CHAPTER- 3
INTERNATIONAL LEGAL FRAME WORK AND STANDARDS FOR THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES

“There can be no keener revelation of a society’s soul than the way in which it treats its children.”

-Nelson Mandela

Once the substantial rights of children and the protection of such rights were recognized by human societies, States parties decided to pass differential laws in their domestic jurisdiction and at the international level. International instruments are undoubtedly among the most important resources of human rights that recognize essential rights and freedoms.

Based on their scope and the protection they provide to humans, international instruments can be classified as general and special instruments. General instruments, like the Universal Declaration of Human Rights (1948), do not address the rights of special groups and generally cover the rights of all humans regardless of gender, religion, nationality, etc. In contrast, special instruments cover special groups including women, refugees, children, etc. Each of these instruments is particularly significant at the international level and each addresses certain general or special principles and rights of human beings.

The present chapter describes a number of important international instruments including Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights. In addition, important special instruments will be discussed, including Declaration on the Rights of the Child (1924), the Declaration on the Rights of Child (1959), United Nations Convention on the Rights of the Child (1989), the Optional Protocols to the

1 Nelson Rolihlahla Mandela was a South African anti-apartheid revolutionary, political leader, and philanthropist, who served as President of South Africa from 1994 to 1999.

3.1 GENERAL INTERNATIONAL INSTRUMENTS

3.1.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights was signed on December 10, 1948 to mark a significant event in human history. At that time, the world was still suffering from the disasters caused by the Second World War and the massacres and other crimes perpetrated by the Nazi regime. The nations would not tolerate war crimes based on unrealistic pretexts; nor could they ignore the fact that millions of people had died as a result of the wars going on the ground. In an unprecedented agreement, the States parties from all around the world declared that human rights should no longer be grossly violated, holding the world accountable for any form of violation of such rights.

Representatives of 48 countries gathered at the United Nations headquarters in Paris to discuss the essential rights of human beings; a discussion which led, on December 10, 1948, to preparing the final version of the Declaration which contained these essential rights holding the world responsible for providing all human beings with these rights. The 30 articles contained in the Declaration reflects agreement of the signing nations on the need to observe essential rules in terms of different aspects of human life including substantial rights (e.g., life, security of the person, freedom); civil rights and liberties (e.g., freedom of opinion and

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3 ibid
4 ibid
5 ibid.
6 ibid.
7 ibid.p.3
8 ibid
9 ibid.
10 Background information: Universal Declaration of Human Rights. op. cit. p.2.
expression); rights to equal treatment (e.g., the right to be free from discrimination); economic rights (e.g., the right to fair wages and safe working conditions); social rights (e.g., access to education and adequate health care); and cultural rights (e.g., the right to speak your native language and practice your culture).\textsuperscript{11}

In the Declaration, children were regarded as vulnerable beings who must receive special protection, better education, and a life along with the best interest of the child.\textsuperscript{12}

It should be noted however that the Declaration does not constitute a legally binding instrument in its own right and the state signatories cannot be held liable for breaching obligations set forth in the Declaration.\textsuperscript{13} However, since the Declaration is regarded as one of the most basic and fundamental international instruments on recognizing human rights, the States parties can rely on the Declaration to pass domestic laws required to protect human rights.\textsuperscript{14}

\textbf{3.1.2 International Covenant on Civil and Political Rights}

By 1948, when the Declaration was passed, many actors at the international level believed that the Declaration had to be transformed into a legally binding instrument in the form of one or more treaties.\textsuperscript{15} This led to the adoption of the \textit{International Covenant on Civil and Political Rights} (ICCPR) by the United Nations General Assembly on 16 December 1966, which later became enforceable on 23 March 1976 to guarantee such rights.\textsuperscript{16}

The Covenant requires State parties to respect the equal rights of men and women to enjoy all the civil and political rights contained in the

\textsuperscript{11}ibid. p.2
\textsuperscript{13}Background information: \textit{Universal Declaration of Human Rights}. op. cit. p.3.
\textsuperscript{14}ibid. p.3.
\textsuperscript{16}ibid
Covenant within their territory and subject to their jurisdiction, regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\(^\text{17}\) It stresses the role of the family “as the natural and fundamental group unit of society”\(^\text{18}\) which is “entitled to protection by society and the state.”\(^\text{19}\) The child has been defined as a “minor” in the ICCPR and shall enjoy particular rights regardless of “race, color, sex, language, religion, national or social origin, property or birth, on the part of his family, society and the state.” The ICCPR also emphasizes the child’s rights to identity, including the right to “birth registration, to a name and to acquire a nationality.”\(^\text{20}\) However, the ICCPR does not directly provide for participatory rights for children, such as their right to be involved in decisions that directly affect them.\(^\text{21}\)

The Human Rights Committee is the entity responsible for monitoring the proper implementation of the ICCPR by reviewing the reports submitted by State parties which are required to include in their reports the measures they have adopted to implement the ICCPR\(^\text{22}\) as well as difficulties they experienced in implementing the ICCPR\(^\text{23}\) and by issuing concluding remarks which specify strengths and weaknesses in the implementation of the ICCPR and recommendations for potential remedies.\(^\text{24}\)

The Committee also specifies the issues linked, whether directly or indirectly, to the right to health and makes suggestions on how the State party should address the weaknesses observed in the implementation of the ICCPR.\(^\text{25}\) For instance, the Committee, in its general comments, may

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\(^{17}\) ibid. ICCPR Art. 3.

\(^{18}\) Article 23(1) and Article 10(1), ICCPR

\(^{19}\) ICCPR Art. 23(1).

\(^{20}\) ICCPR Art. 23(2), (3).

\(^{21}\) ibid.

\(^{22}\) ICCPR Art. 40.

\(^{23}\) ibid


\(^{25}\) ibid
emphasize the need for the removal of gender-based inequality in access to the rights set forth in the ICCPR, require State parties to describe their measures for guaranteeing equal treatment of both genders in terms of equal rights to education, food, and healthcare services, or highlight the need for elimination of those practices which deteriorate freedom and well-being of girls, through legislation and any other appropriate measures. India acceded to the Convention on 10 April 1979.

3.1.3 The International Covenant on Economic, Social and Cultural Rights

It was around 20 years after the adoption of the Declaration that discussions led to the passage of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR) by the United Nations General Assembly on December 16, 1966 and their enforcement on January 3, 1976.

As far as human rights are concerned, every person must be provided with access to the resources necessary for his or her individual livelihood. According to Article 12, ICESCR, “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”

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27The ICCPR does not foresee the option for the Committee of receiving individual communications; however, at the same time as the Covenant was negotiated an optional Protocol to the Covenant was also negotiated. This optional Protocol, known as the First Optional Protocol to the ICCPR, specifically deals with individual communications. States parties to the First Optional Protocol recognize the competence of the Human Rights Committee to receive and consider communications by individuals. A second Protocol to the ICCPR, known as the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty, was adopted on 15 December 1989 and entered into force on 11 July 1991. As for the right to health in particular, the Special Rapporteur of the Commission on Human Rights, now the Human Right Council, on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, deals exclusively with the right to health for everyone, independently of whether State is a party to a human rights treaty incorporating the right to health or not. (Ibid. pp.3,4).
should be protected. The article recommends to the States parties several steps: reduction in the number of stillbirths and infant mortality; provision of required resources for healthy development of children as well as public access to healthcare services; enhancement of environmental health and improvement in industrial hygiene; prevention and treatment of diseases.\(^3\)

In addition, the Committee emphasizes the right to health as a significant right which should be accompanied with access to drinkable water, safe food and housing, hazardless occupational and environmental conditions, education about health and related information such as information about sexual and reproductive health,\(^3\) safe occupation, reasonable working hours\(^3\) particularly for perinatal period,\(^3\) and special protection of children against economic and social exploitation and risks to emotional health.\(^3\)

The right to education is particularly guaranteed by the provisions of Articles 13 and 14 of the Covenant. Moreover, United Nations Educational, Scientific, and Cultural Organization (UNESCO) is required by Article 18 to ask its representatives to participate in sessions held by the committee, formulate recommendations about concluding observations, prepare reports reflecting achievements made in fulfilling the obligations set forth by the Covenant, and contribute to the standard setting procedure under Article 13.\(^3\)

UNESCO’s participation in shaping and codifying the right to education specified by the ICESCR has resulted - at least in theory - in proper protection of all ESCRs.\(^3\)

India has not signed the ICESCR Optional Protocol and has also not ratified ICESCR but has signed it.

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\(^3\)ibid

\(^3\)ICESCR Arts, 6 and 7

\(^3\)ICESCR Art. 10

\(^3\)ICESCR Art. 10


\(^3\)ibid.
3.2 SPECIAL INTERNATIONAL INSTRUMENT

3.2.1 The Declaration on the Rights of the Child (1924)

In 1924, that is 24 years before the adoption of the Universal Declaration of Human Rights, the League of Nations passed another declaration known as the Declaration on the Rights of the Child as the first international declaration on human rights and the first one of its kind exclusively protecting the rights of children. Also known as the Geneva Declaration, it requires members to meet economic, social, and psychological needs of children. The Declaration specifically emphasizes welfare of children as vulnerable beings by requiring adults to observe certain ethical principles in the treatment of children but without specifying particular legal entitlements for children.

There were only five principles about the right of the child contained in the Declaration, obviously indicating the focus of the Declaration on the needs of children in underprivileged communities, the need of orphaned and abandoned children for shelter (Article 4), and children experiencing exceptional circumstances such as war or other national emergencies (Article 3). Another important point to note is that these five principles make no reference to biological parents or the family as persons obligated by these provisions. Thus, the Declaration was not an effort to incorporate dominant norms on child protection into a legal framework that should be followed by State parties.

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40 ibid, p124
41 ibid
42 ibid
43 ibid
44 ibid
3.2.2 The Declaration on the Rights of the Child (1959)

The second international instrument to address specifically the rights of the child, like the 1924 Declaration, was concerned with child victimization, this time as a result of victimizations of children in armed conflicts in the period following WW II. The United Nations International Children’s Emergency Fund (UNICEF) was created in 1946 based on the provisions of a resolution of the United Nations General Assembly. The original objective pursued by UNICEF was to assist children victimized directly or indirectly by WWII, but later it became an entity to deal with the least developed countries of the world. A number of organizations were involved in drafting a new Declaration on the Rights of the Child in 1950. Finally, in 1957, a well-defined project was launched by the Commission on Human Rights to draft a Declaration as the first international instrument devoted to children’s rights.

An assumption stating that “children could and should rely upon the exclusive protection of adults to ensure the exercise of their rights” has been underpinned by the 1959 Declaration and several other instruments approved in the 1960s and the decade that followed. The inclination based on a vision that regards children as objects in international law is obvious in these texts, particularly in Principle 8 of the Declaration, which stipulates “the child shall in all circumstances be among the first to receive protection and relief.”

The scope covered by the 1959 Declaration has an extended scope compared to the similar previously adopted instruments. Despite the emphasis made by the Declaration with regard to disabled children or other children that need particular care, it basically covers a wider scope.

