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Combating children's rights violations in the field of child sexual exploitation and abuse online

JAMM07 Master Thesis

International Human Rights Law

30 higher education credits

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Term of graduation: Spring 2024

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Preface

My time at Lund University has been a great joy, studying the type of law I care most about, International Human Rights Law.

Upon the many occasions where I have been asked by family, friends, colleagues and even strangers, what my thesis was about, I saw a variety of reactions. Some people were shocked –not that I would research such an issue- but shocked that children are not better protected online at the legislative level. Some knew that my bachelor thesis grappled with this same issue, from the perspective of social media’s complicity in children’s rights violations online, and therefore completely saw this coming. The common denominator for the various reactions, was however, the seriousness with which all of those people responded in their follow-up questions and curiosity about the possible solutions. Also, in every discussion about this topic, there was a sad realisation, that the online sexual exploitation and abuse of children, is a much larger problem than most people acknowledge.

I want to thank my supervisor Petra, for helping me through the process of writing this thesis, and for guiding me to make this research the best it could be.

My passion and inspiration for writing this thesis comes from the work of Exodus Cry, International Justice Mission, A21, Thorn, Fight the New Drug, and other NGOs who fight sex trafficking and sexual abuse and exploitation in porn culture.

I have been supported by, spurred on and prayed for by loved ones. To these friends and family members I am incredibly grateful.

Colossians 3:17 says, ‘and whatever you do, whether in word or deed, do it all in the name of the Lord Jesus, giving thanks to God the Father through Him.’

May 20th, 2024.

Executive Summary

This thesis examines current international human rights frameworks, current legal research, and reports from experts, to determine the efficacy of current children's rights protections in the field of online child sexual exploitation and abuse (OCSEA hereafter). The research question addresses the extent to which children's rights are protected against OCSEA and the argumentation centres on the inadequacy of the current provisions in UN and EU children's rights conventions. These legal protections were meant to address something else entirely, therefore the rights violations and harms suffered by children as a result OCSEA, does not line up with the protective measures. In order for a child's right to freedom from OCSEA to be realised, the right needs to be accurately defined, the nature of the harm be reflected in the regulation and the remedies for violating this right must be obtainable. Children's rights literature and specialised journal articles are analysed to answer the research question, and the legal frameworks are evaluated to establish the gaps.

As conveyed through the discussion of current statistics, the matter of OCSEA is an enormous issue, and the amount victims of OCSEA is growing exponentially. Therefore, its underrepresentation in children's rights practice and scholarly analysis warrants this research, to establish how weaknesses in the law impacts the rights of children. Select specialised literature addresses OCSEA, but only from one perspective. The contribution of this thesis to the field of research is the analysis of EU and UN legislation and the analysis children's rights protections against OCSEA from multiple angles. The key legal issues identified are the ineffective regulations, enforcement challenges and lacking access to justice for victims of OCSEA. Therefore, the conclusion of this thesis is that children's rights are not sufficiently protected with the current legal frameworks, and the complexity of the issue requires action on multiple fronts. The recommended solutions to the challenges raised are the following: improving regulations and legislative gaps, establishing accountability for non-state actors and improving victims' access to justice. These come from the independent analysis of this thesis, and therefore three recommendations are made for the improvement of children's rights protection and prevention of OCSEA.

Abbreviations

CRC	Convention on the Rights of the Child
CSA	Child Sexual Abuse
CSAM	Child Sexual Abuse Material
CSE	Child Sexual Exploitation
CSEA	Child Sexual Exploitation and Abuse
ECPAT	End Child Pornography and Trafficking
EU	European Union
ICT	Internet Communication Technology
INTERPOL	International Criminal Police Organisation
ICMEC	International Centre for Missing and Exploited Children
ISP	Internet Service Provider
IWF	Internet Watch Foundation
NHRI	National Human Rights Institute
OCSEA	Online Child Sexual Exploitation and Abuse
OCSA	Online Child Sexual Abuse
OPSC	Optional Protocol on Sale of Children
UN	United Nations
UNICEF	United Nations Children's Fund

1.0 Introduction

The online sexual exploitation and abuse of children is not close to home, it is happening in the homes of children worldwide. It can take many forms. It may involve a child and a perpetrator under the same roof, or it could involve a child and a perpetrator, separated by thousands of miles -yet connected by today's technology. This research will be focusing on the digital aspect of online child sexual exploitation and abuse (OCSEA). The legal challenges involved in protecting children -and their ability to exercise their rights and freedoms from OCSEA- is the main objective of this thesis. For the purposes of this research OCSEA will be referred to, based on the following definition, "situations involving digital, internet and communication technologies at some point during the continuum of abuse or exploitation [occurring] fully online or through a mix of online and in-person interactions between offenders and children."¹

The issue of OCSEA is well-established, as the following statistics reveal, however the complexity of children's rights and the legal challenges to enforcing them is not widely discussed. The harms related to OCSEA are sophisticated and the means to preventing them are multi-faceted, but the legal approach to this is key to combating these children's rights violations. First, the evidence that OCSEA is a growing world-scale problem will be presented, then the research objectives, research questions and methodology will be discussed. The terms used to describe the field of OCSEA are often inaccurately used, therefore a section establishing the correct definitions in law and practice will follow.

¹ ECPAT International, 'Access to Justice and Legal Remedies for Children Subjected to Online Sexual Exploitation and Abuse. Disrupting Harm Data Insight 3. Global Partnership to End Violence Against Children.' (2022) <https://www.end-violence.org/sites/default/files/2022-05/DH-data-insight-3_Final.pdf>.

Globally, 1 in 5 girls and 1 in 13 boys have been sexually exploited or abused before the age of 18.² The rapid evolution of Internet Communication Technology (ICT hereafter) and the advancement in internet accessibility and penetration had increased the prevalence of OCSEA.³ The online environment has become an increasingly easy means, for perpetrators to remain anonymous and avoid detection or identification. Most of the child sexual exploitation or sexual abuse cases involve some form of online interaction, whether the communication, dissemination of material, or the sexual activity itself. However, the full scope and reality of the threat OCSEA poses is unknown, according to the United Nations Children's Fund (UNICEF hereafter).⁴

The Special Rapporteur on the sale and sexual exploitation of children, published a report in 2021, concerning the effect of the Covid Pandemic on these issues. Before the pandemic, the reports of child sexual abuse had increased to 17 million, including nearly 70 million images and videos of this abuse in 2019.⁵ The report found that the pandemic further exacerbated the amount of child sexual abuse and exploitation. An estimated 25% increase in demand for CSAM, occurred during lockdowns. In April 2020, 4 million reports of suspected online CSAM were made in the United States, in comparison to 1 million in 2019 in the same period.⁶ Children's increased vulnerability due to less supervision, paired with greater

² United Nations Children's Fund, 'Ending Online Child Sexual Exploitation and Abuse: Lessons Learned and Promising Practices in Low and Middle Income Countries' (2021). P 7

³ Ibid. P 13

⁴ Ibid.

⁵ United Nations Human Rights Council, 'Impact of Coronavirus Disease on Different Manifestations of Sale and Sexual Exploitation of Children' (2021) A/HRC/46/31. P 12

⁶ End Violence Against Children, 'The Global Partnership to End Violence Against Children' Partnership Strategy 2022-24 <<https://www.end-violence.org/sites/default/files/2023-02/End%20Violence%20Partnership%20Strategy%202022-24%20%284%29.pdf>>.

exposure to the internet and isolation, created the perfect storm for children to fall victim to OCSEA.⁷

According to the International Centre for Missing and Exploited Children (ICMEC hereafter), Meta (owner of Facebook, WhatsApp and Instagram) reported over 46 million CSAM incidents on their platforms during the pandemic, Furthermore, platforms that profit from CSAM have more than doubled since 2020.⁸ This conveys a disturbing statistic, although these are suspected reports, the numbers only include a portion of accounted for CSAM, by ICMEC.

In the years after the pandemic the increased consumption and production of CSAM has continued. The Internet Watch Foundation (IWF hereafter) receives reports of CSAM in the UK, they recorded alarming amounts of CSAM detections in their latest annual report. In 2022, a 60% increase in content depicting pre-pubescent children, meaning around ages 7-10, was detected.⁹ For this same age range, a 129% increase was seen between 2021 and 2022 in ‘self-generated’ sexually explicit content intentionally shared by minors. ‘Self-generated’ CSAM is often a result of sextortion or online grooming, and these numbers are alarming considering these children are in the early years of primary education.

These statistics make it clear that this worldwide issue of growing CSAM consumption and production needs to be adequately addressed to protect children and their rights. There is a pressing need for identifying and rectifying any gaps and shortcomings in the framework

⁷ Ibid. P 11

⁸ ICMEC, ‘Child Sexual Abuse Material: Model Legislation & Global Review’

<https://www.icmec.org/csam-model-legislation_10th_ed_oct_2023/> accessed 21 February 2023. P 7

⁹ Ibid. P 1

protecting children's rights, such as the relevant UN and EU conventions. Addressing OCSEA is not simply a matter of adding an O for 'online' to the existing provisions addressing the sexual abuse or sexual exploitation of children. The online sphere adds a new dimension of threats to children and their right to be free from violence, both off and online.

The key legal challenges that will be analysed throughout this thesis, are the following: inadequate regulations, enforcement challenges and lacking access to justice for victims of OCSEA. These stem from the human rights framework being an imperfect fit, since they address an issue that is entirely different to what children face in the online sphere today. The protective measures in conventions from the EU and UN are not aligned with the nature of the harms suffered from OCSEA. As the literature review will reveal, there is a lack of scholarly research regarding this gap in children's rights protection, despite it being such a firmly established issue. In specialised works there is mention of children being vulnerable to violations of their rights, however the specific issues relating to OCSEA are underrepresented in children's rights literature and practice. Therefore, this thesis aims to close the gap in literature and analyse the role of improving enforcement, regulations and victim's remedies.

The current framework protecting children's rights was created without the future threats of the internet in mind, and the prevalence of sexual violence on the internet affecting, involving and victimising children cannot go unregulated. This research will primarily focus on the obligations of States and the international legal framework, however the issue of OCSEA as a multi-faceted and transnational issue, will be addressed also.

1.1 Research question and objectives

The research question of this thesis is, ‘to what extent are children’s rights protected when it comes to Online Child Sexual Exploitation and Abuse?’ The objective of the thesis is to identify the ways in which children’s right to be protected from sexual exploitation and abuse online are enforced. Furthermore, analysing the shortcomings in the protection of children online that resulting in the increase of OCSEA, forms the critique of the current legal framework from EU and UN conventions. There are three key legal issues that the research objectives focus on, inadequate regulations, enforcement challenges and access to justice, and this is an area of children’s rights literature that is hardly addressed.

The scope of the thesis is evaluating the lacking protection of children’s rights in the digital age, by looking at the obligations of States and non-state actors, as they play a significant role in combating OCSEA. Following an analysis of the current protections in place under EU and UN legislation, this thesis will present recommendations for improvement, based on the findings. These will be presented with the best interest of the child in mind, ensuring a balanced enforcement of children’s rights law that prioritises the access to justice as much as preventive measures.

1.2 Methodology

A doctrinal methodology is applied to carry out this research, as this research method is most prudent for evaluating the legal instruments and assessing the existing gaps. This being a human rights thesis, the research will look at the current international human rights legal framework, in order to determine, the extent to which children’s rights are protected in OCSEA. The approach will be to analyse hard and soft law instruments from the EU and UN

that apply to the issue. The reason for this delineation is that based on statistics that reveal Europe and North America are the key producers and consumers of CSAM, and the most comprehensive legislation stems from the legal bodies to which most of these countries are member States.¹⁰ Because key actors in combating OCSEA are ICTs, the accountability of these will be addressed as an enforcement issue, however a business human rights approach to this will not be delved into.

The main issues with protecting children's rights online are the growing demand for CSAM and the rapid development of technology connecting children with perpetrators, at a rate that international children's rights legislation is not keeping up with. The statistics discussed earlier paint a picture of a rapidly growing issue for children's rights, and although it is impossible to know the full breadth of the issue, it is clear that there are profound effects on the well-being and health of children.¹¹ There is a pressing need to identify and rectify gaps in the relevant legislation, examine the efficacy of enforcement, assess jurisdictional challenges and victim's access to justice. These are addressed throughout the thesis, and are supported by looking at existing scholarly analysis, conventions from the Un and EU, and reports from experts and NGOs. This thesis evaluates existing international human rights law, in order to make up for the literature gap on this issue. The central argument is that children's rights are not adequately protected, and the legal frameworks are key to combating OCSEA.

