

REGULATION OF CHILD PORNOGRAPHY IN THE ELECTRONIC AGE: THE ROLE OF INTERNATIONAL LAW¹

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This paper explores the impact of recent advances in electronic technologies, particularly computer technologies and the advent of the Internet, on the legal regulation of child pornography. Technological advances have transformed child pornography into a global multi-million dollar industry. The digital age has greatly facilitated the trade in pornographic materials. Accordingly, child pornography is cheaper and faster to produce and distribute, and the risk of detection has been substantially reduced. The nature and form of child pornography has been revolutionised. Electronic images, some entirely computer generated and others electronically modified, have inundated the child pornography market. Traditional laws and modes of law enforcement are struggling to keep pace with the formidable impact of modern technology on the trade in child pornography.

This paper argues that effective prevention and repression of child pornography requires international laws and strategies that are specifically directed at its transnational character. The international regulation of child pornography is currently seriously impeded by divergent and inconsistent approaches at the national level. It is submitted that international law must present clear and precise legal definitions and consistent legal standards, which individual nation States can adopt and implement. International initiatives must drive national agendas in the regulation of child pornography, and must specifically target the technology that has rendered the worldwide transmission of child pornography so effortless and almost impregnable to law enforcement. However, any legal intervention by

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¹ The term "international law" is used in its broadest sense and includes both "hard law" e.g. international treaties and "soft law" e.g. recommendations and declarations of international bodies.

the international community must be subject to fundamental democratic principles, especially freedom of expression and privacy, and the right to national sovereignty.

I. INTRODUCTION

The electronic age has generated new challenges, for law makers and law enforcement agencies in the fight against child pornography. Recent advances in electronic technologies have transformed child pornography into a global multi-million dollar industry.² Child pornography has never been as prolific as it is today.³

The prodigious development of computer technologies has redefined the nature and form of child pornography. Today, electronic images dominate the child pornography market.⁴ These images can be transmitted to any corner of the world within seconds, and can be manipulated with consummate ease limited only by human imagination. Pseudo-images that are totally computer-generated have also infiltrated the child pornography market and raise extremely difficult questions about what constitutes child pornography and what materials should be classified as illegal.

The advent of the Internet has facilitated the production and distribution of child pornography. The Internet has broken down territorial boundaries and barriers and has thrust child pornography into a global market. Technological advances have minimised the risks involved in trafficking in child pornography and have rendered transmission of such materials largely immune to law enforcement. The digital age poses a serious threat to effective prevention and repression of child pornography, as traditional laws and modes of law

² "Technology and the Media", Theme Paper prepared for the World Congress Against Commercial Sexual Exploitation of Children, Stockholm, 27 August – 31 August 1996, at <http://193.135.156.14/webpub/csechome/219e.htm> (visited September 1999).

³ R Gerding, "Combating Child Pornography on the Internet – The role of the European Judicial Network", paper presented at the International Conference on Combating Child Pornography on the Internet, Vienna, 29 September-1 October 1999, at http://www.stop-childpornog.at/pa_gerding.html (visited October 1999).

⁴ AM Barnes, TN Burrows, "Brief Summary of the Findings of Working Group I of the International Association of Prosecutors", paper presented at the International Conference on Combating Child Pornography on the Internet, Vienna, 29 September-1 October 1999, at http://www.stop-childpornog.at/pa_barnes2.html (visited October 1999).

enforcement struggle to keep pace with the formidable impact of modern technology.

This paper explores the impact of advances in computer technology on child pornography. The paper argues that new solutions are necessary to meet the challenges posed by recent technological advances. Laws and law enforcement mechanisms must respond to these challenges, but must also remain sufficiently flexible to meet future challenges. Clear definitions and consistent legal standards, combined with international cooperation and mobilisation, represent the most important weapons in the fight against child pornography. International law must continue to develop and to drive national initiatives directed at combating child pornography. However, it is emphasised that legal intervention by the international community must not unduly compromise basic democratic principles especially the right to freedom of expression and privacy, and the right to national sovereignty.⁵

II. DEFINING CHILD PORNOGRAPHY

There is no settled definition of child pornography. What constitutes child pornography in one jurisdiction may not be classified as child pornography in another. Definitions of a "child" and "child pornography" may even vary between legal jurisdictions in the same country.⁶ The content of materials that may constitute child pornography is varied. Adults with a sexual interest in children may collect a range of pictures and other materials that depict children.⁷ Not all of these materials will constitute child pornography and not all will be illegal. These materials can be broadly "categorised along a continuum from less explicitly sexual, through nudity to explicitly

⁵ European Commission, Police and Customs Cooperation Unit, Background Paper prepared for the International Conference on Combating Child Pornography on the Internet, Vienna, 29 September-1 October 1999, at http://www.stop-childpornog.at/pa_eu.html (visited October 1999).

⁶ MA Healy (for the Global Network to End Child Prostitution, Child Pornography, and the Trafficking of Children for Sexual Purposes (ECPAT)), paper prepared as a working document for the World Congress Against Sexual Exploitation of Children, Stockholm, 27 August – 31 August 1996, at <http://193.135.156.14/webpub/csechome/215e.htm> (visited September 1999).

⁷ M Taylor, "The nature and dimensions of child pornography on the Internet", paper presented at the International Conference on Combating Child Pornography on the Internet, Vienna, 29 September-1 October 1999, at http://www.stop-childpornog.at/pa_eu.html (visited October 1999).

sexual."⁸ Three broad categories can be identified: (1) erotica, (2) nudity and (3) sexually explicit materials.⁹

The first category, erotica, consists primarily of materials that do not involve either nudity or depiction of sexual behaviour, for example pictures of children in underwear or swimsuits.¹⁰ These materials are unlikely to fall within definitions of child pornography. The second category that can be identified involves materials that contain nudity in some form.¹¹ Nudity *per se* is not illegal, however some of these materials may be implicitly sexual and may make use of children in provocative poses.¹² The more sexual materials in this category may fall within some legal definitions of child pornography. This category may be viewed as analogous to "softcore" pornography in adult pornography.¹³ The third category that can be identified consists of materials that are explicitly sexual.¹⁴ These materials may focus on particular areas of a child's body such as the genital or anal areas, or may portray children engaged in real or simulated sexual acts.¹⁵ These materials will, in most jurisdictions, fall within the definition of child pornography and may be viewed as corresponding to the "hardcore" pornography associated with adult pornography.¹⁶

Putting aside national differences, even international attempts to define child pornography have failed to yield a clear, unambiguous working definition. Child pornography is difficult to define "in a multi-national environment" where an array of cultural, moral, religious and legal standards coexist.¹⁷ The complexity of defining child pornography has been intensified by the arrival of the Internet, which has destroyed national boundaries and introduced child pornography into a global society with no clearly defined social, sexual or legal standards.

