and the best practices from other countries. Hence, the provision recommended below picks out the best practices and incorporates them in one provision which provides for the highest standard of child protection in the field of child pornography. As in most of the international treaties and the other legislation, the provision will be split up in a definition of the term “child pornography” and a catalogue of offences.

### 1. Definition

As shown in the analysis above, the definition of the term “child pornography” has to be very detailed and precise in the wording. It is proposed that the definition covers at least four elements, which do not necessarily have to be phrased in the way proposed in this report, as long as the respective content is covered:

- **Material:** Any depiction, no limitation to visual depiction;
- **Subject:** Child (definition of the term “child”), virtual pornography, persons made to appear to be minors;
- **Conduct:** real or simulated sexually explicit conduct, depiction of the sexual parts of a child for primarily sexual purposes, nude or semi-nude depiction of a child in an unnatural or sexually suggestive posture.

The elements will be further defined and explained in the following sections.

#### a. Material

In order to cover all different sorts of pornographic material, the definition should not be limited to

visual depiction, but rather also explicitly include text and audio or any other material.<sup>54</sup>

Suggestions for the wording:

- “material that visually or otherwise depicts”;
- “any representation, whether visual, audio, or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means”.

#### b. Subject

When defining the subject of child pornography, the primary target group has to be children. This is also the part of the definition, where the term “child” itself can be defined. Alternatively, there is the option of drafting a separate definition for this term. However, it is of utmost importance to include all persons below the age of 18 years in the definition as no person below that age can give consent to child pornography as it is always considered sexual exploitation of a child.<sup>55</sup>

Furthermore, virtual pornography and pornography depicting persons who just appear to be minors should be included in the definition. The reason for the inclusion of virtual pornography is that virtual images may also be traded as real image, driving the market for child pornography and could entice potential sex offender. Virtual pornography can also be used to lure children into participating in such acts. Furthermore, technology makes it almost impossible to distinguish between a real child and a morphed image, which also makes the prosecution of child pornography more difficult. This argument is also applicable for pornography depicting persons who just appear to be minors. As the victims of child pornography are unknown in most cases, the prosecution agency might struggle to prove that – at least not in obvious cases – the depicted person is a minor. Hence, it is highly recommendable not to limit the definition to actual minors.<sup>56</sup>

These pictures all show “virtual” children:<sup>57</sup>



#### c. Conduct

For the first two elements of the conduct, the approach in Art 20 (2) Lanzarote Convention is recommended. It defines the term as “real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes”. This wording is deemed appropriate, however, there is the option of further defining the term ‘sexually explicit conduct’, as in the legislation in Botswana and the Philippines. Both legislations follow the definition in the explanatory reports for the Budapest (Art 100) and Lanzarote Convention (Art 120):

- a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between minors, or between an adult and a minor, of the same or opposite sex;
- b) bestiality;
- c) masturbation;
- d) sadistic or masochistic abuse in a sexual context; or
- e) lascivious exhibition of the genitals or the pubic area of a minor.

If Namibia follows the approach of a separate definition of “sexually explicit conduct” the phrase “any depiction of a child’s sexual organs for primarily sexual purposes” is obsolete, as it is already covered by e). However, these terms are not sufficient as they don’t cover “erotic posing” material. The term “erotic posing” includes deliberately posed pictures of fully, partially clothed or naked children in sexualised or provocative poses. This subsection of child pornography has to be criminalised as it is also a form of sexual exploitation of children. With regard to the phrasing, it is recommendable to include a half sentence such as “nude or semi-nude depiction in an unnatural or sexually suggestive posture”. This wording is broad enough to capture actual child pornography, but also narrow enough to exclude innocent pictures which no sexual connotation, such as a naked child playing on a beach. This differentiation is important as the child pornography definition should not include mere nude or semi-nude pictures of children, as such pictures are a normal and natural part of daily family life. However, as soon as these pictures have a sexual connotation, described in the definition as “unnatural or sexually suggestive posture”, these pictures can be used for the sexual exploitation of children and should hence be covered by the child pornography definition.

<sup>54</sup>Following this approach: HIPPSA – Computer Crime and Cybercrime: SADC Model Law, Section 3(8).

<sup>55</sup>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), p. 2.

<sup>56</sup>According to HIPPSA – Computer Crime and Cybercrime: SADC Model Law, Section 3(8), the inclusion of virtual pornography and the persons appearing to be minors is also proposed, but can be omitted by a country.

<sup>57</sup>Source of pictures: Chetty, Iyavar, “Sexting” of revealing images of children is the distribution of child pornography, p. 8; by displaying a virtual 10 year old Philippine girl online, Terre des Hommes Netherlands researchers were able to identify over 1,000 adults who were willing to pay children in developing countries to perform sexual acts in front of the webcam. The adults could not identify that the Philippine child in front of the webcam was virtual and not a real child. The video footage of the child perpetrators has been handed over to INTERPOL (<http://www.terredeshommes.org/webcam-child-sex-tourism/>).