The structure of the thesis is as such, first the background of OCSEA and defining the relevant terms will be discussed, in order to establish what OCSEA involves. Thereafter, the

¹⁰ Joseph Savirimuthu, 'Transborder Challenges to Enforcing Online Child Safety Laws' in Joseph Savirimuthu, *Online Child Safety* (Palgrave Macmillan UK 2012) <http://link.springer.com/10.1057/9780230361003_4> accessed 29 March 2024. P 234

¹¹ John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (First edition, Oxford University Press 2019). P 1310.

factors and causes of OCSEA are outlined to prelude the evaluation of current regulation in the legal framework. The adequacy of the legal approach to combating OCSEA is discussed, and two key issues of jurisdiction and enforcement will be further explored in the chapter to follow. Finally, the access to justice for child victims of OCSEA will be evaluated, and the thesis concludes with recommendations for rectifying these shortcomings in protecting children from OCSEA will be presented. In order to unpack the various issues that warrant further investigation, reports from NGOs and statistics from experts in the fields of OCSEA are relied upon. Key academic literature is consulted, and five researchers were identified for the purpose of establishing the extent to which scholarly analysis addresses this issue. The following is a literature review of the key academic scholars that have addressed this issue.

Todres (2019),¹² analyses children's rights through the lens of the impact of violence on children. The research centres on the exploitation and violence children face today. It focuses on States' obligations in international children's rights law, and how they should be strengthened. He discusses how freedom from violence is a civil right, and the current frameworks are flawed in protecting this right. Therefore, legal frameworks need to elevate obligations towards children. As such the definition of violence against children plays a crucial role in establishing a clear mandate that ensures protection of children and enforcement of their rights. This thesis will incorporate this argument into a discussion of the violence against children that occurs in OCSEA, and a connection is made between Todres' argument and how it applies to the issue of child victims in the online sphere. The author does not link a child's right to freedom from violence to their online sexual exploitation and abuse, but this thesis will be arguing that such a link is valid.

¹² Jonathan Todres, 'Violence, Exploitation, and the Rights of the Child' in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer Singapore 2019) <http://link.springer.com/10.1007/978-981-10-4184-6_9> accessed 11 March 2024.

Witting (2021),¹³ looks at the transnational nature of OCSEA and how prosecution and investigation of this crime requires extraterritorial jurisdiction and law enforcement collaboration channels. This paper looks at the OPSC and Budapest and Lanzarote Conventions and their provisions establishing jurisdiction over the issue of OCSEA, which crosses borders of multiple jurisdictions in most cases. From the perspective of children's rights, the author analyses the child-friendliness of the current systems responding to OCSEA offences, considering the rights of child victims within a complex web of jurisdictional conflicts and the need for international cooperation.¹⁴ The author's analysis of these conventions is integrated into a discussion of the adequacy of children's rights protection online, and how the shortcomings of the definitions utilised in these legal instruments stand to weaken children's protection when multiple jurisdictions are in play.

Lievens et al. (2019),¹⁵ investigates the impact of digital technologies on children's rights and wellbeing. By looking at the CRC, the authors analyse the focus on protection rights rather than provision and participation rights when it comes to the intersection between children's rights and digital media and the online sphere. They suggest that enhancing children's rights in the area of digital technology requires stakeholders taking children's views as victims and potential future victims into account, when improving the effectiveness of the policies and laws that protect children in this evolving area. This thesis argues that the definitions used in the CRC does not adequately address the OCSEA seen today. Therefore, the authors'

¹³ Sabine K Witting, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders' (2021) 29 *The International Journal of Children's Rights* 731.

¹⁴ Ibid.

¹⁵ Eva Lievens and others, 'Children's Rights and Digital Technologies' in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer Singapore 2019) <http://link.springer.com/10.1007/978-981-10-4184-6_16> accessed 15 March 2024.

discussion of the State's obligations under CRC adds to this argumentation, by establishing that a greater emphasis is placed on protective measures, over preventive and restorative measures. This is an example of the inadequate protection of children as OCSEA victims, and their rights.

Skelton (2019),¹⁶ analyses the international complaints and remedies available for children whose rights have been violated, their access to justice and the justiciability of children's rights. Some of the obstacles child victims face in their access to remedy is due to the fact that they are children, who have no legal standing, and are therefore dependent on someone else to litigate on their behalf. The procedural aspect of accessing remedies are made with an adult victim in mind and therefore children are at a disadvantage, and do not receive remedies or have justice, even at the domestic level, because of that. The research identifies ways in which complaints procedures and accessing remedies can be made more child friendly -and the requirements more lenient- to allow child victims to access justice at the international level.¹⁷ The author's analysis of children's access to justice is applied to OCSEA, though the analysis of this thesis takes into account the further exacerbated access to remedy for children whose rights are violated in the digital world. This thesis will be proposing that in addition to Skelton's arguments, that the harms suffered by children do not line up with the protective measures in place for children's rights violations.

¹⁶ Ann Skelton, 'International Children's Rights Law: Complaints and Remedies' in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer Singapore 2019).

¹⁷ Ibid.

Binford et al. (2015),¹⁸ discusses the legal ramifications of OCSEA which is a borderless issue, which continues to grow and increase. They discuss the case of Paroline, which was the case of an OCSEA victim in the United States who at the centre of a large CSAM ring in 2014. Material containing her sexual abuse became the most wide-spread CSAM worldwide and she was the victim of a crime of international distribution. This case lays the foundation for the research conducted into OCSEA and CSAM as a transnational issue in the digital age. An analysis is conducted of the framework of international law (the CRC and OPSC) addressing the issue and providing victims with recovery, restitution and remedy. They discuss the obstacles to restoration of foreign victims and challenges these victims face when they are in a separate country from the perpetrator and/or the States with jurisdiction over the violation of their rights. This article inspired the hypothetical case study made to fit the argument of this thesis, where there is no physical contact or connection between victim and perpetrator, as seen in the trends of OCSEA today. Their argumentation around foreign victim's access to remedy is also incorporated into the analysis of the thesis, though once again, it is applied to the circumstances of today, where the internet is the crime scene.

These academic legal sources are selected and contextualised to this issue, to make a strong case for the weaknesses and gaps in children's rights protection in the area of OCSEA. The argumentation of this thesis addresses the regulatory gap in the protection of children's rights in the digital age. The research into how OCSEA threatens children's wellbeing and the lack of rights protections is scarce. Despite this being a well-known problem, only a handful of specialised scholarly articles address the children's rights issue attached to OCSEA. This is essentially an underrepresented and underdiscussed matter in children's rights literature and

¹⁸ Binford, Warren, Giesbrecht-McKee, Janna, Savey, J. L., & Schwartz-Gilbert, Rachel., 'Beyond Paroline: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad.' (2015) 35 Children's Legal Rights Journal 117.

practice, which is why the analysis of this thesis is important. The argument that children's rights are not protected in this field is not in opposition to existing research, it assembles the arguments of legal scholars and addresses gaps in the research. There is a discrepancy between the terminology used in the legal framework and the offences related to this issue. Additionally, there is an imperfect fit between the reality of OCSEA and the outdated children's rights provisions, because they are made to address an entirely different issue than what children face today. This is an independent perspective, that looking at the faults of EU and UN legislation, hindering effective protection of children's rights in law, while considering the overall implications of weak children's rights protections.

1.3 Definitions and legal provisions for OCSEA

There are various terms both in literature and legal instruments addressing the sexual exploitation and abuse of children online, as well as material depicting these offences. These terms are used interchangeably -and to a certain extent inaccurately. For the purposes of the discussion of this thesis, establishing the meanings of these terms is important to establish a common understanding of these. This thesis addresses OCSEA as a violation of children's rights and a criminal offence. However, there is no legal definition that fully encompasses the online element of the CSAM nor CSEA, because the provisions for these offences were not made to protect children in the online sphere.¹⁹ Therefore, the current laws addressing the sexual abuse and exploitation of children are analysed and applied to the online environment

¹⁹ When looking at the Luxembourg Guidelines, the provisions for child sexual abuse or exploitation are said to include their occurrences in the online environment, but the provisions in the CRC were not originally made to address these offences in the online sphere.

throughout the analysis, and it is important to establish the distinctions between these terms. The Luxembourg Guidelines,²⁰ as well as provisions in EU and UN law will be consulted.

Child sexual exploitation and abuse (CSEA hereafter) is defined in Article 34 of the Convention on the Rights of the Child (CRC hereafter) as, “exploitative use of children in prostitution or other unlawful sexual practices” and “exploitative use of children in pornographic performances and materials.”²¹ The CRC establishes State Parties’ requirement to protect children from “all forms of exploitation and sexual abuse,”²² however, in this Convention no distinction is made between sexual abuse and sexual exploitation and the two terms are often used interchangeably.²³

Another definition in international law is from EU directive 2011/93, which defines sexual exploitation offences in Article 4, “making a child participate in pornographic performances, knowingly attending pornographic performances that include children, making a child participate in child prostitution, and engaging in sexual activities with a child where recourse is made to prostitution.”²⁴

A detailed definition of child sexual abuse (CSA hereafter) is:

”the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos

²⁰ ECPAT International, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse (Luxembourg Guidelines)* (ECPAT International 2016).

²¹ United Nations Convention on the Rights of the Child 1989 (A/Res/44/25). Art 34 b) and c)

²² Ibid. art 31

²³ Tobin (n 11). P 1318

²⁴ European Union (EU) Directive 2011/93 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography 2011 (2011/92/EU). Art 4

of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person.”²⁵

The Committee on the Rights of the Child’s General Comment 13 to the CRC, outlines the acts that constitute sexual abuse and exploitation, as a joint definition, rather than separating exploitation from abuse. The definition also conveys the psychological aspect of the power imbalance in abuse and exploitation, which can be overlooked as opposed to when force or payment is involved. These acts include:

“the inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity; The use of children in commercial sexual exploitation; and The use of children in audio or visual images of child sexual abuse; Child prostitution, sexual slavery, sexual exploitation in travel and tourism, trafficking (within and between countries) and sale of children for sexual purposes and forced marriage. Many children experience sexual victimization which is not accompanied by physical force or restraint but which is nonetheless psychologically intrusive, exploitive and traumatic.”²⁶

CSA can be committed without a physical act -contrary to the common understanding and usage of his term. Online child sexual abuse (OCSA hereafter) is an example of non-contact CSA, it can occur for the purpose of the sexual gratification of the abuser, without any use of force. Sexual abuse is commonly committed by someone who has authority and power over

²⁵ ECPAT International (n 20). p 19

²⁶ CRC GC 13 article 25

the child, and most often it is someone the child knows.²⁷ It requires no exchange, which how CSA is distinct from child sexual exploitation (CSE hereafter). In CSE, a perpetrator engages a child in sexual activity as a result of coercion, threats or force, which also occurs in CSA. However, in exploitation, the child might also have been promised some benefit or gain, as a result of the power imbalance at play. CSE is defined as:

“abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation” of a child.²⁸

This definition of CSE conveys how it is distinguished from other forms of sexual abuse, being that an exchange occurring is an element of in CSE. When child sexual abuse material (CSAM hereafter) is exchanged for financial profit, that also amounts to CSE, as well as the usage of CSAM as a bargaining chip between perpetrators to interchange this material. This is the printed imagery or digital depiction through video, audio or livestream representing a child’s involvement in sexual activities.²⁹ The abuse in CSAM may not have been exploitative in nature when it was conducted, however when used in an exchange of CSAM, it can be at the same time abusive and exploitative.³⁰ The usage of terminology referring to CSA, CSE and CSEA is not uniform in the legislation’s definitions, as seen above in the EU and CRC articles. This is problematic for enforcement, which will be further discussed in the subsequent analysis, because uniformity of definition and legal provisions to describe the same offence is important. The analysis of this thesis problematises the inaccurate usage of

²⁷ *ECPAT International (n 20)*. P 18

²⁸ *Ibid.* P 25

²⁹ *Ibid.* P 41

³⁰ *Ibid.* P 25

terminology and definitions of CSEA, as well as the legal gap in addressing the online element of OCSEA, which is highly relevant to children's rights violations today.