46 ibid
47 ibid
compared to its 1924 counterpart as the former is largely concerned with normal childhood situations.\footnote{Declaration of the Rights of the Child [Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959. This was the basis of the basis of the Convention of the Rights of the Child adopted by the UN General Assembly 30 years later on 20 November 1989. The Convention on the Rights of the Child was entered into force on 2 September 1990.]}

The Declaration made two distinct references to the best interest of the child when it refers to legislation on problems associated with childhood and also when it makes references to guidelines that can be used as a basis for the child’s “education and guidance” (Principle 7)\footnote{Principle 7: The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents. The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavor to promote the enjoyment of this right.}. In addition, the Declaration not only provides for some general obligations to resolve pressing issues targeting children but it also sets a number of principles based on which children can be provided with a happier experience of their childhood. However, the Declaration does not make any reference to parent-children relations and how this relationship is affected by parental authority.\footnote{ibid}


No treaty on human rights is more globally well-known that the CRC as a very significant instrument adopted by 192 States parties.\footnote{Todres, Jonathan. Wojcik, Mark E and Revaz, Cris R. (2006). The U.N. Convention on the Rights of the Child. Published and distributed by Transnational Publishers, Inc, Ardsley Park. p.9. With the exception of the United States (which has signed, but not ratified the CRC) and Somalia (which has signed the CRC, but has no internally recognized government to ratify it)}

It is generally believed by States parties that children are more vulnerable to abuse, victimization and the violation of their rights compared to adults.\footnote{Children's Rights in International Politics. (2010). op. cit. p.xvii.} In addition, children, as members of society with limited cognitive, emotional,
social development, and access to political power, need special forms of support to help them deal with their situation.53

All children, regardless of their level of abilities, family conditions, race, ethnicity, and nationality are protected by the provisions of the CRC54 and its four fundamental principles (i.e., the best interest of the child as opposed to those of parents, enjoying the right of the child in a discrimination-free manner, having access to basic rights which include right to life, survival, development, respecting the right to participation and having access to proceeding or hearings affection them),55 which in a very important approach to the right of the child combines civil, political, economic, social, and cultural rights.56

The past years however experienced abuse, neglect, exploitation, and discrimination against children despite the passage of the CRC,57 because of several reasons including the fact that the CRC may not override domestic laws since it does not constitute a statute whose implementation can be monitored by any international mechanism other than a requirement for States parties to periodically provide the United Nations Committee on the Rights of the Child with reports regarding the extent to which their legislation and policy meet the protections outlined in the CRC, but there is no considerable sanction for this process and therefore the CRC has become a merely symbolic instrument.58

Although the CRC has been adopted by many States parties, assessment of its implementation has been assigned to entities which are also responsible for providing education, health and social care.59

54Ibid. p.2.
55Ibid. pp.2, 3.
56Ibid. p.2.
57Ibid. p.3.
58Ibid. p.3.
Incorporation of the CRC principles into domestic legislation is useless if effective mechanisms for raising awareness are not in place.\(^{60}\)

Although all members of the CRC are required to incorporate its principles into their legislative Acts and practices, no certain approach has been prescribed regarding its implementation.

3.2.4 The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking

Child trafficking occurs as a million-dollar business around the world for a number of reasons such as sexual exploitation, forced labor, armed conflicts, marriage, and organ trade. According to UNICEF, two million children per year are trafficked into prostitution or for other illegal purposes worldwide.


\(^{60}\)Ibid. p.101.

\(^{61}\)Both Optional Protocols expressly permit signatories to the CRC to sign and ratify the Protocols even if they have not ratified the underlying Convention. As a result, the United States - which has signed but not ratified the CRC - is eligible to sign, ratify, and implement the two Optional Protocols independent of the CRC. The Optional Protocols are important tools for promoting children’s rights both domestically and internationally. Ibid. p.13.
3.2.5 The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (Child Soldiers Protocol) stipulates that Children under the age of eighteen may not be employed in armed conflicts, and those who are sixteen or seventeen can be recruited on voluntary basis, since children, particularly those with poor families, far from home, living in war-affected areas, or without access to education, are regarded by this Protocol as immaturity and highly vulnerable beings to violence which expose them to serious injury and death, as well as disease, physical assault, and rape.62

Children must not be employed as from line soldiers or for suicide missions and atrocities against their own family and neighbors or receive drugs to increase their courage and dull their sensitivity to pain. Casualty rates and instances of permanent disability blindness, and psychological disorders caused by horrific events are often higher among children, compared to adults, since they lack the required experience and training.63 India signed the Protocol on 15th November 2004, and ratified on 30 Nov, 2005.

3.2.6 The Hague Convention on Adoption

The drafting of the CRC and the speed by which the treaty entered into force led to the international community examining the international laws on children from a child rights perspective.64 From the early 1980’s revaluation occurred in a number of specific areas including adoption and

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62 The Coalition to Stop the Use of Child Soldiers reports that approximately 300,000 children in over 40 countries worldwide are engaged in military conflict, while another 500,000 are recruited into paramilitary organizations, guerilla groups, and civil militias in more than 85 countries. Ibid.
63 Ibid.
fostering and child justice. Similarly standards were raised in the child protection, provision and prevention areas. 

Due to various allegations of adoption abuses and the conditions of orphanages worldwide, increased protection for children was a great concern. This became particularly apparent when Ceausescu’s rule in Romania ended, and the condition of Romanian orphanages was broadcasted worldwide, a driving force in the creation of the CRC. Following the creation of the CRC in 1989, the Hague Convention on Adoption was developed in 1993. This treaty, inter alia, provides detail on how the child’s consent to adoption is to be given freely and unconditionally.

The Hague Convention includes the creation of a central authority in each member country that oversees all adoptions, facilitates accrediting agencies, and ensures that adoption agencies and families follow the standards entailed in the treaty. The subsidiarity principle, which instructs Central Authorities to first seek “suitable” family placement domestically before opening the child’s dossier to inter-country adoption, is one of the key tenets of the Hague Convention.

The Convention’s domestic implementation by more than eighty countries represents extraordinary progress in international law.

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65 ibid
66 ibid
68 ibid
69 ibid .p.29,30.
70 ibid
71 ibid,p.29.
72 ibid
3.3 CHILD SEXUAL ABUSE IN THE UNITED KINGDOM

One in 20 children in the UK have been sexually abused. Operation Hydrant is handling reports passed on by the Goddard inquiry. Justice Lowell Goddard is in charge of 13 investigations involving a number of institutions, including the Church, Westminster, the borough of Lambeth and a detention centre in Durham, along with allegations of child sexual exploitation in Rochdale, Devon, Cornwall, Oxford and Rotherham.

Features of Sexual Offences Act 2003:

2. Sets the age of a "child" at 18, amending the Protection of Children Act 1978, and provides a defence for all sexual offences when the child is 16 or over and the relationship is consensual.
3. Classifies any sexual intercourse with a child aged 12 or younger as rape.
4. Establishes a draft of new criminal offences including crimes involving familial sexual abuse, offences involving adult relatives and offences designed to give protection to persons with a mental disorder.
5. Re-enacts the offences of abuse of a position of trust towards a child. This prohibits sexual contact between adults and children under 18 in schools, colleges and residential care.

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74 Child abuse and neglect in the UK today Research into the prevalence of child maltreatment in the United Kingdom, available at: https://www.nspcc.org.uk/services-and-resources/research-and-resources/pre-2013/child-abuse-and-neglect-in-the-uk-today/ accessed on 19/03/2017

75 Operation Hydrant is a coordination hub established in June 2014 to deliver the national policing response, oversight, and coordination of non-recent child abuse investigations concerning persons of public prominence, or in relation to those offences which took place historically within institutional settings.

76 We've been ignoring an epidemic of child sex abuse in Britain, available at: http://www.telegraph.co.uk/women/life/weve-been-ignoring-an-epidemic-of-child-sex-abuse-in-britain/ accessed on 18/03/2017
6. Creates a number of offences related to "intent" including a new offence targeting drinks spiking.

7. Makes it an offence to give someone a substance without their consent and with the intention of stupefying or overpowering them so that any kind of sexual activity can take place. Two other "intent" offences cover situations where a person commits any offence with the intention of committing a sexual offence or where a person is a trespasser, he intends to commit a sexual offence on the premises and he knows that he is a trespasser,

8. Creates several new initiatives to protect children and the general public from sex offenders. The act allows dual criminality, meaning notification orders can be extended to those convicted abroad, and creates a civil order, the sexual offences prevention order, which combines sex offender orders (Crime and Disorder Act 1998) and restraining orders (Sex Offenders Act 1997).

9. Introduces risk of sexual harm orders, specifically designed to protect children, and also creates foreign travel orders, which can be used to prevent an offender with a conviction for a sex offence against a child from travelling to countries where he is at risk of abusing children.

10. A new offence of voyeurism relating to those who observe others doing private acts without their knowledge for sexual gratification.

11. Decriminalises a series of sexual acts including the offences of gross indecency, buggery and soliciting by men (cruising).

12. Makes necrophilia and bestiality crimes.

The abovementioned legislation doesn’t apply to Scotland but The Sexual Offences (Scotland) Act 2009, does. The Sexual Offences (Scotland) Act 2009 has revolutionised the law relating to rape and other sexual offences in a number of ways. First, it introduces a broader, statutory
definition of rape; Second, it defines consent and does away with the Morgan defence\textsuperscript{77} and Finally, it addresses the issue of alcohol and drug use by victims.

The Sexual Offences (Scotland) Act 2009 is a major step in the reform of the law relating to sexual offences. It moves the emphasis away from the behaviour of the complainer back onto that of the accused person—which is just as it should be; the complainer is not the one on trial. The issue of considering the complainer to also be responsible in some way is one that pervades our society and is undoubtedly a contributing factor to the low reporting and conviction rates in Scotland. Unfortunately, the issue of bringing the background of the complainer into the frame is one which still stands and is not dealt with by the 2009 Act. A shocking statistic from Scottish Government Social Research showed that seven out of ten complainers were questioned in court on their sexual history.\textsuperscript{78}

\subsection*{3.3.1 Child Pornography: Legal Perspective}

\subsubsection*{(i) Protection of Children Act 1978}

The main piece of legislation that deals with child pornography offences in England and Wales is the Protection of Children Act 1978.\textsuperscript{79} It has been amended and updated several times since 1978. In its amended form, it covers the offences of taking, making and distributing child pornography. As will be explained below, the possession of indecent photographs of children was not criminalized until 1988. The 1978 Act was enacted in response to the problem of child pornography following calls by

\textsuperscript{77}There were many cases in the nineteenth century, which made it clear that the lack of consent instead of force was the key element of rape and so sex with a woman who was too drunk or asleep could be classed as rape. Men were not found guilty of rape if they believed that the women had consented, no matter how unreasonable the belief was, this was known as the ‘Morgan Rule’ or the ‘Morgan Defence’. Ref. DPP v Morgan [1975] UKHL 3.


Mary Whitehouse, Chairwoman of the National Viewers and Listeners Association in 1977.

Since then the 1978 Act has been amended four times: by the Criminal Justice Act 1988 – to introduce the possession offence, as the original version of the 1978 Act only criminalized taking indecent photographs of children and distributing such photographs; by the Criminal Justice and Public Order Act 1994 (‘CJPOA 1994’) – to introduce the concept of computer generated pseudo-photographs; by the Criminal Justice and Court Services Act 2000 (‘CJCSA 2000’) – to extend the maximum imprisonment sentences for child pornography related offences; and by the Sexual Offences Act 2003 – to amend the definition of a child to bring it into line with international law.

(ii) Emerging trends of Pseudo Photograph

With the amendments made by the CJPOA 1994, both the 1978 and 1988 legislation criminalize a new form of child pornography known as computer generated child pornography. The amended version of the 1978 Act made it an offence ‘to make’ indecent pseudo-photographs of children. According to section 7(7) as introduced by the CJPOA 1994, pseudo-photograph means an image, whether made by computer-graphics or otherwise, which appears to be a photograph. According to section 7(8) of the 1978 Act deals with the impression conveyed by Pseudo-photograph.

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80 Pseudo-photographs are technically photographs, but they are created by a variety of ways including by computers by the use of photo/image software. For example, a child’s face can be superimposed on an adult body or to another child’s body together with the alteration of the characteristics of the body. A pseudo-photograph can also be created by taping together two photographs and then making a photocopy of that taped photograph. The photograph on the photocopy could be regarded as a pseudo-photograph. Pseudo-photographs and images can also be created entirely by software without using any real images.

81 According to section 7(8) of the 1978 Act: If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph shall be treated for all purposes of the 1978 Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult.
3.4 CHILD SEXUAL ABUSE IN USA

The Child Abuse Prevention and Treatment Act (CAPTA) defines child abuse and neglect as: “Any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or an act or failure to act, which presents an imminent risk of serious harm.”

3.4.1. Historical Background

1. CAPTA (1974): In 1974, Congress passed the first Child Abuse Prevention and Treatment Act (CAPTA). Some features of this landmark legislation are as follows:
   - Authorized programs and services for child maltreatment programs, including funding for states meeting CAPTA requirements
   - Created the National Center on Child Abuse and Neglect and the National Clearinghouse on Child Abuse and Neglect Information (NCCANI).
   - Mandates state to provide data on the number and sources of child abuse and neglect reports, investigation dispositions, types of maltreatment and related information.
   - Provides for reporting of the National Incidence Study of Child Abuse and Neglect (last published in 2008). This report includes data from more than 5,600 community professionals who have had contact with maltreated children.