## 2. Offences

As the catalogue of offences in Art 20 (1) Lanzarote Convention also covers the mere possession and accessing of child pornography, the provision as it is should be translated into national law. The provision could read as follows:

*A person, who – without right -*  
*a. produces child pornography;*  
*b. offers or makes child pornography available;*  
*c. distributes or transmits child pornography;*  
*d. procures child pornography for oneself or for another person;*  
*e. possesses child pornography;*  
*f. knowingly obtains access to child pornography,*  
*commits an offence and is on conviction liable for [sentence to be included].*

As stated with regard to Art 9 BC, the term “without right” excludes cases from the child pornography provision where the material serves a serious literary, artistic, political, or scientific purpose and hence has value for minors. Same applies if the material is used for the purposes of law enforcement.

The provision is deliberately not limited to online child pornography, as e.g. in Art 9 BC (“through a computer system”), as there is no sufficient “offline” provision regulating child pornography in place in Namibia. Hence, the limitation of the child pornography provision to online offences would leave regulatory deficit within the Namibian legislation. In order to stress that the vast majority of child pornography offences are committed online, the law should include in b. – e. the phrase “including through, but not limited to, information and communication technologies”.

## 3. Aggravating circumstances

As presented above, some countries include aggravating circumstances in their child pornography provision in order to raise the sentence for certain circumstances, which seem to be more severe and hence deserve a higher range of sentence. Such circumstances are: using mentally disabled children for child pornography offences,<sup>58</sup> syndicated child pornography crime<sup>59</sup>, perpetrator is a parent/caregiver or a public officer/employee.<sup>60</sup>

Including aggravating circumstances in criminal provisions does not appear to be common practice in Namibia, but should nevertheless be considered in order to give the judicative orientation on the seriousness of the crime committed.

### 4. Exemption Clause regarding sexting between minors

#### a. Background

As stated above, the current draft provision can lead to a prosecution of minors as child pornography offenders because of (consensual) sexting. Such a prosecution has to be avoided as it does not serve the best interest of the child, which is always the guiding principle in the field of child protection (Art 3 CRC). The child pornography provisions are intended to protect children from sexual exploitation by adults, not turning them into sex offenders. If we allow such a loophole in the law, we find children to be prosecuted together with paedophiles: both victim and targeted offender would therefore be lumped together, the law which intends to protect the child from paedophiles would put the child itself on the same level. Hence, the challenge is to draft a provision which protects children from perpetrator, while not exposing minors to prosecution under the same laws which were designed to protect them.

<sup>58</sup>See section on South Africa.

<sup>59</sup>See section on Philippines; also considered aggravating circumstances in section 184b II German Criminal Code and section 184c II German Criminal Code.

<sup>60</sup>See section on Philippines.

### (1) Assessment of sexting: dangers and sexual experimentation

Sexting poses dangers for children which they might not be able to assess properly and therefore be able to avoid them. First of all, children could be pressured into sending nude or semi-nude pictures as a result of peer pressure. Even if pictures are shared consensually within a relationship, there is always the risk that one of the partners nevertheless shares the picture with friends or school mates, especially after the relationship falls apart and these pictures are used to take revenge on the former partner. There is also the risk that even if the pictures have been shared consensually at the beginning, they might fall into the wrong hands and be used as real child pornography by paedophiles. Furthermore, sexting is perceived as unhealthy sexual behaviour between minors and that the child pornography provision without an exemption clause could deter children from sexting.<sup>61</sup> Especially when the picture is uploaded online, there is almost no way of ensuring that the picture is taken down and cannot be accessed or shared anymore. These are severe risks which are very difficult to control with regulatory measures. Especially the severe violation of a child's intimate and private sphere if a picture is shared non-consensually has to be taken into account for the drafting of the legislative provision as such an event can be highly traumatising for a child.

On the other hand, it has to be considered that there is a different perception of sexting between adults and minors. As adults might regard this practice as offensive and immoral, for minors it might simply appear as a part of flirting and exploring sexuality.<sup>62</sup> This different assessment might also be due to the technological process and the excessive use of media, internet and messengers by children and adolescents. Today's youth is the first generation that grew up in the digital age, they are “native speakers” of technology. Hence, social interactions shift to the online world;<sup>63</sup> the law has to keep pace with these new developments and especially in Namibia, foresee the future steadily increasing accessibility of internet and online messaging with the spread of broadband internet in the next years.

Even though sexting poses many risks on minors which they might not be aware of, there has to be a reasonable balance between protecting children from sexual exploitation and handling cases of sexting.<sup>64</sup> These risks imposed by sexting can be deemed as severe, but allowing the prosecution of children for sexting as child pornography offenders can be regarded as even more severe and intrusive for a child. This gets even clearer when focusing on the psychological consequences for children in conflict with the law.

According to the so called labelling approach, a theory developed in the field of sociology and criminology, a person who has once been labelled as “criminal” is more likely to commit another offence.<sup>65</sup> First of all, being in jail and hence in contact with other criminals might facilitate a further criminal “career”. Especially children are much pruner to be negatively influenced by other perpetrators as they have not completed their emotional development and can therefore not resist these influences. This risk is especially high in Namibia as the separated incarceration of adults and juvenile offenders is still far from being implemented in the entire country, despite the regulation in section 231 (1) CCPA and section 61 Correctional Services Act, No. 9 of 2012, which state that children in prison or police cells should be kept separately from adults.

Secondly, research shows that adolescents are inherently tended to deviance during a certain period of their development.<sup>66</sup> From a psychological point of view, children tend to accept this label (“criminal”)

<sup>61</sup>Crofts/Lee, ‘Sexting’, *Children and Child Pornography*, *Sydney Law Review*, Vol. 35:85, 2013, p. 94.