An element of child sexual exploitation to consider, is trafficking. Not all child sexual exploitation involves trafficking, but much of the CSAM produced is a result of child sex trafficking. Therefore, it is worth defining it as such in the context of this thesis, since CSAM is a big part of the production and perpetuation of OCSEA. Child trafficking is the recruitment and/or transportation, harbouring, transfer and receipt of a child, with the intent of exploitation through forced labour, slavery, sexual exploitation and abuse by means of control over a child through fraud, abuse of power, coercion, deception, abduction or involving payment.³¹

Where commercial sexual exploitation occurs, it is closely linked to child sex trafficking. In commercial sexual exploitation, the focus narrows on monetary benefit specifically, which often involves organised crime and criminal networks on a broader scale, where the exploitation is committed for financial gain.³²

Now that the definitions for the various elements of OCSEA have been clarified and distinguished from one another, there is a clear understanding of what these offences involve. Therefore, an analysis to establish their effectiveness in the legal framework can follow. The causes and factors of OCSEA will now be addressed, keeping in mind the definitions discussed here, in order to delve into the legal issues regarding regulation and enforcement.

³¹ Ibid. P 24

³² Ibid. P 25

2.0 Causes of online sexual exploitation and abuse of children

This chapter addresses the ways in which relevant legislation insufficiently takes into account the factors of OCSEA. The current research does not specifically address the legal issues attached to OCSEA, though Lievens et al. (2019) addresses the impact of digital technology on children's well-being and rights. Therefore, the argumentation contributes independent analysis by linking information from NGOs about the causes of OCSEA specifically, to relevant legal instruments from the EU and UN.

This chapter analyses the various aspects of OCSEA, and evaluates the terminology in soft and hard law addressing children's rights and CSEA. The widespread usage problematic terminology such as 'child pornography' and 'child prostitution' in instruments that address OCSEA, and child victims is criticised here for its trivialisation of the violation of children's rights. A hypothetical case study illustrates the complexity of the issues transnational nature. It illustrates a common example of OCSEA no physical contact occurring between perpetrator and victim. To establish the extent to which children's rights are protected in this area, it is essential to analyse whether the current legal framework accurately frames the facets of OCSEA or not.

2.1 Background of OCSEA

CSAM and its production/consumption through CSEA, otherwise known as Online child sexual abuse and exploitation (OCSEA), is commonly referred to as child pornography in the vernacular. In EU Directive 2011/93, the preamble refers to child pornography, stating that it "consists of images of child sexual abuse, and other particularly serious forms of sexual abuse and sexual exploitation of children are increasing and spreading through the use of new

technologies and the Internet.”³³ The term pornography implies that the subject – in this case, a child- has a degree of agency and ability to give consent.³⁴ To more specifically depict the nature of this content, child sexual abuse/exploitation material will be referenced instead of child pornography, to remove any notion of agency and assert the victim status of the child, being unable to give consent.³⁵ Child pornography is still the term used in more recent legislation. However, law enforcement, researchers, NGOs and advocacy organisations use the terms CSAM and OCSEA for the purposes of accuracy. The same applies for these same stakeholders choosing to avoid the terminology surrounding ‘child prostitution’. This is because referring to prostitution is trivialising, diminishing or legitimising what in reality is child sex trafficking, abuse and exploitation. The problematic usage of this terminology in legislation will be discussed further and rectifying this, is also one of the recommendations made by this paper.

The internet and modern technology have increased the production, sharing and of CSAM.³⁶ It also allows perpetrators to access this content with little risk of being caught, especially because this can all take place without any material act or physical contact with the victim. The Committee on the Rights of the Child recognizes the threats and risks the online environment poses to children’s rights and freedoms in General Comment 25. “Sexual offenders may use digital technologies to solicit children for sexual purposes and to participate in online child sexual abuse,”³⁷ and the risks existing in the digital environment

³³ European Union (EU) Directive 2011/93 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. Para 3

³⁴ ECPAT International (n 20). P 35

³⁵ Thomas J Holt and Adam M Bossler (eds), *The Palgrave Handbook of International Cybercrime and Cyberdeviance* (Springer International Publishing 2020) <<http://link.springer.com/10.1007/978-3-319-78440-3>> accessed 8 February 2024. Ch 57 P 1227

³⁶ Binford, Warren, Giesbrecht-McKee, Janna, Savey, J. L., & Schwartz-Gilbert, Rachel. (n 18). P 125

³⁷ Ibid.

may include, "cyberaggression, including bullying and threats to reputation, the non-consensual creation or sharing of sexualized text or images, such as self-generated content by solicitation and/or coercion."³⁸ One has to turn to the soft law in the form of General Comments from the Committee on the Rights of the Child, to find definitions and descriptions that adequately present the violations of children's rights that are further exacerbated by the internet, especially in the area of sexual abuse and exploitation of children. This is because the CRC is from before the internet was considered a threat to children's rights. Several General Comments 13 and 25 from the Committee on the Rights of the Child are consulted throughout this thesis to make up for the areas the CRC's does not address for today's issues of children's rights, specifically regarding the online sphere. The definition of OCSEA was established in the previous chapter, and an example of this is given in the following chapter to convey the complexity of combating OCSEA in from a legal perspective, when the acts involved happen virtually. To further convey the mismatch between the nature of how OCSEA occurs and the legal provisions in place to protect children, an example of an entirely virtual OCSEA is presented, and afterwards the factor of OCSEA will follow to lay the foundation for analysing the legal issues that ensue.

2.2 Case study of OCSEA example

Below is a hypothetical case study, illustrating an example of how complex OCSEA is. The argumentation of this research is that the legal challenges and difficulty of enforcement relating to children's rights are due to weaknesses in the international legal framework. The example below is utilised to convey how the online sphere results in OCSEA occurring

³⁸ United Nations Committee on the Rights of the Child, 'General Comment No. 25 (2021) on Children's Rights in Relation to the Digital Environment' Para 81.

across borders, without physical contact between victim and perpetrator and is entirely facilitated by the internet. The analysis to follow, will reflect how complex this issue is for protecting children's rights online.

Andrea is a 11-year-old girl who lives in the Philippines with her Filipino parents, and like most children her age she has a smartphone. She has been on social media for a few years, and especially likes to spend time on Instagram, watching videos and sharing them with her peers. She has befriended Mike, who she thinks is a teenage boy from the UK. He contacted her over Instagram, and they have been messaging for a few months; they have become quite close and tell each other their secrets. Mike has a few photos of Andrea, some from her profile on Instagram and some that Andrea has sent him. Over time, Mike has been sending Andrea photos and videos of teenage girls posing naked, and engaged in sexual acts, in order to normalise this type of exchange. He has also been collecting intimate photos of Andrea, first as a part of a game, and most recently Andrea sent a picture of herself without a shirt on as Mike requested. Mike threatens to expose secrets Andrea has shared with him and post her photos on Instagram, if she does not film herself doing the same things as the girls in the videos he has sent. Andrea is scared that people would see these photos of her, so she does as he asks.

What Andrea does not know, is that Mike is actually, a 53-year-old British man. Mike has been lying to her, he has been pretending to be a 16-year-old boy, and he is not her friend by any means. Through fraud and with the use of CSAM, he has groomed Andrea and put her in a vulnerable position. Now through coercion and threats Mike is generating CSAM that he is

uploading to Pornhub, a Canadian internet company, and exchanging it with other users on CSAM-sharing sites of other children.³⁹

This case study is fictional, but it represents a very common picture of that OCSEA looks like. It provides a picture of how the internet connects people from different countries and can be used to hide identities and take advantage of children. It is a reality for children all over the world, that they are prone to exploitation, being robbed of their innocence and having their rights violated in the online sphere of the internet. This case study also shows how transnational the issue is, as the internet crosses borders and jurisdictions, the complexity of accountability and protection of children. The jurisdictional challenges of OCSEA will be addressed in chapter 4, referring to the example in this case study. The next section will be discussing the causes and factors that are relevant to understanding the depth of the issue of OCSEA.

2.3 Factors of OCSEA

In 1997, Durkin discussed four ways in which the internet could be misused by child predators, causing an increase in child sexual abuse and the spread of CSAM online. He anticipated that predators would use the internet to spread CSAM, communicate with other predators, to groom children to sexually abuse them and finally engage in sexual communication with children.⁴⁰ This shows that the possibility of the internet posing a threat for children was established over 20 years ago, even if cases of OCSEA had not begun to occur. Because the internet provides global communication and access to websites,

³⁹ This hypothetical case study is loosely based on a similar fictional example from: Witting (n 13).

⁴⁰ Keith F Durkin, 'Misuse of the Internet by Pedophiles: Implications for Law Enforcement and Probation Practice' in Ronald Holmes and Stephen Holmes, *Current Perspectives on Sex Crimes* (SAGE Publications, Inc 2002) <<https://sk.sagepub.com/books/current-perspectives-on-sex-crimes/n14.xml>> accessed 22 February 2024. 162-70

perpetrator and victims of OCSEA can be in separate countries, providing offenders with convenient and low risk means to accessing CSAM and engaging in OCSEA.⁴¹ Therefore, if this information was available around the time of the creation of the CRC and its optional protocols, it can be argued that these conventions have failed to address the threats the internet poses to children's rights, even if the full extent of its threat to children, was unknown at the time of drafting the CRC.

There are consequences, to these children's rights conventions being outdated, and that is clear from the evidence presented so far, revealing that children are vulnerable on the internet. The gaps and inadequacies of children's rights legislation will be discussed in later chapters, this however, sets the scene for considering the endangerment of children's rights through OCSEA.

Online child sexual abuse and exploitation takes many forms, as previously established. The nature of online CSAM, stemming from different sources and the continual consumption, sharing and distribution of this material by unidentified perpetrators, makes removal and destruction of this material impossible to guarantee. This causes indefinite victimization of the children subjected to OCSEA, as they grow up with the knowledge that the digital evidence of their sexual abuse is indelible. To make matters worse, this CSAM is used as a tool by which perpetrators groom children as potential victims, to create new CSAM.⁴² Therefore these aspects of OCSEA need to be addressed in children's rights legislation.

⁴¹ Sana Ali, Hiba Abou Haykal and Enaam Youssef Mohammed Youssef, 'Child Sexual Abuse and the Internet—A Systematic Review' (2023) 6 *Human Arenas* 404.

⁴² Binford, Warren, Giesbrecht-McKee, Janna, Savey, J. L., & Schwartz-Gilbert, Rachel., 'Beyond Paroline: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad.' (2015) 35 *Children's Legal Rights Journal* 127.

Children are highly vulnerable to emotional, physical, and sexual exploitation, and with children's usage of the internet, those vulnerabilities are increased and additionally more likely to be exploited by people involved in OCSEA. As previously discussed, the Coronavirus pandemic contributed to the increase of OCSEA and demand for CSAM. Since 2019 the volume of CSAM reported increased by 87% according to We Protect.⁴³ As the volume of reported CSAM has drastically grown, it begs the question of how much unreported CSAM is unaccounted for in the available statistics. Furthermore, how many more children have become victims of OCSEA during this escalation of reported CSAM?

When categorising the victims of OCSEA by their age, ethnicity, sex, socioeconomic circumstances, different trends emerge. One notable category that stands out in the data are the sexes of victims. Studies show online grooming is greater among girls, especially above the age of 13.⁴⁴ When looking at statistics, there is a clear majority in the female victims of OCSEA, though girls and boys are vulnerable to OCSEA in differing ways. For the past three years, 93% of CSAM detected by IWF featured girls.⁴⁵ The IWF is the largest hotline for reporting CSAM in Europe, and their data reflects that girls are more likely to suffer child sexual exploitation and abuse online than boys.⁴⁶ This indicates that preventive measures for CSAM need to address disproportionate amount of female victims.⁴⁷ However, if the general population is focused on victims of CSAM being girls, there is a possibility that some preventive measures are not well enough tailored to protecting boys, as there are fewer of them, and the factors that contribute to the vulnerability of boys is of importance as well.

⁴³ We Protect Global Alliance, 'Assessing the Scale and Scope of Child Sexual Exploitation and Abuse Online, to Transform the Response' (2023) Global Threat Assessment 2023 <<https://www.weprotect.org/global-threat-assessment-23/>>.

⁴⁴ Ibid. P 22

⁴⁵ Ibid.p 13

⁴⁶ Ibid. At 13

⁴⁷ Tobin (n 11). P 1310

Therefore, while acknowledging the importance of the fact that girls are especially vulnerable to becoming OCSEA victims, for the purpose of this thesis, the legal challenges discussed and proposed recommendations will not be focusing on female child victims in particular.