The difficulties inherent in defining child pornography are underlined by variations in definitions of childhood. Article 1 of the

⁸ n 7.

⁹ n 7.

¹⁰ n 7.

¹¹ n 7.

¹² n 7.

¹³ n 5.

¹⁴ n 7.

¹⁵ n 7.

¹⁶ n 5.

¹⁷ Y Akdeniz, "The Regulation of Pornography and Child Pornography on the Internet", 1997 (1) *The Journal of Information, Law and Technology (JILT)* at http://clj.warwick.ac.uk/jilt/internet/97_lakdz/ (visited October 1999).

United Nations Convention on the Rights of the Child (UNCRC) defines a child as a person "below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

In numerous countries throughout the world the threshold age of a child for protection against exploitative use in pornography is determined by the age of consent.¹⁸ Where the age of consent is lower than 18, as is often the case,¹⁹ young people are left vulnerable to sexual exploitation. This situation seems to stem from a basic confusion between sexual relation and sexual exploitation.²⁰ Consent is irrelevant to sexual exploitation, as sexual exploitation is by definition a "suppression of choice...free will and decimation of self-determination."²¹

It is fairly obvious that international law needs to adopt a clear and unambiguous definition of the "child" before issues relevant to child pornography can be effectively addressed. It is submitted that all international laws that deal with the issue of child sexual exploitation should define a "child" as any person under the age of 18. This definition has more recently been adopted by the International Labour Office (ILO) in the Worst forms of Child Labour Convention 1999 (WFCLC).²² Article 2 of the Convention states that "the term child shall apply to all persons under the age of 18." The WFCLC explicitly includes "the use, procuring or offering of a child...for the production of pornography or for pornographic performances" within the definition of the worst forms of child labour.²³

Similarly, it is also important for international law to adopt a clear and unambiguous working definition of child pornography and to establish precise legal standards for the classification of materials as illicit. The UNCRC regards child pornography as an abuse of the rights of the child.²⁴ Article 34 of the UNCRC requires States Parties to take

¹⁸ V Muntarbhorn, General Rapporteur, Report of the World Congress Against Commercial Sexual Exploitation of Children at <http://193.135.156.14/webpub/csechome/22ca.htm> (visited September 1999).

¹⁹ See generally the Reports of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Commission on Human Rights, at <http://www.uncchr.ch/html/menu2/isschild.htm> (visited September 1999).

²⁰ United Nations High Commissioner for Human Rights, General Assembly, Document A/49/478.

²¹ n 18.

²² 174 Member States unanimously adopted this Convention (no. 182) on 17 June 1999.

²³ Article 3(b).

²⁴ Background Document prepared for the Experts Meeting on Child Pornography on the Internet, Lyon, 28 May–29 May 1998, at <http://www.crin.org/iasc/sedoc1.3htm>

“all appropriate national, bilateral and multilateral measures to prevent...[t]he exploitative use of children in pornographic materials.” However, the Convention does not provide a definition of child pornography nor any guidance as to what materials might fall within this description.

Professor Vitit Muntarbhorn as the UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography in 1990, defined “child pornography” as “the visual or audio depiction of a child for the sexual gratification of the user and involves the production, distribution and use of such material.”²⁵

The International Police Organisation’s (Interpol) Standing Working Party, established to deal with offences against minors, described “child pornography” as:

“a consequence of sexual exploitation or abuse of a child. It can be defined as any means of depicting or promoting the sexual exploitation of a child, including written or audio material, which focuses on the child’s sexual behaviour or genitals.”²⁶

The Council of Europe has defined “child pornography” as “any audiovisual material which uses children in a sexual context.”²⁷

These definitions are useful, but only in so far as they describe the basic nature of child pornography. Otherwise, they appear deficient in a number of important respects. Firstly, the definitions identify as central, varying dimensions of child pornography. For example the Special Rapporteur’s definition has a purposive focus i.e. the use of child pornography for the purpose of adult “sexual gratification.” In comparison Interpol’s definition focuses on the form of materials i.e. “written or audio material” which depicts “the child’s sexual behaviour or genitals.”

(visited September 1999). This meeting was organised by the Interpol Standing Working party on offences against Minors in conjunction with ECPAT.

²⁵ n 20.

²⁶ AF de Saint Maur, Head of Trafficking in Human Beings Branch for Interpol, The Sexual abuse of children via the Internet: a new challenge, paper presented at the International Conference on Combating Child Pornography on the Internet, Vienna, 29 September-1 October 1999, at http://www.stop-childpornog.at/pa_maur.html (visited October 1999).

²⁷ Recommendation R(91)11 and Report of the European Committee on Crime Problems (1993) in MA Healy, n 6.

Secondly, the definitions are vague and leave unanswered a number of key questions. For example what does "sexual gratification mean"? How do we determine whether materials depict or promote sexual exploitation or whether a child has been used "in a sexual context"? What constitutes a "child's sexual behaviour"?

Thirdly, these definitions do not specifically embrace electronic images nor do they directly address the role of recent technological advances in the production of child pornography. In particular, these definitions fail to make explicit reference to pornographic materials that are either: entirely computer-generated i.e. "actual" children are not depicted but rather simulated images; or manipulated images (pseudo-images or morphed images). It is arguable that traditional definitions of child pornography do not reify pornographic materials of this nature.

More recently, attempts by international bodies to define child pornography have tended to specifically include computer generated and pseudo-images. Fortunately, there is a growing realisation, albeit a slow one, in the international community that the efficacy of laws aimed against child pornography relies largely on directly targeting the role of computer technologies in the production and transmission of child pornography.²⁸ In 1992, the Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, adopted by the Commission on Human Rights emphasised the need for "a high priority to be given by law enforcement agencies...to the investigation of child pornography."²⁹ In particular it urged States to:

"enact legislation making it a crime to produce, distribute or possess material involving children, and to introduce new legislation and penalties to protect children from exposure to pornographic material and to prevent technology being used to produce pornography."³⁰

²⁸ V Muntarhorn, Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child pornography, Commission on Human Rights, 14 January 1994, paras 172-193 at <http://www.unchr.ch/Huridocda/Huridoc...8967c4768802567320064762f> (visited October 1999).

²⁹ In ECPAT, Child Pornography on the Internet a Position paper for ECPAT International at <http://www.crin.org/iasc/sedoc11.html> (visited September 1999).

³⁰ n 29.

