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AN OVERVIEW OF THE CRIME OF ONLINE CHILD PORNOGRAPHY

Safiyah Ummu Mohammed*
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ABSTRACT

Technological advances and the use of internet has propelled child pornography into a global market and also minimised the risks involved in its distribution. This has raised concerns about exploitation and abuse and its effect on children's rights. Using a doctrinal research methodology, this paper examines online child pornography, which is one of the manifestations of child sexual abuse and exploitation. The history and nature of child pornography was examined as well as the provisions under the Cybercrime Act 2015 that deal with the occurrence. The paper finds that legislation alone cannot achieve the desired change without an effective system in place to implement and enforce them. The paper recommends the regular reviews of existing laws in order to effectively tackle online child pornography.

Keywords: Overview, Crime, Online, Child, Pornography.

1. INTRODUCTION

Internet has made a dramatic impact on sexual abuse and sexual exploitation and has contributed to the increase of child pornography by bringing about new ways of accessing, disseminating and selling of child pornography materials.¹ Lack of territorial boundaries on the internet has indeed propelled child pornography into a global market and technological advances have also minimised the risks involved in distribution child pornography, making it more difficult to track.

In recent times, the use of internet has raised concerns about exploitation and abuse and its effect on children. With the introduction of internet and smart phones over the past two decades, the way offenders sexually exploit children has been altered.² This is evident from the child sexual exploitation database of the International Criminal Police Organisation (INTERPOL) which contains more than 2.7 Million images and videos.³ A staggering 84 percent of the material on the database contains

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¹NajatM'jidMaalla, United Nations General Assembly Human Rights Council, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, A/HRC/12/23, 13 July 2009, 6.

²End Child Prostitution in Asian Tourism (ECPAT) International, *Trends in Online Child Sexual Abuse Material*, (ECPAT International, 2018).

³INTERPOL, International Child Sexual Exploitation Database
<<https://www.interpol.int/en/Crimes/Crimes-against-children/exploitation-database>>Last accessed on 28thDecember 2021.

explicit sexual activity with more than 60 per cent of victims identified as prepubescent including infants and toddlers.⁴ The amount of material that has been created or is in circulation on the internet cannot even be quantified, because new content is constantly being added and only a proportion of older content has been identified and taken down.⁵ To complicate matters, traditional laws and modes of law enforcement struggle to prevent child pornography within the new digital environment. This increased online exposure coupled with lack of basic technical knowledge on accessing and using the internet, makes internet users in Nigeria easy targets for criminals.

This paper examines online child pornography, which is one of the manifestations of child sexual abuse and exploitation. The history and nature of child pornography will be examined as well as provisions that deal with the occurrence under the Cybercrimes Act 2015.

2. ONLINE CHILD PORNOGRAPHY (CHILD SEXUAL ABUSE MATERIAL)

Online child pornography act involve the use of a computer system to produce, create, distribute, access or view, receive, store or possess any representation, by whatever means, of any real or fictional person under 18 years of age, or appearing to be under 18 years of age, engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.⁶ It is a type of sexual exploitation of children that takes many forms, depicting children of any age engaged in real or simulated explicit sexual activities or lewdly depicting parts of a child's body, with the intention of stimulating sexual arousal and gratification.⁷

The term "child pornography" is the most used in legal definitions and international policy documents. However, the term "child sexual abuse material" has been increasingly used to describe sexually explicit representations of children. According to international consensus, it is believed that the term describes the true nature and extent of sexually exploitive images of child victims to which children can never consent.⁸ Indeed, from a law enforcement perspective, child sexual abuse material is documented evidence of the crime of sexual abuse or rape in progress.⁹

2.1 History of Child Pornography Laws in Nigeria

Sexual abuse and exploitation of children has been in existence throughout history. However, the invention of photography in 1839 was a determining factor in the

⁴ Ibid.

⁵ ECPAT International (n2) 7.

⁶ United Nations Office on Drugs and Crime (UNODC), *Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children* (United Nations, 2015) 258.

⁷ Najat M'jid Maalla (n 1) 7.

⁸ The Interagency Working Group, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse* (ECPAT International, 2016) 37.

⁹ UNODC (n 6) 10.

emergence of images depicting such acts.¹⁰ The 1970s saw a great explosion of child abuse images produced in countries like Denmark, the Netherlands and Sweden, which had liberal laws concerning sexuality and materials containing pornographic images of minors.¹¹ During this time, child pornography laws apparently were relatively effective largely because the distribution of pornography required printed material, which was difficult to find and expensive to purchase if found.¹²

As more children became victims of child pornography, it became apparent that there was a need for legislative action and a tightening of regulations with regard to child abuse material which subsequently led to a decrease in availability. The enactment of the Protection of Children Act 1978 in England and Wales provided the first 'specific' legal response to combat the problem of child pornography.¹³

In Nigeria, child pornography is considered harmful and the courts have recognised the importance of prohibiting obscene content by holding that the right to freedom provided under section 39 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) cannot justify public immorality. In *Okedara v Attorney General of the Federation*¹⁴ the Court noted that the freedom granted under section 39 includes the freedom to hold an opinion and pass information without interference. The Court however stressed that the right provided under section 39 is not an open-ended or absolute right, it is qualified, and therefore subject to some restrictions. The Court went on to note that such freedom cannot be taken away "except for the purposes of preserving the interest of defence, public safety, public order, public morality, public health or for the purpose of protecting the rights and freedom of other persons."¹⁵

Furthermore, there are various laws prohibiting the dissemination of obscene and indecent publications. Both the Criminal Code Act and the Penal Code Laws contain provisions that prohibit such materials. In addition, the Child Rights Act 2003 and the Trafficking in Person (Prohibition) Law Enforcement and Administration Act of 2003 all prohibit the publication of harmful materials. The above laws are however not specific to child pornography in an online context.