2.4 Summary

This chapter discussed the various factors of OCSEA and the threat it poses to children globally, and the legal challenges it poses. In determining whether children's rights are sufficiently protected in this area or not, the objective of this chapter was to convey the factors and extent of the legal issues attached. A hypothetical case study illustrated how modern CSEA can be facilitated entirely by the internet, without any real-life interaction between perpetrator and victim. This chapter laid the foundation of the current knowledge of OCSEA, by addressing statistics and reports, as well as hard and soft law instruments frame the issue from the relevant perspectives. The effects of inaccurate and stigmatising terminology in legislation was discussed, for the purpose of the analysis to follow, of children's rights protection in the international legal framework. Understanding OCSEA, its causes and factors, as well as the relevant legal instruments have been discussed, lays the foundation for delving into the key legal issues arising from the children's rights legislation discussed next.

3.0 Adequacy of regulation: an imperfect fit with reality

Having discussed the interconnected aspects of child sexual exploitation and abuse online, the adequacy of the existing definitions in international law are worth considering. There are binding legal instruments that define child sexual exploitation and abuse; these can be applied to the online world, with definitions for CSAM and grooming applying to the online

environment. The scope of the chosen legislation is based on the most widely ratified international instruments for children's rights that are relevant to OCSEA. These stem from the EU and the UN, and to establish the extent to which children's rights are protected the existing legal framework warrants an evaluation. Gaps in these instruments will be addressed, drawing on the discrepancies seen in age of sexual consent, criminalisation of grooming, the non-physical aspect of OCSEA acts and other areas that convey the inadequate protection of children's freedom from sexual violence.

3.1 Shortcomings in the legal international framework

As discussed previously, the terms 'child pornography' and 'child prostitution' are problematic because they are inaccurate, but also because they trivialise the nature of the violation of children's rights that occur in OCSEA. CSAM is a result of a child being coerced, groomed, or exploited by their abuser, it is not a subcategory of legal sexual content, like pornography. Calling this form of sexual abuse 'child pornography' puts focus on the consumption of the material and away from what the child is victim of. However, the terminology surrounding OCSEA is used in soft law and in regional treaties such as the EU directive 2011/93 and the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention hereafter).⁴⁸

'Pornography' and 'prostitution' are used frequently throughout these, and they are legally binding instruments that Member States' legislation and policies in turn, will be based upon. So, the misuse of the language trickles down to a domestic level and shift the focus away from the impact on children, and the sexual abuse and exploitation they are being subjected

⁴⁸ Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse 2007 (CETS 201).

to. Referring to children who are victims of sexual exploitation, sex trafficking or commercial sex trafficking as ‘child prostitutes’ is also harmful. Being a prostitute is criminalised in many countries, since these children are victims without the ability to consent, they should not be linked to the connotations attached to prostitution, this draws attention away from the reality that they are child victims.

On an international level, the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OPSC hereafter) uses this terminology throughout. The language has changed surrounding these topics over the last 24 years, but as recently as in 2021, the Committee on the rights of the Child uses the same outdated and incorrect terminology in its General Comment 25 on children’s rights related to the digital environment.⁴⁹

Another aspect to consider, is the reference to the age of sexual consent in various binding legal agreements. According to the CRC, a child is considered anyone below the age of 18, unless majority is attained at a lower age.⁵⁰ The EU directive 2011/93 describes the offences of sexual abuse and sexual exploitation in Articles 3 and 4, wherein both offences discern between the acts committed against a child who is above or below the age of sexual consent. In article 2, the term ‘sexual age of consent’ is explained, it refers to the age where domestic law dictates a child consent to engage in sexual activities.⁵¹ The CRC and OPSC do not refer to an age of sexual consent, or a legal age for engaging in sexual activities below 18. Above this age, a young person is allowed more freedom to consent to sexual activity, as they get

⁴⁹ Optional Protocol 2000, and General Comment 25 2 March 2021.

⁵⁰ United Nations Convention on the Rights of the Child. Art 1

⁵¹ European Union (EU) Directive 2011/93 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. Article 2b)

closer to adulthood, according to the law. Below the age of consent, sexual activity with the child is illegal, regardless of circumstances, as the child cannot give consent whatsoever.⁵²

The problem with the age of consent, is that countries have differing ages of sexual consent, though most lie around the ages of 14 to 16.⁵³ In South Korea, the age of sexual consent is 20, which puts the age of sexual consent after the age the CRC considers a person to become an adult.⁵⁴ On the lower end, the Philippines has their age of consent at 12,⁵⁵ and in Portugal it's 14 years.⁵⁶ It is left entirely up to the country at what point a victim of child sexual abuse and exploitation is considered capable of consenting to any of the acts committed against them. For example, if a 13-year-old child is involved in a case of sexual exploitation, they may not have the same protection as someone below the national age of sexual consent, because the child is considered to have a level of sexual autonomy or ability to consent to sexual acts. Even if a child close to the age of 18, they still require -and are entitled to- protection as children, they are still vulnerable to exploitation and lack the maturity to be fully autonomous.

An area where the effects of a differentiation in age of consent is conveyed is grooming. Grooming is solicitation of children for sexual purposes. Various UN soft law instruments reference grooming. General Comment 13 from the Committee on the Rights of the Child says:

“children in contact with others through ICT, children may be bullied, harassed or stalked (child “luring”) and/or coerced, tricked or persuaded into meeting strangers off-line,

⁵² Jonathan Clough, ‘Lawful Acts, Unlawful Images: The Problematic Definition of Child Pornography.’ (2012) 38 Monash University Law Review 213. (219)

⁵³ ECPAT International (n 20). P 7

⁵⁴ South Korea's Criminal Act Article 305

⁵⁵ Criminal Code of the Philippines Sec. 55.1

⁵⁶ Criminal Code of Portugal Art. 171

being “groomed” for involvement in sexual activities and/or providing personal information.”⁵⁷

However, grooming is only criminalised in the regional binding instruments of the Lanzarote Convention in Article 23 and in the EU Directive 2011/93 which states:

“the proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent,⁵⁸ (for) the production of child pornography,⁵⁹ and causing, for sexual purposes, a child who has not reached the age of sexual consent to witness sexual abuse, even without having to participate.⁶⁰

In this definition of child grooming, States are obligated to criminalise the act, when it is carried out against a child who has not reached the age of consent. This results in children above the domestic age of sexual consent to be protected adequately, when they are still vulnerable to being exploited or manipulated into an exploitive situation.⁶¹ This further exacerbates the lack of protection for children when they are victim of OCSEA, because there are variations in when they are considered to be at an age of sexual autonomy, depending on which country they live in.

The CRC mentions grooming in Article 34(a), mandating States to protect children from “inducement or coercion of a child to engage in any unlawful sexual activity.”⁶² However, the act of inducement or coercion itself is not criminalised in the CRC. Furthermore, the CRC and the EU Directive 2011/93 leaves it up to the States own legislation to determine the level

⁵⁷ CRC GC 13 art 31 (ii)

⁵⁸ European Union (EU) Directive 2011/93 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. Art 6

⁵⁹ Ibid. Art 5(6)

⁶⁰ Ibid. Art 3(4)

⁶¹ ECPAT International (n 20).p 50

⁶² United Nations Convention on the Rights of the Child. Art 34(a)

of protection from OCSE, dependent on a when children need more or less protection from OCSEA as well as grooming, despite the fact that a 12-year-old and a 16-year-old both being children under the CRC. A weakness in the legislation surrounding this act is that States are only obligated to criminalise the act when carried out against children below the age of sexual consent.⁶³ With discrepancy in the age of sexual consent between different member States, it becomes a factor the in barriers to enforcement, which will be discussed further in subsequent chapters. This thesis will be arguing that all children under the age of 18 are entitled to equal protection and when it comes to OCSEA which is a transnational issue, affected by the legislation in multiple jurisdictions. This will be discussed further as one of the recommendations of this research.

The Lanzarote Convention and the EU Directive 2011/93 are the two legally binding instruments that criminalise grooming. A key issue with their definitions is the reliance on ‘material acts’ leading to or constituting the solicitation, which means that online grooming purely carried out with technology is not criminalised at all. When considering the evolution of CSEA and how so many elements have moved to the online sphere, it is problematic that these instruments have definitions of grooming that do not include immaterial acts.

In most cases, the luring and manipulation of children happens without the perpetrator ever meeting the child in person, or even residing in the same country, because of ICTs. The online element further exacerbates the amount of CSAM being created because using the internet is low risk for perpetrators for various reasons.⁶⁴ Therefore it is necessary to adjust the definition of grooming, to include grooming carried out online, and furthermore for the Committee on the Rights of the Child to criminalise online grooming in their member States.

⁶³ ECPAT International (n 20). p 50

⁶⁴ Ibid. p 50

3.2 Human Rights Obligations of CRC Member States applied to OCSEA

The obligations to protect children from CSEA are outlined in one of the most ratified conventions, the CRC. The OPSC elaborates on the specific issue of CSEA and violence against children, and goes into greater detail with the offences related to CSEA. These instruments were constructed over 20 years ago, and does not account for the need of children's rights protection needed in 2024, against the threat of OCSEA. However, it is relevant to look at the obligations of States under these instruments, to establish their gaps and weaknesses, in protecting children from OCSEA.

In the preamble of the CRC, States are reminded that they need to 'extend particular care' to children, through special safeguards and legal protection that is appropriate in consideration of the physical and mental maturity they have.⁶⁵ This focus on children as rights-holders as well as potential victims informs the obligations States have in meeting their obligations to protect their rights. States have an obligation in Article 19 to protect children from "all physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse,"⁶⁶ taking all measures on a social, legislative, educational, and administrative level to do so. This article provides the 'cornerstone' of children's protection against violence in law and provides a comprehensive definition of violence against children in international law.⁶⁷ It is tenable that a child's right to freedom from violence includes their right to freedom from OCSEA. There is no provision in the CRC

⁶⁵ United Nations Convention on the Rights of the Child. The Preamble

⁶⁶ Ibid. Art 19

⁶⁷ Todres (n 12). P 221

that establishes that OCSEA is an offence against children's rights, however, freedom from violence does include children should be protected from exploitation and sexual abuse, therefore freedom from OCSEA is a form of freedom from violence.

This is of significance, because States have the onus of an immediate and full obligation to protect children from violence because freedom from violence is a civil right.⁶⁸ The right to freedom from violence right carries greater obligations than economic, social and cultural rights. where State obligations are subject to the States available resources.⁶⁹ Furthermore, States have the obligation to take appropriate measures on a multilateral, bilateral and national level to protect them from 'all forms of sexual exploitation and sexual abuse'⁷⁰ according to Article 34. Child victims of "any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment,"⁷¹ are protected in Article 39, where States are obligated to ensure their physical, psychological recovery as well as the child's social reintegration.

Looking at the content and language of the CRC applied to the issue of OCSEA, a few weaknesses become evident. Firstly, the mandate given to States surrounding sexual abuse and exploitation of children fails to address the online aspect of violence against children, which leaves out a dimension that is crucial in protecting against, preventing and victim assistance in OCSEA. Secondly, the CRC does not criminalise the grooming of children, as discussed earlier, which is a great gap in the protection of children online as well as the prevention of grooming and punishment of perpetrators. Thirdly, there is no mention of CSAM, or how States should protect against its production, distribution, and sale to address

⁶⁸ United Nations Committee on the Rights of the Child, 'General Comment No. 13 (2011) The Right of the Child to Freedom from All Forms of Violence'. Para 65

⁶⁹ Todres (n 12). at 222

⁷⁰ United Nations Convention on the Rights of the Child.art 34

⁷¹ Ibid. Art 39

for example, its role in the grooming of children for OCSEA.⁷² Fourth, the language of the CRC when expressing the duties States have in applying these Articles, are unsatisfactory from a children's rights perspective. The only mandate for States to protect children through legislation is in Article 19, where prevention and protection of children from violence in the broadest sense.

In Articles 34 (protecting children against CSEA), 35 (protecting children against sale and trafficking, and 39 (recovery and reintegration of victims) States are to undertake 'all appropriate measures', but there is no mention of legislative measures as stated in Article 19. Thereby one can deduce that the priority is on States to prevent and protect against violence explicitly through criminal legislation, but the same priority is not placed on the victim's rights or the protection against sexual violence. A similar limitation carries over to the OPSC, which will be discussed below.

