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## ONLINE CHILD SEXUAL EXPLOITATION: POLICING AND PROSECUTING CHILD PORNOGRAPHY IN CYBERSPACE

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### Abstract

The advent of information and communication technologies (ICTs), particularly the internet, has created immense mediums for the increasing availability and accessibility of child pornography. With the internet and the diverse forms of ICT, child pornography has escalated and become one of the most serious crimes in cyberspace. While child pornography is far from being a new phenomenon, its migration onto cyberspace is a contemporary element which has presented a whole range of new problems for law making and enforcement. This situation has created a novel form of child pornography, as well as a new dimension of child sexual abuse distinct from the traditional forms of child abuse. The nature of cyberspace, evident in jurisdictional issues, law making and enforcement, further adds to the difficulties of effectively prosecuting child pornography in this emergent world without borders. This article examines child pornography as a cybercrime. It evaluates the nature, characteristics and effects of child pornography and discusses the phenomenon as a contemporary dimension of child sexual abuse.

Keywords: Child pornography, Cybercrime, Child, Child abuse, Cyberspace.

### 1.0 Introduction

Online communications that entail the sexualised representation of minors increasingly feature high on the list of cybercrimes.<sup>1</sup> The internet has become a fast medium for people to create access to, and share child sexual abuse content. This has radically changed how child pornography is produced and disseminated. Child pornography today is different from what it was years ago, because at that time, anonymous distribution and receipt was almost impossible and paedophiles found it difficult to interact with each other.<sup>2</sup> Today, digital cameras and internet

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<sup>1</sup> Yar, M. *Cybercrime and Society* (Sage: London, 2013) 114.

<sup>2</sup> The United States Department of Justice. Child Exploitation and Obscenity Section. Available on: <http://www.justice.gov/criminal/ceos/subjectareas/childporn.html> Accessed 24/1/19

distribution facilitated by the use of financial cards, and the ease of transferring images across national borders has made it relatively easy for producers and users of child pornography to obtain child pornographic materials and carry on their act and trade.<sup>3</sup> Hence, the prosecution of online child pornography has become an issue of concerted legal, academic and public attention.<sup>4</sup>

Serious issues that arise when it comes to prosecuting child pornography in relation to cyberspace. The child pornography market exploded after the emergence of digital technology. The advancement of ICTs have indeed aided the production and heightened the demand for child pornographic materials. In the words of Jenkins, "there is overwhelming evidence that child pornography is all but impossible to obtain through non electronic means."<sup>5</sup> Today, child pornographic images are instantly available through virtually all forms of ICT. The internet permits access to vast quantities of child pornographic images from around the world and makes such content instantly available at any time or place. It allows anonymous or private access, delivers such content relatively cheap and facilitates direct communication and image sharing amongst users. Variety of formats can be created including seemingly interactive experiences with the child (victim). ICTs also permit the creation of digital images that have been modified to create virtual images of children engaged in sexually explicit conduct. It is believed that over 20% of all pornography traded over the internet is child pornography<sup>6</sup> and that each year; child pornography becomes more rampant, with the number of such images rising in fourfold.<sup>7</sup>

## 2.0 Defining Child Pornography

It is important to distinguish child pornography from the more conventional understanding of the term pornography. Child pornography has generally been defined as pornography that involves a child.<sup>8</sup> Child pornography uses a variety of media, including photos, drawings, videos, writings, cartoons, sound recordings,

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<sup>3</sup> Yar, M. (n1) 114.

<sup>4</sup> Ibid.

<sup>5</sup> Phillip, J. "Law Enforcement Efforts Against Child Pornography Are Ineffective," in A Lewis, (ed.) *Child Sexual Abuse* ( Farmington Hills, MI : Greenhaven Press, 2005)

<sup>6</sup> See PR Newswire 'Child Porn Among Fastest Growing Internet Businesses' Available on: <<http://www.prnewswire.com/news-releases/child-porn-among-fastest-growing-internet-businesses-55491177.html>> Accessed 05/01/2019.