<sup>62</sup>Wolak/Finkelhor, *Sexting: A typology*, *Crimes against Children Resource Center*, 2011, p. 7.

<sup>63</sup>Doornwaard/ Bickham/Rich/ ter Bogt/van den Eijnden, *Adolescents’ Use of Sexually Explicit Internet Material and Their Sexual Attitudes and Behavior: Parallel Development and Directional Effects*, *Developmental Psychology* 2015, Vol. 51, No. 10, p. 1485.

<sup>64</sup>Lehnart, *Amanda, Teens and sexting: how and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging*, *Pew Research Center*, 2009.

<sup>65</sup>Hayes/Prenzler, *An introduction to crime and criminology*, Melbourne 2015.

<sup>66</sup>National Research Council. *Institute of Medicine, Juvenile Crime – Juvenile Justice*, p. 66.

more easily and are therefore more tempted to see themselves as criminals and hence commit crimes as they don't have a fully developed personality which allows them to critically analyse this label. The label becomes a self-fulfilling prophecy.<sup>67</sup>

Applying criminal law for children should therefore always be ultima ratio, especially when the conduct which leads to the prosecution is deemed to be normal sexual experimental behaviour and if committed consensually, does not harm a child.<sup>68</sup> In order to avoid the dangers of sexting, the focus should rather be on educating children on the dangers of such practices and teaching them how to protect themselves.

## (2) Constitutional concerns

If sexting between minors is criminalised, this might also impose constitutional implications on the respective provision. Reference shall be made to a South African case (*The Teddy Bear Clinic for Abused Children and RAPCAN v The Minister of Justice and Constitutional Development*) which has been argued before the Constitutional Court. The Court had to decide whether the criminalisation of consensual sexual activity between adolescents violates the adolescents' rights under the South African Constitution. The court held that the right to human dignity (Art 10 South African Constitution) has been infringed:

*"If one's consensual sexual choices are not respected by society, but are criminalised, one's innate sense of self-worth will inevitably be diminished. Even when such criminal provisions are rarely enforced, their symbolic impact has a severe effect on the social lives and dignity of those targeted."*<sup>69</sup>

Furthermore, the Court views the right to privacy (Art 14 South African Constitution) to be infringed. The

right to privacy includes the "inner sanctum" of personhood which covers "the right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community."<sup>70</sup> With regard to the criminalisation of sexual activity between minors, the court held:

*"The criminal offences [...] apply to the most intimate sphere of personal relationships and therefore inevitably implicate the constitutional right to privacy."*<sup>71</sup>

Finally, the court held that the infringement of the right to dignity and privacy cannot be justified under Art 36 South African Constitution and declared the respective provision unconstitutional and hence null and void.<sup>72</sup>

This decision shows that children indeed have rights which they can recall with regard to their sexual activity. As sexting is deemed to be part of the sexual behaviour of minors and adolescents and the structure of the South African and the Namibian constitution are comparable, this decision can lead as a guiding decision on the criminalisation of sexual activity between minors. This report does not claim to make an absolute judgement on the possible constitutionality of a child pornography provision which does not make an exemption for sexting between minors, but rather intends to point to the constitutional implications that might occur if such a case should be pending before a Namibian court.

## (3) Legislative contradiction

Another problem is the discrepancy between the age of consent to sex in Namibia and the possible applicability of the child pornography provision on sexting cases between minors. Both the Combating of Rape Act, No. 8 of 2000, and

the Combating of Immoral Practices, Act 21 of 1980, regulate offences related to sexual intercourse with persons below the age of 18 years.

Section 2 (2) d) of the Combating of Rape Act, No. 8 of 2000, sets the age of consent at 14 years, with a close-in-age clause of three years.<sup>73</sup> This means for example, if a 13 year old girl sleeps with a 17 year old boy, the boy is guilty of the offence of rape. However, if a 12 year old boy sleeps with a 14 year old girl, the girl is not guilty of rape, as the two criteria (complainant under 14, perpetrator not more than three years older) are cumulative.

However, section 14 of the Combating of Immoral Practices Act, No. 21 of 1980, sets the age of consent at 16 years, with a close-in-age clause of three years. If a 14 year old has consensual sex with a 18 year old, this is not considered rape under Section 2 (2) d) of the Combating of Rape Act, No. 8 of 2000, as the child is not below the age of 14 years. However, according to the Combating of Immoral Practices Act, this would be considered a "sexual offence with youth", as the child is younger than 16 years and the partner is more than three years older. Even if the incident is not classified as rape, it is still not legal, as it can be subsumed under the "sexual offence with youth" offence. But even under the Combating of Immoral Practices Act, a 12 year old child can have sex with a 14 year old child, as the two aspects of the provision are cumulative. This shows that already at a very early age, children can consent to sex, as long as their partner is not more than three years older.

Therefore, the regulation of child pornography without an exemption clause for minors seems to cause a legislative contradiction with regard to the age of consent to sex. Children can consent to sex as long as the child is older than 16 years or their partner is not three years older, but if the children take a picture of this act or send a semi-nude or nude picture to their partner, they are prosecuted for such a severe crime as child pornography.