This message was reiterated by the then Special Rapporteur for the Sale of Children, Child Prostitution, and Child Pornography, Professor Vitit Muntarbhorn who stated in his report dated 14 January 1994 that "new legislation... should be introduced...to prevent new technology being used to produce pornography."³¹

Also, in her report dated 20 September 1995, the current Special Rapporteur for the Sale of Children, Child Prostitution, and Child Pornography, Ms Ofelia Calcetas-Santos recognised that "[t]here can hardly be any better illustration of the complications brought about by the advent of modern technology than in the field of pornography, including child pornography."³² The Special Rapporteur concluded that:

"in light of recent developments where the telephone or other audio devices are also being widely used for pornographic messages involving children, there is now a need to distinguish visual from audio pornography."³³

Accordingly, the Special Rapporteur defined "visual pornography" as:

"the visual depiction of a child engaged in explicit sexual activity, real or simulated, or the lewd exhibition of genitals intended for the sexual gratification of the user, and involves the production, distribution and or/use of such material."³⁴

"Audio pornography" was defined as "the use of any audio devices using a child's voice, real or simulated, intended for sexual gratification of the user, and involves the production, distribution and/or use of such material."³⁵

The Experts Meeting on Child Pornography on the Internet, held in May 1998, defined "child pornography" as the "sexually explicit reproduction of a child's image including sexually explicit

³¹ n 28.

³² O Calcetas-Santos, Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child pornography, Commission on Human Rights, 20 September 1995, para 22 at <http://www.unchr.ch/Huridocda/Huridoc...9be18883f80256719005e5661> (visited October 1999).

³³ n 32, at para 23.

³⁴ n 32, at para 24.

³⁵ n 32, at para 25.

photographs, negatives, slides, magazines, movies, videotapes and computer disks.”³⁶

The working document of the draft convention of cybercrime includes in the definition of “child pornography” pornographic material that visually depicts:

- (a) a minor engaged in a sexually explicit conduct
- (b) a person representing a minor engaged in a sexually explicit conduct
- (c) [realistic] images representing a minor engaged in a sexually explicit conduct.³⁷

The term “images representing” include entirely computer-generated and manipulated (morphed) images that do not represent a real situation.³⁸ It is anticipated that the explanatory note to the final Convention will specify that “sexually explicit conduct” covers at least actual or simulated:

- (a) sexual intercourse, including genital-genital, oral-genital, anal-genital or anal-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; or
- (e) lascivious exhibition of the genitals or the pubic area of a minor.³⁹

Clearly, more recent attempts to define child pornography recognise that the form and nature of child pornography have been irreversibly altered by technological advances, and thus explicitly

³⁶ n 24.

³⁷ Draft Article 3. In P Csonka, Secretary to Committee PC-CY, Council of Europe, paper presented at the International Conference on Combating Child Pornography on the Internet, Vienna, 29 September – 1 October 1999, note 7 at http://www.stop-childpornog.at/pa_eu.html (visited October 1999).

³⁸ n 3.

³⁹ In n 37.

attempt to catch within their ambit electronic modes of production. Accordingly, these definitions make direct reference to computer generated and/or manipulated images and are consequently more likely to be effective in combating child pornography in the electronic age.

There is also a tendency in more recent definitions of child pornography, to specifically elucidate and focus on those sexual acts that should fall within the definition. However, despite these positive developments, more recent definitions of child pornography have nevertheless failed to embody the audio dimension of child pornography recognised in earlier definitions and emphasised by the Special Rapporteur, Ofelia Calcetas-Santos.⁴⁰ It is submitted that Special Rapporteur Calcetas-Santos' definition of child pornography is currently the most apposite and should as a minimum, be adopted in all international instruments and laws that deal with child pornography.

III. IMPACT OF ELECTRONIC TECHNOLOGIES

Advances in electronic technologies have had a profound impact on the production and distribution of child pornography. Camcorders, VCRs, microphonic devices, home-editing and computer graphics software "have moved the child pornography industry into the home."⁴¹ Accordingly, the industry has become increasingly hidden and more difficult to detect and police.⁴² These electronic tools have made the production of child pornography easier, quicker and cheaper, and have also facilitated their distribution. Visual and audio pornographic materials can now be produced instantaneously with little or no expertise.

Computer technology, and the advent of the Internet in particular, has had a dramatic impact on child pornography. It is extremely difficult to evaluate the precise impact of computer technology on the growth of child pornography because of the covert nature of the pornographic industry, but also because technology itself is constantly developing and changing very rapidly. New uses and applications for computer technology are being discovered every day.

⁴⁰ n 33.

⁴¹ n 2.

⁴² n 2.

Advances in Computer Technologies

The electronic image has revolutionized child pornography. Computer technology has impacted on the production of child pornography in two principal ways. Firstly, computer technology allows electronic images to be manipulated. Photographs and video-clips can be scanned into a computer and can then be manipulated in almost anyway imaginable. For example, a photo of a grown woman's genitals can be transposed onto a photo of a child. Images that have been manipulated in this way are referred to as morphed photos, pseudo-photographs or pseudo-images.⁴³ These images are quite common amongst child pornographers because the process obscures the identity of the children involved and consequently hampers the chances of finding the source.⁴⁴

Secondly, computer advances now provide the means for the production of entirely computer-generated images. As a result some sexually explicit materials that appear to feature children do not actually contain "real" children but rather simulated images of children. This means that "real" children are less likely to have been actually abused or exploited in the "real world" in the course of producing these materials. This raises the difficult question of whether such materials should be rendered illegal.

Advances in electronic and computer technologies have also enhanced the attractiveness of audio forms of child pornography and have facilitated their production and distribution. Audio-visual packages featuring child pornography can be produced, manipulated and transmitted with minimal effort and expertise.

Development of the Internet

In five years the Internet "has gone from being an obscure resource used occasionally, mainly by academics, to being a mass medium used by 90 million people globally. And the figure is growing every month."⁴⁵ The most significant difference between communication via the Internet and traditional modes of mass

⁴³ W Bruggeman (Deputy Director Europol), "Child Pornography – Police and justice co-operation", paper presented at the International Conference on Combating Child Pornography on the Internet, Vienna, 29 September – 1 October 1999, at http://www/stop-childpornog.at/pa_bruggeman.html (visited October 1999).

⁴⁴ n 3.

⁴⁵ n 24.

communication is that "each user can now become a potential supplier."⁴⁶ The other feature of the Internet that has had a dramatic impact on child pornography is the fact that the Internet "does not respect or respond to national boundaries. It is impossible to isolate particular geographic areas or nation states."⁴⁷ Accordingly, child pornography has developed a strong transnational character.

The Internet has aided the growth of child pornography because it preserves anonymity, provides direct access to pornographic materials and children themselves. The "Internet has no central organisation and little possibility of being monitored, [and so] can ensure a large degree of privacy to the user."⁴⁸ The Internet has brought with it on-line chat rooms where adults who have a sexual interest in children can communicate directly with one another as well as with children themselves. The Internet has become a dangerous forum for the luring of children into sexual exploitation. Through these channels, child pornographers have anonymous access to "an enormous number of potential victims."⁴⁹

The distribution of child pornography has also been facilitated through the Internet. Distribution has been made easier, cheaper and more difficult to detect. In particular, the sharing of material has become easier and there is a lower risk involved in distribution, as materials don't need to be carried through border checks.