<sup>7</sup> M'jid, N M. Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, United Nations General Assembly. Document No: A/HRC/25/48. March, 2014

<sup>8</sup> Finkelhor, D. 'Current Information on the Scope and Nature of Child Social Abuse' (1994) 4(2) *The future of Children* Vol. 4(2), 31-53, 35.

films, etc. In *New York v. Ferber*,<sup>9</sup> child pornography was enunciated as “any material that visually depicts sexual conduct by children below a specified age.” The notion of criminalising child pornography is premised on the fact that the act involves the use of children who are *doli incapax*. Hence, they should not be engaged in sexual situations because they are legally unable to consent to sexual relations.<sup>10</sup> This includes virtual displays of pictures, media, images, drawings, writings, videos, cartoons and even sounds which depict minors engaged in sexually explicit conduct.<sup>11</sup>

Child pornography constitutes cybercrime when produced, distributes, purchased, possessed or circulated online or virtually.<sup>12</sup> Article 9(2) of the European Convention on Cybercrime<sup>13</sup> provides that Child Pornography shall include pornographic material that visually depicts:

- (i) A minor engaged in sexually explicit conduct
- (ii) A person appearing to be a minor engaged in sexually explicit conduct
- (iii) Realistic images representing a minor engaged in sexually explicit conduct.

According to the Optional Protocol to the Convention on the Rights of the Child (on the Sale of Children, child prostitution and child pornography),<sup>14</sup> 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, the dominant characteristic of which is the depiction for sexual purposes.”<sup>15</sup> As similarly stated in the Electronic Transactions Act of Ghana, child pornography includes “material that visually depicts (a) a child engaged in sexually explicit conduct; (b) a person who appears to be a child engaged in sexually explicit

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<sup>9</sup> 458 U.S. 747, 102 S.Ct. 3348, 73, L.Ed.2d 1113 (U.S. 1982).

<sup>10</sup> Bandalli, S. ‘Abolition of the Presumption of *Doli Incapax* and the Criminalisation of Children’ (1998) 37(2) *Howard Journal of Criminal Justice*, 114-123.

<sup>11</sup> Finkelhor, D, Wolak, J and Mitchell, K J. ‘Defining Child Pornography: Law Enforcement Dilemmas in Investigations of Internet Child Pornography Possession’ (2007) 8(3) *Journal of Police Practice and Research* 269-282.

<sup>12</sup> Gordon, S and Ford, R. ‘On the Definition and Classification of Cybercrime’ (2006) 2(1) *Journal in Computer Virology*, 13-20.

<sup>13</sup> Council of Europe Convention on Cybercrime, 2001.

<sup>14</sup> Optional Protocol to the Convention on the Rights of the Child (on the Sale of Children, child prostitution and child pornography), 2002.

<sup>15</sup> *Ibid*, Article 2(c).

conduct; (c) images representing a child engaged in sexually explicit conduct; and (d) unauthorised images of nude children.”<sup>16</sup>

The process of child pornography involves the production, distribution, importation, reception or possession of any sexual image of minors unable to consent to sexual activities. Child pornography involves three aspects which is visual depiction, specified age and sexual conduct.<sup>17</sup> In *New York v. Ferber*,<sup>18</sup> the elements of child pornography were also analysed. Sexual conduct in this context implies anything that involves a child’s genitals. Visual representation implies a situation where a person who is depicted is a minor or appears to be a minor and is involved in a sexually explicit conduct. It includes processed photographs in electronic data format, or found in saved formats, though they cannot be visualised at first sight. Some jurisdictions have included sound recordings. Also, suggesting that minors have such behaviour or should emulate such behaviour can constitute child pornography. It is immaterial that a child was not hurt in the process. It is the intent of making the idea acceptable to the victims that is material.<sup>19</sup>

The most obvious of the above definitions and provisions of statute is ‘sexual activity’ or the ‘depiction of the sexual organs of a child for a primarily sexual purpose.’<sup>20</sup> There are two aspects to this, firstly, child pornography in which adult offenders sexually exploit minors as victims and sexual behaviour that involve minors as both victims and offenders. It is generally agreed that sexual conduct will mean conduct involving a child’s genitals.<sup>21</sup> It would also mean the performance “by a person of an act of intercourse or oral sex with or in the presence of a child; an act of masturbation by, of, involving or in the presence of a child; an act which involves penetration of the vagina or anus of a child with a part of a person's body or with anything else; an act of penetration, in the presence of a child, of the vagina or anus of a person with a part of a person's body or with anything else; the performance by a child of an act of intercourse or oral sex with an animal (whether dead or alive or imaginary); and the performance by a person of an act of intercourse or oral sex with an animal (whether dead or alive or imaginary) in the presence of a child.”<sup>22</sup>

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<sup>16</sup> The Electronic Transactions Act 2008 Act 772, Ghana. Section 136(2).

<sup>17</sup> The United States Department of Justice: Child Pornography (2017) paras 1.