2. Indian Child Welfare Act (ICWA)

In 1978, the Indian Child Welfare Act (ICWA) was added to CAPTA. This act was designed to protect Native American children in the child welfare system.

3. CAPTA (2010)

CAPTA has been amended several times and was most recently amended and reauthorized on December 20, 2010, by the CAPTA
Reauthorization Act of 2010. In addition to CAPTA, there are a number of other national and local policies that support child welfare. These include:

a. Social Security Act

b. PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003)

c. Foster Care Independence Act

d. Promoting Safe and Stable Families Act


4. Preventing Sex Trafficking and Strengthening Families Act (2014): This act ensures that states implement mechanisms for reporting and collecting data on sex trafficking and identifying children who may be at risk of becoming victims of sex trafficking. Additionally, the law strengthens existing laws related to adoption incentives and the provision of services to foster parents.  

3.4.2 Development of Pornography Law in United States

Child pornography has been a serious concern in the United States, as in England and Wales and other Western societies. The United States has, however, witnessed a major constitutional challenge to child pornography laws at the Supreme Court level following the amendments introduced by the Child Pornography Prevention Act 1996. The Act introduced the concept of computer-generated images and criminalized content that depicts children engaging in sexually explicit conduct whether or not the content in question involved real children. The Constitutional challenge involved these provisions and, as will be detailed below, the Supreme Court struck down two of the three provisions of the 1996 Act relating to virtual child pornography decision in April 2002.

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82 Supra note 13.
3.4.3 Child Pornography Prevention Act 1996

Sexually explicit pseudo-photographs as well as computer-generated images involving children were not covered by US legislation until October 1996. Such indecent pseudo-photographs were subject to the Miller obscenity test \(^{84}\) and other federal laws dealing with obscenity but not regarded as child pornography.

The Child Pornography Prevention Act 1996 (‘CPPA’) was introduced to criminalize material that depicts children engaging in sexually explicit conduct whether or not the content in question involved real children. The new approach ‘shifted from defining child pornography in terms of the harm inflicted upon real children to a determination that child pornography was evil in and of itself, whether it involved real children or not.’\(^{85}\)

In June 1996 the Bill was the subject of intense debate, and it was included as part of a broad-spending Omnibus Consolidated Appropriations Act 1996 which was signed into law by President Bill Clinton. It passed the US Senate on 30 September 1996.

The CPPA 1996 expanded the federal prohibition on child pornography to include not only pornographic images made using actual children as in 18 U.S.C. 2256(8)(A), but also to ‘any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture’ that ‘is, or appears to be, of a minor engaging in sexually explicit conduct’, through the newly introduced section 2256(8)(B).

The CPPA 1996 also added section 2256(8)(D) which states that any sexually explicit image that is ‘advertised, promoted, presented, described, or distributed in such a manner that conveys the impression’ depicts ‘a

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\(^{84}\) Miller v. California 413 U.S. 15 (1973)

\(^{85}\) Free Speech Coalition v. Reno, 198 F3d 1083, 1097 (9th Cir. 1999) available at www.https://m.openjurist.org accessed on 29/12/2017
minor engaging in sexually explicit conduct’. Thus section 2256(8)(B) banned a range of sexually explicit images, referred to as ‘virtual child pornography’ or ‘indecent pseudo photographs’ that appear to depict minors but were produced by means other than using real (actual) children, such as through the use of youthful-looking adults or computer-imaging technology.

The American Civil Liberties Union (ACLU) criticized the 1996 Act arguing that the new definitions and provisions were clearly unconstitutional because they criminalized images produced without the involvement of an actual child.\textsuperscript{86} The ACLU argued that its view was supported by the decision in Ferber,\textsuperscript{87} where the Supreme Court made clear that restrictions on child pornography were justifiable because the government had a compelling interest in preventing the physical and psychological abuse of children who are forced to engage in sexual activity for commercial purposes. The ACLU referred specifically to the view expressed by the Supreme Court that child pornography lacks First Amendment protection because actual depictions of child exploitation and abuse affect ‘the welfare of children engaged in its production’. On this basis, the ACLU argued that it was clear from Ferber that the government’s interest was based on protecting children from actual harm, and not shielding the general public from such images. Moreover, it claimed that ‘the bill would have a severe chilling effect on constitutionally protected expression’.\textsuperscript{88}

The US Judiciary Committee rejected the arguments raised by the ACLU and stated that the Government had an interest in prohibiting computer-generated child pornographic depictions because of the actual or possible future harm to children.

\textsuperscript{87}458 U.S. 747 (1982).
3.4.5 Protect Act, 2003

In the PROTECT Act (Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today), Congress attacked pandering and solicitation of child pornography, and the law applied regardless of whether the material consisted of computer-generated images or even of adults who looked like children, or even if the material was fraudulent or did not exist at all.

The Protect Act was enacted in April 2003\(^{89} \) partly in response to the Supreme Court decision in Ashcroft v. Free Speech Coalition.\(^{90} \) It was introduced in the US Senate in January 2003, and passed the Senate by a vote of 84 to zero in February 2003. The House of Representatives later moved to introduce a related bill entitled the Child Obscenity and Pornography Prevention Bill of 2003 in March 2003. The Bill passed by a vote of 410 to 14. A compromised version of the 2003 Protect Bill, with its amended sentencing provisions, was introduced, and passed the House on 10 April 2003 by a vote of 400–25 and the Senate by 98–0. The President signed the bill into law on 30 April 2003, declaring:

The new law confronts an evil that is too often a cause of child abuse and abduction in America – the evil of child pornography. In the past, prosecutors have been hindered by not having all the tools needed to prosecute criminals who create child pornography. Under the Protect Act, we’ve seen images of children, even those created with computer technology, will now be illegal, giving prosecutors an important new tool. Obscene images of children, no matter how they are made, incite abuse, raise the dangers to children and will not be tolerated in America.\(^{91} \)

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\(^{91} \) http://www.whitehouse.gov/news/releases/2003/04/20030430-6.html, accessed on 29/08/2017

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3.5 CANADA

In 2001 the constitutionality of the Canadian possession of child pornography offence was challenged at the Supreme Court level in *Sharpe*.\(^9\) This decision has had a major impact on debate and the development of laws in Canada with particular concern on the court’s approach to written material. Although there were a number of attempts at legislation, there was no specific law in Canada criminalizing child pornography until 1993. In 1993 the Canadian Parliament created a number of offences related to child pornography by introducing section 163.1 of the Criminal Code. By enacting these new provisions, Parliament’s intention was to prevent harm to children by banning the production, publication, importation, distribution, sale and possession of child pornography, and by sending a stern message to Canadians ‘that children need to be protected from the harmful effects of child sexual abuse and exploitation and are not appropriate sexual partners. It should be noted that unlike the provisions of the Protection of Children Act 1978 in England and Wales, the Canadian Criminal Code uses the words ‘child pornography’ within section 163.1(1).

As far as the child pornography provisions are concerned, a child is defined as under the age of 18 in line with the UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. It may be noted that the above definition provided by the Canadian legislators is wider than the definition used in the Protection of Children Act 1978 which deals with indecent photographs and indecent pseudo-photographs of children in England and Wales.

The Canadian version includes written material in addition to visual representations. Therefore text based content such as writings as well as drawings could be regarded as child pornography if the other conditions within section 163.1 of the Canadian Criminal Code are satisfied.

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In terms of the offences, under section 163.1(2), every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or an offence punishable on summary conviction. According to section 163.1(5), an accused will not be able to rely on a defence to a charge under section 163.1(2) if he believes that a person shown in a visual representation that is alleged to constitute child pornography was or was depicted as being 18 years of age or more, unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was 18 years of age or more, the representation did not depict that person under the age of 18 years.

Under section 163.1(3), every person who imports, distributes, sells or possesses for the purpose of distribution or sale any child pornography is guilty of an indictable offence and liable for imprisonment for a term not exceeding ten years; or an offence punishable on summary conviction. Similarly, under section 163.1(4), every person who possesses any child pornography is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or an offence punishable on summary conviction.

According to section 163.1(6), where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose. The above-mentioned provisions of section 163.1 are analysed below in light of the decision of the Canadian Supreme Court in R v. Sharpe. This important case illustrates potential challenges on privacy and free-speech grounds to offences involving the ‘private possession’ of child pornography.
3.5.1 Amendments to Canadian Law after Sharpe’s decision

An immediate reaction to the Supreme Court decision in Sharpe came from the Canadian Parliament with the introduction of Bill C-15A to amend the child pornography provisions of the Canadian Criminal Code. The Minister of Justice and Attorney General of Canada, the Honourable Martin Cauchon, stated:

*While the Internet allows us many positive opportunities, we know that criminals use the Internet to target vulnerable children. These laws better equip us to effectively protect Canadian youth from those who use technology to victimize them ... Law enforcement agencies will have more appropriate tools to bring offenders to justice and prevent future offences from occurring.*

Bill C-15A received Royal Assent in June 2002. Apart from amending the existing provisions on child pornography, the new Bill also introduced new offences of accessing child pornography, and communicating with children via a computer system for the purpose of facilitating or committing certain sexual offences, such as child luring or abduction.

After the Bill C-15A amendments were made, Bill C-255 – an Act to amend the Criminal Code (protection of children and other vulnerable persons) – and the Canada Evidence Act were introduced in the House of Commons of Canada on 8 October 2004. Bill C-257 was designed to amend further the child pornography provisions of the Canadian Criminal Code.

The amendments were triggered by unhappiness regarding the nature of child pornography laws following the *R v. Sharpe* judgment of the Supreme Court and its application by the courts in Canada, as well as being due to the obligations arising following the ratification of the United

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Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography by the Canadian government. Bill C-2 was enacted on 20 July 2005 and it amended the child pornography provisions with respect to the type of written and audio material that constitutes child pornography, and with respect to the child pornography offences, defences and penalties. Following the enactment of Bill C-2, Canada ratified the United Nations Optional Protocol in September 2005. Bill C-2 increased the penalties from six months to a maximum of 18 months for making of child pornography under section 163.1(2)(b); distribution of child pornography under 163.1(3)(b); possession of child pornography under section 163.1(4)(b); and for accessing child pornography under section 163.1(4.1)(b).

Bill C-2 amendments, literally known as the ‘Robin Sharpe amendments’, the Canadian legislators abolished and removed the defence of ‘artistic merit’ from section 163.1(6). The new version of the defence introduced by Bill C-2 still provides a limited ‘legitimate purpose related to art’ defence under the new subsection 163.1(6)(a). This limited defence is part of a two-pronged defence which can only be raised if the content in question has a legitimate purpose related to the administration of justice or to science, medicine, education or art and does not pose an undue risk of harm to persons under the age of 18 years. According to Department of Justice Canada, the amendments narrow and clarify the test for the child pornography defence. The Department of Justice Canada argued, ‘this single legitimate purpose defence incorporates the harm-based standard used by the Supreme Court of Canada in upholding the existing child pornography provisions in 2001.’

3.6 COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN AFRICA

Since the First World Congress held in Stockholm in 1996, the term commercial sexual exploitation has generated much debate. Data on the extent of child exploitation can only be estimates. Abuse is almost invariably covert and so compiling accurate figures is nearly impossible. According to the United Nations (UN), the number of children trafficked annually internally and externally in Africa is around 1.2 million. A clear understanding of the nature of the problem across Africa is needed in order to tackle the issue and, based on a real understanding of the size of the problem, monitor the progress towards eradicating child sexual exploitation.

It is important to recognize the various push-pull factors that precipitate child involvement in commercial sexual exploitation. Firstly there is demand. Amidst growing consumerism both in developed and developing countries, children are at risk of being seen as just another commodity to be bought and sold. The growth of the pornography industry including, most recently, on the internet has led to increased tolerance of and demand for sexual images including those of children. Secondly there is supply. The availability of children for sex work is directly related to family poverty. There may be few alternative sources of income. Poverty is the most frequent explanation cited but poverty alone does not account for the large number of children recruited into the sex industry.

Other powerful explanations of the commercial sexual exploitation of children (CSEC) include paedophilia, ease of access, relaxed legal enforcement environments, debt bondage, inter-generational prostitution, and the high remittances received by child sending to sex tourist-receiving countries. Other explanations which have been less fully studied include community disintegration, social and cultural devaluation of children, and

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95 Pedophilia or paedophilia is a psychiatric disorder in which an adult or older adolescent experiences a primary or exclusive sexual attraction to prepubescent children.
international crime organizations with trans-national transportation and financial capabilities.