In the case of *Miller v California*,¹⁶ a three-pronged test was established that includes a set of criteria which must be met in order for a material to be considered as obscene. The test uses the following criteria:

¹⁰ Ibid, 16

¹¹ L. Negredo and O. Herrero, Child Pornography on the Internet, (2016) 37(3) *Psychologist Papers*, 217.

¹² J. Mann and S. R. Belzley, The Promise of Internet Intermediary Liability (2005) 47 (23rd) *William & Mary Law Review*, 291.

¹³ YamanAkdeniz, *Internet Child Pornography and the Law: National And International Responses* (Routledge, 2016) 9.

¹⁴ (2019) LCN/12768(CA)

¹⁵ Ibid, Per TijjaniAbubakar, JCA.

¹⁶ 1973

- a. Whether the material is obscene.
- b. Whether the material is harmful to minors.
- c. Whether the material is obscene or harmful to minors.

However, the rapid growth of the Internet and the ease of transporting and distributing child pornography has led to a resurgence of child pornography. The Internet has made it possible for child pornography to be distributed globally, including in countries that have strict laws against child pornography. The ease of access to child pornography on the Internet has led to a significant increase in the number of child pornography cases. The need to protect children from child pornography has led to the enactment of various laws and regulations. The Internet has also led to the development of new technologies that can be used to detect and prevent child pornography. The Internet has also led to the development of new methods for distributing child pornography. The Internet has also led to the development of new methods for identifying and prosecuting child pornography offenders. The Internet has also led to the development of new methods for protecting children from child pornography. The Internet has also led to the development of new methods for preventing child pornography. The Internet has also led to the development of new methods for identifying and prosecuting child pornography offenders. The Internet has also led to the development of new methods for protecting children from child pornography. The Internet has also led to the development of new methods for preventing child pornography.

The rapid growth of the Internet has caused the number of child pornography users to increase significantly. This has led to a significant increase in the number of child pornography cases. The ease of access to child pornography on the Internet has led to a significant increase in the number of child pornography cases. The need to protect children from child pornography has led to the enactment of various laws and regulations. The Internet has also led to the development of new technologies that can be used to detect and prevent child pornography. The Internet has also led to the development of new methods for distributing child pornography. The Internet has also led to the development of new methods for identifying and prosecuting child pornography offenders. The Internet has also led to the development of new methods for protecting children from child pornography. The Internet has also led to the development of new methods for preventing child pornography.

¹⁷ J.V Eggman, *Child Development*, 30.

¹⁸ Ibid, 30.

¹⁹ 1982.

²⁰ J.V Eggman, *Child Development*, 30.

²¹ Claire M. Mitchell, *Child Development*, 30.

²² Ibid, 36.

²³ Bert-Jaap van der Meer, *Child Development*, 30.

²⁴ Ibid.

²⁵ Ibid.

emergence of images depicting such acts.¹⁰ The 1970s saw a great explosion of child abuse images produced in countries like Denmark, the Netherlands and Sweden, which had liberal laws concerning sexuality and materials containing pornographic images of minors.¹¹ During this time, child pornography laws apparently were relatively effective largely because the distribution of pornography required printed material, which was difficult to find and expensive to purchase if found.¹² As more children became victims of child pornography, it became apparent that there was a need for legislative action and a tightening of regulations with regard to child abuse material which subsequently led to a decrease in availability. The enactment of the Protection of Children Act 1978 in England and Wales provided the first 'specific' legal response to combat the problem of child pornography.¹³

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¹³ YamanAkdeniz, *Internet Child Pornography and the Law: National And International Responses* (Routledge, 2016) 9.

¹⁴ (2019) LCN/12768(CA)

¹⁵ Ibid, Per TijjaniAbubakar, JCA.