<sup>18</sup> 458 U.S. 747, 102 S.Ct. 3348, 73, L.Ed.2d 1113 (U.S. 1982).

<sup>19</sup> *New York v. Ferber* 458 U.S. 747, 102 S.Ct. 3348, 73, L.Ed.2d 1113 (U.S. 1982)

<sup>20</sup> Gillespie, A A. *Cybercrime: Key Issues and Debates* (Oxon: Routledge, 2016) 236.

<sup>21</sup> *New York v. Ferber* 458 U.S. 747, 102 S.Ct. 3348, 73, L.Ed.2d 1113 (U.S. 1982)

<sup>22</sup> See Generally, the English Coroners and Justice Act 2009, Section 62(7).

Visual depiction is a situation where one that is depicted is a minor legally unable to consent or appears as such, while specified age has to deal with what is considered as the precise age of consent jurisdictionally (this will be discussed below).<sup>23</sup> With regards to online child pornography, visual depiction includes non-real persons and images of an imaginary person who is a child. An image is to be treated as an image of a child if the impression conveyed by the image is that the person shown is a child.<sup>24</sup> Hence virtual images, cartoons and animations that depict children impliedly engaged in sexually explicit conduct falls under acts of child pornography. This is of course a question of fact and therefore would be left for the court to decide.

### **3.0 Age and the Criminalisation of Child Pornography**

The criminalisation of child pornography is premised on the fact that a child lacks the capacity to consent to sexual conduct and hence lacks the capacity of involvement in sexually explicit conduct. The term child is, however, very contentious and is often concerned with complex and contradictory meanings when considered under the subject of child pornography.<sup>25</sup> Significant differences remain over issues of who counts as a child. Questions of age determination, physical and psychological maturity, jurisdictional differences and other considerations, play diverse roles on how and what is criminalised in relation to child pornography. There is rarely an agreed definition of what constitutes a child and how the child age unit is determined remains one of the most controversial issues in policing child pornography.<sup>26</sup> In many places, child pornography is incriminated mainly as a conduct against the moral values of the society and not a sexual assault on a minor.<sup>27</sup> The definition of age for the purpose of child pornography is different for various jurisdictions and the age children are offered protection by the laws against child pornography differs considerably. Age in regard to child pornography does not only constitute biological age but also legal age, therefore, the emphasis on a child's age

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<sup>23</sup> Crow, M.S. and Lannes, P.S. 'Risk, Proportionality, and Sentencing: Guideline Circumvention in Federal Child Pornography and Sexual Abuse Cases' (2015) 26(6) *Criminal Justice Policy Review*, 575-597.

<sup>24</sup> Gillespie, A A. (n20) 250.

<sup>25</sup> Taylor, M. and Quayle, E. *Child Pornography: An Internet Crime* (Brighton: Routledge, 2003) 5.

<sup>26</sup> Gillespie, A A. (n20) 233.

<sup>27</sup> Asholu, D. and Oduwole, OA.(eds). *Policing Cyberspace in Nigeria* (Ibadan: Lifegate Publishing, 2009) 108.

for this purpose is dependent on not only a chronological judgement but also social and cultural values.<sup>28</sup>

A child has been defined as a person under the age of majority.<sup>29</sup> In the words of the United Nations Convention on the Rights of a Child,<sup>30</sup> “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”<sup>31</sup> The European Convention on Cybercrime stipulates 18 years as the age limit in classifying a person as a child.<sup>32</sup> Based on Article 9(6) of the European Convention on Cybercrime<sup>33</sup>, the Convention admits the 18-year old limit and gives a party the right to require a lower age- limit which shall not be less than 16 years. In Ghana, The E-Transactions Act and the Children’s Act define a child to be below 18.<sup>34</sup> On the other hand, Canada and United States (non-European countries) that have signed the same document, agree on the same age limit, although, according to their laws, a person becomes a ‘major’ at the age of 21.<sup>35</sup> In Canada however, the defining age for the purpose of child pornography is 18 years.<sup>36</sup> When it comes to protecting minors from being exploited as pornography actors, in Germany and Austria the age limit is 14 years,<sup>37</sup> and 15 years in France<sup>38</sup>. However in countries like Norway, the courts consider the sexual maturity or sexual age of a child rather than the biological age. The Norwegian Penal Code provides that whether a child has reached sexual maturity or not, is a matter for the court to establish, considering the data provided in each particular case.<sup>39</sup>

There is an underlying difference between sex and child pornography and the idea of the age of consent. In Ghana for example, section 14 of the Criminal Offences

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<sup>28</sup> Ibid.