Technological advances allow communication to be more discrete with increased security. Technology is continually developing to provide even greater privacy to users. For example, the new Integrated Services Digital Network (ISDN) will soon make it easier to display and distribute video clips on the Internet.⁵⁰ Chat programs, such as the Internet Relay Chat (IRC), which have undermined the function of home pages, facilitate transmission of child pornography over the Internet.⁵¹ The "IRC is becoming increasingly popular because the communication between two users is discrete and can not be monitored."⁵² To increase security further users are also turning to Invisible Mode (IM) which makes communication invisible to anyone

⁴⁶ n 24.

⁴⁷ n 24.

⁴⁸ n 24.

⁴⁹ n 29.

⁵⁰ n 43. ISDN is essentially a digital telephone service.

⁵¹ n 43.

⁵² n 43.

who is not involved.⁵³ Encryption systems can also be used to prevent scanning from law enforcement and to boost up security.⁵⁴ Technological advances will continue to facilitate the trade in child pornography unless new legal and law enforcement strategies and solutions are conceived and urgently implemented in response.

The use of technology to control child pornography

The international community is increasingly becoming aware of the challenges posed by technology in the regulation of child pornography. Ms Ofelia Calcetas-Santos the Special Rapporteur on the Sale of Children, Child prostitution and Child Pornography in her report dated 20 September 1995, identified the impact of technological advances on child pornography. In particular she stated that:

"[t]he advent of new technology [has given] birth to concepts like cyberporn or audio-pornography, not envisaged by most legislation. Even where legislation already includes measures against the proliferation of pornographic materials, actual detection and monitoring may pose serious barriers to effective prosecution of offenders."⁵⁵

Further, the Commission on Human rights earlier this year declared its deep concern about "the unabated use of new information technologies, including the Internet, for [the purpose] of ...child pornography."⁵⁶

It is submitted that if international law is to effectively address the impact of technology on child pornography, it must undertake two important tasks. Firstly, international law must provide a clear legal framework for the regulation of child pornography that is specifically adapted to a world without borders.

Secondly, international law must explicitly recognise the impact of technology on the proliferation of child pornography and must respond by utilising this very technology in the fight against pornography. The greatest weapon against the "new" child

⁵³ n 43.

⁵⁴ n 43.

⁵⁵ n 32.

⁵⁶ United Nations High Commissioner on Human Rights, Commission on Human Rights Resolution 1999/40, 26 April 1999 at <http://www.unhchr.ch/Huridocda/Huridoc...3471edaa88025676300571578> (visited October 1999).

pornography is computer technology, particularly the Internet. How this technology can be most effectively applied and utilised requires serious scrutiny and careful and informed consideration by the international community. This approach has to date been largely avoided, primarily because it has been perceived as too difficult. Electronic technology is, even today, intimidating for many people, including lawyers. However, the time has come to fight child pornography with modern technology, or otherwise risk losing the battle. Any international solutions and strategies of this kind must be strongly grounded in a coordinated effort and nation States mobilised into an impenetrable force.

III. REGULATION AND LAW ENFORCEMENT

The importance of regulating child pornography

There is little doubt that children who are used to produce pornography are exploited.⁵⁷ This is a direct contravention of the UNCRC, which declares the child's right to bodily integrity and the right to a secure and dignified childhood.⁵⁸ In the actual course of producing child pornography, children are often sexually abused.⁵⁹ Where "real" children are used it also has the effect of desensitising and socialising these children into believing that pornographic activity is normal for children.⁶⁰ It is beyond dispute that children who have been used in the production of pornography are harmed by the experience. Research unequivocally demonstrates that these children experience a multitude of symptoms including emotional problems, withdrawal, anti-social behaviour, mood swings, depression, fear and anxiety.⁶¹ These children are also likely to experience destructive feelings of guilt and shame and are more likely to become perpetrators of child abuse themselves.⁶² Through the distribution of child pornography, those children who are involved, can be victimised for the rest of their lives.⁶³

Child pornography itself can also be used to persuade other children to participate in sexual behaviour. For example, children can

⁵⁷ n 29.

⁵⁸ n 29.

⁵⁹ n 6.

⁶⁰ n 24.

⁶¹ n 6.

⁶² n 24.

⁶³ n 24.

be seduced into encounters with adults by being shown child pornography.⁶⁴ Article 17 of the UNCRC states that:

"Parties shall...encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being."

This Article imputes a responsibility on nation States and the international community to protect children from exposure to pornographic materials. It is arguable that by inference, this requires the production and distribution of child pornography to be criminalised worldwide. In practical terms this would require nation States to adopt equivalent standards in the regulation of production and distribution of child pornography. Evidence indicates that:

"child pornographers identify and travel to countries that have no laws against production of child pornography, or poor law enforcement. They then export the child pornography back to countries that have weak or non-existent distribution laws. These countries then become distribution centers for the pornography".⁶⁵

Clearly, there are very good reasons for outlawing the production and distribution of child pornography and for adopting global standards. Where actual children are involved in the production of child pornography, international legal intervention is clearly justified on the basis of protection and prevention of harm to children.

The harmful effects of possession and use of child pornography are less obvious than those of production and distribution, but nevertheless equally as malevolent. The question as to whether the degree of culpability for possession of child pornography should be equivalent to that for production and distribution has attracted considerable debate. It is submitted that the answer to this question should be a resounding yes, particularly in light of technological advances that obfuscate the distinction between individuals that produce and distribute child pornography on the one hand, and those that merely use it, on the other. As was highlighted earlier in this paper computer technology now provides every user with the opportunity to become a potential supplier.⁶⁶ In addition, it can also be

⁶⁴ n 29.

⁶⁵ n 24.

⁶⁶ n 46.

argued that possession of child pornography serves to stimulate the market, and should accordingly be criminalised.

Moreover, research seems to indicate that there is a close link between child abusers and users of child pornography. It has become increasingly apparent that "seizure of child pornography by law enforcement personnel [can] lead to the arrest, prosecution and conviction of child sex abusers."⁶⁷ A recent study by US Customs revealed that 80% of the users of child pornography identified by the department were themselves child abusers.⁶⁸ In 1984, a Chicago Police study found that when arresting people for the possession of child pornography they almost always found photographs of the arrested person himself, having sex with children.⁶⁹ The abuser had generally taken these pictures.⁷⁰

Computer technology has further complicated the issue of the regulation of child pornography, by providing means through which child pornography can be produced without using "actual" children. This gives rise to two important questions. Firstly, should child pornography made without using "real" children also be classified as illegal? Secondly, what about non-realistic images such as animations? Again it is submitted that the answer to both these questions should be in the affirmative.