¹⁶ 1973

An Overview of The Crime of Online Child Pornography

- a. Whether the average person, applying community standards would find that the work, taken as a whole, is indecent.
- b. whether the work depicts or describes, in an offensive way, sexual conduct; and
- c. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value

However, the first legislation to specifically criminalise the distribution or transportation of digital child pornography via computer was contained in the United States Child Protection and Obscenity Enforcement Act of 1988.¹⁷ Subsequently, The Child Pornography Prevention Act of 1996 criminalized any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture that is, or appears to be, of a minor engaging in sexually explicit conduct.¹⁸ The first child pornography case brought before the U.S. Supreme Court was the case of *New York v. Ferber*¹⁹. In this case, the Court was asked to determine whether the First Amendment protected an individual's right to manufacture and distribute images and videos of child pornography. The Supreme Court held that the need to protect the emotional and physical well-being of the child superseded First Amendment protections in that distribution of these materials is related to child abuse.²⁰

The rapid development and subsequent widespread availability of the internet caused the trade in child pornography to continue growing at a fast rate.²¹ It enabled users to traffic child pornography, locate children to molest, engage in inappropriate sexual communication with children and to communicate with other paedophiles.²² A combination of several factors enabled the internet make such an impact. For instance, there is now a global reach and the vulnerable victims can be reached by offenders from anywhere in the world.²³ This enables distant interaction with victims, removing potential social barriers that perpetrators face in physical, person-to-person interaction.²⁴ The internet also facilitates anonymity and perpetrators can hide behind an IP number, email address, or scam profile that is not easy to trace to a specific individual.²⁵ Prior to the widespread availability and use of

¹⁷ J.V Eggstein and K.J Knapp, Fighting Child Pornography: A Review of Legal and Technological Developments (2014) 9 (4) *Journal of Digital Forensics, Security and Law*, 32.

¹⁸ *Ibid*, 30.

¹⁹ 1982.

²⁰ J.V Eggstein and K.J Knapp (n 17) 33.

²¹ Claire Milner and Ian O'Donnell, *Child Pornography: Crime, Computers and Society* (Willan Publishing, 2011) 29.

²² *Ibid*, 36.

²³ Bert-Jaap Koops, *The Internet and its Opportunities for Cybercrime*, Tilburg Law School Legal Studies Research Paper Series No. 09/2011 <<http://ssrn.com/abstract=1738223>> Last accessed on 28th December 2021.

²⁴ *Ibid*.

²⁵ *Ibid*.

internet, producers of child sexual abuse material had to employ expensive filming and copying equipment, and ship videotapes or CD-ROM copies for distribution and to produce advertising material accordingly.²⁶

In the current technological context, internet significantly reduce the costs and efforts at all stages of the production and distribution of child sexual abuse material. While digital equipment creates a comparatively cheap and easily accessible means of producing and widely distributing child sexual abuse material through the internet, commercial spam campaigns reduce the challenges and costs related to advertising, enabling child abuse and exploitation networks to quickly expand the scope and scale of their activities. Once directly connected to customers and consumers, providers can continuously advertise additional illicit materials in open and explicit language and keep in touch freely, thus enabling them to generate greater revenue from their activities.²⁷

Criminals in Africa have also use social networking sites and online platforms such as Facebook and WhatsApp to contact, solicit and blackmail children as well as sell sexual materials produced.²⁸ In West Africa also, young girls have been recruited to take part in pornographic films and bestiality.²⁹

2.2 Characteristics of Child Pornography

Legal systems tend to divide child pornography material into three categories as follows:³⁰

- i. Indicative: Material depicting clothed children which suggest a sexual interest in children.
- ii. Indecent: Material depicting naked children which suggests a sexual interest in children.
- iii. Obscene: Material which depicts children in sexual acts.

The second and third categories are most likely considered to be illegal which is reflected in most obscenity laws. The material referred to can consist of visual, written and audio representations of child abuse and exploitation. The material can take several forms including photographs, negatives, slides, magazines, books, drawings, movies, videotapes and computer disks or files.³¹ Visual representations are the most common type of child pornography material and consist of photographs, drawings (including computer-generated images) and cartoons.³² Therefore, any photograph, drawing or cartoon depicting the sexual exploitation or abuse of a child is considered a type of child pornography material.

²⁶Nigerian Communications Commission (NCC), Study on Young Children And Digital Technology: A Survey Across Nigeria (NCC, 2020) 18.

²⁷Ibid.

²⁸INTERPOL., *Online African Organized Crime from Surface to Dark Web* (Interpol, 2020) 26.

²⁹Ibid, 27.

³⁰Alisdair A. Gillespie, *Child Pornography: Law and Policy*, (Taylor & Francis Group, 2011) 25.

³¹UNODC (n 6) 10.

³²Ibid, 20.

Additionally, technological developments in computing have created the situation whereby images can be manipulated or realistic images of a child can be created.³³ It then becomes possible to create an image that appears to be a child engaged in sexual activity without a child ever being involved or allow an image to suggest that a real child is engaging in sexual activity when, in fact, they are not. This can make it difficult to prosecute cases where such digital images are involved. Continued advancement of photo manipulating software, graphics, and multi-media technologies will make both altered photographs of human beings and computer-generated images indistinguishable from raw images of an actual human person.³⁴

The United States grappled with the issue of virtual and simulated child sexual abuse material in 2002 when the Supreme Court in *John D. Ashcroft Attorney General, et al v. The Free Speech Coalition, et al.*³⁵ repealed the prohibition on virtual child sexual abuse material contained in the Child Pornography Prevention Act of 1996. On that occasion, the Supreme Court struck down as unconstitutional a definition of child sexual abuse material that included images that merely "appear to be" of a minor engaged in sexually explicit conduct. Almost immediately thereafter and in response to this decision, the United States Congress adopted the "Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003" (PROTECT Act). In addition to prohibiting "real" child sexual exploitation images, the PROTECT Act also includes prohibitions against: (a) any digital or computer-generated image that is "indistinguishable" from that of a minor engaging in sexually explicit conduct; and (b) a visual depiction that has been created or modified to appear as an identifiable minor engaging in sexually explicit conduct.³⁶