If one compares both actions, there is no reasonable justification for legalizing sex between over 16 years old but at the same time prosecuting them for child pornography if they conduct a comparably innocent act such as taking a nude picture.<sup>74</sup> One might argue that the taking of a picture or a video poses unforeseen risks for the minors, e.g. that the recipient shares the picture without the consent of the sender. However, sex poses much more severe risks as HIV transmission and pregnancy. These risks also didn't stop the legalisation of sex between minors. Therefore, there is no reason why there should not be an exemption clause for minors with regard to child pornography and sexting. Otherwise, this would impose a legislative conflict of values which can barely be solved. It is a contradictory conclusion to deny those which are deemed mature enough by law to have sex to depict these same acts.

## b. Legislative solution

Namibia has the chance now to enact a progressive legislation and forestall the technical development and its impact on the sexual behaviour of minors. The reason for the broad lack of exemption clauses in other countries is either that the law predates the technical development and could therefore not foresee the possibility of a prosecution of minors with regard to sexting, or there was just no thought given to the possibility that children themselves might be found to be offenders under the child pornography laws.

When it comes to sexting, we have to distinguish strictly between two cases, primary and secondary sexting. Primary sexting means hereby the *consensual* sharing of pictures within a sexual relationship, secondary

<sup>67</sup>For further information on the various aspects of this discussion: Lieberman, Akiva/Kirk, David/Kim, Kideuk, *Labelling Affects of first juvenile arrests: secondary deviance and secondary sanctioning*, p. 345 et seq.

<sup>68</sup>Crofts/Lee, 'Sexting', *Children and Child Pornography*, Sydney Law Review, Vol. 35:85, 2013, p. 100.

<sup>69</sup>*The Teddy Bear Clinic for Abused Children and RAPCAN v The Minister of Justice and Constitutional Development*, Section 55.

<sup>70</sup>*The Teddy Bear Clinic for Abused Children and RAPCAN v The Minister of Justice and Constitutional Development*, Section 59.

<sup>71</sup>*The Teddy Bear Clinic for Abused Children and RAPCAN v The Minister of Justice and Constitutional Development*, Section 60.

<sup>72</sup>*The Teddy Bear Clinic for Abused Children and RAPCAN v The Minister of Justice and Constitutional Development*, Section 101.

<sup>73</sup>" Any person who intentionally under coercive circumstances commits [...] a sexual act with another person [...] shall be guilty of the offence of rape."

<sup>74</sup>In more general terms Crofts/Lee, 'Sexting', *Children and Child Pornography*, Sydney Law Review, Vol. 35:85, 2013, p. 101.

sexting means the further dissemination of these pictures without the consent of the depicted person. As these two forms have a very different nature with regard to the consent of the depicted person, it seems reasonable that these forms are treated differently within the legislation.

### (1) Exemption clause (primary sexting)

The exemption clause proposed in this paper shall only apply for primary sexting as defined above. The rationale behind this is that in the case of primary sexting the complete exemption of any legal consequence is utterly legitimate. As discussed above, in cases of consensual sexting the provision on child pornography designated to protect children shall not be used to turn them into offenders, especially because sexting is deemed as normal sexual behaviour in the age of rising technology.

Hence, the law has to recognize this special construction and provide a solution to exempt minors from prosecution. A proposal to strike the balance of protecting minors from prosecution, but at the same time not mitigate the prosecution mechanisms for "real" child pornography offenders is to include an exemption clause. This exemption clause has to be drafted broad enough to allow for a full exemption of minors with regard to primary sexting but at the same time not creating a loophole for perpetrators.

Art 20 (3) Lanzarote Convention is the only international instrument providing for such an exemption clause. The phrasing can be used as a basis and then be further adjusted to the Namibian context:

*Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material [...] involving children who have reached the age set in application of Article 18, paragraph 2 [age of consent], where these images are*

*produced and possessed by them with their consent and solely for their own private use.*

From this provision, three essential elements can be highlighted:

- Decriminalisation only for possession and production of child pornography
- Decriminalisation only for minors who have reached the age of consent
- Decriminalisation only for images possessed and produced with their consent and only for private use

An exemption clause adapted to the Namibian context could read as follows:

*[Section x] shall not apply to acts of persons under the age of eighteen years related to child pornography produced or possessed by them solely for their own private use and with the consent of the persons therein depicted, but not if sexual intercourse between the child depicted and the person in possession of the material would be an offence under the law of Namibia.*

This exemption clause contains all three elements stated above and is aligned with Namibian legislation on consensual sex between minors.

### (2) Juvenile offence (secondary sexting)

If child pornography, which has been produced consensually in the beginning or even without consent, is shared by a minor without the consent of the depicted person, the conduct has to be assessed fundamentally different than the cases of primary sexting. The typical case is that pictures, which have been taken consensually during a relationship, are shared without consent of the depicted minor after the relationship is over in order to take revenge or to humiliate the former partner publicly. Such actions definitely prove

some sort of criminal energy, especially when committed in a malicious intention. Therefore, secondary sexting cases should not be covered by an exemption clause.

However, it remains questionable whether child pornography offences are the appropriate answer to such kind of deviant behaviour as the intention of the offence is fundamentally different from the paradigm child pornography cases. As the paradigm child pornography cases are committed with the intention of sexual stimulation by using sexual exploitative material, the intention of sharing pictures in the secondary sexting cases is to humiliate or harass another person. This proves that the nature of secondary sexting is much closer related to offences such as harassment rather than to sexual offences.