<sup>29</sup> Garner, B (ed.) *Blacks Law Dictionary* (9<sup>th</sup> Edn) (Minnesota: Thompson West, 2009) 232.

<sup>30</sup> United Nations Convention on the Rights of the Child, 1989.

<sup>31</sup> Article 1, Ibid.

<sup>32</sup> Article 9(3) provides that, the term "minor" shall include all persons under 18 years of age. A Party may, however, require a lower age-limit, which shall be not less than 16 years.

<sup>33</sup> Council of Europe Convention on Cybercrime, 2001

<sup>34</sup> The Electronic Transactions Act 2008 Act 772, Ghana. Section 136(2); The Children’s Act 1998 Act 560, Ghana. Section 1.

<sup>35</sup> Asholu, D and Oduwole, OA. (n27) 111. According to United States Federal law child pornography is any visual depiction of sexually explicit conduct involving a minor (persons under 18 years of age). See 18.U.S Code 2256

<sup>36</sup> See Section 163.1 (1) of the Canadian Criminal Code.

<sup>37</sup> See for example Section 206 the Penal code of Austria.

<sup>38</sup> See Article 227-25 of the Penal Code of France.

<sup>39</sup> Section 204 of the General Civil Penal Code of Norway.

Act provides that a sixteen year old can consent to sex, therefore, legally speaking it is wrong for the E-Transactions Act to set the bar at 18 years in reference to sexual conduct, unless the goal of the E-Transactions Act is to prevent the exposure of the sexual conduct of 16 and 17 year olds to cyberspace.<sup>40</sup> Child pornography deals with sexual exploitation. The principle should be that children under the age of 18 years are safeguarded by the child pornography laws as arguably, they cannot give consent. Most times, the age of the children used for these pornographic contents are cumbersome to ascertain, hence it is even hard to prosecute the persons behind such acts. Due to ascertainment of age, the younger the age, the stricter the liability which may be imposed on persons for the prosecution of child pornography.

#### **4.0 Punishable Acts of Child Pornography**

A violation of child pornography law is a serious crime in many jurisdictions and convicted offenders are expected to face severe statutory penalties. Unfortunately, international law and many countries are unable to agree on a definition of child pornography.<sup>41</sup> Not all countries criminalise all forms of child pornography, however, different laws prohibit the production, distribution, importation, reception or possession of any child pornography material. The punishable acts of child pornography include the production, dissemination, provision, publishing and possession of child pornographic materials. Some countries have also penalised storing pornographic material on computer systems and devices.<sup>42</sup> There is a growing trend to extend the penal provisions of child pornography to acts of possession as more countries are increasingly discussing the incorporation of possession of child pornography in penal provisions.

According to Article 9 of the European Convention on Cybercrime, “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: producing child pornography for the purpose of its distribution through a computer system; offering or making available child pornography through a computer system; distributing or transmitting child pornography through a computer system; procuring child pornography through a

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<sup>40</sup> The Electronic Transactions Act 2008 Act 772, Ghana. Section 136(2); The Children’s Act 1998 Act 560, Ghana. Section 1.

<sup>41</sup> Gillespie, A A. ‘Defining Child Pornography: Challenges for the Law’ (2010) 22 *Child and Family Law Quarterly* 200-222.

<sup>42</sup> Asholu, D and Oduwole, OA. (n27) 125. Countries include Germany, UK, Ireland, Denmark and Norway.



computer system for oneself or for another person; possessing child pornography in a computer system or on a computer-data storage medium.”<sup>43</sup>

Although Ghana is yet to promulgate a cybercrime legislation, the Electronic Transactions Act<sup>44</sup> criminalises Child Pornography. Its Section 136(1) provides that a person who intentionally does any of the following acts:

- (a) publishes child pornography through a computer;
- (b) produces or procures child pornography for the purpose of its publication through a computer system; or
- (c) possesses child pornography in a computer system or on a computer or electronic record storage medium commits an offence and is liable on summary conviction to a fine of not more than five thousand penalty units or a term of imprisonment of not more than ten years or to both.