Similarly, the Supreme Court of Norway in *A (Counsel John Christian Elden) v. The Public Prosecution Authority (Counsel Hugo Henstein)* decided in September 2019 that sex dolls mimicking child-like qualities represent the sexualisation of children and violate criminal law. The defendant had bought a doll online that had the appearance of a child with an oral, vaginal and anal body orifice. The doll was marketed as a sex toy and the Supreme Court of Norway found it clear that the doll had such features that it involved sexualisation of children. The doll also had to be regarded as a depiction within the meaning of the law.³⁷

Despite the categorisation of child pornography, the crime still remains complex because it involves a chain of behaviours and a variety of actors.³⁸ From a legal perspective, offences concerning child pornography include the production, offering,

³³Ibid, 20.

³⁴J.V Eggstein and K.J Knapp (n 17) 34.

³⁵U.S. Supreme Court, Case No. 00-795.

³⁶NCC (n 26) 43.

³⁷Norway Supreme Court Judgment, HR-2019-1715-A (case no. 19-78768STR-HRET), 10 September 2019 <<https://www.domstol.no/en/enkelt-domstol/supremecourt/rulings/2019/supremecourt-criminal-cases/hr-2019-1715-a/>> Last accessed on November 11th 2021.

³⁸L. Negrodo and O. Herrero (n11) 219.

dissemination, viewing and possession of child abuse material³⁹ which are the four main elements involved in child pornography and its use.

- i. Production: Production covers a broad range of behaviour, from commercial production to the individual offender recording his own material.⁴⁰ Production is considered a main behaviour because it involves physically harming a child. In May of 2021, authorities in Peru arrested a couple accused of producing sexual abuse material of their two-month-old baby.⁴¹ The arrest occurred subsequent to investigators in Canada and Australia contacting INTERPOL after identifying a user who was not only sharing abusive images, but also offering to produce additional material in exchange for payment. The evidence and intelligence trail eventually led to Peru, where INTERPOL's Crimes against Children unit in conjunction with Peruvian authorities raided the suspect's home and rescued the baby. The couple are now facing charges for producing child sexual abuse material. Where the child has been sexually assaulted, the production of child pornography aggravates this harm.⁴² The internet then ensures that these images can circulate forever and thus increase the long-term consequences for the victim. Consequently, a major reason for criminalising the production of child pornography is this additional psychological harm that is caused separate to the harm caused by the initial abuse.⁴³ In *DuToit v The Magistrate and Others*,⁴⁴ The Supreme Court of Appeal of South Africa held that a child compromised by a pornographer's camera has to go through life knowing that the image is probably circulating within the mass distribution network for child pornography. Because the child's actions are reduced to a recorded image, the pornography may haunt him or her long after the original recording.
- ii. Dissemination: This refers to the distribution of child pornography. The images and/or videos are distributed via email, instant messaging applications, social media platforms and communication applications.⁴⁵ In the case of *United States v. Dylan Heatherly*⁴⁶ and *United States v. William Staples*,⁴⁷ the two defendants, William Staples and Dylan Heatherly, used a

³⁹National Rapporteur on Trafficking in Human Beings, Child Pornography – First report of the Dutch National Rapporteur. The Hague: (BNRM, 2011) 46.

⁴⁰Alisdair A Gillespie (n 30) 30.

⁴¹ INTERPOL, "Peru: Parents arrested for sexually abusing baby, selling images" <<https://www.interpol.int/en/News-and-Events/News/2021/Peru-Parents-arrested-for-sexually-abusing-baby-selling-images>> Last Accessed on 23rd October 2021.

⁴² Ibid.

⁴³ Ibid.

⁴⁴(2016) 2 All SA 328 (SCA) at para 14.

⁴⁵ INTERPOL (n 28) 28.

⁴⁶ No. 19-2424 (3d Cir. Dec. 11, 2020).

⁴⁷ No. 19-2932 (3d Cir. Dec. 11, 2020).

web conferencing software (Zoom) as a chat room space where they virtually met with others to view, request, receive, distribute, and otherwise facilitate the receipt and distribution of child sexual abuse material. William Staples was found guilty of conspiracy to advertise, receive/distribute, and aid and abet the receipt/distribution of child sexual abuse material. The other defendant, Dylan Heatherly, was found guilty of conspiracy to receive/distribute and aid and abet the receipt/distribution of child sexual abuse material. For their crimes, they were sentenced to 25- and 30-years' imprisonment, respectively.