This fundamental difference has to be taken into account when dealing with secondary sexting cases between minors. In order to protect the minor from being labelled as sexual offender while the nature of the crime is rather a harassment or defamatory offence, the legislative mechanism have to ensure that this different criminal energy is assessed appropriately.

### c. Exemption Clause and binding international standards on child pornography

As stated above, the Lanzarote Convention is the only international instrument providing for an exemption clause. Other conventions as the OPSC and the ACRWC, which are binding for Namibia, do not provide for an exemption clause. One might argue that an exemption clause mitigates the standard of protection by excluding person from prosecution and Namibia therefore violates its international obligations under the respective conventions.

The prosecution of a child as child pornography offender with regard to sexting is not in the best interest of the child. The principle of the best interest of the child (Art 3 CRC) is always the primary consideration. Therefore, an exemption clause does not violate Namibia's obligation under international law, as an exemption clause serves the best interest of the child and hence Namibia is not failing to comply with binding international standards.

## 5. Possible bills to regulate child pornography

There are two laws in Namibia, which are about to be enacted and which have a strong thematic link to child pornography: the Draft Trafficking in Persons Bill and the Draft Electronic Transactions and Cybercrime Bill.

### a. Draft Trafficking in Persons Bill

Even though child trafficking and child pornography have in common that they are both considered as child exploitation and child trafficking can also include the component of sexual exploitation, these are two very different offences. Child trafficking does not necessarily aim at sexual exploitation, trafficked children are also exploited as domestic workers or slaves.<sup>75</sup> This shows that child pornography and child trafficking are two different offences and hence, a child pornography provision cannot be included in the Draft Trafficking in Persons Bill.

### b. Draft Electronic Transactions and Cybercrime Bill (February 2016 Version)<sup>76</sup>

The current draft criminalises child pornography (section 62 and 66). The following analysis aims to identify

<sup>75</sup>See Art 3 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

<sup>76</sup>UNICEFs originally made comments on the December 2015 Version. After consultations with MICT and the legal drafter in January 2016, many of UNICEFs recommendations have already been incorporated. The recommendations given now are focusing on the February 2016 Version.

whether the provision meets the standards set in the section “Recommendations for Namibia” and proposes amendments if deemed necessary.

### (1) Definition and Exemption Clause

The Draft Electronic Transactions and Cybercrime Bill (Abbr. Draft ETCB) provides for a definition and a catalogue of offences relating to child pornography. Section 62 Draft ETCB defines the term “child pornography” as follows:

*“child pornography” means the depiction by means of images, sounds, text or in any other manner of a person who appears to be under the age of eighteen years or who is represented or held out to be below that age (referred to in this definition as “the child”)*

*(a) while performing asexual act;  
(b) in such a manner that it strongly suggests that the child is performing such an act or is inviting such an act;  
(c) while engaging in other sexually explicit conduct where the material is calculated or appears to be calculated to stimulate erotic, sadistic or masochistic feelings or emotions:*

*Provided that material depicting a child who has voluntarily provided that material to another person is not child pornography, if sexual intercourse between the child depicted and the person in possession of the material would not be an offence under the law of Namibia.*

First of all, it is positive that the provision is not limited to visual depiction, but follows the principle of the OPSC and includes also text, sound, or other means. The next part of the provision is ambiguously drafted as it only refers to persons who appear to be minors, are represented or held out to be minors. While this provision appears to follow the intention not only to include children,

but also persons who appear to be children, this definition excludes persons who are in fact minors as it does not include “a person under the age of eighteen years”. This way, the term would also provide for a definition of “child”.

Regarding the conduct, the content of number (b) is not clear. The phrasing should rather be consistent with international law and hence use the formulation “any depiction of a child’s sexual organs for primarily sexual purposes” would be preferable. The second half sentence of number b) intends to cover “erotic posing” and hence exceeds international standards which is a very commendable approach. However, the phrasing could be clearer such as suggested in B. IV. 5. b.: “nude or semi-nude depiction in an unnatural or sexually suggestive posture”.

In order to tackle sexting cases between minors, an exemption clause has been included in the provision.<sup>77</sup> The current exemption clause is located in the definition, not the catalogue of offences. The exemption clauses in the Lanzarote Convention and in national legislations, e.g. in Germany, locate the exemption clause rather in the catalogue of offences, which might be justified as the content is still considered potential abusive material if the material ends up in the wrong hands. Hence, rather possession and production are decriminalised in the catalogue of offences.

Furthermore, some changes are proposed to the wording of the current exemption clause, which reads as follows:

*“Provided that material which is produced and possessed with the consent of the depicted child and solely for the private use, is not child pornography, if sexual intercourse between the child depicted and the person producing or possessing the material would not be an offence under the law of Namibia.”*

The current wording of the clause avoids the two problematic scenarios discussed under the German exemption clause, as the possession and production is not linked to the original producer. The production and possession is merely linked to the consent of the child.

### (2) Catalogue of Offences

The catalogue of offences in Section 66 is almost identical with Art 20 1) Lanzarote Convention<sup>78</sup> and is therefore in line with the highest international standard. However, the phrasing of section 65 (1) a) limits its applicability: the production of child pornography for the private use is not criminalised (“production for the purpose of its distribution”) and hence leaves a gap in the legislation. However, these cases can be prosecuted as possession of child pornography.