The processes whereby children are recruited into sexual exploitation are varied and are complex. They nearly always involve adult accomplices including parents and older siblings. Others are recruited into “sex work” through forced abduction, by pressure from their parents, and through deceptive agreements between parents and traffickers, including unrecognized representatives of crime rings. Once recruited, these children typically are taken or travel to work sites located great distances from their place of origin. Isolation from their families and friends is the norm. Few are able to establish new relationships with persons other than those who are managing their victimization. Violence, forced drug use and threats to the point of death are only part of the daily abuse to which the majority of these children and youth are subjected.

The United Nations Convention on the Rights of the Child (UNCRC) and African Charter on the Rights and Welfare of the Child (ACRWC) challenge the customarily ‘unquestionable’ control parents exert over their children and the traditional practices within families that harm children like early marriage. In many cases, laws that prohibit early marriage have faced strong resistance from cultural and religious groups and child marriage continues to be an issue in a number of African countries. Most domestic workers are girls who come from very poor families. Abuses committed by employers and labour agents include physical, psychological, and sexual abuse; forced confinement in the workplace; non-payment of wages; and, excessively long working hours with no rest days. In the worst situations, women and girls are trapped in situations of forced labour or have been trafficked into forced domestic work in conditions akin to slavery.

Furthermore, HIV/AIDS is both a cause of and a contributing factor in the sexual exploitation of children. Children engaged in prostitution are
more at risk of sexually transmitted diseases and HIV infection, as protection is rarely provided and daily survival a more pressing concern.

Orphaned children are much more likely than non-orphans to be working in commercial agriculture, domestic service, commercial sex and as street vendors. Children who live on the streets are vulnerable to commercial exploitation as a means of survival. They are also vulnerable to pimps and traffickers.

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts 2000 does not expressly discuss the sexual exploitation of children but does prohibit the compulsory recruitment into armed forces for all those under 18. Women and children have been conscripted as ‘sex slaves’ and forced to provide sexual services to armed forces.

3.6.1 Africa’s International and Regional Commitments

African governments have made a number of commitments to protect the rights of children from sexual exploitation. At the international level, there has been a growing recognition and emphasis amongst governments of the importance of children’s rights and the call for more effective implementation of international legal instruments on children. International and regional instruments on children must be translated into national legislation, policies and programmes in order to have value and adequately protect children from sexual exploitation. Sexual exploitation of children is the focus of a number of international laws and treaties.

The United Nations Convention on the Rights of the Child (UNCRC)

96 The UN General Assembly adopted the Convention and opened it for signature on 20 November 1989 (the 30th anniversary of its Declaration of the Rights of the Child). It came into force on 2 September 1990, after it was ratified by the required number of nations. Currently, 196 countries are party to it. The CRC forms the most comprehensive and well-established international standard for children's rights and provides the framework for the actions of UNICEF, the UN children's agency.
- Article 34 of the Convention calls for inter-disciplinary measures aimed at preventing the inducement or coercion of a child to engage in unlawful sexual activity, the exploitative use of children in prostitution and/or other forms of unlawful sexual practices, the exploitative use of children in pornographic performances and materials.

- Article 35 of the Convention also calls for a variety of measures to prevent the abduction of, the sale of or traffic in children for any purpose or any form.


- The Trafficking Protocol supplements the UN Convention against Transitional Organized Crime and is the first universal instrument to address all aspects of human trafficking.

- The Trafficking Protocol (sometimes referred to as the Palermo Protocol) defines trafficking as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force, or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”.

- In addition, the Protocol mandates States to provide physical, psychological and social recovery of child victims of trafficking. State parties are also mandated to establish comprehensive policies that prevent children from re-victimization.


- The Optional Protocol requires States to criminalize the sale of children, prostitution and trafficking.
• The Optional Protocol requires States to ensure jurisdiction over the offences; provide for the extradition of offenders; encourage international cooperation between states to pursue offenders; and provide support to child survivors of sexual exploitation.

• The International Labour Organization Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)

• The ILO Convention 182 prohibits the sale and trafficking of children, the use, procuring or offering of a child for prostitution, the production of pornographic materials or for pornographic performances, and any work which is likely to harm the health, safety or morals of a child. It also emphasizes education as a preventative measure and as a means of reintegration.

• The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (2000)

• Articles 2 and 4 of the Protocol prohibit the compulsory recruitment into the armed forces of all those under the age of 18, including those recruited into the armed forces or militia for the purpose of sexual exploitation.

Regional Commitments:

• The African Charter on the Rights and Welfare of the Child (ACRWC) ⁹⁷

• The Declaration of the Arab-African Forum against Sexual Exploitation of Children. ⁹⁸

• The Arab-African Forum against the Sexual Exploitation of Children. ⁹⁹

⁹⁷ It was adopted by the Organisation of African Unity (OAU) in 1990 (in 2001, the OAU legally became the African Union) and was entered into force in 1999. Like the United Nations Convention on the Rights of the Child (CRC), the Children's Charter is a comprehensive instrument that sets out rights and defines universal principles and norms for the status of children.

⁹⁸ The Arab-African Forum Against Sexual Exploitation of Children, a regional consultation for the Second World Congress against Commercial Sexual Exploitation of Children, was held in Rabat from 24 to 26 October 2001.
• The Declaration of the Arab-African Forum against Sexual Exploitation of Children urges countries: to ratify and implement international legal instruments on the CSEC; harmonize national legal instruments with the provisions of the UNCRC and ensure their enforcement; adopt legal provisions to protect children from sex tourism;

• Legal Frameworks and Law Other commitments and declarations have been adopted by regional bodies such as Economic Commission for West African States (ECOWAS), Economic Community for Central African States (ECCAS), Middle East and North Africa (MENA), and the Southern Africa Development Community (SADAC) in order to facilitate trans-national cooperation against the CSEC. These include:
  o Lome Appeal on Trafficking in Children, 1999
  o Abidjan Appeal on Trafficking in Children, 2000
  o ECOWAS Declaration and Plan of Action against Trafficking in Persons, 2001
  o The Southern African Regional Network against Trafficking and Abuse of Children (SANTAC)\textsuperscript{100}
  o Libreville Declaration and Appeal to Harmonize National Legislation on Trafficking in Children in French-Speaking countries in West and Central Africa, 2003
  o Cairo Declaration Regional Consultation for the Middle East and North Africa (MENA) on the UN Study on Violence against Children, 2005

\textsuperscript{99}It was held in Rabat Morocco, from 24 to 26 October 2001 to prepare for the effective participation of the Arab African region at the 2nd World Conference against Commercial Sexual Exploitation of Children in Yokohama, Japan

\textsuperscript{100} It was born as an advanced step of the Regional Campaign against Child Abuse launched on 16 June 2002 by regional and national NGO’s from five different SADC countries, under leadership of Mrs. Graça Machel and her husband Nelson Mandela (Madiba). SANTAC mission is to build synergies amongst Southern Africa institutions and individuals to fight against all manifestations of child abuse, in particular child sexual and commercial exploitation, child exploitive labour and trafficking of children for any purpose, through lobby and advocacy, protection, law reform, rehabilitation and care services for victims.
Multilateral Agreements between members of ECOWAS and the Economic ECCAS in order to Strengthen Cooperation on Anti-Trafficking Measures, 2006

The process of harmonization is essential in order to ensure that governments have aligned national laws to reflect commitments made in international and regional instruments on children.

3.6.2 Selected National Legal Frameworks

Legislation and law enforcement play an integral role in the protection of children from commercial sexual exploitation. The Agenda of Action against Commercial Sexual Exploitation of children provides a detailed framework and categories of action to be taken by governments in partnership with civil society organization for combating sexual crimes perpetrated on children. These include prevention mechanisms; protection within laws; recovery, rehabilitation and reintegration; and child participation.

There have been various national legislative reform efforts on the continent to address the sexual exploitation of children. In general, the countries studied have utilized several approaches in their law reform initiatives: (i) enacting consolidated children’s acts; (ii) amending the criminal law and revising the penal code; and (iii) enacting legislation which prohibits specific offences and/or a combination of these approaches. However, the complex patchwork of existing legislation relating to children’s rights poses significant barriers to the effective harmonization of national laws with international norms and standards. This is further compounded by the pluralist nature of legal systems on the continent, where common and civil law coexist with customary and religious law.

Harmonization aims to reduce the discrepancies between national legal systems and procedures.
3.6.2.1 Enacting Consolidated Children’s Acts

South Africa

The South African Law Commission efforts resulted in a consolidated children’s act with significantly enhanced protection for children. The Children’s Act of 2005:

Defines child exploitation as the “procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography, irrespective of whether that reward is claimed by, payable to or shared with the procurer, the child, the parent or care-giver of the child, or any other person or trafficking in a child for use in sexual activities, including prostitution or pornography.”\textsuperscript{102} The exploitation of a child is further defined to include all forms of slavery or practices similar to slavery, including debt bondage, forced marriage, servitude, forced labour and the removal of body parts.\textsuperscript{103}

Defines and prohibits the trafficking of children and criminalises actions which facilitate trafficking in children.

Provides provisions that assist in the physical, psychological and social recovery of victims of trafficking. Thus, a child who is a victim of trafficking must be referred to a designated social worker for investigation and should be placed in temporary safe care. Similarly, a trafficked child who is not a citizen of South Africa may not be returned to the child’s country of origin or the country from where the child has been trafficked without giving due consideration to the availability of care arrangements and the possibility that the child might be trafficked again, harmed or killed.\textsuperscript{104}

\textsuperscript{102}The Children’s Act of 2005, Section 1.
\textsuperscript{103}Ibid. Section 1.
\textsuperscript{104}Ibid, section 290 (1) (a), (b), (c).
In addition, the Criminal (Sexual Offences and related Matters) Amendment Act No. 32 of 2007 contains a chapter on sexual offences and children.

**Ethiopia**

The Ethiopian criminal law pertaining to the sexual exploitation of children was reviewed and amended in 2004 to provide enhanced protection to children from sexual exploitation. Also, notable, the Constitution of the Federal Democratic Republic of Ethiopia 1994, Article 18 (2) prohibits human trafficking for any purpose. In Ethiopia, the revised penal code provides:

- It is an offence to procure a minor for prostitution, even if he/she consents, or to keep a minor in a brothel for the sake of prostitution. If convicted, this crime carries a prison term of five years’ rigorous imprisonment and a fine of up to 10,000 Birr (approx. USD 1,125);
- Abducting a minor with the intent to use him/her for prostitution is an aggravated crime punishable by ten to twenty-five years imprisonment;
- It is illegal to have sexual relations with children and there is enhanced punishment where the child is under 13;
- The trafficking of children or women for gain or to “gratify the passions of another” by enticing, inducing or procuring a child or a woman for prostitution, or, arranging or providing for the procurement of trafficked children is unlawful.

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105 See Constitution of the Federal Democratic Republic of Ethiopia 1994, Article 18 (2)
106 See Criminal Code of the Federal Democratic Republic of Ethiopia, Articles 635
107 Criminal Code of the Federal Democratic Republic of Ethiopia, Articles 635. Ibid. Articles 589, 590 (1) (a) and 590 (2) (e)
108 See Article 636 (a). Offenders may be punished with up to 25 years rigorous imprisonment, a fine of up to 10,
Nigeria

In 2003, Nigeria enacted new legislation on trafficking that includes provisions related to child prostitution, child sex tourism and child pornography. The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act:

Makes it illegal to use threats, intimidation or false pretences to procure a person under 18 years of age to engage in sexual activity in or outside of Nigeria, or to use any drug to overpower a person under 18 years of age in order for a man to have sex with the drugged person. Offenders of these two provisions may be punished with a fine or 14 years’ imprisonment under 18 years of age; permitting such a person’s defilement on one’s premises;\(^{109}\) or allowing such a person to be in a brothel.\(^{110}\) The law also makes it illegal to keep a brothel or to trade in prostitution.\(^{111}\)

Kenya

In Kenya, the protection of children from sexual exploitation is found primarily in three sources: in the children’s act, in the sexual offences act and in revised criminal procedures.

The Children’s Act 2001 protects children from “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity”. The Children’s Act defines a child as “any human being under the age of eighteen years”.