Child pornography is also frequently traded on websites on the visible, deep and dark web.⁴⁸ According to a recent Interpol report, a large number of cases of sale of child sexual abuse/exploitation material has been reported in Eastern Africa, Southern Africa and Western Africa.⁴⁹ The distribution of images means that the secondary harm caused by the production of child pornography continues to exist many years after the victim's assault.⁵⁰

- iii. Possession: In the context of the internet, possession will be the act of downloading material. It has been argued that possession fuels the demand for new images and therefore justifies the criminalisation of possession especially in relation to commercial child pornography.⁵¹

In *Williams v The Queen*,⁵² Aikin J while discussing the basis of the law of possession stated as follows:

It is necessary to bear in mind that in possession there is a necessary mental element of intention, involving a sufficient knowledge of the presence of the drug by the accused. No doubt in many cases custody of an object may supply sufficient evidence of possession, including the necessary mental element, but that is because the inference of knowledge may often be properly drawn from surrounding circumstances.

Thus, in relation to child pornography, any evidence discovered must be sufficiently linked to the accused in order to prove possession. In *R v R, AM*⁵³ the accused lived in a two-storey house with several other persons who also happened to be present during a search of the premises where material containing pornographic images of children was found. The material consisted of 8 digital video discs found in a bedroom and 23 video files contained in an office on the ground floor of the house. The prosecution could not establish that the accused had physical possession of the

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Alisdair A. Gillespie (n 30) 33.

⁵¹ *Ibid.*, 37.

⁵² (1978) 140 CLR 591.

⁵³ [2011] SADC 38

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material and there was no DNA or fingerprint evidence. The judge found that all the material seized was not in the possession of the accused.

In *United States v. Dominguez*,⁵⁴ the defendant pleaded guilty to distribution and possession of child pornography in federal court in Florida. The defendant had Instagram messages that he sent to a minor requesting nude photos. These messages, between him and a nine-year-old girl, were sexually explicit and also included the defendant sending her a photo of his private part. Although the defendant argued that there was no actual or attempted physical contact with the minor, the Court found the actions constituted the sexual exploitation of a minor.

In *Edvalson v. State*, The Georgia Supreme Court found that there can be one prosecution and conviction for a single act of possessing child pornography, regardless of the number of images involved. Edvalson owned and maintained a child pornography website called Cruels.net, and the images of child sexual abuse were found on electronic drives and computers located at his residence.⁵⁵ The defendant was convicted for the possession of, and possession with intent to distribute 11 digital images of child pornography. He was initially indicted and convicted on 22 separate counts; however the Georgia Supreme Court found that even though multiple images were involved, the offense involved just a single course of conduct.

iv. Viewing: This behaviour occurs when an offender browses the internet for child pornography material without intentionally downloading them. The market for child pornography enlarges with the knowing viewing of these images, regardless of whether a price has been paid by the viewer and regardless of whether the image is downloaded or printed, because the more frequent the images of children engaged in sexual conduct are accessed, the more the creators produce to satisfy the growing demand, which results in more children being coerced and groomed for the sex trade.⁵⁶ Thus the very act of viewing makes the offender a party to child sexual abuse.

Viewing is distinguished from possession where a defendant's conduct must exceed mere viewing to encompass more affirmative acts of control such as printing, downloading or saving. In *People v. Kent*, Court of Appeals of New York considered, among other issues, the evidentiary significance of temporary internet files automatically created and stored on a defendant's hard drive, and the defendant's awareness of the presence of such files. The court held that merely viewing web images of child pornography does not, absent other proof, constitute possession. Where no evidence shows a

⁵⁴No. 19-11378 (11th Cir. 2021).

⁵⁵*Edvalson v. State* (Case No. A19A0492), 351 Ga. App. XXIV (June 28, 2019) (unpublished) <<https://law.justia.com/cases/georgia/supreme-court/2020/s19g1516-0.html>> Last accessed on 26th December 2021.

⁵⁶*People v. Kent*, 2010 NY Slip Op 07364 (79 AD3d at 55) <<https://caselaw.findlaw.com/ny-court-of-appeals/1600537.html>> Last accessed on 26th December 2021.

defendant was aware of the presence of images stored in temporary internet files, such files cannot underlie a prosecution for promotion or possession.

3. EXPOSURE TO HARMFUL CONTENT

Exposure to harmful online content pertains to situations where a child accidentally or intentionally views pornographic or other content that is judged to be harmful to their development, sexual or otherwise.⁵⁷ In Nigeria, 90 percent of children aged 4-16 years have come across sexual images or content on the internet.⁵⁸ Some children who are exposed to harmful content can experience stress from the exposure. In some cases, curiosity leads children to look for such materials and, in the process, they may become addicted to viewing such content. In either case, exposure to explicit or harmful content has the potential to influence the child's development of values and perceptions.⁵⁹

4. SEXTING

In some jurisdictions, sexting is considered child sexual abuse material. Sexting has been defined as the self-production of sexual images or the creating, sharing and forwarding of sexually suggestive nude or nearly nude images through mobile phones and/or the internet.⁶⁰ It is often a consensual activity between peers, although research has shown that girls feel pressured or coerced into it more often than boys.⁶¹ It is a term used to describe online sexual behaviour that usually involves the sender sharing the compromising and/or sexual images or videos of themselves.⁶² It is also the transmission by message of one's body image in an allegedly sexual pose.⁶³ Due to connections made between sexting and the person concerned not knowing about it or agreeing to it, sexting is sometimes discussed in the context of coercive or bullying practices.