In order to serve the purpose of excluding child pornography material which serves political, scientific or artistic purposes, the term “without right” should be included in the catalogue of offences.<sup>79</sup> As this is a fairly vague term, it might be advisable to include a bona fide clause instead.

Concerns have been raised that the unknowing possession of child pornography would lead to prosecution, e.g. because an email containing this content was sent as SPAM and not deleted in the folder. This is not the case. As a basic principle in criminal law, an offender has to act intentionally with regards to the objective element of the stipulation. If someone possesses child pornography, but can prove that this possession is not intentional, there is no room for prosecution. In order to avoid confusion about the intention requirement, the term “intentionally” can be added to the catalogue of offences.<sup>80</sup>

As already discussed above, the provision is limited to the use of information systems. This makes sense as the law focuses on cybercrime. However, there is no comprehensive legislation for offline child pornography in place in Namibia.<sup>81</sup> If the Draft only regulates online offences, it leaves a gap in criminal liability. In order to strike the balance between avoiding a legislative gap by excluding offline offences and fitting into the cybercrime context, the wording should be changed to “including through, but not limited to information systems”. With this formulation, Namibia has a comprehensive legislation in place for both online and offline offences.

## C. Grooming

Another crime which can be grouped under the term “child online protection” and can therefore be considered for the Cybercrime Draft is the so-called “grooming” or solicitation of children. The grooming/solicitation of children via ICTs describes the situation that adults are approaching children online with the intention to arrange an offline meeting in order to commit a sexual offence. Even though international law only partly provides for a grooming regulation, many countries have enacted provisions on grooming. Especially in countries where general internet access is still new and therefore children are not well-informed about the dangers of social media and online communication, they are particularly vulnerable for online abuse.

<sup>78</sup>Art 20(3) Lanzarote Convention: “Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised:

a. producing child pornography; b. offering or making available child pornography; c. distributing or transmitting child pornography; d. procuring child pornography for oneself or for another person; e. possessing child pornography; f. knowingly obtaining access, through information and communication technologies, to child pornography.”; Section 13 SADC Model Legislation uses almost the same wording.

<sup>79</sup>E.g. Art 9(1) Budapest Convention: “when committed intentionally and without right”; Section 13(1) SADC Model Legislation: “without lawful excuse or justification”.

<sup>80</sup>See Art 9(1) Budapest Convention, Art 20(1) Lanzarote Convention, Section 13 SADC Model Legislation.

<sup>81</sup>E.g. A possesses a picture with child pornography content, which has been printed by B.

<sup>77</sup>UNICEF Namibia proposed the inclusion of an Exemption Clause in order to address sexting cases between minors.

## I. International Law

Two international instruments, which require the criminalization of grooming, are Art 23 Lanzarote Convention and Art 6 EU Directive on Child Exploitation 2011/92/EU. Although both instruments are not binding for Namibia, they can serve as best practices and role models on the regulation of this online offence.

### 1. Art 23 Lanzarote Convention

Art 23 Lanzarote Convention requires the criminalization of solicitation of children for sexual purposes:

*Each Party shall take the necessary legislative or other measures to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set in application of Article 18, paragraph 2, [age of sexual consent] for the purpose of committing any of the offences established in accordance with Article 18, paragraph 1.a, or Article 20 paragraph 1.a [sexual abuse, child pornography], against him or her, where this proposal has been followed by material acts leading to such a meeting.*

First of all, it has to be noted that grooming is only considered an offence if the child has not reached the age of sexual consent. Furthermore, there has to be a "material act" leading to such a meeting. In order to understand this addition, a general explanation of the distinction of preparatory actions and its criminalisation in law has to be provided. The ground rule in criminal law is that a preparatory action to a crime is not criminalised, as long as it does not pass the threshold of an attempted crime. Therefore, preparatory actions are mostly not considered to have passed the threshold for prosecution. As the mere (sexual) chatting to a child online, even with the attention of abusing the child later, is a preparatory action and furthermore

is protected by the freedom of expression, Art 23 Lanzarote Convention requires a "material act" in order to avoid over-criminalization and a possible unconstitutionality of such a criminal provision. According to section 160 Lanzarote Convention (Explanatory Report) the term "material act" requires concrete actions, such as, for example, the perpetrator arriving at the agreed meeting point.

### 2. Art. 6 EU Directive on Child Exploitation

Art 6 (1) EU directive criminalises the solicitation of children for sexual purposes:

*Member States shall take the necessary measures to ensure that the following intentional conduct is punishable: the proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of committing any of the offences referred to in Article 3(4) and Article 5(6), where that proposal was followed by material acts leading to such a meeting, shall be punishable.*

Art 6 (1) EU directive criminalises the grooming of children in order to engage in sexual activities with a child who has not reached the age of sexual consent (Art 3 (4) EU directive) or the production of child pornography (Art 5 (6) EU directive). Furthermore, it also requires that there has to be any material act leading to an actual meeting. This provision is textually comparable to Art 23 Lanzarote Convention and hence reference is made to the explanatory notes regarding this provision.