The Act, in explaining the punishable acts of child pornography stipulates in Section 136 (2) that “publish” means;

- (a) distribute, transmit, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell or offer for sale, let on hire or offer to let on hire, offer in any other way, or make available in any way; (b) have in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a) (above);<sup>45</sup> and
- (c) print, photograph, copy or make in any other manner whether of the same or of a different kind or nature to carry out an act referred to in paragraph (a) (above).<sup>46</sup>

Various reasons have been posed as the premise upon which particular acts of child pornography are criminalised. Yar argues that a significant proportion of those involved in the circulation and consumption of such images may also be involved in committing contact abuse against minors.<sup>47</sup> According to Wall, both acts of sexually abusing minors and consuming sexualised images of minors are never mutually exclusive but “exist in a mutually enforcing dynamic wall.”<sup>48</sup> With respect to the distribution of child pornography, it has also been suggested that what makes acts of child pornography such as distribution necessary for punishment is that in many instances distribution seemingly occurs on a quasi-commercial basis, with

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<sup>43</sup> Article 9(1) Council of Europe Convention on Cybercrime.

<sup>44</sup> The Electronic Transactions Act 2008 Act 772, Ghana.

<sup>45</sup> Bracket mine for emphasis.

<sup>46</sup> Bracket mine for emphasis.

<sup>47</sup> Yar, M. “The Private Policing of Internet Crime” in Jewkes, Y and Yar, M. (eds) *Handbook of Internet Crime* (Cullompton: Willian, 2010) 234.

<sup>48</sup> Wall, D.S. *Cybercrime: The Transformation of Crime in the Information Age* (Cambridge: Malden, 2007) 114-115

such images being bartered in return for other pornographic images, rather than being sold, thereby further propagating child abuse.<sup>49</sup> In *United States of America v. Villalobos*,<sup>50</sup> the Supreme Court affirmed the sentence of a man who argued that his punishment for viewing child pornography was draconian. He was sentenced to more than 24 years in prison by a Federal Judge who declared him a danger to society. After obtaining a court-ordered search warrant, agents found Villalobos who also sexually molested his own sister, with computer hard drives, more than 100 DVDs and other electronic media. A forensic analysis of the materials found revealed that he was in possession of 5,442 photographs and 164 videos of children, including prepubescent minors, nude and engaged in sexual acts with one another and with adults. The evidence at trial also proved that Villalobos routinely used the internet to solicit, receive and distribute such images. Villalobos was convicted of amassing and sharing an extensive collection of photos and videos of children being sexually abused.

The production and provision of child pornography also extends to making, uploading and downloading of such materials through the internet. In *R v. Bowden*,<sup>51</sup> it was noted that when one downloads an image from the internet, a file now exists on the internet, which never existed prior to that, in other words, it has been made. In *United States of America v. Grober*,<sup>52</sup> a United States District court, sentenced a man to 293 months in prison, followed by lifetime supervised release, for producing child pornography and attempting to coerce and entice a minor to engage in sexually explicit activity. According to the court documents, the offender repeatedly requested that his ex-wife also produce sexually explicit photos of minor girls. The Police Department received information that images, and videos of child pornography were observed on his external hard drive at his residence and many files depicting minors engaged in sexually explicit conduct were found. Sexually explicit e-mail messages with attachments were recovered in which the offender solicited child pornography from other individuals and shared child pornography

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<sup>49</sup> Grant, A, Grabosky, P and David, F 'The Commercial Sexual Exploitation of Children' (2001) 12(3) *Current Issues in Criminal Justice* 269-287, 273.

<sup>50</sup> United States Supreme Court (2014) N0.13-2598

<sup>51</sup> [2000] QB 88.

<sup>52</sup> No. 09-1318 D.C. Crim. No. 2-06-cr-00880-001.

from his collection. In all, over 2,200 images and 100 videos of minors engaged in sexually explicit conduct, including prepubescent minors, were recovered.<sup>53</sup>

An act of child pornography which has raised so much debate is that of possession. Possession implies custody or control.<sup>54</sup> Unfortunately, not every jurisdiction has criminalised possession of child pornographic materials. Some countries prohibit the production, publication and distribution of child pornography but not its possession. Some countries also allow possession without intent to distribute. It is however consoling that countries like the United Kingdom go beyond prohibiting only production and distribution to also prohibiting the possession of child pornography. In *Atkins v. DPP*,<sup>55</sup> a lecturer was found guilty of the act of possessing child pornographic material. The appellant was an English lecturer and he sought to argue that he had possession of the material for academic purposes. The trial judge convicted him and in affirming the conviction, the Divisional Court noted that “the central question... will be whether the defendant is essentially a person of unhealthy interests in possession of indecent photographs in the pretence of undertaking research, or by contrast a genuine researcher with no alternative but to have this sort of unpleasant material in his possession.”<sup>56</sup>