It may be argued that since these materials do not involve "actual" children and as they do not depict "actual" child abuse, they can not be described as exploitative of children and so should not be classified as illegal. In some countries like the US and New Zealand the regulation of child pornography is approached solely from the perspective of preventing harm to child victims.⁷¹ This approach to regulation of child pornography will not support a restriction in freedom of expression, information and privacy where the images in question are computer-generated, as clearly no actual child victims exist. However, it is submitted that this approach ignores the broader actual and potential harm caused to children more generally by both "real" and "computer-generated" pornography.

⁶⁷ n 29.

⁶⁸ In n 24.

⁶⁹ In n 24.

⁷⁰ In n 24.

⁷¹ n 6.

Some commentators have postulated that computer generated pornography may actually deflect interest away from "real" children and hence may assist to decrease the incidence of child abuse and sexual exploitation.⁷² There appears however to be little research to support this view.

On the other hand, it may be argued that such images only serve as incitement for those adults with a sexual interest in children and that viewing child pornography whether real or simulated may arouse abusers and encourage further sexual exploitation of children.⁷³ Furthermore, research has shown that children are at risk of seduction by being shown child pornography.⁷⁴ It is irrelevant whether the image they are shown is real or not, the danger is still there.⁷⁵ It may also be argued that "pseudo-images [are] likely to encourage the abuse of real children by "normalising" pornographic depictions of children."⁷⁶ Such images may also be used to convince children that the sexual acts depicted are natural and fun.⁷⁷ Animated images may also be used in this way. Moreover in the case of pseudo-images, for example where a child's face is superimposed on a sexually explicit photo of an adult, the child will nevertheless be victimised by the distribution of such images.

Distinguishing between "real" and "computer generated" or "morphed" child pornography may also pose serious problems in the prosecution of child pornographers. The International Association of Prosecutors has recently stated that:

"[as computer] technology improves it will become increasingly difficult for any expert to distinguish between "real" and "morphed" child pornography. Thus, any defendant will be more likely to defeat a prosecution by simply claiming that his images were not real victims. The inability of government experts to distinguish between "morphed" and "real" pornography may well cause judges to dismiss cases, if statutes are interpreted as requiring the prosecutor to prove the existence of authentic images of children engaged in sex."⁷⁸

⁷² n 6.

⁷³ n 24.

⁷⁴ n 29.

⁷⁵ n 29.

⁷⁶ n 29.

⁷⁷ n 4.

⁷⁸ n 4.

Child pornography can not be effectively regulated unless both international and national laws prohibit the production, distribution and possession of all child pornography, real and simulated. The distinction between real and simulated child pornography is artificial and potentially dangerous. Fortunately, there are some indications that the international community is indeed leaning towards this same conclusion.

The Interpol Standing Working Party of April 1996, urged countries to legislate making it a criminal offence to produce, import, distribute or possess pornography showing children.⁷⁹ In 1996, Interpol's General assembly at its 65th session adopted a resolution recommending that:

"member countries enact legislation (if they have not already done so) making the production, distribution, importation or possession of child pornography criminal offences, and also making assistance and incitement punishable in the context of such offences."⁸⁰

Interpol stressed the importance for such legislation to take into account the types of mechanisms currently used to transmit child pornography, but stressed that "legislation should also leave room for new technologies, such as computers and other virtual representations, so as to avoid any legal void [that] might favour offenders."⁸¹

Ms Ofelia Calcetas-Santos the incumbent Special Rapporteur on the Sale of Children, Child Prostitution and Pornography has also adopted this position.⁸²

Reconciling Individual Rights and the Rights of the Child

The legal regulation of child pornography gives rise to a degree of dissension between the rights of the child on the one hand, and the rights of an adult to freedom of expression, information and privacy on the other.⁸³ The rights of the child as embodied in the UNCRC must be balanced with those contained in other international instruments. In particular, it is difficult in the case of child pornography to reconcile

⁷⁹ In n 29.

⁸⁰ n 26.

⁸¹ n 26.

⁸² n 32.

⁸³ n 29.

the competing rights of the child as embodied in Article 34 and Article 3 of the UNCRC with those contained in the Universal Declaration of Human Rights.

Article 34 of the UNCRC requires States Parties to protect children from sexual abuse and sexual exploitation.⁸⁴ In addition, Article 3 of the UNCRC states that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*"⁸⁵

On the other hand, Article 19 of the Declaration of Human Rights states that:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and import information and ideas through any media and regardless of frontiers."⁸⁶

Some civil libertarians argue that the regulation of pornography is an unjustified intrusion upon individual rights.⁸⁷ Such arguments are often grounded in the assumption that pornography is a victimless crime. As the preceding discussion demonstrates child pornography is clearly not a victimless crime. An appreciation of the insidious nature of the harm inflicted on children generally, by child pornography, swiftly displaces such arguments. The harmful effects of child pornography are becoming blatantly apparent in the wake of technological and computer advances. Accordingly, whereas possession of child pornography tended not to be criminalised in the past, because privacy and freedom of speech were thought more important, technological advances have seemingly caused a shift in favour of the rights of the child. The international community now appears more committed to encouraging nation States to criminalise possession of child pornography, along with production and distribution.⁸⁸ Indeed many countries have already done so.⁸⁹

⁸⁴ See pages 5-6 above.

⁸⁵ Emphasis added.

⁸⁶ United Nations High Commissioner for Human Rights at <http://www.unhchr.ch/udhr/lang/eng.htm> (visited October 1999).

⁸⁷ In n 6.

⁸⁸ n 29.

Some civil libertarians also argue that "if computer generated pornography involves no real child victim, laws based on protecting children would no longer apply and regulation would be an unwarranted restriction of free speech."⁹⁰ Further:

"because there is no absolute scientific data that demonstrates a causal connection between the use of child pornography and the commission of crimes against children, there is no reason to restrict its transmission on the Internet".⁹¹

However, as the preceding discussion illustrates, such arguments are unconvincing when account is had of the harm caused by child pornography beyond individual victims.

International law is increasingly being called upon to balance such competing rights. In the face of compelling evidence of the harmful effects of child pornography, international law has more recently tended to favour the rights of the child. In 1996, the Child Pornography Panel Report of the World Congress concluded that child pornography should be outside the protection of freedom of speech laws.⁹² Whilst every endeavour must be made to reconcile these competing rights and to avoid censorship or restrictive laws concerning the Internet, the rights of the child should indeed prevail.

In fact, most national provisions state that individual rights are not absolute and "can be subjected to certain limitations, for example the protection of health, morals and the prevention of crime."⁹³ This view is also reflected in the European Convention on Human Rights 1950.⁹⁴ Article 10 of the Convention states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

⁸⁹ n 19.