The OPSC is the most comprehensive international treaty establishing State obligations to protect children from CSEA, eradicate CSAM and protect victims.⁷³ It further expands on the obligations of States party to the CRC, for example the CRC does not criminalise CSAM, but the OPSC addresses it, albeit with the controversial term of 'child pornography'. The OPSC establishes a mandate for States consisting of three prongs to address CSEA, in Articles 3, 8 and 9.⁷⁴ It requires criminalisation and prosecution of CSEA, institute preventive measures and provide victims with assistance. States are required to prohibit and criminalise child sexual exploitation and abuse, grooming, sale of children and CSAM, regardless of where

⁷² Bistra Netkova, 'International Legal Standards in Combating Child Online Sexual Abuse and Exploitation' (2021) 6 *Journal of Liberty and International Affairs* 112. P 115

⁷³ Binford, Warren, Giesbrecht-McKee, Janna, Savey, J. L., & Schwartz-Gilbert, Rachel. (n 18). P 140

⁷⁴ Todres (n 12). P 230

and how it occurs.⁷⁵ Jurisdiction over these offences is established through the territoriality principle or nationality of the victim or the residence or nationality of the offender.⁷⁶

The main form of prevention of CSEA is focused on protection of children and young persons through legislation, policies, programmes and administrative measures to prevent these offences, in Article 9 (1) of the OPSC.⁷⁷ Another step towards protection is the expectation of States to assist multilaterally, with investigations, extradition, or criminal proceedings, as well as the collection of evidence.⁷⁸ This will be discussed further in chapters 4 and 5. States are required to assist victims and protect children vulnerable to exploitation, as seen in Articles 8 and 9.⁷⁹ An example of the protection against CSEA through prevention, is established in Article 9 (2) where States are obligated to:

“promote *awareness* in the public at large, *including children*, through *information by all appropriate means, education and training*, about the preventive measures and harmful effects of the offences referred to in the present Protocol. In fulfilling their *obligations* under this Article, States Parties shall *encourage the participation* of the community and, *in particular, children and child victims*, in such information and education and training programmes, including at the international level.”⁸⁰ (*emphasis added*)

This subsection of Article 9 is of significance because in this protective measure, States are to specifically consider children as rights-holders that are valuable in a prevention strategy.

Children as well as adults play an important part in promoting awareness and training to

⁷⁵ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2000 (A/RES/54/263). Art 1 and 3

⁷⁶ Ibid. Art 4

⁷⁷ Lievens and others (n 15). P 501

⁷⁸ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Art 6

⁷⁹ Todres (n 12). P 230

⁸⁰ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.2002 Art 9(2)

prevent CSEA. States are to encourage children to participate in the preventive measures taken, and education and awareness raising. This emphasis on children's participation is a good example of children's human rights approach. This is in line with Article 3 of the CRC which establishes that the child's best interest must be the primary consideration of States as well as the Article 12 right of children to participate in matters that affect them. This child-centred approach will be discussed in following chapters relating to enforcement and access to justice.

The OPSC goes further than the CRC to protect children from CSEA, however there are some limitations to address as well. Firstly, as with the CRC, the online element of CSEA is not addressed and therefore protection against OCSEA, its factors and additional offences linked to it, are not tackled in the protocol. Grooming, as well as "producing, distributing, disseminating, importing, exporting, offering, selling or possessing"⁸¹ CSAM, are neither criminalised in the CRC, nor in the OPSC. As has been established, CSAM and OCSEA go hand in hand, therefore it is very problematic that these are not considered offences.

Secondly, the aforementioned three prongs in the OPSC carry differentiated mandates through their language and standards, which prioritises criminalisation over protection through prevention and victim assistance. The prevention and victim assistance provisions (Articles 8 and 9) utilise weaker language than the criminal law provision in Article 3 that states a minimum requirement that "acts are fully covered under its criminal or penal law."⁸² Comparing this to the language in Article 8 "adopt appropriate measures"⁸³ for prevention and Article 9, "take all feasible measures" for victim assistance, much is left to the

⁸¹ Ibid. Art 3(1)

⁸² Todres (n 12). P 230

⁸³ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Art 8 .

interpretation of the State. The State obligations for prevention and victims' assistance are much weaker and leaves it up to the State what they consider to be feasible or appropriate. Furthermore, this language sets a low and unclear standard for sufficiently meeting children's human rights obligations, and prospect of enforcement is unconvincing, with the inequality between prevention, assistance and protection. The fifth chapter addressing remedies and victim's access to justice will discuss this further.

3.3 Summary

This chapter addresses the weaknesses in regulation of children's rights pertaining to OCSEA and how EU and UN instruments criminalise the relevant acts. The outdated language conveys that OCSEA and CSAM are merely illegal forms of prostitution and pornography, which overshadows the victimhood of children involved, and trivialises their inability to consent in any way. The age of sexual consent poses a dilemma, since the treaties defer to the domestic legislation, which varies depending on the country. Children above the local age of consent are less protected than children younger than them. Similarly, children above the age of consent are more at risk than children who are the same age as them, in a country with a higher age of consent. As a result, perpetrators can target children in jurisdictions with lower ages of consent to escape a higher penalty, and these children are more vulnerable to becoming targets for OCSEA.

Grooming is not criminalised in the CRC nor its optional protocol, only signatories to the EU treaty criminalise what is a big factor in OCSEA offences. Weaknesses in the language and regulation of OCSEA offences create a gap in international law that limits the protection of children and their right to freedom from violence, as this chapter has established. The next chapter goes on to elaborate on the subsequent legal issues in the argumentation of the thesis, relating to enforcement and jurisdiction.

4. Jurisdiction and Enforcement Challenges

Bilateral and multilateral cooperation between States and NGOs, is essential in order to ensure children's rights are respected, protected and fulfilled in the field of OCSEA. Due to the virtual nature of the internet, cases of OCSEA are by default transnational in their jurisdiction. There must be a strong joint effort regionally and internationally between all types of stakeholders involving States, businesses, and children's rights organisations to effectively protect children in the online environment.⁸⁴ This chapter will be tackling the issue of enforcing children's rights, considering the parties and jurisdictional aspects involved. First this chapter will consider the jurisdictional issue and State obligations when it comes to the perpetrator and the victim. Then the accountability of online platforms, Internet service providers (ISP hereafter) and the dimension of their complicity in OCSEA will be addressed. This chapter will be identifying the issues that arise when there is no established extraterritorial jurisdiction over rights violation on the internet. The matter of enforcing children's rights law, holding complicit parties accountable, as well as having clear guidelines on the jurisdiction are examples of how children's rights are inadequately protected, especially when they are victims of OCSEA.

4.1 Jurisdiction over OCSEA

⁸⁴ United Nations Committee on the Rights of the Child (n 38). Para 123

Looking back at the hypothetical case study of Andrea from 2.2, this section will be considering the jurisdictional aspect for the example. There are different people and actors involved in Mike's exploitation and abuse of Andrea, and different countries are involved as well. In this single case of OCSEA at least 4 actors are complicit and at least 4 jurisdictions are represented. Andrea is Filipino, Mike is from Britain, and they exchanged messages over Instagram owned by Meta, an American company, Pornhub owned by Aylo (formerly MindGeek) is a Canadian company, hosted the CSAM and the 'invisible' parties involved are the ISPs (internet service providers) that facilitate both the exchange between Mike and Andrea over Instagram, and Pornhub where Mike uploads the content. This case study assists the analysis of the enforcement and jurisdictional challenges of OCSEA.

Several questions arise, when considering Andrea's rights as a victim, as well as the formal routes for collaboration between the involved States. For example, in which jurisdiction(s) did the OCSEA occur? Is this determined by the nationality of the victim (Philippines), nationality of the perpetrator (United Kingdom), the location of Instagram's (USA) or Pornhub's (Canada) server? Given that the evidence related to the OCSEA will be primarily digital, it is volatile in nature and in order to effectively gather that evidence in time, there is a potential issue of requiring the consent of the other jurisdictions involved, because it becomes an extraterritorial investigation. This chapter will be identifying the challenges to enforcement of children's rights when it comes to the transnational nature of OCSEA, involving complicit parties in multiple jurisdictions.

When a State claims jurisdiction over an OCSEA offence, there are aspects of the investigation that may require collaboration with another State. Effectively combating OCSEA worldwide, heavily depends on there being efficient mechanisms in place, for

transnational collaboration, that are also children's rights focused. There are three instruments that provide the regulation of the multilateral and bilateral collaboration necessary for combating this a transnational issue. These include two regional instruments in Europe, the Lanzarote Convention, and the Council of Europe Convention on Cybercrime (Budapest Convention hereafter), as well as the international instrument, the OPSC.⁸⁵ These conventions have provisions for establishing jurisdiction, extradition, transnational law enforcement mechanisms through extradition and multilateral cooperation which are important elements in combatting OCSEA.

4.1.1 Jurisdiction of States under the Optional Protocol (2000)

In the OPSC, Article 4 provides that States 'shall' establish territorial jurisdiction for offences in Article 3(1), sale of children, child prostitution (child sexual exploitation) and child pornography (child sexual abuse material) when committed on their territory.⁸⁶ States 'may' establish extraterritorial jurisdiction over these same offences, when the victim is a national of that State (through the passive personality principle) or the offender is a national or habitual resident of that State (active personality principle).⁸⁷ This indicates that claiming extraterritorial jurisdiction for States, regarding CSE and CSAM is optional, while territorial jurisdiction for these offences is obligatory.

Applied to the case of Andrea, it means that the UK could claim territorial jurisdiction through Mike's nationality as the perpetrator, and the Philippines could claim it through her

⁸⁵ Witting (n 13). P 734

⁸⁶ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Art 4(1)

⁸⁷ Ibid. Art 4(2)

nationality as the victim. As previously discussed, grooming is only criminalised by the EU Directive and Lanzarote Convention, and therefore Mike's grooming of Andrea is would only be an offence the UK or the Philippines could claim jurisdiction over if they are party to either of those treaties. Article 4(3) establishes that if a State does not allow extradition to another jurisdiction where their offence is being prosecuted, that State must establish jurisdiction instead over the offence their national committed. This principle is set in place to avoid loopholes and perpetrators escaping accountability/liability based on jurisdictional complexities. Applied to Andrea's case, if the Philippines claimed jurisdiction, and the UK did not allow Mike to be extradited for the Philippines to prosecute him, the UK would in turn have to establish jurisdiction in their stead. If the Philippines or the UK claim jurisdiction, the investigation would lead to examining the Canadian and American server, which would likely require the consent of those States since that investigation when it is an extraterritorial matter. An argument could also be made based on the location, that both Canada and USA could claim jurisdiction over the violation of Andrea's rights, through holding Pornhub accountable in Canada for hosting and profiting from the content, or Instagram in the USA accountable for hosting the material. The liability of Pornhub and its ISPs as examples will be discussed later in this chapter. Additionally, wherever the CSAM (that Mike uploads) is accessed, would also have grounds for jurisdiction over the offence. This illustrates that determining a single jurisdiction based on location is not likely in offences that involve the internet.

However, there are loopholes in the law in terms of jurisdiction, which perpetrators can exploit to avoid prosecution. Article 3(2) of the OPSC establishes that being complicit in or participating in CSE, is an offence.⁸⁸ Yet, the complicity or participation in this offence is

⁸⁸ Ibid. Art 3.

excluded from the Article 4 obligation for States to establish jurisdiction. As a result, States cannot establish jurisdiction over the offence that is of a participatory or complicit nature. This exclusion, as well as the voluntary nature of extraterritorial jurisdiction in Article 4(2) results in a gap in determining jurisdiction over OCSEA offences, under the OPSC.⁸⁹ This is problematic, when the very nature of OCSEA is that it crosses borders and jurisdictions via the internet. There is real potential for cases of OCSEA all over the world never being investigated and the perpetrators going unprosecuted, and this will be discussed in the subsequent recommendations for combatting OCSEA later on.

4.1.2 Jurisdiction of States under the Budapest Convention

The 2001 Budapest Convention contains provisions on criminal law applied to cyberspace and presents a strong commitment towards international collaboration. It is the most ratified treaty on cybercrime, by States both in and outside of Europe.⁹⁰ This convention criminalises conduct that relates to child sexual exploitation and CSAM – though referred to as child pornography and pornographic material- specific to the technological and online sphere. The criminalisation is provided by Article 9(1):

“producing child pornography for the purpose of its distribution through a computer system; offering or making available child pornography through a computer system; distributing or transmitting child pornography through a computer system; procuring child pornography through a computer system for oneself or for another person; possessing child pornography in a computer system or on a computer-data storage medium.”⁹¹

⁸⁹ Witting (n 13). P 736

⁹⁰ Ibid. P 740

⁹¹ Council of Europe Convention on Cybercrime 2001 (CETS 185). Art 9

Article 9(2) defines child pornography as pornographic material visually depicting:

”a minor engaged in sexually explicit conduct; a person appearing to be a minor engaged in sexually explicit conduct; realistic images representing a minor engaged in sexually explicit conduct.”