Objectively, there is a link between possession and production, therefore prohibiting possession is equally vital. Yar argues that even where consumers of child pornographic materials are not directly involved in committing such acts, it is the demand for it that incites others to produce it, thereby encouraging further acts of abuse.<sup>57</sup> According to Gillespie, although it may be argued that a possessor is not the cause of primary harm, “one of the most common policy justifications advanced for the criminalisation of possession is that it leads to people sexually abusing children.”<sup>58</sup> Baker suggests that possessors of child pornographic materials must be punished because they are aware that it is illegal and as such their acts must be considered illegal for contributing to the chain of illegality and harm.<sup>59</sup> Authors like

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<sup>53</sup> See also Federal Bureau of Investigation (FBI) <http://www.fbi.gov/baltimore/press-releases/2014/baltimore-man-sentenced-to-more-than-24-years-in-prison-for-producing-child-pornography-and-attempting-to-entice-a-minor-to-have-sex>. Accessed 21/12/2018.

<sup>54</sup> *R v. Porter* [2006] 1 WLR 2633.

<sup>55</sup> [2000] 1 WLR 1427.

<sup>56</sup> *Ibid* at 1435.

<sup>57</sup> Yar. M. (n1) 115.

<sup>58</sup> Gillespie, A.A. (n20) 230.

<sup>59</sup> Baker, D.J. The Moral Limits of Criminalising Remote Harms’ (2007) 10 *New Criminal Law Review* 370-391, 387.

Ost argue that possession must be criminalised because it will contribute to the reduction of the market for child pornography.<sup>60</sup>

In *R v. Sharpe*<sup>61</sup> the Supreme Court of Canada held that possessing child pornography was a crime under the Canadian Criminal Code.<sup>62</sup> Sharpe was charged with two counts of possessing child pornograph, which he argued infringed his freedom of expression as guaranteed under the Canadian Charter of Rights and Freedoms. The trial judge accepted that there was an infringement of freedom of expression, that the infringement could not be justified in a free and democratic society, and he ruled that the Code section was unconstitutional and Sharpe was acquitted. The British Columbia Court of Appeal upheld the acquittal by a 2 to 1 majority. The Crown appealed to the Supreme Court of Canada. The appeal was portrayed publicly as a contest between freedom of expression and the protection of children. The idea was promoted that unless the Supreme Court upheld the Code prohibitions against child pornography, all Canadian children would be at risk of serious harm. The Supreme Court reversed the decision of the appeal court and held the provision on child pornography constitutional and justifiable.

## **5.0 Relationship between Child Pornography and Child Sexual Abuse**

In the words of Gillespie, “the first reason for criminalising child pornography is that harm is caused to the participants.”<sup>63</sup> Child pornography and child sexual abuse are two sides of the same coin. The entire description of child pornography will seem void without a valuable reference to the sexual abuse of children. In fact, studies have shown that children suffer psychological harm from production of child pornography.<sup>64</sup> Authors have also emphasised that with child pornography, continuous victimisation occurs.<sup>65</sup> According to Taylor and Quayle, there is evidence that re-victimisation occurs through the images being kept perpetually alive in cyberspace.<sup>66</sup>

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<sup>60</sup> Ost, S. *Child Pornography and Sexual Grooming: Legal and Societal Responses* (Cambridge: Cambridge University Press, 2009) 113-118.

<sup>61</sup> [2001] 1 S.C.R. 45, 2001 SCC 2.

<sup>62</sup> Section 163.1(4) Canadian Criminal Code.

<sup>63</sup> Gillespie, A.A. (n20) 228.

<sup>64</sup> Taylor, M and Quayle, E. (n25) 48.

<sup>65</sup> Ost, S. *Child Pornography and Sexual Grooming: Legal and Societal Responses* (Cambridge: Cambridge University Press, 2009); Taylor, M. and Quayle, E. *Child Pornography: An Internet Crime* (Brighton: Routledge, 2003).

<sup>66</sup> Taylor, M and Quayle, E. (n25) 24.