⁹⁰ In n 6.

⁹¹ In n 6.

⁹² In n 29.

⁹³ n 5 at note 1. It is beyond the scope of this paper to consider specific national provisions.

⁹⁴ At <http://www.hrcr.org/docs/euroconv3.html> (visited October 1999).

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁹⁵

The European Court of Human Rights has developed the principle of proportionality, which states that restrictive measures that impinge on the basic principles embodied in the Convention must meet “a real social need and be effective without being discriminatory or disproportionate in the restrictions they impose.”⁹⁶ Clearly, the protection of children from the harmful effects of child pornography constitutes a legitimate social aim.

In its attempt to regulate child pornography international law may also be perceived to traverse the right to national sovereignty.⁹⁷ Accordingly, it is essential that international law secures a clear basis for agreements on transnational cooperation and establishes “international mechanisms for mutual consultation and coordination” required for the effective regulation of child pornography.⁹⁸

National laws and law enforcement mechanisms

A detailed discussion of national laws and modes of law enforcement aimed at the regulation of child pornography is clearly beyond the scope of this paper. However, intractable loopholes in national legislation are briefly discussed. This section also focuses briefly on legal initiatives expressly introduced by nation States to redress the impact of computer technologies, particularly the Internet on the trade in child pornography. Specific legal problems posed by technological advances are examined and possible solutions

⁹⁵ Article 8 of the Convention contains similar provisions in relation to the individual’s right to have their privacy respected.

⁹⁶ In n 5 at note 1.

⁹⁷ n 5.

⁹⁸ n 5.

canvassed. The role and future direction of international law in relation to the regulation of child pornography is also explored.

Needless to say nation States around the world have introduced a wide array of strategies to combat child pornography. Many of these strategies may be described as non-legal interventions. Principal examples include the setting up of police committees, working groups and campaigns.⁹⁹ Another recent key initiative has been the setting up of child pornography hotlines that enable consumers to report instances of child pornography on the Internet. The hotlines have primarily been coordinated by Non Government Organisations (NGOs), at both national and international levels. It is very difficult to determine the efficacy of these programs, but generally speaking preliminary indications are positive.¹⁰⁰ However, even the most effective non-legal strategies need to operate within a viable legal framework.

Many nation States still rely on general obscenity and prostitution laws to control child pornography.¹⁰¹ These laws do not deal with child pornography specifically and particularly child pornography on the Internet. Accordingly, many loopholes in the legislation exist that prevent effective regulation of child pornography.¹⁰² One of the main problems inherent in such laws is the lack of "objective standards that can be applied as tests of whether certain materials are pornographic or not."¹⁰³ Subjective standards like "indecent" and "obscene" are inadequate for this purpose.¹⁰⁴ It is submitted that international law has a critical role to play in providing clear objective legal standards which individual nation States can adopt and implement.

Even countries that have legislation that specifically prohibits the production, distribution and possession of child pornography nevertheless have loopholes that make effective enforcement difficult.¹⁰⁵ For example, legislation in the Netherlands prohibits the "stocking" of child pornography. Stocking is defined as 10 or more items of a certain number of pages each.¹⁰⁶ This provision effectively

⁹⁹ n 24.

¹⁰⁰ n 29.

¹⁰¹ n 24.

¹⁰² n 24.

¹⁰³ n 29.

¹⁰⁴ n 29.

¹⁰⁵ n 24.

¹⁰⁶ In n 24.

renders prosecution for possession of child pornography impracticable in the Netherlands.

International law must encourage and assist nation States to overcome these loopholes and must provide an appropriate international legal framework and international mechanisms for the effective regulation of production, distribution and possession of child pornography in the electronic age.

To begin with, nation-States should be encouraged under international law, to impose equivalent penalties in national legislation for production, distribution and possession of child pornography. Such legislation should not distinguish between commercial and non-commercial use of child pornography, as this is an extremely difficult and artificial line to draw, and one that has been for the most part obscured by technological advances.

Some very difficult questions central to the regulation of child pornography ensue from recent advances in computer technologies and the advent of the Internet in particular. These issues require careful and considered evaluation by the international community so that effective modes of regulation and appropriate directions for the future can be determined. The more pressing of these issues are now examined below.

(i) *Legal liability on the Internet*

A number of complex questions arise relating to legal liability on the Internet. For example, who is legally liable for material placed on a bulletin board system, on-line service, electronic mail system or the Internet? Is it the person who introduces the material itself into the system, the system manager, the person who produces the material and/or the person who transfers it?¹⁰⁷ Regulation of child pornography on the Internet is difficult due to the multi-level structure of the Internet. As highlighted by the European Commission:

"where services are centralized, it is possible to identify an operator so that the rules can be discussed and responsibility for the application allocated, but *responsibilities are difficult to allocate in*

¹⁰⁷ n 26. See also O Calcetas-Santos, n 32, at para 61.

the case of decentralized services as there are so many stages involved - from initial loading to access by the end-user".¹⁰⁸

It is submitted that international law should impose liability on those key commercial players, in the Internet industry, that are most easily identifiable i.e. Internet Service Providers (ISPs). International law should encourage nation States to introduce legislation that directly targets the role of such players in the perpetuation of child pornography. For example, Germany has recently passed laws that impose liability for the transmission of illegal materials on the Internet, on the ISPs.¹⁰⁹ Beijing also has recently issued new regulations that impose fines and jail sentences on anyone using the Internet to leak state secrets, promote violence or spread political subversion and pornography.¹¹⁰ Under the Beijing regulations Chinese ISPs are obliged to assist in tracking down anybody who breaks the laws.¹¹¹

The central role of ISPs in the fight against child pornography is increasingly being recognised and is gaining favour and recognition as a useful strategy amongst law makers. To date, the prevailing approach to ISP involvement in the regulation of child pornography has centred on self-regulation of the Internet industry. It is submitted in this paper that international law should prescribe clear standards for ISPs to follow in the regulation of child pornography. In setting these standards due consideration should of course be given to the ISP's right to engage in competitive commerce. Accordingly, any such standards should not impose undue burdens. If these strategies are to succeed co-operation between ISPs and governments and the broader international community must be carefully cultured.

Some useful guidelines pertaining to the liability and role of ISPs in the regulation of child pornography have already emerged in several international fora.

For example, working group I of the International Association of Prosecutors has recently made the following recommendations:

- (a) In identifying a suspect of Internet crimes, law enforcement is very often dependent on information from the

¹⁰⁸ European Commission, Communication on Illegal and Harmful Content on the Internet at <http://www2.echo.lu/legal/eu/internet/communic.htm> (visited October 1999).

¹⁰⁹ In n 24.

¹¹⁰ In n 24.