The Sexual Offences Act 2006 criminalizes child prostitution. Any person who (i) knowingly permits any child to remain in any premises for the purposes of causing such child to be sexually abused (ii) acts as a

\(^{109}\)This law further prohibits any Nigerian resident from encouraging the prostitution of a person.

\(^{110}\)In relation to sex tourism, this law prohibits organising or promoting foreign travel that promotes or encourages prostitution. Violators may be punished with ten years’ imprisonment. Tour operators and travel agents must notify their clients of their obligation

\(^{111}\)Under this law, and not to aid, abet, facilitate, or promote a person’s exploitation in tourism. Contravening the above provisions may be punished with up to 12 month’s imprisonment.
procurer of a child (iii) induces a person to be a client of a child (iv) takes advantage of his influence over a child (v) threatens/uses violence toward a child to procure the child for sexual intercourse (vi) rents property for the purpose or (vii) gives consideration with the intent to procure the child for any form of sexual abuse commits an the offence of child prostitution punishable by a term of not less than ten years.

The Sexual Offences Act also targets child sex tourism. Thus, any person who makes or organizes any travel arrangements for or on behalf of any other person with the intention of facilitating the commission of any sexual offence against a child, irrespective of whether that offence is committed, is guilty of the offence of promoting sex tourism and is liable upon conviction to a term of imprisonment of not less than ten years.

The Sexual Offences Act’s prohibition on child trafficking provides that anyone who organizes any travel arrangements for a child within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against that child or who supplies, recruits, transports, transfers, harbours or receives a child, within or across the borders of Kenya, for purposes of the commission of any sexual offence under this Act with such child or any other person is guilty of the offence of child trafficking.

3.6.2.2 Challenges in Existing National Laws

Despite legislative advancements in African countries to protect children from sexual exploitation, the review found that children on the continent are not reaping the protective benefits of laws for several reasons including the following:

**Definition of a child & determination of age of majority**

All the rights and protection accorded to children hinge on the definition of a child. The review found that there is a threat to children’s protection from sexual exploitation due to the failure to have an overarching
definition of a child and as a result of discrepancies and ambiguities on the minimum ages of related issues, such as marriage and sexual consent.

For example, although Nigeria’s Child Rights Act provides a uniform definition of a child as a person under the age of 18 years, the Act is not binding on all states. Thus, the age of sexual consent in two southern states is as low as 13. In some northern states, 14 is the age at which a child can consent to marriage.

Sudanese legislation also employs varying definitions of the child. Puberty, which is generally recognized in girls between the ages of 9 and 15 and in boys between the ages of 14 and 18, is one way of determining majority. Consequently, a 15 year-old person who has manifested obvious external signs of puberty is generally said to have reached the age of majority.

Marriage as a defence

The Criminal Code of Chad provides that if a kidnapped or abducted minor marries her abductor, the offender may be prosecuted only on the basis of application by persons having the legal capacity to request the annulment and he may not be convicted until after such annulment.

In Eritrea, under the Transitional Penal Code, the consent of the victim to marry the accused bars prosecution and, where the offender was convicted, terminates the sentence. This was deemed in the best interest of the child victim, who would otherwise be stigmatized in the community and have little chance of marrying.

112 The Criminal Code of Chad Act No. 38 of 11 December 1996 penalizes the marriage of girls under the age of 13 years and provides, in article 277, that "the consummation of a customary marriage before a girl has reached the age of 13 years is deemed to be rape and punishable as such".

113 Article 589 of the Transitional Penal Code of Eritrea criminalizes a person who compels or induces a child under 15 years of age to submit to sexual intercourse. This offense is punishable by rigorous imprisonment for up to 15 years. Apart from this, any other sort of sexual outrage or indecent act on a child under 15 years of age or between 15-18 years of age is penalized under Articles 594 and 595 of the Penal Code.
• Reasonable belief the child victim was old enough to consent to sexual relations.

• The penal codes of Botswana, Nigeria and Zimbabwe permit the accused to argue he reasonably believed the victim was 18 years or older.

• Discrimination on the basis of gender

• Despite the growing incidence on the sexual exploitation of boys on the continent, legislation often affords lesser protection to boys compared to girls. For example, in Uganda the Penal Code prohibits procuring girls for the purposes of prostitution but gives no protection to boys.

• Swaziland’s Girls and Women’s Protection Act\textsuperscript{114} does not provide general protection for all children against “unlawful carnal connection”. Its provisions are specific to girls and do not cover the sexual abuse against boys.

• In Tanzania for example, girls can get married at 14 while boys cannot consent to marriage until age 18.

• Ambiguous definitions on prostitution, trafficking and pornography

In Egypt, The Suppression of Prostitution Act, No 10 of 1961 renders anyone who engages in prostitution, whatever their age liable to one to three years’ imprisonment. However, The Children’s Act No. 12 of 1996 provides that a child who is “employed in work connected with prostitution” or who is “in the service of a person involved in such activities” shall be regarded as being at risk of delinquency. Anyone who places a child at risk of delinquency shall be punished by imprisonment. In

\textsuperscript{114} According to a report by Amnesty International, “Swaziland has not criminalized marital rape under statutory law and common law also appears not to provide legal redress for women raped by their husbands. The Girls’ and Women’s Protection Act, concerned with sexual abuse of girls under 16, specifically excludes marital rape from its range of offences. Yet girls as young as 13 may be married under customary law and forced marriages continue to be reported.”
Egypt, The Suppression of Prostitution Act, No 10 of 1961 renders anyone who engages in prostitution, whatever their age liable to one to three years’ imprisonment. It is unclear whether those involved in prostitution are liable to prosecution for the “crime of prostitution”. The law could thus be read to prosecute children exploited in prostitution. It is also unclear which activities can be considered prostitution.

Many of the countries under review had no legislative provisions protecting children from child pornography. In many countries, the law limits children’s access to pornographic material but fails to criminalize making or distributing child pornography

Inconsistencies between the minimum age at which a child can consent to marriage and age at which a child can consent to sexual relations

In Tanzania, the law has created the anomalous situation where the age of marriage is lower than the age of sexual consent. The Sexual Offences Special Provision Act 1998\footnote{An Act to amend several written laws, making special provisions in those laws with regard to sexual and other offences to further safeguard the personal integrity, dignity, liberty and security of women and children. Enacted by the Parliament of the United Republic of Tanzania. The Act, No. 4 of 1998, was assented by the President on 1 July 1998. The Act amends the REF\{LEG\}\{1016; the Criminal Procedure Act (1985), the Evidence Act (1967), the Children and Young Persons Ordinance and the Minimum Sentences Act (1972).} sets the age of sexual consent at 18, but under the Law of Marriage Act,\footnote{Tanzania's Law of Marriage Act of 1971 allow men to contract polygamous marriages, and permit the marriage of 15-year-old girls, while the minimum age of marriage for boys is 18.} it is set as 15 for girls.

In Egypt, the age of consent for sexual activity is 18 and the age of consent for marriage is 16 for females (and 18 for males).

In Malawi, the minimum age of sexual consent is as low as 13 for girls and 12 for boys.

Many of the countries under review have ineffective sanctions and penalties for abusers. Sex offenders are given suspended sentences, non-custodial or short sentences and often receive bail.
Implementation challenges

Poor implementation by duty bearers in the entire criminal justice system including lack of child friendly procedures inhibit the formal protection afforded to children.

Lack of medical and other services for child victims

Many laws do not adequately address the care and rehabilitation of child victims of sexual abuse, through medical, legal and psychological support. In the review, only South African law provides comprehensive, free medical services for victims of sexual abuse and exploitation.

Birth Registration Many African countries have insufficient birth registration systems which often preclude children from protection against sexual exploitation. Children who have no formal proof of age are at risk of not benefiting from protective minimum ages which as this paper has revealed, is fundamental in protection children from sexual exploitation. Therefore it is logical to infer that despite important progress in the international, regional and national legislative frameworks to protect children from sexual exploitation, children in Africa still lack the power and support structures to protect themselves from sexual exploitation. The complex and fragmented patchwork of laws pose a significant barrier in the harmonization of national laws with international norms and standards. There is often a direct correlation between better protection of children and countries which have enacted harmonized, comprehensive children’s acts. The findings identify some pressing steps that need to be taken in order to bring about change in the legal protection of children from sexual exploitation.

3.7 SEXUAL ABUSE IN SOUTH ASIA

3.7.1 Afghanistan

Afghanistan has suffered several decades of foreign military occupation and fratricidal conflict, resulting in a drastic erosion of
protective safety nets for women and children. The country has approximately 3 million refugees living in neighbouring countries, primarily Iran and Pakistan, and more than 150,000 internally displaced persons, mainly in refugee camps.\textsuperscript{117} The country has among the lowest social indicators in the world, ranking 174 out of 178 countries, and the lowest in South Asia.\textsuperscript{118} Over one-fourth of primary-school-age children are involved in labour, most of them boys.\textsuperscript{119}

Afghan society is conservative and patriarchal, and women and girls are kept close to the household. Girls are frequently the victims of forced marriage and child marriage and there are cases where they have been provided like property to settle disputes.

**Legislation**

Afghanistan has ratified the Convention on the Rights of the Child and the South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. It has acceded to the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. It has not signed ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, or the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol\textsuperscript{120}).

The legislation and practices of Afghanistan in addressing child sexual abuse and exploitation are complex because the country uses several forms of jurisprudence: State law, customary law and Sharia (Islamic) law. The wide assortment of customary laws find their source in tribal legal

\begin{footnotesize}
\begin{enumerate}
\item Adopted by General Assembly resolution 55/25, is supplementing the UN convention. It entered into force on 25/12/2003.
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practices, and up to 80 per cent of the population uses customary laws and traditional conflict resolution practices to address legal problems, including for violence against children and rape. In the past, village elders supervised these legal procedures, but they are increasingly coming under the supervision of local tribal military leaders.\textsuperscript{121}

All legislation lacks clear definitions of victims, perpetrators and illegal acts. Substantive and procedural issues are diverse and sometimes conflicting, and interpretations of the laws vary widely. Within State law, the Penal Code 1976, Civil Code 1977, Press Law 1965 and Labour Law of Afghanistan 1940 are most applicable to the sexual abuse and exploitation of boys.

**Definition of a child**

The legal age of the child varies considerably across the laws of Afghanistan. The Civil Code defines a child’s age of majority as 18 years for boys and 16 for girls, while laws against rape and kidnapping in the Penal Code consider both sexes to be children if they are under 18. Sharia law defines majority as 16 years for boys; for girls it is 14 years or the onset of menstruation, whichever is sooner.

According to article 5 of the Afghan Juvenile Code, the age of criminal responsibility is 12 years\textsuperscript{122}. Children (persons under the age of 18) are protected from life imprisonment and the death penalty according to article 39(c) of the Code. The Labour Code in Afghanistan states that a child can work in light industries at the age of 15, as a servant at 14 and as a workers’ apprentice at 13.\textsuperscript{123} This young age of child labour has implications for the sexual abuse of boys, as research throughout South Asia has shown

\textsuperscript{121}Save the Children Sweden-Denmark (C. Slugget), 2003, ‘Mapping of psychosocial support for girls and boys affected by child sexual abuse in four countries in South and Central Asia’.  
that young children, particularly if separated from their parents, are highly vulnerable in the workplace.\textsuperscript{124}

\textbf{Sexual abuse}

The Penal Code provides penalties for those who rape either boys or girls, with additional penalties for abusing those under age 18 years old.\textsuperscript{125} It criminalizes adultery and pederasty as well as the ‘violation of chastity of another (whether male or female)’. It also considers sexual abuse by a tutor, teacher or servant to be an aggravating condition. Notably, the Penal Code does not distinguish the sex of the perpetrator, so females could also be charged with offence.