The fact that sexting involves intimate content in electronic form means it can easily be shared beyond the intended recipient, which raises many legal issues.⁶⁴ These can include potential actions in privacy, nuisance, defamation and copyright, as well as possible criminal actions.⁶⁵

The Supreme Court of Australia, in the Court of Criminal Appeal, considered the behaviour of sexting, held that "This Court can, and indeed should, take judicial notice of the legitimate community concern about children engaging in the practice

⁵⁷UNODC (n 6) 13.

⁵⁸NCC (n 26) 49.

⁵⁹UNODC (n 6) 13.

⁶⁰The Interagency Working Group (n 8) 44.

⁶¹Ibid.

⁶²D. Moritz and L.S. Christensen, When Sexting Conflicts With Child Sexual Abuse Material: The Legal And Social Consequences For Children, *Psychiatry, Psychology and Law*, 2020 <<https://doi.org/10.1080/13218719.2020.1742242>> Last accessed on 26th December 2021.

⁶³Brian Simpson, Challenging childhood, challenging children: Children's rights and sexting (2013) 16(5/6) *Sage Journals* 691.

⁶⁴D. Moritz and L.S. Christensen (n 60).

⁶⁵Ibid.

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known as 'sexting'. One salient aspect of that concern is the misuse by adults of access to children through social media to persuade or trick them into engaging in sexualised communications⁶⁶

Sexting may also involve children sending images, videos or explicit content to adults and vice versa. However, many cases of sexting involve children willingly sharing sexual content with another child. When the sender and recipient are both children, there are different concerns which relate to their capacity to share the content, their criminal culpability and the impact of that behaviour on them personally.⁶⁷

Some cases of sexting have resulted in criminal prosecution because the transmission of sexually explicit images of children constitutes child pornography or obscenity. A Magistrate Court in Sokoto convicted three defendants for alleged circulation of a nude video of a girl on social media platforms. The defendants were arrested and detained by the police after one of them allegedly circulated a video in which he reportedly had carnal knowledge of a minor in 2017 after luring the girl to a hotel within Sokotometropolis, where he allegedly drugged and had sex with her and eventually recorded the act. They were charged with circulation of an 18 seconds nude video, criminal conspiracy, abatement, sale/circulation of an obscene books, obscene and indecent act.⁶⁸ The offences of indecent act were held to be contrary to Section 171 of Sokoto State Penal Code.

In the context of digital safety, sexting links the production and dissemination of child pornography with the issues of exposure to pornography and harassment.⁶⁹ There are often connections made between sexting and the person concerned not knowing about it or agreeing to it which places Thus sexting is often discussed in the context of coercive or bullying practices.⁷⁰

5. PREVALENCE OF ONLINE CHILD PORNOGRAPHY

In Africa, there is significant gap regarding the numbers and the specific groups of children who may have been victimised online.⁷¹ Similarly, it is difficult to obtain accurate data on sexual abuse and exploitation in Nigeria due to under reporting. The lack of global data, the inconsistency in data collection, sharing and analysis across agencies, and the complexity of internet-facilitated crimes has made it almost

⁶⁶R v Symons (2018) 130 SASR 503, 506 (Kourakis CJ).

⁶⁷D. Moritz and L.S. Christensen (n 60).

⁶⁸New Telegraph Newspaper, Court sends son of Tambuwal's aide, 2 others to prison <<https://www.newtelegraphng.com/court-sends-son-of-tambuwal-aide-2-others-to-prison/>> Accessed on 11th November 2021.

⁶⁹U. Gasser and C.N Maclay and J.G Palfrey, 'Working Towards a Deeper Understanding of Digital Safety for Children and Young People in Developing Nations.' (2010) Harvard Law School Public Law & Legal Theory Working Paper Series Paper, 19

⁷⁰Brian Simpson (n 63) 691.

⁷¹Anjan Bose and RenataCoccaro, Understanding African Children's Use of Information and Communication Technologies (ECPAT International, 2013) 6.

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impossible to accurately study and understand this crime.⁷² Global prevalence is estimated by identifying online offenders, victims that can be identified, reports to law enforcement, and identifying countries where abuse material is hosted and broadcasted.

The National Centre for Missing & Exploited Children (NCMEC) is a United States corporation whose mission is to help find missing children, reduce child sexual exploitation, and prevent child victimization. NCMEC works with families, victims, private industry, law enforcement, and the public to assist with combat child sexual exploitation. serve as the national clearinghouse and to provide a coordinated, national response to problems relating to missing and exploited children.⁷³ In 1998, with the help of a private donation and after starting to receive an increase in reports relating to the online sexual exploitation of children, NCMEC created the CyberTipline. The CyberTipline provides an online mechanism for members of the public and electronic service providers (ESPs) to report incidents of suspected child sexual exploitation. Since its inception, NCMEC's CyberTipline has received millions of reports concerning crimes against children. According to the CyberTipline, there were 21.7 million reports of child sexual exploitation made to the CyberTipline in 2020.

The 21.7 million reports of child sexual exploitation made to the CyberTipline in 2020 included 65.4 million images, videos and other files. These materials contained suspected child sexual abuse material (CSAM) and other incident related content.