In *R v. Beaney*,<sup>67</sup> the English Court of Appeal recognised that a child can suffer psychological harm by the knowledge that “people out there are getting a perverted thrill from watching them forced to pose and behave in this way.”<sup>68</sup> In *United States v. Williams*,<sup>69</sup> the Court stated that “it is an unassailable proposition that child pornography harms and debases the most defenceless of our citizens.” Child pornography is a visual record of a child’s sexual abuse and child pornography is created in the process of carrying out sexual abuse. In fact, in all cases, including photographs, child pornography is a permanent record of sexual abuse of a child. In *New York v. Ferber*,<sup>70</sup> it was held that child pornography is intertwined with child exploitation and abuse and that states have a compelling interest in protecting children because it is a record of the child abuse that encourages a production of such similar materials.

Child pornography is usually produced with the direct sexual exploitation of children, thus establishing a relationship between child pornography and child abuse. Each child involved in the production of a pornographic image is out rightly a victim of sexual abuse.<sup>71</sup> Yar contends that the images under consideration definitely involve actual acts of sexual exploitation and abuse of children as part of the production.<sup>72</sup> Indeed, it is totally a “permanent record of actual acts of abuse” of which is obviously a necessary ingredient of the production of such pornographic images.<sup>73</sup> According to Finkelhor, the abuse of a child occurs during sexual acts which are recorded in the production of child pornography.<sup>74</sup> Child pornography is a form of child sexual abuse where each image graphically memorializes in particular, sexual abuse of the child. Once an image is on the internet, it is irretrievable and can continue to circulate forever. In *United States v. Blinkensop*,<sup>75</sup> it was stated that “it is a clear reality that every time one of these websites are opened and every time one of these images are viewed, additional harm is visited upon the victim.”

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<sup>67</sup> [2004] EWCA Crim 449.

<sup>68</sup> *Ibid.*

<sup>69</sup> 553 U.S. 285, 307 (2008).

<sup>70</sup> 458 U.S. 747, 102 S.Ct. 3348, 73, L.Ed.2d 1113 (U.S. 1982)

<sup>71</sup> *Ibid.*

<sup>72</sup> Yar. M. (n1) 115.

<sup>73</sup> *Ibid.*

<sup>74</sup> Finkelhor, D. (n8) 35.

<sup>75</sup> 606 F.3d 1110,1117 (9<sup>th</sup> Cir. 2010).

## 6.0 Challenges of Policing Child Pornography in Cyberspace

Child Pornography is definitely incidental to sexual abuse suffered by children and such acts abuses, degrades and exploits the weakest and most vulnerable members of our society. An obvious impediment to the regulation of child pornography includes issues of jurisdiction, regulation and enforcement. The policing of child pornography online is complicated by the fact that the internet spans the entire globe. The internet is essentially ungovernable and the structure of the internet makes controlling child pornography very difficult.<sup>76</sup> The fact that child pornography can be purchased at almost no cost on the internet has further caused an escalation in this problem, globally creating an immeasurable impact on the sexual exploitation of children.<sup>77</sup>

What may constitute child pornography in region A may not amount to child pornography in region B. The age of a child in Jurisdiction A may not be the stipulated age in jurisdiction B as the age of a child varies in legislation enacted in different countries. It is also difficult to identify child pornography offenders as well as identifying where such images originate from. Thus, issues of jurisdiction are inevitable. The issue of cross-jurisdictional differences in laws and levels of permissiveness regarding child pornography is a major concern. There is also the problem of a lack in international laws to address the jurisdiction issue, particularly in consideration of the fact that child pornography materials and activities are not tied to geographically proximate locations.

Child pornography is continuously evolving, making its investigation and enforcement more challenging and complex for governments. Equally problematic is the issue of who is responsible for investigating child pornography on the Internet. There is potential for pornography crimes to go uninvestigated because they do not fall within a particular law enforcement jurisdiction. According to MacQueen, laws can be written in the most draconian terms, but the critical question is whether they can be enforced.<sup>78</sup> Attention is not adequately being given to enforcing liability for cybercrimes such as child pornography. In some jurisdictions, such awareness does not even exist for law makers and law enforcement agents. Another problem that has long been acknowledged is that the

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<sup>76</sup> Johnson, D.R and Post, D. 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48(5) *Stanford Law Review* 1367- 1402, 1375.

<sup>77</sup> Tate, T. *Child Pornography: An Investigation* (Methuen, 1990) 15.

<sup>78</sup> MacQueen, H. "Copyright and the Internet" in Edwards, L and Waelde, C *Law and the Internet Regulating Cyberspace* (Oxford: Hart Publishing, 1997) 93.

use of ICT and the advancements in technology outstrips the development of legislation.<sup>79</sup> The volume of electronic communication and transaction crossing territorial boundaries through cyberspace is overwhelming in comparison to resources available to government authorities and their law enforcement mechanism to monitor this.<sup>80</sup> The sophistication of ICTs can also make it difficult to track down offenders. It is in this areas that cooperation among governments and law enforcement agencies become necessary to track offenders across jurisdictions.