Other forms of child sexual abuse are not addressed in Afghan state law. It has no provisions readily applicable to molestation or sexual harassment. Parents and siblings are not identified as possible perpetrators in sexual abuse, although they are not excluded from penalties for rape under the Penal Code. Legislation does not specifically cover other forms of child sexual abuse, including using indecent sexually explicit language towards a child as well as indecent exposure to sexual activities, showing children pornographic material or forcing a child to witness sexual acts. However, presumably some of these crimes could be addressed through a provision in the Penal Code prohibiting a person from “instigating a male or female, not eighteen years old, to delinquency”.\textsuperscript{126}

\textbf{Sexual exploitation in pornography}

Afghan legislation has limited application to exploitation of children through exposure to pornography, and no reference to child pornography/child abusive images. The primary provision regarding pornography in State law is the Press Law 2002, which criminalizes inciting others “to seek depravity by means of…publication of obscene articles or photos which

\textsuperscript{124}International Labour Organization, 2006, ‘Violence against children in places of work’.
\textsuperscript{125}Afghanistan Penal Code, Article 429(1).
\textsuperscript{126}Afghanistan Penal Code, Article 430(1).
tend to debase public morals”. Exposing a child to pornography could perhaps be adjudicated through the Penal Code laws on ‘exposing a child to delinquency’, but this has not occurred in practice.

3.7.2 Bangladesh

The geographical features of Bangladesh and its civil and governmental challenges have had a strong impact on the well-being of children. Its 142 million people live in low-lying areas adjoining the Bay of Bengal, an area prone to frequent cyclones and floods, which displace thousands of people every year. Rural-to-urban migration is a key response to poverty, and this directly impacts children, particularly boys, who are more likely to migrate for labour without the accompaniment of family or friends. More than one-third of boys aged 11 to 16 are not in school and 38 per cent of them are in the labour force, primarily in the informal sector. Poverty, absence of primary caregivers and extensive rural-to-urban migration result in two groups of boys who are highly vulnerable to sexual abuse and exploitation: working children separated from their families and children living on the street. According to the Bangladesh Institute of Development Studies, approximately 380,000 children live on the street in Bangladesh, the majority of them boys. This number is rapidly growing and is expected to double by 2020.

Legislation

Bangladesh has ratified the Convention on the Rights of the Child; the Optional Protocol on the Sale of Children, Child Prostitution and Child

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127 Press Law 2002 (No. 81).
130 Association for Community Development, 1999, ‘Socio-cultural study of border belt area’.
131 Paul, D., 2007, ‘Children previously involved in camel racing in the United Arab Emirates (UAE): Project review’. It should be noted that this practice has ended, and the children who were exploited as camel jockeys have the possibility to return, inter alia through the support by UNICEF and other organizations, more info available at: www.unicef.org/infobycountry/bangladesh_35935.html, accessed on 18/03/2016.

In general, the country’s legislation emphasizes protection of girls and women; boys are not adequately protected from many forms of abuse and exploitation. Older adolescent boys are almost entirely excluded from protection in existing legislation. The Penal Code refers only to girls in its sections on procuring a minor, transporting a victim and obtaining a child for the purpose of prostitution. For the crimes of transporting or enticing a child from his/her lawful guardian, the age limit is 14 for boys and 16 for girls. While the Suppression of Violence against Women and Children Act criminalizes many acts against ‘women and children’, a child is defined as a person under 16 (as of the 2003 amendment), thereby excluding boys and girls between 16 and 18. Similarly, the Children Act defines a child as anyone younger than 16, thus not protecting boys from 16 to 18.

**Definition of a child**

Bangladesh law lacks uniformity on the definition of a child. According to the Bangladesh Majority Act 1875, childhood ends at
18. The Suppression of Violence Against Women and Children Act 2000 Section 2(k) and the Children’s Act (1974) Part 1 2(f), defines a child as anyone below the age of 16. The Child Marriage Restraint Act 1929 forbids the marriage of boys under 21 and girls under 18. The age of criminal responsibility is not clear in Bangladesh law. The Penal Code 1860 states that a child cannot be held criminally responsible under the age of 9. There is, however, a provision for presumption of innocence for children between 9 and 12 years; criminal responsibility depends on the maturity of the child to understand the consequences of the act.

Sexual abuse

The Suppression of Violence against Women and Children Act (SVWCA), the primary law addressing rape in Bangladesh, has an explicit provision on Punishment for Rape or Death in Consequence of Rape. However, as the SVWCA defines the legal age of children as 16 and the law applies only to the rape of ‘women and children’, the rape of boys between 16 and 18 is not an offence. A provision regarding rape in police custody applies only to women, not to children. It is unclear whether women can be charged with perpetration of rape under the SVWCA. While it states ‘if a man commits rape…’ some subsequent references to the perpetrator refer to a ‘person’. Although the Penal Code states that “the pronoun ‘he’ and its derivatives are used of any person, whether male or female”, the SVWCA does not provide a similar clarification. While the General Clauses Act 1897 states “the words importing the masculine gender shall be taken to include females”, Section 375 of the Penal Code (referred

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135 Suppression of Violence against Women and Children (Amendment) Act 2003, Section 9
136 Bangladesh Penal Code 1860.
137 Bangladesh Penal Code 1860, Section 375.
to in the SVWCA) explicitly identifies a male perpetrator with the words ‘a man is said to commit rape…” 137

The Children Act (1974) does not directly address rape and provides little more protection to boys than does other legislation. It does not impose penalties on the act of rape, but rather the “exposure of a child to the risk of rape”. 138 As the age of majority is 16 according to the Children Act, Part 1, Section 2(f), even if this law were enforced it would not protect boys and girls between 16 and 18 years. Like the SVWCA, the Children Act contains no clear indication that women are or are not to be considered perpetrators. Bangladesh law has no reference to incest or sexual abuse conducted by parents or siblings.

Sexual molestation, non-penetrative sexual abuse of children is specifically addressed in the SVWCA in Section 10(i), although it excludes boys and girls between 16 and 18. In the criminalized act, defined as ‘sexual oppression’, the perpetrator “touches the sexual organ or other organ of a woman and child”. In the case of molestation, only males are considered perpetrators.

Sexual exploitation in pornography

The country’s legislation regarding pornography, from the Penal Code of 1860, forbids the possession or production of pornography and is primarily concerned with protecting the public from the sale and distribution of materials that may “tend to deprave and corrupt”. The legislation does not mention sexual abuse or exploitation of children in pornography. While the Penal Code can protect children from the effects of exposure to pornography through its prohibition against selling pornographic materials to children under 20 it does to protect children from the sexual violence inherent in producing pornography. There are currently

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137 Children’s Act 1974.
138 Children’s Act 1974
no laws to protect children from pornography transmitted through electronic media.

3.7.3 India

The immense diversity of India, the world’s most populous democracy, makes it difficult to generalize about factors that contribute to the sexual abuse and exploitation of children. India’s many states encompass diverse natural environments, economic resources, ethnicities and customs, as well as varying levels of education, child labour, poverty and government efficiency and integrity. The differing degrees of child protection and vulnerability in various parts of India shape the forms of child sexual abuse and exploitation for the country as a whole.

Legislation


The Immoral Traffic Prevention Act 1956 (ITPA), with one exception, does not discriminate against boys in favour of girls in defining the victim, using the word ‘person’ rather than ‘woman’ or ‘girl’. The exception is the provision on detaining a person in a brothel for the purpose of sexual intercourse, which discriminates against boys through the use of the words ‘her’ and ‘woman or girl’. However, regarding rape, the Indian Penal Code (IPC) states the victim as being a woman (or girl) and the perpetrator a man. Regarding ‘unnatural offences’, an undefined term indicating anal intercourse but not necessarily other forms of sexual abuse, the victim can be male or female and the perpetrator can also be male or female. Legislation under consideration makes no significant distinction between boys and girls.

Definition of a child

The definition of a child in Indian legislation is inconsistent. The ITPA defines a child as a person under the age of 16, but the Immoral Traffic (Prevention) Amendment Act 2006 amended the age to 18. The IPC has no age definition of a child. It states that ‘the word “man” denotes a male human being of any age’ and similarly treats the word ‘woman’, as a female human being of any age. While there is no specified age of consent to sexual intercourse in Indian legislation, 16 is the age below which consent is irrelevant in statutory rape for girls, with stricter punishment if the girl is younger than 12. The Juvenile Justice Act 2015, defines a ‘juvenile’ or a ‘child’ as a person who has not completed his/her eighteenth year. At the same time, the age of criminal responsibility as established in the Penal Code Chapter 4, section 82 is below 7 years of age. It states that the age of criminal responsibility may be raised to 12 years if the child is found incapable of understanding the nature and consequences of his/her act. This low age of criminal responsibility is not remedied by the Juvenile Justice Act. However, it extends juvenile justice protection to all children.
from age 16 to age 18, although it is not clear if this refers to the child’s age at the time of offence or at the time of trial.

Sexual abuse

‘Sexual abuse’ per se has been defined in Indian legislation i.e The Protection of Children from Sexual Offences Act (POCSO Act) 2012 and the legislation directly address child sexual abuse. However before POCSO Cases of child sexual abuse are addressed under adult laws. The legislation of India addresses some, though not all, forms of sexual abuse through diverse provisions, most of which are found in the Indian Penal Code 1860. Many of these provisions exclude boys.

Regarding procurement of a child for sexual intercourse, the IPC outlaws forcing or seducing a minor girl (under 18) into ‘illicit intercourse’, but it does not protect boys. No law forbids procuring a child for sexual intercourse through the Internet. While the IPC provides stringent measures to protect girl rape victims, its protections for boy victims are insufficient. Section 375 on rape addresses only females. There is no legal acknowledgement that parents and siblings can be perpetrators, nor any specific legislation forbidding incest in India. The exception to this is the Goa Children’s Act 2003, which includes incest among the ‘sexual offences’ for which a perpetrator can be punished. The definition of incest includes anyone who is a relative or related by adoption.\textsuperscript{139} The penalties are insignificant: one year in prison and a fine. However, the ITPA Section 9, on seduction of a person in custody, refers to those persons who have “custody, charge or care of” another person. This and other provisions relating to the abuse of persons by their custodian can be applied to incest cases.

Most forms of sexual abuse are addressed in the Goa Children’s Act, which penalizes touching, voyeurism, exhibitionism, forcing children to

\textsuperscript{139}Goa Children’s Act 2003, Part 2 (y) (iii)
watch sexual acts and using obscene language with children. The Law Commission of India reviewed the laws related to child sexual abuse and recommended amendments to the Indian Penal Code in its 172nd report. The report suggests substituting the offence of rape with the broader offence of ‘sexual assault’, which covers additional forms of sexual abuse, including non-penetrative sexual contact.

Legislation addressing pornography is found in the Indecent Representation of Women (Prohibition) Act 1986 (IRWPA) and under POCSO 2012, some provisions of the Penal Code 1860 and the Information Technology Act 2000. The legislation inadequately covers the full range of pornographic activities; focuses on the impact of obscene publications upon public morality rather than on the abuse and exploitation perpetrated in the production of pornography; does not distinguish between pornography produced using children or using adults; and discriminates against men and boys.

The IRWPA protects the integrity of women and the public in general by forbidding production and distribution of materials that are “…likely to deprave, corrupt or injure the public morality or morals” but it does not address the sexual abuse and exploitation inherent in creating pornography. The term ‘pornography’ is not used in the Act. In its definition of “indecent representation of women”, the effects of pornography upon the victim are limited to “being indecent, or derogatory to, or denigrating women”. While girls may be included in the definition of ‘women’, boys are not.

The provisions of the IPC relating to pornography reflect its 1860 genesis. They address protecting the public from the sale and distribution of

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140Goa Children’s Act 2003, Part 2 (y) (iii)
141Kathmandu School of Law, Terre des hommes Lausanne, European Commission and SALS Forum, 2007, ‘Regional study for the harmonisation of anti-trafficking legal framework in Bangladesh, India and Nepal with international standards’, Kathmandu, KSL.
142Sexual exploitation in pornography Indecent Representation of Women (Prohibition) Act 1986.
materials that are ‘lascivious’ and may “tend to deprave and corrupt persons” who encounter them. At the same time, the IPC is superior to the IRWPA 1986 in that it addresses one of the forms of child sexual abuse by prohibiting the sale and exposure of pornographic materials to young people. The Young Persons (Harmful Publications) Act 1956 prevents the publication and dissemination of publications, with or without pictures that are harmful to young persons.\(^\text{143}\) The act does not discriminate regarding offences committed against boys or girls. However, the crime carries minimal penalties.

The primary purpose of the Information Technology Act 2000 is to regulate, license and ensure copyright protection for the information technology sector, and its attention to pornography is slight. It simply adds materials ‘in electronic form’ to the language of previous acts, repeating the same moral reasoning of the IRWPA and IPC regarding the danger of ‘lascivious’ materials that may “tend to deprave and corrupt persons”.\(^\text{144}\) It does not define child pornography, address the abuse and exploitation perpetrated during the production of pornography or remedy the exclusion of boys from the IRWPA.