An argument could be made that this definition allows for offences relating OCSEA to be criminalised without the guarantee that the victim is a proven minor. This is a positive principle considering that age can be difficult to determine on visual footage alone.

As discussed earlier, the legal age of consent is not regulated by any international convention, so that is a domestic law matter. Therefore, there is room for cases involving victims who are above the age of legal consent in their own jurisdiction, to be prosecuted in a State with jurisdiction over the offence, because the age here in Article 9 is of no consequence, merely the subject appearing like a minor. If the CSAM contains someone who looks like a minor, or the subject represents a minor, it is on equal footing legally as if the subject is a minor. This means that perpetrators committing any of the above offences in Article 9(1), can be prosecuted without proof of the victim’s age or identifying the victim, if suffices that they appear to be a minor or represent one. This is one way in which the Budapest Convention widens the scope for OCSEA cases to be prosecuted, because it specifically takes into account the ways in which the online element of OCSEA differ from cases of child sexual exploitation and abuse where a physical act is part of the offence.

However, Article 22 (1)d establishes extraterritorial jurisdiction with a more limited scope than in the OPSC, since it does not include the passive personality principle. If the offence is committed, “by one of its nationals, if the offence is punishable under criminal law where it

was committed or if the offence is committed outside the territorial jurisdiction of any State,⁹² jurisdiction must be established by the State. This results in the risk of OCSEA going unpunished when the act is committed in jurisdictions without cyber-specific legislation, whereas the OPSC establishes that jurisdiction can be claimed based on the victim's nationality as well.⁹³

4.1.3 Rule of reason

In order to pre-empt jurisdictional conflict between different States that may be involved in a case of OCSEA, the 'rule of reason' has been introduced.⁹⁴ This rule according to Witting (2021), "implies that the valid assertion of jurisdiction will only be lawful if exercised reasonably, i.e., after State courts and regulators have balanced the different interests involved in a transnational situation before establishing their jurisdiction."⁹⁵ As a result of this rule, the State with the strongest connection to the case gains jurisdiction based on the interests of the involved party. The application of this rule is exposed to a level of subjectivity, which is its greatest weakness. However, from a children's rights perspective, determining which State has jurisdiction, should be determined with the child victim's needs in mind, when bringing justice.⁹⁶ This could in some cases be a State that is not linked to the victim through their nationality, but a State that can bring the victim justice based on the connection to the perpetrator or other involved parties, in the best interest of the child. For example, a State that has the ability and jurisdiction to prosecute not only the offender but also the complicit online platforms and ISPs.

⁹² Ibid. Art 22(1)d

⁹³ Witting (n 13). 741

⁹⁴ Ibid. P 744

⁹⁵ Ibid.

⁹⁶ Ibid. P 745

While establishing jurisdiction over OCSEA can be a complex matter, there are provisions in place internationally that establish the principle of jurisdiction applied to transnational nature of OCSEA. What most complicates the protection of children from OCSEA is the role of non-state actors and the stakeholders involved in OCSEA. The following section will be discussing this challenge to enforcement when it comes to complicit parties such as ISPs and online platforms.

4.2 Accountability in the online sphere

Having discussed jurisdiction -which is a key feature of the transnational nature of the issue- this section will be discussing other complicit parties in OCSEA. While changes made on the legislative level is important, there is a need for greater accountability for the non-state actors involved in OCSEA as well.

The internet connects the perpetrator to the victim, as well as connecting the perpetrator to the CSAM hosted online and the other perpetrators who consume CSAM worldwide. The issue in this case isn't jurisdictional, but the fact that the internet eternalises the lifespan of the CSAM, creates global access to the material, perpetuating the exploitation and abuse of the victim. The third-party agents that play key roles in the global access to and spread of OCSEA are the ISPs and the online host where CSAM is accessed by anyone with internet access. It is arguable that ISP's and platforms facilitating and hosting CSAM, are complicit in the children's rights violations attached to that content.

There are three layers of complicity in human rights abuses: direct (when a company knows they provide a good or service utilised in the rights abuse), beneficial (without assisting or directly causing abuse) and silent complicity (when a company remains passive despite the

rights abuse occurring).⁹⁷ If complicity of an ISP or online host in a case of OCSEA is established, then the jurisdiction over that offence could be claimed territorially, despite the victim and perpetrator being in a second and third jurisdiction entirely. Therefore, it is relevant to consider the accountability of non-state actors involved in OCSEA, in order to effectively address the regulatory gap. The following section will convey why considering these potentially complicit actors is significant for combating OCSEA.

4.2.1 Internet Service Providers

ISPs are also known as network infrastructure providers, supplies connection to the internet for end users and corporate customers. They are among the first to detect CSAM, and as “gatekeepers of the internet,”⁹⁸ they play an important role in detection and acting upon the detection of CSAM.⁹⁹ Being in the private sector, ISPs have a significant amount of power, and they provide a service heavily relied upon by civil society, companies and States alike. However, because they are non-state parties, they are only subject to the regulation (if this exists) of the States to which they provide internet access.¹⁰⁰ In the ICMEC’s report from 2023, it was discovered that 32 out of 196 countries require that ISPs report suspected CSAM.¹⁰¹ That is an approximate 94 percent of the world’s countries that do not have regulation in place to ensure ISPs report suspected CSAM to law enforcement when it is detected. Regulation of ISPs should require them to monitor and search for CSAM, considering that they play a crucial part¹⁰² in providing the vehicle and storage for CSAM

⁹⁷ ‘UN Global Compact ‘Human Rights: Principle 2’ <<https://unglobalcompact.org/what-is-gc/mission/principles/principle-2>>.

⁹⁸ Holt and Bossler (n 35). P 1236

⁹⁹ Ibid. P388

¹⁰⁰ Ibid. 370

¹⁰¹ ICMEC (n 8).

¹⁰² ‘UN Global Compact ‘Human Rights: Principle 2’ (n 97).

online. The ISPs play a significant role in combating the production and dissemination of CSAM, which inherently involves OCSEA, however, if they can enter 94 percent of the markets that do not require regulation, there is no incentive for them to do so. This will be discussed further in the recommendations chapter.

4.2.2 Online host

When discussing the online host there are two categories to consider, the physical host (the person who operates or owns the servers where the CSAM physically is stored), and the host provider (the person responsible for producing the platform or website that allows access to CSAM).¹⁰³ In the case study example from earlier, Pornhub would be considered the online host of the CSAM Mike accesses and supplies on the internet. There are different ways in which Pornhub would be liable, the physical host would be the owner and operator of Pornhub's physical servers, and the host provider would be Pornhub's creator and owner. Whether Aylo, the parent company of Pornhub, falls into one or both of those categories depends on how the company structure and ownership is constructed.

The location or nationality of the physical host would determine which regulations apply to them jurisdictionally, as discussed earlier in terms of territoriality. The host provider, making available CSAM on the server or website they have authority over, would be subject to the jurisdiction of the State under the same territoriality principle. Regarding the handling of CSAM, aside from hosting it, uploading and downloading the material involves innumerable people.

¹⁰³ Alisdair A Gillespie, 'Jurisdictional Issues Concerning Online Child Pornography' (2012) 20 International Journal of Law and Information Technology 151. P 165

Combating the spread of CSAM in terms of establishing jurisdiction over the hosting and handling of CSAM is not a legislative issue in terms of jurisdiction. However, the decentralised nature of regulation exacerbates the problem because regulation is subject to domestic legislation. According to ICMEC, out of 196 countries, currently only 125 have a definition for CSAM in their legislation, and 140 countries criminalise simple possession of CSAM.¹⁰⁴ This is an obstacle to combating OCSEA and protecting children, from the perpetual spread CSAM -resulting from their sexual exploitation and abuse- globally due to gaping loopholes in the international legal framework.

4.3 Summary

This chapter has discussed the various obstacles to combating OCSEA, by looking at enforcement and the jurisdictional aspect of offences that involve various States. OCSEA being a transborder crime, implicates various jurisdictions and the challenges that follow have been outlined. The main challenge legally is that countries have enforced relevant legislation to differing degrees. The online aspect of OCSEA means that there are multiple parties involved, aside from the victims and perpetrator, namely the ISP and online host, which was analysed as well. Through the lens of EU and UN legislation the enforcement and protection of children's rights was discussed, and the vague language was argued to set unclear parameters for State's obligations. These discoveries prepare for an evaluation of OCSEA victims' access to justice in the following chapter.

¹⁰⁴ ICMEC (n 8).

5.0 Access to justice for OCSEA victims

This chapter will explore the promotion of children's rights through their access to remedies, through a victim's access to justice. According to the UN Human Rights Council, children's access to justice is a fundamental right and an "essential prerequisite for the protection and promotion of all other human rights."¹⁰⁵ This is defined as children's "ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards, including the Convention on the Rights of the Child."¹⁰⁶ Children's rights are therefore of little use if they are not enforced. A child's right to protection from sexual exploitation is pointless, if the State does not have preventive measures in place, carry out an investigation, guarantee consequences for violating that right and soundly dealing with the effects on the child victim.¹⁰⁷

In their 25th General Comment, the CRC addresses the difficulties child victims face in obtaining a remedy, where the rights abuse has occurred in the digital environment. The committee calls on States to "consider measures to respect, protect and fulfil the children's rights," even in extraterritorial matters where a "reasonable link between the State and conduct" is evident.¹⁰⁸ They add, that States should ensure that businesses provide a mechanism for raising complaints and seeking remedies, though to not preclude those victims from accessing the State-based remedies.

¹⁰⁵ United Nations Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on Access to Justice for Children' (2023). P 3

¹⁰⁶ Ibid. Para 4

¹⁰⁷ Skelton (n 16). P 66

¹⁰⁸ United Nations Committee on the Rights of the Child (n 38). Para 48

It is vital that children can raise their complaints, for the enforcement of their rights. First raising a complaint at the domestic level, and then an international level, if obtaining redress in their State fails.

It is a principle in international law, that exhausting domestic remedies is a requirement for human rights violations to be taken to the international court level. According to Skelton (2019) however, its interpretation in human rights law considers that in some cases, a complainant may not have received fair treatment with available remedies that are sufficient and effective.¹⁰⁹ In such cases, the admissibility of a case (based on fulfilling the principle of internal remedy exhaustion) will not be affected at the international level. Arguably these formal requirements were not made with child victims or complainants in mind. For children, additional barriers to accessing domestic remedies is evident, being that their legal standing and resources are not the same as adult victims, and they therefore rely heavily on a guardian or curator to assist their case. As rightfully argued by Skelton, the rules surrounding the admissibility to an international court, for cases of children's rights abuses should be softened, to account for the difficulty children have in accessing justice at the domestic level.¹¹⁰ Without this consideration for the nature of child complaints, the chances of children accessing remedies are slim.

Legal remedies include restitution, rehabilitation and compensation.¹¹¹ Obtaining these remedies happens through the reporting of the OCSEA and through this process formal remedies are available to the victim, in the form of medical care and social services to aid their participation as a witness in the court proceedings and to help their long-term

¹⁰⁹ Skelton (n 16). P 72

¹¹⁰ Ibid. p 89

¹¹¹ UN, 'UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'. Para 18

recovery.¹¹² The courts may order restitution be paid to the victim, by the perpetrator. In addition, compensation may also be available through victim funds managed by the State for eligible victims. Remedies can also be obtained from National Human Rights Institutes, consumer protection associations, national ombudspersons, or the ISPs themselves.¹¹³ These play an important role in resolving complaints at the domestic level,¹¹⁴ however analysis these routes to accessing remedies is outside the scope of this chapter.