CyberTipline reports uses geographic indicators determine the location where child sexual abuse material was uploaded. From these geographic indicators, it was reported that Nigeria had 39,052 reports of uploaded child sexual abuse material in 2019 and 46,610 reports in 2020.

6. NIGERIAN LAW ON ONLINE CHILD PORNOGRAPHY

Due to the use of internet for the distribution of child abuse materials, it is very important for legislation to be in line with international standard. Nigeria has a strong legal framework in relation to child pornography with several laws and policies that criminalise the actions of any person who publishes an obscene material. According to the Criminal Code Act, "An article shall be deemed to be obscene for the purposes of this Chapter if its effect taken as a whole is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."⁷⁴ The Act also states that "subject to the provisions of this Chapter, any person who, whether for gain or not, distributes or projects any article deemed to be obscene for

⁷²Interagency council against trafficking (IACAT). Online Sexual Exploitation of Children in the Philippines: Analysis and recommendations for Governments, Industry and Civil Society.

⁷³ National Center for Missing & Exploited Children(NCEMC), History, <<https://www.missingkids.org/footer/about/history>>Last accessed on16th November 2021.

⁷⁴ Section 233C.

the purposes of this Chapter, commits an offence punishable on conviction"⁷⁵ In the case of *Commissioner of Police, Midwest State v. Igene & Anor*. The accused were tried on charges of having in their possession for purposes of exhibition obscene printed matters (magazines) with obscene pictures which tend to corrupt morals and of exhibiting material that contained obscene pictures.⁷⁶

The Children and Young Persons (Harmful Publications) Act 1961 also prohibits harmful publications. According to Section 2(2) of the Act:

This Act applies to any book or magazine which is of a kind likely to fall into the hands of children or young persons and consists wholly or mainly of stories told in pictures (with or without the addition of written matter), being stories portraying:

- (a) the commission of crimes
- (b) acts of violence or cruelty
- (c) incidents of a repulsive or horrible nature in such a way that the work as a whole would tend to corrupt a child or young person into whose hands it may fall.

In addition, the Child Rights Act 2003 states that "a child shall not be used procured or offered for prostitution or for the production of pornography or for any pornographic performance".⁷⁷ Section 35 also prohibits the importation of any harmful publication.

The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, No 24 2003 also provides that "any person who procures, uses or offers any person for prostitution, or the production of pornography, or for pornographic performance; commits an offence and is liable on conviction to imprisonment for fourteen years without an option of fine."

The laws mentioned above contain provisions to combat the publication of indecent and obscene material. However, application of these obscenity laws may not provide relief for those children who are exploited and abused online. The Cybercrimes Act 2015 is the only legislation with direct provisions regarding child pornography in an online environment. The Act is the first legislation in Nigeria that deals specifically with cybersecurity issues and was enacted into law in March 2015. The Act harmonises the law and implements many of the substantive and procedural provisions of the Council of Europe Convention on Cybercrime. The Act provides a legal, regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria. In line with efforts on protecting children from online sexual exploitation and abuse, the Cybercrimes

⁷⁵Section 233D.

⁷⁶ Ayo Olanrewaju, *The Law And The Media In Nigeria* (Media Foundation For West Africa, 2012)

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⁷⁷ (s30(2)(e)).

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Act contains provisions regarding child pornography as contained in Section 23 as follows:

(1) Any person who intentionally uses any computer or network in or for

- a) producing child pornography
- b) offering or making available child pornography
- c) distributing or transmitting child pornography
- d) procuring child pornography for oneself or for another person
- e) possessing child pornography in a computer system or on a computer data storage medium

commits an offence under this Act and shall be liable-

(i) in the case of paragraphs (a), (b) and (c) to imprisonment for a term of 10 years or a fine of not more than N20,000,000.00 or to both fine and imprisonment; and

(ii) in the case of paragraphs(d) and (e) of this subsection, to imprisonment for a term of not more than 5 years or a fine of not more than N10,000,000.00 or to both such fine and imprisonment.

(2) any person who knowingly makes or sends other pornographic images to another computer by way of unsolicited distribution shall be guilty of an offence and upon conviction shall be sentenced to one year imprisonment or a fine of two hundred and fifty thousand naira or both.

(3) Any person who, intentionally proposes, grooms or solicits through any computer system or network, to meet a child for the purpose of:

- (a) engaging in sexual activities with the child;
- b) engaging with sexual activities with the child where-
 - i) use is made of coercion, inducement, force or threats;
 - ii) abuse is made of a recognised position of trust, authority, or influence over the child, including within the family; or
 - iii) abuse is made of a particularly vulnerable situation of the child, mental or physical disability or a situation of dependence;
- c) recruiting, inducing, coercing, exposing, or causing a child to participate in pornographic performances or profiting from or otherwise exploiting a child for such purposes;

commits an offence under this Act and shall be liable on conviction

(4) the term child pornography shall include pornographic material that visually depicts-

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

Although, the Act does not give a clear definition of child pornography such as found in some international instruments, the elements of the act are clearly outlined as required by Article 3 of the Protocol. In addition, the penalties provided under this section are adequate enough to act as a deterrent. Section 23 of the Act recognises the vulnerable nature of children and addresses adequately the risks associated with online sexual exploitation and abuse. However, other laws are potentially applicable to the address the crime as outlined. Traditional obscenity laws are still preferred in crimes involving child pornography

Thus, the effectiveness of Cybercrime in addressing online exploitation and abuse requires clear policy coordination and strategy in order to effectively provide the protection it was created to address. As it is, this researcher has not been able to identify any prosecution of cases arising from section 23 of the Act.