The Goa Children’s Act\(^\text{145}\) addresses many aspects of pornography not found in national legislation. Notably, the Act criminalizes making children pose for the production of pornography, deeming it a form of sexual abuse. This follows from article 2 (y) (i) of the Act. It is also stated in that unaccompanied children under the age of 14 years are not allowed to use cyber cafés, and penalizes those entrepreneurs who allow children access to prohibited Internet sites and to any ‘objectionable media’ on film, video and other electronic form. This follows from article 13(16)(17)(18). The Act also requires photo and film processing laboratories to report child pornography to the police. Article 8(14) states that “…it shall be mandatory

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\(^\text{143}\) Young Persons (Harmful Publications) Act 1956
\(^\text{144}\) Information Technology Act 2000, section 6

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for a developer of photographs or films, if he finds that the photos/films
developed by him contain sexual /obscene depictions of children, to report
this to a police officer...”. In addition, article 13(15) of the Act established a
Special Advisory Group with the aim to suggest ways to protect children
from the harmful influences of the Internet.

3.7.4 Nepal

Children make up nearly 40 per cent of the country’s 27 million
people, 256 and nearly 40 per cent of children between ages 5 and 14 are
engaged in labour.146 This is one of the highest proportions of working
children in the world. Just 20 years ago, the population of Nepal was almost
entirely rural, but massive internal migration has swollen urban areas to 16
per cent of the population.147 This has divided extended families and created
large areas of poor housing occupied by single or fragmented families. In
addition, the country has become increasingly dependent on remittances
from Nepalese men working overseas, primarily in Malaysia and the Gulf
states. This out-migration has left more women-headed households and
reduced protection for children. These changes have increased the
vulnerability of boys and girls to sexual abuse and exploitation.

Legislation

The Government of Nepal has ratified the Convention on the Rights
of the Child; the Optional Protocol on the Sale of Children, Child
Prostitution and Child Pornography; ILO Convention 182 on the Worst
Forms of Child Labour; and the SAARC Convention on Preventing and
Combating Trafficking in Women and Children for Prostitution. It adopted
the Stockholm Declaration and Agenda for Action in 1996 and reaffirmed
its commitment in Yokohama in 2001. It has not signed the Protocol to
Prevent, Suppress and Punish Trafficking in Persons, Especially Women

accessed on 16/03/2016.
and Children (Palermo Protocol). Under the Nepal Treaty Act 1991, the country adopted a system whereby international treaties ratified by Nepal automatically become domestic law, and in the case of conflict with domestic law, these treaties take precedence. In practice, however, the judiciary has not always applied international standards to domestic cases.148


Definition of a child

The legal definition of a child is inconsistent in Nepalese law. While article 2(1a) of the Children’s Act (1992)150 defines a child as “...every human being below the age of 16 years”, the Human Trafficking and Transportation (Control) Act (2007)151 Part 1(2d) defines a child as “...children who have not reached the age of eighteen”. The Country Code states the age of marriage as 18 years for males and 16 years for females, although the age of consent for sexual activity is 16 years for both. The age of criminal liability, as per the Children’s Act, 1992, is 10 years, with reduced punishment allowed for children below the age of 16 (half the

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149ibid
penalty) and additional reduction for children under the age of 14. This follows from article 2(11) of the Children’s Act, 1992.

**Sexual abuse**

Overall, legislation in Nepal lacks mechanisms to address child sexual abuse, particularly of boys. The Children’s Act 1992 is silent on the subject of sexual abuse of children. However, an amendment to the Children’s Act proposed by the Central Child Welfare Board of the Ministry of Women, Children and Social Welfare would provide a definition of sexual exploitation and abuse that, though incomplete, would include ‘a sexual relationship with children (natural or unnatural)’, showing a child pornographic materials, and touching or fondling. While an ‘unnatural’ sexual relationship could perhaps be construed to include anal and oral sex, the definition does not include sexual harassment, indecent touching, showing children pornographic material, using indecent sexually explicit language towards a child, or indecent exposure by the child or perpetrator.

Other legal provisions address sex with children, rape, sexual molestation and incest. In the Country Code, sex with a minor (under the age of 16) is defined as ‘unnatural sexual intercourse’ and is treated as an aggravated form of statutory rape. Sexual molestation (touching any part of a female body) ‘with intent to commit intercourse’ applies to females above the age of 11 years. It does not address boys; nor does it address girls age 11 or younger.

Presumably, a man who rapes a boy through anal intercourse could be punished under the Civil Code provision on sodomy. Intended primarily to prohibit sex with animals, it does not directly mention anal intercourse but forbids ‘unnatural sexual acts’. It is questionable whether this provision could be applied to oral sex, masturbation or most other aspects of child

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sexual abuse. However, in practice this provision has been used to punish males for consensual sex. It is thought that many boy victims of rape refuse to report their abuse due to fear of being treated as criminals rather than victims.\textsuperscript{153}

**Sexual exploitation in pornography**

The three laws that address child pornography [the Children’s Act, the Some Public (Offences and Penalties) Act 1974 and the Electronic Transaction Ordinance 2005] do not specifically define or prohibit child pornography. Definitions and prohibitions primarily focus on protecting the public from exposure to obscenity; they do not address or penalize sexual abuse inflicted upon a child through the production of pornographic materials. As well, the legislation is limited to production of pornographic materials; it does not include live pornographic displays, grooming and sexual chat rooms, etc.

The Children’s Act 1992, article 2(16) prohibits taking, distributing or exhibiting photographs for the purpose of “engaging a Child in immoral profession”.\textsuperscript{154} Additional penalties are imposed if there has been ‘damage to the child’s character’ or the child’s health. The Some Public (Offences and Penalties) Act 1970 adds little to the protection of children. It prohibits public obscenity and printing, publishing, exhibiting or selling obscene materials, but it neither defines pornography nor addresses the abuse of children in the production of child pornographic materials. The Electronic Transaction Ordinance 2005 expands the limited scope of the previous two acts by prohibiting publication of pornography on electronic media. Again, pornography is not defined, the prohibition is limited to materials that offend ‘public morality and decency’ and the impact on the child is not taken into consideration.\textsuperscript{155}

\textsuperscript{154}Children’s Act 1992.
\textsuperscript{155}Electronic Transaction Ordinance 2004.
The recently proposed amendment to the Children’s Act by the Central Child Welfare Board attempts to add substance to legislation on pornography by including child sexual abusive images in its definition of sexual exploitation and abuse: taking unnatural photos, publishing or distributing pornographic photos in electronic media and showing pornographic material by means of deception, force, or any other influence, including fear, threat or making the child unconscious, or by giving or not giving money or other goods.\textsuperscript{156}

3.7.5 Pakistan

In Pakistan as in many countries of South Asia, the combination of poverty, inadequate education and extensive child labour and child mobility creates a situation that is highly conducive to child sexual abuse and exploitation. Pakistan is diverse in linguistic and cultural identities and in rule of law. The country is composed of four provinces, the Islamabad Capital Territory, Azad Jammu and Kashmir, and two federally administered tribal areas. The tribal areas are essentially autonomous, governed largely by tribal councils and village headmen.

Nearly one-third of the population lives below the poverty line, and almost half of the population are children under 18. The educational system does not address the needs of the great number of children, and Pakistan has a very low literacy rate.\textsuperscript{157} School dropout rates are high; in rural areas more than one-third of children do not complete primary school.\textsuperscript{158}

Instead of attending school many children work, particularly boys – 40 per cent of boys aged 15 to 17 and 17 per cent of boys between 10 and


\textsuperscript{157}Among the persons aged 15 years and above, the number is around 54 per cent. This, according to data from the United Nations Development Fund’s Human Development Index, available at: http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_PAK.html, accessed on 16/03/2016

14 are engaged in labour. The necessity to work takes many of these boys away from their homes, often to cities where they have little, if any, protection. Pakistan hosts more refugees than any country in the world, almost all from Afghanistan, and the vast number of refugees adds to the many thousands of boys living without family protection.

**Legislation**


Pakistan has both national and provincial legislation used to address the sexual abuse and sexual exploitation of children. The primary national legislation includes the Pakistan Suppression of Prostitution Ordinance 1961; the Prevention and Control of Human Trafficking Ordinance 2002 and subsequent Rules of 2003 and 2004; the Offence of Zina (Enforcement of Hudood). Ordinance 1979; the Protection of Women (Criminal Laws Amendment) Act 2006; and the Pakistan Penal Code 1860. With the exception of some amendments, Pakistan shares the nineteenth century British Penal Code with Bangladesh and India.

Boys are inadequately protected from both sexual abuse and sexual exploitation in Pakistan law. There is an absence of legislation clearly prohibiting child sexual abuse, and the legal definitions of sexual abuse, sexual consent and trafficking are inadequate. The sexual abuse of boys is

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not only generally ignored in legislation, but some laws severely penalize boys for sexual activities with other males, whether or not they are coerced into the activities. Trafficking laws are focused on external trafficking and primarily apply to girls. Key passages in legislation that could address trafficking of boys, such as laws against abduction, apply only to boys below the age of 15.

**Definition of a child**

The legal age of children in Pakistani law varies from 14 to 18. The Prevention and Control of Human Trafficking Ordinance 2002 (Trafficking Ordinance) defines a child as a person who is under 18 years. While there is no specified age for sexual consent, the legal age for marriage is 16 for girls and 18 for boys. However, the Offence of Zina (Enforcement of Hudood) Ordinance 1979 prescribes the age of adulthood for boys as 18 and for girls as either 16 or the onset of puberty, whichever comes earlier.

As dictated by the Hudood Ordinance, Pakistan law holds all persons, male and female, regardless of age, criminally responsible for a number of crimes including rape and adultery. Children are given consideration only in the level of their punishment. For crimes not addressed in the Hudood Ordinance, laws such as the Penal Code prescribe the age of criminal responsibility as 7 years. Under a proposed child protection bill, submitted to Parliament in 2007 and awaiting approval, the minimum age for criminal responsibility would be raised from 7 to 12 years, in compliance with international standards.

The Employment of Children Act 1991 forbids the use of children under 14 in hazardous labour, but permits them in ‘non-hazardous’ work. The act does not forbid children under 14 from working in hotels or

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restaurants—situations known to be conducive to the sexual abuse of boys in Pakistan.

Sexual abuse

Pakistan has no specific legislation addressing sexual intercourse with a child, which is in all cases considered rape. Among the diverse forms of child sexual abuse, Pakistan legislation only criminalizes rape. It does not address sexual harassment, oral sex, indecent touching, molestation, using indecent sexually explicit language with a child as well as indecent exposure and showing children pornographic material.

Previous legislation stated that sexual intercourse with any child under 14 was considered rape, as the child could not properly give consent. Today, rape is addressed under the Hudood Ordinance, which supersedes the Penal Code. However, this law is punitive rather than protective, as a child of any age can be convicted of having illicit sexual relationships. It prescribes adult penalties for girl from age 16 or from the time she has menstruated, whichever is earlier. For boys it prescribes adult penalties from the age of 18. In this respect, boys fare than girls better under the law, as the punishment for children is considerably less than for adults. The Hudood Ordinance discourages girls and women from prosecuting rape cases as their testimony alone is not sufficient; rape can be proven only with the testimony of four adult males. Should this testimony not be provided, the girl or woman can be convicted of illicit sexual activity and severely punished.