The internet and today's technology has aggravated the harms caused by OCSEA, because revictimization is inevitable through the permanent presence of the sexual abuse imagery online. The CSAM that evidences the sexual abuse and exploitation of the child victim is distributed and viewed repeatedly all over the world. The victims can never receive a lasting or full recovery afterwards, because of the digital nature of OCSEA and CSAM, but as rights-holders they deserve remedies to enforce their rights to protect them.¹¹⁵

The State's fulfilment of their obligation to respect, protect and remedy the harm caused by OCSEA, should involve multiple stakeholders. These include firstly, the voices of children and parents, as well as civil society, industry and National Human Rights Institutes (NHRI's hereafter). Aside from the State providing legislation to uphold the rights of its children to be free from sexual exploitation and abuse, there are other actors that play a role in the victim's access to justice through non-state remedies. This chapter will be evaluating current remedies available to children from the State, and the existing gaps in their access to justice.

¹¹² Ibid. Para 20

¹¹³ Council of Europe, 'Recommendation of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users' (2014). Paragraph 103

¹¹⁴ Skelton (n 16). P 89

¹¹⁵ Binford, Warren, Giesbrecht-McKee, Janna, Savey, J. L., & Schwartz-Gilbert, Rachel. (n 18). P 162

5.1 Remedies from international law

States party to the OPSC have obligations towards victims of OCSEA, as well as implementing protective and preventive measures to combat OCSEA. As discussed in the previous chapter, the OPSC establishes the ways in which States establish jurisdiction over an offence. However, the OPSC does not set a limit on the population of victims that States must support the restoration of. Article 9 mandates that all States party to the OPSC shall take measures to restore victims of OCSEA and give them equal access to remedy, there is no implicit or explicit limitation on which victims this applies to.¹¹⁶ In fact, this Article emphasises that the victims must be assisted “without discrimination,¹¹⁷”. When a State has a mandate to establish jurisdiction over an offence committed on its territory, it follows that the responsibility for the victims of that offence falls on that State simultaneously.¹¹⁸

Going back to the fictional case study from 2.2, victim’s access to remedy will be exemplified here. Canada is a State that can claim jurisdiction over the CSAM of Andrea hosted on Pornhub, the online host, which was uploaded by Mike. Pornhub is a Canadian company. Therefore, based on the OPSC mandate, Canada has a duty towards Andrea, as well as innumerable child victims of OCSEA, whose offenders have uploaded the CSAM unto Pornhub. These victims do not have to be Canadian citizens, and neither does their offender, thereby the potential amount of children Canada has legal obligations towards is as great as the number of victims of OCSEA whose CSAM is hosted by Pornhub.

Article 9(3) of the OPSC mandates that States, must “take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social

¹¹⁶ Ibid. 160

¹¹⁷ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Art 9(4)

¹¹⁸ As per the OPSC Art 4.

reintegration and their full physical and psychological recovery.”¹¹⁹ Although the emphasised words leave room for various interpretations, Article 9(4) states that child victims must be given “access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.”¹²⁰

Based on these Articles, an argument can be made, that regardless of nationality or location of the offender and the offence’s setting, all States party to the OPSC -in this case Canada- has a legal obligation to ensure victims of OCSEA have access to remedy, compensation and restoration. In terms of the victims that Canada has a duty towards, there is a narrow and broad scope for interpretation when applying these obligations. The narrowest interpretation is that Canada only must support the restoration of victims whose cases they have gained jurisdiction over. The most extensive interpretation would be that it has an obligation towards all victims of OCSEA worldwide as a member State to the OPSC.¹²¹ In the case of the narrowest interpretation being applied, the State still has an obligation to foreign victims, and it must ensure that victims are given the appropriate assistance, recovery, and access to seek compensation from Pornhub for the violation of their rights.

The wide inclusion of victim’s access to remedy benefits victims of OCSEA, being that many of them are in a different country to the one claiming jurisdiction over the offence. However, the description of what these victims’ access to justice encompasses, leaves a lot of the obligations up to interpretation and feasibility. As discussed in the previous chapter on enforcement, the language utilised in Articles 8 and 9 is vague and indefinite. These articles describe the measures States are obligated to ensure, provide child victims with access to

¹¹⁹ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Art 9(3)

¹²⁰ Ibid. Art 9(4)

¹²¹ Binford, Warren, Giesbrecht-McKee, Janna, Savey, J. L., & Schwartz-Gilbert, Rachel. (n 18). P 160

justice and remedies. Article 8 uses language like ‘appropriate’ support and protection for child victims but gives no indication of a minimum standard the State is held to, or how to determine the appropriateness of the child’s protection and support.

In Article 9, the States obligated to take legislative and administrative measures, programmes and social policies to prevent OCSEA from occurring.¹²² The measures required by States for prevention are much more substantive and determinate than the measures for remedies and restoration. The States are obligated to take ‘feasible’ measures to assist victims in their recovery, and ‘adequate’ procedures must be accessible for victims to seek compensation.

This vague language surrounding remedies and restoration of victims is problematic. Based on these obligations, it is much easier to determine whether or not a State meets its obligations for having legislation in place and implementing policies, than it is to determine whether or not victims are not given ‘appropriate’, ‘adequate’ and ‘feasible’ access to justice. In States where there is less political will or focus on OCSEA, the victims have a weak and ambiguous claim to receive assistance, restoration and compensation when the standard for States is for it to be ‘feasible’ and ‘appropriate’.

Aside from the unclear parameters ensuring victims’ access to justice, in practical terms, the avenue of pursuing remedies in another country is very difficult. Firstly, the perpetrator(s) must be prosecuted, and once this results in a conviction, the cost of pursuing remedies in a foreign jurisdiction make this recovery unlikely, also because the administrative challenges make it impractical.¹²³ A solution might be to implement a multilateral effort to establish a victim’s fund focused on the restoration and assistance of OCSEA victims. Consideration for how these victims can recover compensation in a fair manner and access justice effectively

¹²² Art 9(1)

¹²³ Binford, Warren, Giesbrecht-McKee, Janna, Savey, J. L., & Schwartz-Gilbert, Rachel. (n 18). P161

when their perpetrator is foreign, is key. An international body giving child victims of OCSEA access to remedy through a fund would ameliorate some of the barriers the victims face due to the transnational nature of the issue.¹²⁴ In this way, a body independent of subjective interpretations of the OPSC obligations, would ensure equal access to justice for victims, no matter what jurisdiction they are under. Further recommendations for strengthen children's access to remedy in international law will be discussed in the following chapter.

5.2 Barriers to justice

Access to justice for child victims is comprised of several components. Based on the UN's guidelines, the following rights apply to victims: being treated with dignity and compassion; to protection from discrimination; being informed; being heard and expressing views and concerns; to effective assistance, such as victim-witness specialists, lawyers, translators and care and recovery providers; privacy; being protected from hardship during the justice process, including avoidance of unnecessary delays; safety and reparation.¹²⁵ There are elements of legal empowerment in accessing remedies, for victims to claim the abovementioned rights and relevant information. Because a child victim's age could be anywhere below the age of 18, it is essential to consider a child's evolving capacity and maturity in understanding and exercising their rights, to ensure each child's access to justice is going to be effective.¹²⁶ This impacts the amount of support and assistance the victim may need, in proportion to their age and maturity,

¹²⁴ Ibid.

¹²⁵ United Nations Economic and Social Council, 'Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime' <<http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>>.

¹²⁶ United Nations Human Rights Council (n 105). Para 5

A large multilateral research project called ‘Disrupting Harm’ assessed prevention and response systems to OCSEA, to provide insights and recommendations on the issue. It was a collective effort by ECPAT, INTERPOL and UNICEF that conducted its research between 2019 and 2022 conducted in 13 countries in Southwest Asia and Eastern and Southern Africa. The assessments made in this research provides contemporary and comprehensive findings, that convey the barriers children face in obtaining justice and OCSEA victims¹²⁷. The hindrances child victims face was identified as barriers to obtainable and safe formal justice. This includes financial barriers, experiencing discrimination and victims being blamed for the offence having occurred. Four areas were identified as being key to the process of obtaining justice: knowledge of reporting mechanisms, obstacles to convicting perpetrators, providing ongoing comprehensive victim support and victims’ access to compensation. The processes for obtaining legal remedies and the police procedures, were complex and intimidating for the child victims, it was common for victims to face their offenders in person in the process.

Overcoming these barriers requires that legislative responses to OCSEA in the form of legal remedies and compensation is the bare minimum, and real access to justice for child victims requires that States go beyond responding legislatively. The research identified that more action is necessary to ensure child victims have fair, safe, easily accessible access to justice, assistance and services. Governments need to ensure children have the knowledge and ability to access their rights, otherwise the accountability for perpetrators and restoring victims relies far too heavily on children having the courage, money and resources to withstand these impediments. It is their task to ensure children feel safe and empowered to report OCSEA and seek justice through formal channels to they can fairly access the support, recover and compensation they are entitled to as victims. Recommendations for best practices relating to

¹²⁷ ECPAT International (n 1).

ensuring access to justice and remedies for victims will be further expanded upon in the following chapter.

5.3 Summary

This chapter has outlined the obligations of States towards victims' of OCSEA and identified the gaps therein. Having access to justice through remedies such as rehabilitation, remuneration, compensation and assistance from professionals, is the only way a child can truly have their rights protected and enforced. This chapter has illustrated that without better access to remedies and compensation from States, the victims of OCSEA are not protected sufficiently. The harm suffered and the legal protection are not proportionate, and children as an especially vulnerable group of victims, need much better support than adult victims, considering that they do not have autonomy nor the ability to fend for themselves. This analysis and evaluation lay the foundation for discussing recommendations, not only in the area of victim's access to justice, but all the challenges to combating OCSEA that have become evident through the research.

6.0 Recommendations from a children's rights perspective

This final chapter will be presenting recommendations, in order for the protection of children's rights and the victim's access to remedies in the field of OCSEA to be more effective. The onus is on the States primarily, but it is also the responsibility of non-state actors to be proactive in providing effective protection against the harm OCSEA causes. This is ensured through judicial and data tools, and extraterritorial enforcement of protection of

children's rights.¹²⁸ Based on the analysis of this research and the gaps identified in the current international human rights framework, as well as reports and findings from experts on children's rights inform these recommendations. The ICMEC suggests that multiple sectors need to be involved in order to improve the protection for children online through, "harmonized legal measures, technological innovations, and sustained collaborative efforts."¹²⁹

In hopes that the various stakeholders implement these recommendations, an improvement will be evident in the protection of children against the threats OCSEA poses to their freedom and rights. The structure of the recommendations discussed are firstly, addressing the weaknesses of legislation and inaccuracies in language that make a regulatory gap, secondly child-friendly reporting as a way to improve access to justice for victims and finally, the collaboration between sectors in the area of industry social responsibility.

6.1 Regulations Fit For the Digital Age

As discussed throughout this paper, the current international law framework has shortcomings that do not adequately protect children's rights. The remedy for these inadequate regulations is based on the legislative changes that need to be made for improving enforcement, and the terminological issue which perpetuates the inaccurate portrayal of child victims of OCSEA and CSAM. Several measures are hereby recommended for the improvement of these legislation, to combat OCSEA and the necessary changes to the terminology.

¹²⁸ Holt and Bossler (n 35). P 1249

¹²⁹ ICMEC (n 8). P 77

Firstly, the terms ‘pornography’ and ‘prostitution’ should not be used in conjunction with children, because of the attached connotations misrepresent the reality where children are victims, and they cannot give consent. Nor should offences such as ‘child pornography’ or ‘child prostitution’ be referred to in legislation when describing CSAM and CSEA.

Therefore, the legislative bodies and children’s rights organisations need to put an end to this prejudicial and problematic language and correct its usage in legislation, so the accurate describe the offences. This applies to the conventions discussed in the legal analysis, such as the CRC, OPSC, EU Directive and Lanzarote Convention, who all employ these terms.

Altering international treaties is not a simple matter, so alternatively these legislating bodies can issue statements correcting their usage of this language and establishing the correct terminology for the future.

Secondly, the issue with the differing domestic age of consent, as previously discussed, results in variable protection for children, depending on what the age of sexual consent is in their country. EU and UN legislation discussed in earlier analysis, both defer to the domestic age of sexual consent, which is to preserve the sovereignty principle of the Member nations, so the convention is not contradictory to the national legislation. It is arguable that since the offence of OCSEA involves a level of coercion, force, fraud, exploitation, abuse or power imbalance, that it cannot involve consent from the child victim in any form. Therefore, it should be clear in international legislation that the age of consent should be disregarded in cases of OCSEA, and that every child under 18 has equal protection. This is recommended to create uniformity of protection and penalisation for a transnational offence such as this, in every jurisdiction.