## II. Gap analysis regarding regulation of grooming in Namibian legislation

Section 14 (c) of the Combating of Immoral Practices, Act 21 of 1980, regulates solicitation as follows:

*Any person who [...]*

*(c) solicits or entices such a child to the commission of a sexual act or an indecent or immoral act, and who -*

*(i) is more than three years older than such a child; and*

*(ii) is not married to such a child (whether under the general law or customary law),*

*shall be guilty of an offence and liable on conviction to a fine not exceeding N\$40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.*

Even though this provision is not limited to offline offences, both international instruments take explicit reference to ICT's and hence provide for an online specific offence. The rationale is that online grooming is by nature different from offline grooming: the communication starts online and hence the child is not in concrete danger yet. The broad access to ICTs by children of all age groups and the difficulties in monitoring online dangers justifies the need for a specific online grooming provision.<sup>82</sup>

Contrary to international law, the provision does not require a material act and hence raises concerns with regard to its constitutionality.

## III. Comparative Legal Analysis

### 1. South Africa

Section 18 (1) CLAA criminalises the promotion of sexual grooming of a child and section 18 (2) addresses the actual grooming of a child:

*A person ("A") who -*

*(a) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of an article, which is exclusively intended to facilitate the commission of a sexual act with or by a child ("B")*

*(b) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of a publication or film that promotes or is intended to be used in the commission of a sexual act with or by "B";*

*(c) supplies, exposes or displays to a third person ("C")*

*(i) an article which is intended to be used in the performance of a sexual act;*

*(ii) child pornography or pornography; or*

*(iii) a publication or film, with the intention to encourage, enable, instruct or persuade C to perform a sexual act with B; or*

*(d) arranges or facilitates a meeting or communication between C and B by any means from, to or in any part of the world, with the intention that C will perform a sexual act with B, is guilty of the offence of promoting the sexual grooming of a child.*

*(2) A person ("A") who -*

*(a) supplies, exposes or displays to a child complainant ("B") -*

*(i) an article which is intended to be used in the performance of a sexual act;*

*(ii) child pornography or pornography; or*

<sup>82</sup> Lanzarote Convention, Explanatory Report, section 159.

(iii) a publication or film, with the intention to encourage, enable, instruct or persuade B to perform a sexual act;

(b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to –

(i) perform a sexual act with A or a third person (“C”);

(ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching;

(iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of selfmasturbation;

(iv) be exposed to child pornography or pornography;

(v) be used for pornographic purposes as contemplated in section 20(1); or

(vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B;

(c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B;

(d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B –

(i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or

(ii) during such meeting or communication or any subsequent meeting or communication to –

(aa) commit a sexual act with A;

(bb) discuss, explain or describe the commission of a sexual act; or

(cc) provide A, by means of any form of

communication including electronic communication, with any image, publication, depiction, description or sequence of child pornography of B himself or herself or any other person;

or

(e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B, is guilty of the offence of sexual grooming of a child.

As regarding the definition of child pornography in the CLAA, South African legislation tends to describe all possible scenarios which constitute the grooming of a child. If a variety of scenarios are spelled out explicitly by the law, it poses the risk that not all possible scenarios are covered or that it might not include any future developments. Therefore it is advisable to use more general though specific terms, which allow for a concrete interpretation of the wording by the courts but also leave enough margin for interpretation to cover various scenarios and cases. Even though the Namibian provision is much shorter and more compact, all scenarios of section 18 CLAA can be subsumed under this clause. As the provision does not explicitly refer to online grooming, the provision does not add concrete value to the Namibian legislative process. Moreover, it is important to state that the provision does not require that any material act leading to such a meeting has been committed. Hence, the criminalised conduct already start with approaching the child.

As discussed above with regard to the CLAA provision in child pornography, there is also a special provision for grooming of mentally disabled persons (section 24). Grooming of mentally disabled children should be considered as aggravating circumstances for the crime of grooming.

## 2. Philippines

The Philippine legislation regulates the grooming and luring of a child. The definition in Art 3 (h), (i) ACPA defines “grooming” and “luring” as follows:

“Grooming” refers to the act of preparing a child or someone who the offender believes to be a child for sexual activity or sexual relationship by communicating any form of child pornography. It includes online enticement or enticement through any other means.

“Luring” refers to the act of communicating, by means of a computer system, with a child or someone who the offender believes to be a child for the purpose of facilitating the commission of sexual activity or production of any form of child pornography.

The definition of the term “grooming” is more specific and narrow compared to international and South African law, as it only includes the act of preparing a child for sex by communicating any form of child pornography, not communication in general. However, it is broader than the international standards as it covers both online and offline activities and also the situation where the perpetrator prepares someone who he/she believes to be a child. “Luring” is defined in broader terms than in international law as there is no need for a proposal, a mere communication is sufficient, and as there has to be no material act leading to a meeting. Furthermore, it also covers the situation where the offender believes to communicate with a child. The term “computer system” is not defined in the Act; hence, it has to be assumed that the term does not equal to ICTs. According to section 4 (h) ACPA, it is prohibited to engage in the luring or grooming of a child.

This provision should not serve as an example for the legislation in Namibia as it unnecessarily complicates the offence. There is no reasonable ground why the internationally acknowledged offence of “grooming” should be split up in “grooming” and “luring” and why “grooming” only refers to the presentation of child pornography.

## 3. Germany

§ 174 IV Nr. 3 StGB criminalizes cyber-grooming. As this section has been lately amended, there is no official translation available. Hence, the analysis is limited to the academic discussion on this section as they are very instructive for the general discussion around the necessity of a cyber-grooming provision.