After much advocacy by legal rights groups against the Hudood Ordinance, the Protection of Women (Criminal Laws Amendment) Act was enacted in 2006. It amends some of the provisions in the Hudood Ordinance and transfers some offences to the Pakistan Penal Code. This Act affects the application of the Hudood Ordinance especially in matters relating to sexual crimes, such as rape. It does not remedy the omission of boys from protection under either the Hudood Ordinance or the Penal Code.
Under the Protection of Women Act, rape is an offence under the Penal Code, and convictions are to be based on evidence. The Act also prohibits charging women with fornication offences in cases where they allege they were victims of rape but cannot prove their ‘absence of consent’ through the production of four male witnesses. At the same time, activists consider the Protection of Women Act insufficient in addressing the discrimination found in the Hudood Ordinance, as it still allows the judiciary to interpret the law according to strict orthodox precedents. Heterosexual consensual sex outside of marriage continues to be criminalized, although it provides that such complaints are to be investigated by a court before formal charges are laid. Human Rights Watch has criticized the Act, stating that it does not comply with Pakistan’s obligations under the Convention on the Elimination of All Forms of Discrimination against Women. The UN Special Rapporteur on freedom of religion or belief has stated that sentences of stoning and amputation for ‘adultery’ and other offences are still possible under the Act.163

While the Hudood Ordinance applies, albeit severely, to girls, it has no application to the rape of boys, as rape is considered to be vaginal penetration. Thus the Hudood Ordinance appears to apply only to heterosexual rape of females by males. In the Pakistan Penal Code as well, the offence of rape is defined by vaginal penetration; only men are perpetrators and only women are victims.164 A 1997 amendment to the Hudood Law provided severe penalties, including the death penalty, to those found guilty of sodomy with a child as well as those committing gang rape.

The rape of boys, or sodomy, is also addressed under the Pakistan Penal Code, which punishes a person who ‘has carnal intercourse against

164 Pakistan Penal Code, Section 375.
the order of nature with any man woman or animal…” 165 However, while this could be applied to the perpetrator, it is frequently applied to the child victim as well, and it is used to criminalize consensual sex among homosexuals.

There is no separate law or reference in legislation that addresses child sexual abuse by a family member, nor is there legislation in use that specifically criminalizes child sexual abuse by those in care or authority, such as police and care providers. However, such offences may be tried under the Hudood Ordinance.

**Sexual exploitation in pornography**

The legislation on pornography is primarily found in the Penal Code166 and does not include electronic, audio or simulated images. The legislation does not distinguish between adult and child pornography, nor does it address the sexual exploitation inherent in the production of pornography. Pakistan’s legislation is therefore inadequate for addressing many aspects of pornography, child pornography in particular. Developed in the nineteenth century, the Penal Code is primarily concerned with protecting the public from the dangers of exposure to indecent literature and artwork. Photographs are not mentioned, though they may be included under ‘obscene representations’. Children are protected from exposure to obscene materials under another provision that forbids the sale of obscene objects to persons under 20 years.167 Although research has shown extensive exposure of children to Internet pornography, it is not addressed by present legislation.

**3.7.6 Sri Lanka**

Sri Lanka has sufficient health care services, informative media coverage and one of the best educational systems in South Asia. With a

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165Pakistan Penal Code, Section 377.
166Pakistan Penal Code, Section 292.
167Pakistan Penal Code, Section 293.
long tradition of government priority for education, children have easy, free access to school, and enrolment is high.

The civil conflict with the Liberation Tigers of Tamil Eelam (LTTE) has had a powerful impact on the country’s social foundations. In the war-affected zones in the north and east, basic services such as health, education, transportation, electricity, water and sanitation have deteriorated. The war has eroded children’s safety nets, and sexual abuse and exploitation have increased. In addition to rural poverty and war, protection of Sri Lankan children from sexual abuse and exploitation has been further eroded by national economic strategies.

Sri Lanka has rapidly developed its tourism industry since the 1970s. In 2002 it accounted for nearly 8 per cent of economic growth and is the fourth largest generator of income. The low level of child protection, high level of family fragmentation and strong promotion of tourism have contributed to the growth of an industry that has resulted in the sexual exploitation of children in tourism. In Sri Lanka, the exploitation of boys appears to be greater than that of girls, and the majority of boys being exploited in prostitution serve the tourism industry.

Legislation


The legislation of Sri Lanka relevant to child sexual abuse and sexual exploitation includes the Penal Code of Sri Lanka; Ordinance No. 2 of 1883 and subsequent Amendments; the Vagrants Ordinance 1941; the Brothels Ordinance; the Children and Young Persons Ordinance No. 48 of 1939; and the National Child Protection Authority Act 1998.

The Penal Code of 1883 lacks adequate provisions to address child sexual abuse and exploitation. This was remedied under the Penal Code (Amendment) Acts No. 22 of 1995, No. 29 of 1998 and No. 16 of 2006. The country’s legislation in general does not discriminate against boys, although as in many other legislation in South Asia, boys can be treated as perpetrators as well as victims under legal provisions criminalizing sodomy. The legislation as a whole is comprehensive in addressing all forms of sexual abuse, although it does not adequately protect boys and girls aged 16 to 18.

**Definition of a child**

The Age of Majority (Amendment) Act No. 17 of 1989 places the age of majority at 18. The Children and Young Persons Ordinance 1939 does not deal with age of majority as such, but defines a ‘child’ as being under 14 and a ‘young person’ as being under 16 only for the purpose of care and protection and juvenile justice. The Penal Code (Amendment) Act (PCA) No. 22 of 1995, the most viable legislation to address child abuse, places the age of statutory rape as below 16. The age of marriage is 18 for both males and females. The minimum age of criminal responsibility is 8 years old, although judges have discretion to decide whether or not to hold criminally accountable a child between 8 and 12 years of age. A draft Juvenile Justice Procedure Act seeks to raise the age to 10 years. The general minimum age of employment for most sectors of work is 14 years old.

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Sexual abuse

Sexual intercourse with a male child is not explicitly recognized as child sexual abuse in Sri Lankan law. The act would be adjudicated within the definition of ‘grave sexual abuse’ in section 365(b) of the Penal Code 1883. Section 363 of the Penal Code defines rape as sexual intercourse of a female victim by a male perpetrator, and this gap was not rectified in the Penal Code (Amendment) Act 1995. Consent is considered irrelevant if the girl is under the age of 16. Between 16 and 18, the child’s lack of consent must be proved by the prosecution. However, aggravated offences include rape of any female below 18, as well as gang rape, rape of a mentally or physically disabled person, and rape by a person in a position of authority or the management or staff of a caregiving facility. This amendment also references juvenile offenders; those under 18 are given lighter sentences for the rape of a girl under 16. In addition, heavy penalties are provided for incestuous rape of a girl under 16.

Sexual intercourse with a male child perhaps could be adjudicated under 365(b) of PCA 1995 and PCA 1998, ‘Grave Sexual Abuse’, in which a person “for sexual gratification, does any act, by use of his genitals or any other part of the human body or any instrument on any orifice, or part of the body of any other person, being an act which does not amount to rape under Section 363”. This definition covers many of the non-penetrative forms of sexual abuse and would include oral sex, molestation (touching, fondling, kissing) and masturbation of either the perpetrator or the victim. Absence of consent is limited to age 16, although the perpetrator is given a heavier penalty for grave sexual abuse of a person under 18. As in the section on rape, consent is irrelevant if the victim is in detention. Women as well as men can be convicted of this offence, although there is no reference to juvenile perpetrators.

172Sri Lanka Penal Code, Section 365B,
173Sri Lanka Penal Code, Section 363.
Section 365(a) of PCA 1995 forbids ‘gross indecency’. The section forbids anyone to commit, or procure another person to commit, ‘any act of gross indecency’, with additional punishment provided for those over 18 who commit such an act with a person under 16. The section thus does not include additional punishment for those who commit offences upon children between 16 and 18. Women as well as men can be considered perpetrators. However, the term ‘gross indecency’ is not defined. It is generally used to mean sexual intercourse with members of the same sex, and as such it has been used to victimize child victims as well as their abusers.  

It is not clear whether it could be used to address non-penetrative or non-physical forms of sexual abuse, including using indecent sexually explicit language towards a child as well as indecent exposure of sexual activities and showing children pornographic material.

Sexual harassment, including communicating suggestive words to a child, is adequately covered in section 345 of the Penal Code and its 1995 amendment. The section prohibits ‘sexual annoyance or harassment’ whether committed by assault or criminal force, or by ‘the use of words and actions’. Although either males or females can be considered perpetrators, and abuse by a ‘person in authority, in a working place or any other place’ is noted, this section does not distinguish child victims from adult victims.

Sri Lankan law directly criminalizes incest. In the Penal Code and its 1995 amendment, incest is defined as “sexual intercourse with another, who stands towards him in any of the following degrees of relationship…”, which include biological and adoptive parents and grandparents, children and grandchildren, sisters, brothers, nieces, nephews, aunts, uncles, widows and half-relations. The law applies to both male and female victims, and

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175 Supra note 168
176 PC and PCA 1995, Section 345.
177 PC and PCA 1995, Section 364A.
either males or females may be considered perpetrators. However, this section does not distinguish children from adults.

The 2006 amendment to the Penal Code addresses offences of child sexual abuse facilitated by the Internet, such as procuring a child through chat sites. The amendment imposes responsibility upon computer service providers to ensure that the “computer facility is not used for the commission of an act constituting an offence relating to the sexual abuse of a child”. The amendment also imposes a duty upon any person to report to the police any abuse of the child on premises they control or possess.

**Sexual exploitation in pornography**

Pornography was first addressed in section 286 of the Penal Code 1883, which criminalized possession of ‘obscene’ books or other articles for sale, distribution or public exhibition. Early legislation, including the Obscene Publications Ordinance No. 4 of 1927 and its amendment act of 1983, enlarged the scope of pornography to include engaging in business related to obscene publications or abetting their sale or distribution. However, these laws did not define ‘obscene’, did not refer to the involvement of children in pornography and imposed light sentences. The Children and Young Persons (Harmful Publications) Act No. 48 of 1956 sought to protect children from publications that could corrupt a child or young person (a child being defined as under 14, and a young person as 14 to 16 years). Its primary purpose was to protect children from exposure to crimes and acts of violence or “any incident of a repulsive or horrible nature”, rather than pornography as such.

The Penal Code (Amendment) Act No. 22 of 1995 directly addressed the influence of pornography on children and the abuse inherent in the production of child pornography. This amendment made criminal any act that would engage a child to “appear or perform in any obscene or indecent

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178 PCA 2006, Section 286B.
179 Children and Young Persons (Harmful Publications) Act No. 48 of 1956.
exhibition or show or to pose or model for, or to appear in, any obscene or indecent photographs or film”. It also criminalizes parents or guardians who allow their child to be involved in such acts. A person who sells, distributes, publishes or owns child pornographic photographs or films is also liable for punishment. In this act, a child is defined as a person under 18 years according to article 286A (2). While the legislation is commendable for criminalizing the use of children in the production of pornography, the penalties for such are the same as the penalties for owning or distributing child pornography.

The Penal Code Amendment Act of 1998 did not repair this problem, although it added subsections requiring those who develop photographs and films to report the presence of child pornography to the police. Similarly, the Amendment Act of 2005 did not address the seriousness of engaging children in the production of child pornography, although it stated that a “person who provides a service by means of a computer” must ensure that the “computer facility is not used for the commission of an offence relating to the sexual abuse of a child”.\footnote{PCA 2006, Section 286B.} However, the terms of this section, such as ‘computer facility’, are unclear vis-à-vis the complex roles in the information technology industry. They may not be sufficient to address, for example, the responsibilities of Internet service providers to limit child pornography. Also, as with other Sri Lankan legislation regarding pornography, the penalties are so minimal that the law is an ineffective deterrent.

Therefore it is logical to recommend that The Convention on the Rights of the Child contains four general principles or rights that cut across all actions, decisions and other matters affecting a child. These are the right to non-discrimination (article 2); the best interests of the child (article 3); the right to life, survival and development (article 6); and the right of the child to have his or her views heard and taken into account (article 12).
These rights need to be considered in all actions to address and prevent child sexual abuse exploitation and trafficking and to assist children who have been abused or exploited. The general measures of implementation are also important guidelines for making the Convention a reality.

Non-discrimination is a fundamental principle in human rights law, including in the Convention on the Rights of the Child, and is a critical dimension in the development of laws, policies and programmes for children. Furthermore, child-friendly information and services must be provided that take children’s diversities into account, such as gender, age, ethnicities and national origin, caste, religion, sexual orientation, disabilities, etc. Awareness and capacity to challenge discrimination should be provided to all stakeholders, including to parents, families and professionals working with and for children.

Boys and girls should be recognized as social agents with the right and capacity to be consulted on matters that affect them, to express their opinions freely and have those opinions taken into account, and to seek, receive and impart information. Children have to be given the opportunity to influence social policies and measures that address sexual abuse and exploitation. Listening to children and learning from their experiences and recommendations are key to designing and implementing effective preventive and protective mechanisms.

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