¹¹¹ In n 24.

Internet Service Providers about their subscribers. ISPs should therefore verify and maintain the identity of each new subscriber.

(b) Child exploitation investigations nearly always require an inquiry into the ISP's dynamically assigned IP ("Internet Protocol") addresses, and into the ISP's subscriber account information. ISPs worldwide should retain this information for at least one year.

(c) In cases of child abuse quick reactions may be critical. The police need to be able to contact personnel of an ISP 24 hours a day.

(d) ISPs that deliberately fail to provide properly requested data should be sanctioned in a manner consistent with national laws.

(e) If an ISP knowingly assists in the distribution of child pornography, this ISP should be prosecuted.¹¹²

Knowledge and the ability to control the flow of information by the ISP are the keys to criminal responsibility. This should be a policy in every country.¹¹³ This approach is consistent with Interpol's recommendation that assistance and incitement in the production and distribution of child pornography should also be made punishable.¹¹⁴

The European Commission however has highlighted the need to establish guidelines that limit the ISPs liability in certain circumstances.¹¹⁵ The Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce, specifically limits the liability of ISPs.¹¹⁶ Pursuant to Article 12:

the provider ...shall not be liable...for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

¹¹² n 4.

¹¹³ n 4.

¹¹⁴ See n 79.

¹¹⁵ n 5.

¹¹⁶ OJC 030/1999, 05/02/1999.

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

Similar provisions have also been included with respect to the caching of information and the hosting of information under Articles 13 and 14 of the Proposal. In addition, Article 15 provides that:

States shall not impose a general obligation on providers...to monitor the information which they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal activity.¹¹⁷

It is submitted in this paper that ISPs should however, be required by law to report child pornography to the police where they become aware of its existence on their systems.¹¹⁸

The European Union has also adopted a multi annual Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks.¹¹⁹ The objective of the action plan is to "foster a favourable environment for the development of the Internet industry by promoting safe use of the Internet and combating illegal or harmful content."

The action plan includes within its definition of "illegal content" the "protection of minors" and "protection of human dignity". "Harmful content" is defined as material "which is authorised but subject to distribution restrictions...or material which some users might find offensive even if, on the grounds of freedom of speech, there are no restrictions on publication."

Child pornography falls into the category of illegal content. This is important as illegal and harmful materials are treated differently under the plan. Illegal content:

¹¹⁷ Para 1.

¹¹⁸ n 4.

¹¹⁹ Decision No 276/1999/EC of European Parliament and Council of 25 January 1999, OJ L 33, 6/2/99 at <http://europe.eu.int/scadplus/leg/en/lvb/124190.htm> (visited October 1999).

"must be dealt with at source by the police and the legal authorities,...[although], the industry can be of considerable assistance in restricting the circulation of illegal content by means of effective self-regulation schemes governed and supported by legislation".¹²⁰

In comparison harmful content is dealt with by "development of technology to enable users to reject such content by promoting awareness among parents and fostering self-regulation."

Clearly, ISPs will have a pivotal role to play in the future, in the legal regulation of child pornography. Implicating ISPs in the fight against child pornography makes good sense, as argued earlier in this paper child pornography can only be effectively combated if the international community and nation States are willing to explore the application of technology itself in the regulation of child pornography. Guidelines for the conduct of ISPs must be implemented at the international level to prevent divergent approaches emerging at the national level. It must be emphasised that this strategy is but one in the complex legal armature to be used in the fight against child pornography.

The recommendations for ISP guidelines discussed above, particularly those of the European Community, are indeed useful and represent an excellent platform for future developments. It is submitted that any future recommendations should build on these so as to avoid duplication and inconsistency. However, as underlined by the European Commission:

"the question of the responsibility of intermediate stages (notably where material is stored, even temporarily, in readable format) is far from settled. The point is to ascertain what is technically feasible and economically viable and to observe a balance between protection of freedom of expression and privacy, on the one hand, and the protection of minors and human dignity on the other."

Guidelines for regulation of child pornography on the Internet must of course evolve as technology itself evolves, to that end strategies to control child pornography must remain sufficiently flexible to respond to the challenges of future technologies.

¹²⁰ n 119

The use of technology to combat child pornography should also be explored independently of legal interventions. For example, the international community should also encourage and support initiatives directed at the development of software and search engines capable of screening out child pornography at the server level and user level.

(ii) Legal Standards and jurisdictional issues

Serious questions also arise in relation to the legal standard that should be adopted on the Internet. For example, where pornography is transmitted by computer and the sending jurisdiction has a lower legal standard than the receiving jurisdiction, which should prevail? Should the global network be dominated by the strictest standard or the most lax?¹²¹ Under international criminal law the state competent to try the case is the state on whose territory the offence was committed.¹²² The difficulty with the Internet of course, is that it is a worldwide network and so it is extremely difficult to pinpoint where the offence actually took place.¹²³

International law could resolve many of these difficulties by simply establishing clear and precise legal standards that nation-States can adopt.

Extra territorial legislation i.e. legislation that allows states to prosecute its own citizens for crimes committed overseas, may also assist in part, to overcome some of the problems raised above. International law must actively encourage nation States to introduce extra-territorial legislation with respect to crimes relating to child pornography. It is submitted that extra-territorial laws are fundamental in the fight against child pornography, as the Internet has no regard for national boundaries.¹²⁴ Accordingly, transnational laws and law enforcement are required. The ultimate goal should be a legal framework that ensures child pornographers can be prosecuted irrespective of whether they have committed a crime at a national or international level. One of the problems in achieving such an outcome is that the sovereignty of nation States may be viewed as compromised. To overcome this concern close cooperation between

¹²¹ n 32, at para 61.

¹²² In n 26.

¹²³ n 26.

¹²⁴ Austria, Germany, England, Australia, Canada and the US have passed extra-territorial legislation of this kind. The effectiveness of such legislation has yet to be gauged.

nation States is required.¹²⁵ International law should ensure that the requisite legal frameworks are developed and implemented.

International cooperation requires a legal basis, this will usually be grounded in a treaty. For example, in European countries the relevant treaty is the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters.¹²⁶ Article 5 of the Convention states that “the execution of letters rogatory for search or seizure of property” is dependent on fulfillment of one or more of the following conditions:

- (a) that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party;
- (b) that the offence motivating the letters rogatory is an extraditable offence in the requested country; or
- (c) that execution of the letters rogatory is consistent with the law of the requested Party.¹²⁷

However, it is submitted that current legal bases grounded in provisions of this kind will not be effective in the case of child pornography. Firstly, the possession of child pornography will frequently not satisfy the criteria of dual criminality. Secondly, and more often, possession and/or production and distribution of child pornography will not constitute an extraditable offence.¹²⁸ This example demonstrates the need for international law to implement requisite legal frameworks, so that nation States can effectively legislate and cooperate with respect to the regulation of child pornography and so to, ultimately enforce such laws.