§ 174 IV Nr. 3 StGB criminalises inducing a child via written material or information and communication technology in order to engage in sexual activity with or in the presence of the offender or a third person or allow the offender or a third person to engage in sexual activity with the child; or in order to commit an offence referred to in §184b I Nr 3 (Production of Child Pornography) or §184b III (Possession and Procurement of Child Pornography) StGB.

There is no material act leading to such a meeting required, such as in Art 23 Lanzarote Convention. This leads to the result that a preparatory action is criminalised (the offence is already completed with the inducement!). As elaborated above, preparatory actions shall only be criminalised in exceptional circumstance. It does not seem to be justifiable to criminalise these preparatory actions as even the preparatory actions for a more severe crime such as murder are not criminalised. This contradiction imposes a challenge for the country's value system.<sup>83</sup>

<sup>83</sup>JTU, *Understanding cybercrime: Phenomena, challenges and legal responses*, September 2012, p. 199; Mathiesen, *Cybermobbing und Cybergrooming – Neue Kriminalitätsphänomene im Zeitalter moderner Medien*, *Jahrbuch des Kriminalwissenschaftlichen Instituts der Leibniz Universität Hannover*, Hannover 2014, p. 21.

Furthermore, the provision only covers solicitation via ICTs and therefore causes a contradiction within the legal system. Solicitation of children happens online and offline but is only criminalised online due to no specific provision on offline solicitation.<sup>84</sup> Therefore, it seems inconsistent that the same behaviour is only criminalised if it is committed online. With regard to the deliberate decision in the Lanzarote convention to solely criminalise cyber-grooming, it was argued that there is a particular danger inherent in the use of such technologies due to the difficulty of monitoring them.<sup>85</sup> This argument can be easily encountered: as the cyber-grooming provision in the Lanzarote Convention requires a material act offline, there is no specific challenge in monitoring the crime as it has an offline component. This argument would only hold truth if the entire offence was committed in the online world. Furthermore, with regard to the objective of the provision, it cannot be argued that this differentiation can be justified as the child is exposed to a higher risk online: The child is less in danger when it is approached online than offline – the perpetrator cannot immediately commit a sexual offence due to the corporal distance. Hence, the cyber-grooming poses another contradiction within the legal system.

#### IV. Recommendations

As solicitation/grooming of children offline is already criminalised in Namibia, the only question arises whether a specific online provision is required. As section 14 (c) of the Combating of Immoral Practices, Act 21 of 1980, does not limit the applicability to offline offences, this provision also covers online offences. However, for the sake of clarification, solicitation children via ICTs might have to be incorporated either in the respective provision in the Combating of Immoral Practices Act or in the Draft Electronic Transactions and Cybercrime Act. In this case, also the alignment of the provision with the Lanzarote Convention should be considered in order to avoid the already debated problems arising from the omission of the element 'a material act leading to such a meeting'.

## D. Conclusion

Cybercrime offences pose new and tricky challenges to both legislative and prosecution authorities. From the legislative perspective, Namibia is on the right track to enact a very comprehensive and progressive legislation which tackles both primary and secondary sexting and comes up with the most child friendly legislation possible. Issues which require further attention in the legislative reform are the admissibility of electronic evidence, extraterritorial jurisdiction and law enforcement in collaboration with other prosecution authorities. Even though the admissibility of electronic evidence is regulated in section 24 of the Draft Electronic Transactions and Cybercrime Bill, it should also be addressed in legislation dealing with criminal procedure.

However, having legislation on (online) child pornography in place does not guarantee the safety of the Namibian child online. Child Online Safety requires a holistic approach. Educating children on the dangers they might encounter online, training prosecutors on the specifics of child-related cybercrime, reporting mechanisms for the population and for Internet Service Providers, effective blocking and taking down of child abuse material, international collaboration and prosecution mechanisms are just among a variety of approaches required to prevent and prosecute child online sexual abuse.

As many countries struggle with this holistic approach, Namibia has the unique chance now to serve as a role model in the region and beyond. With the definitive rising of Internet accessibility and usage within the country, Namibia is ready now to tackle the field of child online protection and ensure that important steps are undertaken to guarantee the safety of the Namibian child online.

## Recommendations at a glance

### 1. The definition of the term child pornography should include the following components:

- *Material:* Any depiction, no limitation to visual depiction;
- *Subject:* Minors (definition of "child"), virtual pornography, persons made to appear to be minors;
- *Conduct:* real or simulated sexually explicit conduct, depiction of the sexual parts of a child for primarily sexual purposes, nude or semi-nude depiction of a child in an unnatural or sexually suggestive posture.

### 2. The Catalogue of Offences should include the following components with regard to child pornography:

- a. producing;
- b. offering or making available;
- c. distributing or transmitting;
- d. procuring for oneself or for another person;
- e. possessing;
- f. knowingly obtaining access.

### 3. An exemption clause with the following components has to be included in the legislation:

- Possession and production of child pornography;
- Minors who have reached the age of consent are involved;
- Content possessed and produced with their consent and only for private use.

<sup>84</sup>Mathiesen, *Cybermobbing und Cybergrooming – Neue Kriminalitätsphänomene im Zeitalter moderner Medien*, Jahrbuch des Kriminalwissenschaftlichen Instituts der Leibniz Universität Hannover, Hannover 2014, p. 22.

<sup>85</sup>Lanzarote Convention, Explanatory Report, section 159.

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