While cybercrime is continuously evolving, it takes time to update national criminal law to prosecute new forms of online cybercrime.⁷⁸ Effective legislation is essential in the prevention of child pornography. If legislation is not up to date, the investigation and prosecution of crimes is hindered. Due to the international nature of the crime, perpetrators can take advantage of any loopholes in legislation and base criminal operations in countries with lax laws.

The use of the term "child pornography" has been rejected by international organisations, law enforcement agencies, academics and child protection professionals because it minimises the serious form of violence, can place blame on the child rather than on the perpetrator of the offence and it risks conveying that what is occurring is consensual.⁷⁹ Despite this rejection the term child pornography is still featured in various legal instruments including the Cybercrime Act.

7. OBSERVATIONS

Legislation and policy cannot achieve change without an effective system in place to implement and enforce them. The following challenges present in the system hinder the effective investigation and prosecution of online child pornography cases:

- i. Speed of internet developments: While cybercrime is continuously evolving, it takes time to update national criminal law to prosecute new forms of online cybercrime.⁸⁰ Effective legislation is essential in the prevention of child pornography. If legislation is not up to date, the investigation and prosecution of crimes is hindered. Due to the international nature of the

⁷⁸Marco Gercke, *Understanding Cybercrime: Phenomena, Challenges And Legal Response* (ITU, 2012) 82.

⁷⁹UNODC, *Online Child sexual exploitation and Abuse* <<https://www.unodc.org/e4j/en/cybercrime/module-12/key-issues/online-child-sexual-exploitation-and-abuse.html>> Last accessed on 31st December, 2021

⁸⁰Marco Gercke (n 78) 82.

crime, perpetrators can take advantage of any loopholes in legislation and base criminal operations in countries with lax laws. Furthermore, the use of the term child pornography as contained in the Cybercrime Act has been rejected by international organisations, law enforcement agencies, academics and child protection professionals because it minimises the serious form of violence, can place blame on the child rather than on the perpetrator of the offence and it risks conveying that what is occurring is consensual.⁸¹ Despite this rejection, the term child pornography still features in various legal instruments including the Cybercrime Act.

- ii. Insufficient data regarding the scale of the problem: There is a lack of official statistics and accurate data on investigations and prosecutions of child pornography cases. Detailed evidence on the online exploitation of children in Africa is extremely limited, but it may be a notable and worsening problem in Africa given increases in internet access.⁸² In the course of this research, various attempts were made to obtain information from the Cybercrime Prosecution Unit of the Attorney General's office. Despite establishing contact, all queries remained unanswered. Also in November of 2020, the Nigerian Police Force unveiled a portal to report cybercrime activities in Nigeria. All attempts to access the website have been unsuccessful. These issues highlight the difficulty of obtaining relevant information on child pornography online.

8. RECOMMENDATIONS

In line with the above observations, the following recommendations are made:

- i. Regular reviews of existing laws: laws need to be responsive and able to adapt quickly. Criminal acts performed by perpetrators of online child pornography need to be addressed by existing laws. In order to avoid this scenario, it is necessary to continuously compare the status of provisions in the national law with requirements arising from the new kinds of criminal offences. For this reason, it is important for the term child pornography in the Cybercrime Act be amended to child abuse material in line with international standards. Although the use of the terminology used may appear insignificant, it will help encompass the ever evolving forms of child pornography on the internet if terminology aligns with international standards. In addition, as has been done in other jurisdictions, laws prohibiting obscene publications can be amended to also prohibit obscene material transmitted or downloaded through the internet.
- ii. It is necessary to obtain adequate data on the scale of the problem. Case studies on how law enforcement deals with online child pornography online would provide insight and identify gaps in investigation and implementation. In addition,

⁸¹UNODC (n 79).

⁸²African Child Policy Forum (ACPF), *Sexual Exploitation of Children in Africa: A Silent Emergency* (ACPF, 2019) 30.

national surveys done on children would identify and evaluate negative experiences so that an adequate response could be formulated.

9. CONCLUSION

Online child pornography has increasingly become a feature of the sexual abuse and exploitation of children globally. The rapid rate of development in digital technology has increased the opportunities to produce, distribute and view child pornography.⁸³ The influence of the internet has contributed to the accessibility of child pornography as well as the ease with which it is shared worldwide. Also, in addition to being a means of fulfilment of deviant desires, criminals use the images to profit from the unfortunate abuse and exploitation of children.

This paper explored the history of child pornography as well as the characteristics and elements of the crime. It also outlined the provisions of the Cybercrimes Act 2015 regulating child pornography in an online environment. The challenges faced in the investigation and prosecution of child pornography online were also examined before recommendations that would help to overcome these challenges were discussed.

⁸³National Rapporteur on Trafficking in Human Beings (n 39) 21.