Thirdly, as established earlier in this paper, current legislation does not sufficiently address OCSEA, because the ‘online’ element of the offence is not included in the CRC or OPSC. Grooming is not an offence under the CRC, and in EU legislation it involves an element of a material act, and grooming plays a big role in OCSEA. The actions leading up to the creation of CSAM involves grooming the victim beforehand, and often groomers use CSAM of another child victim, as part of the grooming process. Grooming that does not result in OCSEA can be difficult to prove, but arguably that should be an offence in and of itself, even if the child who is being groomed does not end up becoming an OCSEA victim. Therefore, it is essential that in international law grooming becomes an offence, and that the online nature of grooming excludes the need for material acts as a criterion for the offence.

These recommendations based on the weaknesses identified by this research in the legal framework, are also part of the ICMEC’s fundamental principles for protection children against sexual exploitation and abuse on the internet. Aside from criminalising grooming and disregarding the age of sexual consent for the purposes of OCSEA, these fundamental principles pertaining to legislation include: CSAM specific offenses in the penal code, criminal penalties for legal guardians or parents permitting their child’s participation in CSAM, punishing those who publicise or share sources of CSAM, penalising attempted crimes relating to CSAM and OCSEA.¹³⁰

The ICMEC proposes the model legislation for combating OCSEA, based on the correct definitions and provisions addressing CSAM. There are five elements: specifically addressing CSAM, a comprehensive definition of CSAM including the technology-specific elements, criminalisation of technology-facilitated CSAM offences, criminalisation of knowingly

¹³⁰ Ibid. P 7

possessing CSAM (regardless of distribution intent) and requiring ISPs to report all suspected CSAM to law enforcement or relevant agency.¹³¹ Currently, only 38 countries have mandatory ISP reporting, according to ICMEC. This is a big issue in terms of accountability and the State's knowledge of the statistics and their ability to combat OCSEA. This statistic reveals that there is a significant need for addressing improvements needed within regulation to fill the current legislative gaps that allow for OCSEA offences to go unpunished.

These recommendations pertaining to legislation can be resolved by implementing the necessary changes on a national level, or through regional instruments to ensure uniformity of legal protections against OCSEA. Alternatively, another Optional Protocol to the CRC or a new children's rights convention addressing the threat to children's rights posed by the internet. The benefit of having an international treaty would be ensuring that none of the principles established by ICMEC would be overlooked and the legislation once ratified would have greater uniformity and consistency between member States. Adopting universally agreed upon terminology surrounding this issue would further promote a rhetoric in law as well as in civil society and media, that has a children's rights approach and unites stakeholders with a common understanding and terminology. The link between a child's freedom from violence and OCSEA offences was argued in this research, and making this connection in a legal instrument would place a higher standard of obligations on States to combat OCSEA. This would be a considerable step towards combating OCSEA through strengthened and more comprehensive regulation.

¹³¹ Ibid. P 3

6.2 Child-friendly reporting

This recommendation is focused on improving the access to justice for victims of OCSEA, through formalised reporting structures. Based on the arguments previously presented, and the opinions of experts on this matter, it is clear that for OCSEA victims, reporting avenues are essential. As discussed in chapter five there is ample foundation in the international legal framework for the obligation of States to provide victims with access to remedy. The CRC outlines these obligations towards children, specifically regarding rights violations on the internet in General Comment 25.¹³² There are many recommendations for States within this soft law instrument, the key recommendation from the research of this thesis would however be, to implement a complaint and reporting mechanism for children. This would show a State's willingness to go beyond legislative action in order to protect children better.¹³³

Disrupting Harm suggests based on their findings that there is a greater need for pathways for formal reporting. They recommend that States prioritise providing necessary support to children and caregivers throughout the reporting of OCSEA and ensure access to remedies outside of the legal process.¹³⁴ This mechanism would involve multiple sectors relevant to the judicial and non-judicial remedies, such as social services, law enforcement, the judiciary, NGOs and the private sector, in order to strengthen national collaboration.¹³⁵

The States cannot leave it up to non-state actors such as the ISPs to have the appropriate measures in place protecting children, especially when considering that only 35 countries

¹³² United Nations Committee on the Rights of the Child (n 38). P 8

¹³³ ICMEC (n 8). P 78

¹³⁴ ECPAT International (n 1). P 6

¹³⁵ End Violence Against Children (n 6). P 75

require ISPs by law to report CSAM to law enforcement. Nor can States assume these actors will act in the best interest of the child when reports of OCSEA or CSAM on their platforms arise. If the child victims of OCSEA have a child-friendly mechanism for reporting OCSEA occurrences to the relevant authorities, there is a greater chance of accessing justice and holding the involved parties accountable. A victim's fund which was discussed earlier should then be a part of the mechanism to ensure there is access to the necessary remedy and remuneration in the judicial process as well as in the recovery of the victim. Therefore, another recommendation addressing this will follow.

6.3 Industry Social Responsibility

Enhancing corporate social responsibility for ICT, media, and financial companies, is a key recommendation from the Special Rapporteur on the sale and sexual exploitation of children, to strengthen the online safety of children through protective and preventive programmes.¹³⁶ As mentioned in the fifth chapter, States are encouraged to ensure businesses provide complaints mechanisms for any violations of users rights that have occurred. The recommendations discussed so far pertain to the obligation of States, and it is largely the State's responsibility to regulate non-state actors. This third recommendation is mostly aimed outside the scope of State obligations, however at its best combating OCSEA is a joint effort and at its best, a form of hybrid solution. For example, the implementation of compulsory ISP reporting of suspected CSAM -as recommended by NGOs and experts- could be a joint effort if non-state actors went beyond complying with the minimum standard and took on social responsibility to go beyond this.

¹³⁶ Human Rights Council, 'Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography'. P 18

Aside from what a State can regulate and hold ISPs and online platforms accountable for, several improvements to the current state of OCSEA prevention can be accomplished through self-regulation. These non-state parties have a lot of power over the internet and have a big say in stopping perpetrators from sharing CSAM or committing OCSEA through their services. Therefore, accountability in this sphere is a key recommendation from this research. At a certain stage it is evident that best chances of protecting children online from sexual abuse and exploitation, relies on the willingness of non-state actors to prioritise children's rights over other motives.

The usage of technology and protective tools is a mechanism that should be encouraged for ISPs and online platforms by States. The scanning and detection of their networks to identify and remove illicit content is way of combating OCSEA by reducing CSAM content online as well as making it difficult for perpetrators to commit these acts.¹³⁷ There are different technological tools available, the main aim is to stop CSAM being hosted on the internet by determining where it comes from, reporting it to law enforcement, and notifying the platform and ISPs in order to remove it.

As discussed previously, there are legal instruments that instruct States to investigate and prosecute the spread of CSAM and OCSEA offences, such as in the Lanzarote Convention in Article 30(5).¹³⁸ The EU Directive 2011/93 has a provision requiring the removal (by States) of website containing or disseminating CSAM, in Article 25.¹³⁹ An exception should be made

¹³⁷ This is another of the ICMEC's fundamental principles, ICMEC (n 8). P 7.

¹³⁸ Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse. Article 30(5).

¹³⁹ European Union (EU) Directive 2011/93 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. Article 25.

for webpages employing detective tools, so their reporting of suspected CSAM or OCSEA activity does not result in their removal.

The implementation of the detection tools would go a long way for States to fulfil their preventive and investigative obligations, so the States could incentivise the non-state actors to use these tools by removing barriers, whether financial or legal, for these tools to be employed by ISPs and platforms. This form of cross-sector collaboration would also help close the regulation gaps and implementing a joint effort in industry responsibility.¹⁴⁰ This recommendation relies on the collaboration between stakeholders, and the best-case scenario would be for States and ISPs and platforms alike to implement a joint effort to prioritise children's rights to freedom from violence, by addressing the issue of OCSEA which is rapidly expanding.

6.4 Summary

In summary, these three recommendations are presented as a result of the analysis conducted, to improve the status quo of children's rights for OCSEA. The protection of children online is currently inadequate, as proven through this research. Children today -and the generations to come- will be better protected and victims supported in the online sphere with these changes. By addressing the issue on a formal level to close the regulatory gap in protecting children's rights, improving the access to remedies, and ensuring child victims get justice, and thirdly by encouraging the industry to take responsibility for their part in protecting children from OCSEA, steps towards eradicating OCSEA are being taken.

¹⁴⁰ This is yet another fundamental principle of the ICMEC (n 8). P 23

7.0 Conclusion

This conclusion will bring the argumentation of this research to a close, by summarising the results of the analysis and presenting the answer to the research question. Limitations as well as recommended avenues for future research will be discussed also. The research has relied upon -and analysed- academic articles from legal scholars, reports from NGOs and experts, UN documents, soft law and international treaties. These have been consulted in order to answer the question for this research: to what extent are children's rights protected when it comes to Online Child Sexual Exploitation and Abuse? The key findings all point to an inadequate protection against OCSEA, and the legal issues of enforcement, regulation and access to justice, support this argument. The recommendations proposed have been made based on these findings, in order to improve the current lack of protection for children's rights in this field in three main areas: regulation, reporting and remedies. Each of these must be addressed in order to combat OCSEA and better protect children's rights.

Freedom from violence is a civil right, which imposes an immediate and full obligation on States to take action to protect children against violence and prevent it from occurring. Connecting the right to freedom from violence and OCSEA in law, would change the obligations of States towards children's rights, to combat OCSEA and protect victims.

Technology and the internet exacerbate OCSEA and creates challenges for legal enforcement of children's rights across borders and real violations being committed against them in a virtual world. The current legislation does not sufficiently address the factors and reality of OCSEA, because it is outdated, and the legal protection was meant to address something else entirely. Therefore, the first recommendation tackles these gaps in the law.

The terminology surrounding OCSEA in international legislation and soft law instruments trivialise, legitimise, and diminish the reality of the exploitation and abuse of children. Terms such as ‘child pornography’ or ‘child prostitute’ is problematic because it perpetuates an inaccurate perception of what children are being subjected to, being that their consent to OCSEA is impossible.

A regulatory gap was identified, as the existing legal instruments do not sufficiently address sexual exploitation and abuse that happens over the internet. The act of grooming a child is not an offence in countries outside EU jurisdiction, and grooming is a key part of committing or attempting to commit OCSEA. The age of sexual consent creates a loophole for perpetrators and creates an unequal protection for children, further exacerbated by the difficulty of establishing the age of a child simply based on a picture.

Accountability within the industry is incredibly important, for example through mandatory ISP reporting, for States to have evidence and knowledge to act accordingly in combatting OCSEA. Non-state actors, civilians and States are in the online sphere, and in order to protect children in this space, regulation and employing protective tools are essential in stopping the exploitation of the vulnerable position of children.

Finally, the third recommendation addressed child victims’ access to justice, and the research conducted here established that there are many obstacles for them. This group of victims in particular are ill-protected and their access to remedies is very weak. The focus here was that protecting children from OCSEA is just as important as protecting and aiding those children who have become victims.

This thesis' objective has been to identify the ways in which children's rights are not being protected from sexual exploitation and abuse online. The analysis of the shortcomings in the protection of children online identified weaknesses in their protection and gaps in the legal framework we have today. Therefore, this research has argued that the protection of children's rights online, in the field of the sexual abuse and exploitation of children, currently falls short in addressing the complexity of the harm caused to children worldwide.

7.1 Limitations and future legal analysis.

The limitations of this thesis relate to the specificity of the scope. The research did not include an analysis of every international instrument, and therefore the recommendations pertain to the obligations of States under the UN and EU jurisdictions. For example, the ILO is a source of international law that was not included in the research, and neither were regional instruments from the Americas, Pacific Asia and Africa. The relevance of these instruments in addressing OCSEA is possible, however they were not chosen for the objective of this thesis. There are signatories to the selected UN and EU treaties, that do come from these other regions, however the only region with an international treaty on cybercrime is Europe, and therefore it was included in the analysis.

In terms of the accountability of non-state actors such as ISPs and online platforms and social media companies, a business and human rights angle could have been explored, however that was outside the scope and methodology chosen for the objective of this research. This is another potential avenue to explore in combating OCSEA in international human rights law. The emergence of AI and deepfake technology has already made an impact on the pornography industry, where identities of the subject in the CSAM is hidden or falsified by

editing the pictures and videos. It is unavoidable that this will appear more and more in CSAM and therefore impact OCSEA in various ways. Therefore, the international human rights framework must address this urgently. Finally, the suggestion of for future research, would be to avoid retroactive examination, and get ahead of the inadequate safeguarding against OCSEA by looking at emerging methods of sharing and creating CSAM.

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