(iii) Electronic conversations – should higher legal standards apply?

A further question that arises, is whether consenting adults should be able to engage in e-mail interactive conversations without regulation, since the same conversations might not be criminalised if

¹²⁵ n 3.

¹²⁶ In n 3.

¹²⁷ Para 1.

¹²⁸ n 3.

they were face to face, on the telephone, or transmitted through the post?¹²⁹

It is submitted that as a general rule, electronic forms of child pornography should not be regulated more harshly than conventional forms. However, if it can be clearly shown that the harm inherent in electronic forms of child pornography exceeds that of conventional forms, then there may be some justification for the application of stricter legal standards in the case of electronic materials. Based on current evidence however, it would be difficult to justify the imposition of varying legal standards.

(iv) Identification of victim's age

A final problem that needs to be addressed is whether prosecution in cases of child pornography should require identification of a victim or at least the victim's age. Given advances in technology and the emergence of computer generated and manipulated pornography, identification of a victim or a victim's age has become increasingly difficult and is likely to become impossible in the near future. Accordingly, it is submitted that international law should adopt the legal standard proposed by ECPAT, namely, that prosecution should be contingent on an image of a child that is manifestly under the age of 18 i.e. any image of a person who does not have the physical attributes of an adult would be manifestly under the age of 18.¹³⁰ There should be no requirement in law for the identification and production of a child victim in order to establish guilt.

IV. INTERNATIONAL SOLUTIONS

The final issue that arises for consideration is whether international law should adopt supranational legislation to address the problem of child pornography or whether it should simply provide a framework for Nation-States to implement?

The committee of experts in crime in cyber space (PC-CY) who have been working on a draft Convention on cyber-crime since April 1997 have addressed this issue.¹³¹ This international treaty will be open for signature by both Council of Europe members and non-members. The treaty is expected to determine a list of behaviour which future

¹²⁹ n 6.

¹³⁰ n 29.

¹³¹ Csonka, n 37. Drafting work is expected to be completed during 2000.

contracting parties will be required to criminalise. The treaty will also address the question of jurisdiction in relation to information technology and attempt to provide an answer to this problem. In accordance with its terms of reference the Committee will look at defining "content" related offences in the draft convention.

The committee has considered two techniques to criminalise such material. Firstly, the so-called assimilation techniques, which criminalise the distribution of harmful material "in so far as such behaviour would also be punishable under national law had it been committed in the analogue (paper) world."¹³² This approach leaves underlying national concepts unchanged.

The alternative approach is the *sui generis* approach to criminalisation by which the most important elements of the offence are defined by the Convention. The advantage of this latter approach is that it requires a harmonisation of concepts, thus facilitating easier international cooperation as it ensures that the conduct in question is illegal in both States.¹³³ This has important ramifications in terms of mutual arrangements.

After conducting a survey of member States the Committee concluded that the latter approach would be preferable to address the issue of cyber-crime.

Accordingly, Draft Article 3 of the Convention provides that:

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

(a) distributing, transmitting or making available child pornography through a computer system;

(b) producing child pornography for the purpose of its distribution [through a computer system];

(c) possessing child pornography in a computer system;
and

¹³² In Csonka, n 37.

¹³³ In Csonka, n 37.

(d) [advertising (and offering) child pornography through a computer system]."¹³⁴

It is submitted that international law should adopt a dual approach to the regulation of child pornography, where appropriate international instruments should utilise both assimilation and harmonisation techniques in the criminalisation of child pornography.

V. CONCLUSION

The explosive growth in child pornography is one of the most profound and complex problems that confront the world today. International law has a fundamental role to play in the regulation of child pornography in a global society where national borders and boundaries are rapidly disappearing. In particular, international law must redress the impact of modern technologies, particularly computer technology and the advent of the Internet, on the trade in child pornography.

This paper has demonstrated that international law has indeed begun to recognise and acknowledge the formidable impact of technology on the legal regulation of child pornography and is accordingly attempting to address the emergent issues in various international fora.

The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography has recently urged the Commission on Crime Prevention and Criminal Justice, to pay continuing attention to the ongoing issue of child pornography at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, to be held in April 2000.¹³⁵

Child pornography is now clearly on the international agenda as is also the role of modern technology in the perpetuation of an industry that is so destructive of human dignity. International law must ensure that the regulation of child pornography remains also foremost, in the psyche of nation States.

¹³⁴ In Csonka, n 37.

¹³⁵ O Calcetas-Santos, Interim Report by the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, 29 September 1999 at <http://www.unchr.ch/Huridocda...fb1ba9a2680256818005861fe> (visited October 1999).

If international law is to be effective in the fight against child pornography it has to directly and explicitly address the role of modern technologies in the production and distribution of child pornography. To a large extent the problems posed by advances in electronic technologies are new problems and so new solutions will have to be explored. Accordingly:

"Law makers and indeed the legal profession will have to adopt new mind-sets and new frameworks of reference if they are to redefine their role in a globalised world where extraterritoriality has become a key feature. Transnational tools like the Internet are a question to be addressed by transnational institutions, from the viewpoint of international legislation and capacity for action."¹³⁶

A number of directions and priorities for international law in the fight against child pornography have been explored in this paper.

Firstly, it has been submitted that international law must help overcome loopholes at the national level and must establish minimum standards of illegal content and confer upon nation States the task to transform these minimum rules into their national law.

Secondly, international law must establish clear and precise definitions and legal standards that nation-States can adopt. International law must strive to remove inconsistent and divergent approaches to the regulation of child pornography both at an international and national level.

Thirdly, international law must establish appropriate legal frameworks within which nation-States can operate. In particular, requisite frameworks for international coordination and mobilisation must be ensured. The problem of child pornography in the electronic age can only be effectively addressed if there is:

"[c]oncerted action...at the local, national, regional and international levels...It is imperative to build a strong partnership between Governments, international organisations and all sectors of society to counter such exploitation".¹³⁷

¹³⁶ MF Mayor, Directeur general de l'Organisation des Nations Unies pour l'éducation, la science et la culture (UNESCO), 18 January 1999, DG/99/5.

¹³⁷ Declaration, World Congress Against Commercial Sexual Exploitation of Children, Stockholm, 27 August - 31 August 1996, at

<http://193.135.156.14/webpub/csehome/219e.htm> (visited September 1999).

International law must be eclectic in its approach and must adopt a range of strategies that nevertheless form a cohesive insult on child pornography. In driving the fight against child pornography international law must pursue clear and well thought out strategies, with sufficient flexibility to also address future challenges. Any legal intervention by the international community must however, not unduly compromise individual rights and must pay due consideration to the differing priorities, concerns and approaches of nation States.