## **7.0 Conclusion: Towards Effectively Policing Online Child Pornography**

Child pornography is obviously not just a cyber specific problem.<sup>81</sup> The United Nations Convention on the Rights of the Child,<sup>82</sup> calls on governments to deter and eradicate the production, distribution and possession of child pornography. This should be by the promulgation of legislations to effectively address the production, distribution and possession of child pornography. Arguably, given that child pornography touches on the abuse or exploitation of a child, it is an area where many countries at least agree on the need to combat its menace. However, simply promulgating legislations that focus on defining criminality rather than implementation as well will entirely result in an exercise in futility. A multitude of treaties without implementation and action simply disguises a lack of effective action.<sup>83</sup> States must further move from promulgation to implementation. Recently in September 2019, the United Nations Committee which monitors the Convention on the Rights of the Child officially launched new guidelines<sup>84</sup> designed to help States better implement the Convention's Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. The Guidelines drawn up by the UN Committee on the Rights of the Child place a particular focus on the specific new threats confronting children all across the world as a result of digital technologies such as the internet and social media. The Guidelines aim to foster a deeper

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<sup>79</sup> Rahman, MR *et al.*, 'Cyberspace Claiming New Dynamism in the Jurisprudential Philosophy' (2009) 51 *International Journal of Law and Management* 274-290, 274

<sup>80</sup> Silverman, A. 'Online Offerings: Is Cyberspace a Medium for Capital Formation, or a Jurisdiction Unto Itself?' 2-3 (Jan. 1996) (unpublished manuscript, on file with the Stanford Law Review); in Johnson, D.R and Post, D. (n76) 1372.

<sup>81</sup> Akhere, JI. *Cyber Law: An Introduction* (Ehiose Publishing, 2010) 13.

<sup>82</sup> United Nations Convention on the Rights of the Child, 1990.

<sup>83</sup> Gillespie, A.A (n20) 232.

<sup>84</sup> Guideline on Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography available at:

[https://www.ohchr.org/Documents/HRBodies/CRC/CRC.C.156\\_OPSC%20Guidelines.pdf](https://www.ohchr.org/Documents/HRBodies/CRC/CRC.C.156_OPSC%20Guidelines.pdf) (Assessed 22/10/2019)

understanding of the provisions of the Optional Protocol, and offer practical solutions based on the good practices and challenges that States have encountered in its implementation.

Governments must invest in infrastructure, technology and experts who can effectively assist in combatting child pornography. These efforts must further include obligations for ISPs. ISP authentication servers can provide information with which to track activities related to child pornography. A number of countries have broadened attempts to combat online child pornography by involving Internet Service Providers (ISPs) and other internet intermediaries. ISPs legal obligations with respect to online child pornography are often unclear, and, for the most part, the emphasis has been on self-regulation. There is also legal ambiguity about whether ISPs should be liable for the material they carry or merely be regarded as the conduits for that material. While some countries like the UK have rather relied on self-regulation and cooperation with ISPs, other countries like Germany and France have held ISPs criminally liable for providing access to child pornography. For such latter states, policing child pornography includes establishing ISPs' liability for third-party content which others have placed on sites that they host or provide access to.

As emphasised, while child pornography is not a phenomenon unique to cyberspace, its circulation there intensifies policing and regulatory problems. The challenges posed by cyberspace to legal systems are indeed tremendous. For now, although intense efforts are continuously aimed both nationally and internationally towards combatting and prosecuting cybercrime, child pornography continues to thrive. The production of child pornographic materials continues to constitute serious harms of sexual and physical abuse against minors. Cybercrimes such as child pornography require highly responsive and internationally coordinated control measures, making investigation and reporting of such crimes highly productive.<sup>85</sup> It is important that states, individually and collectively focus on policing and combatting child pornography. It is pertinent to establish an international basis for acting effectively against online pornography against children. Importantly, all states must criminalise acts of child pornography as we focus on achieving some uniformity and harmonisation in efforts, so that we can rightly say that children are truly protected from all forms of sexual abuse.

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<sup>85</sup> EUROPOL Public Information 'Internet Facilitated Organised Crime'. (The Hague: File No. 2530-264, January 2011).