



Children's Rights

**Laws,
Policies and
Practice**



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CHAPTER

1

***Is there an End to Child
Pornography?***

T.S.N. SASTRY

The well-being of children requires political action at the highest level. We are determined to take that action.

*—Declaration of the World Summit for Children,
30 September 1990*

INTRODUCTION

Change in the attitude of man for development is a welcome feature. Development has become a buzzword across the nation-states for the augmentation of economic, social, and cultural conditions of the international community. No doubt, the aspects of development, especially science and technology have a great impact to develop the products regionally, nationally and internationally. The all round growth in various

sectors, led man to evolve the most important aspect of human right is the communication technology.

Any aspect of development has to contribute for the progressive development of humanity. At the same time, the excessive use of it brings in disastrous results. For misuses of a few players, the entire society has to bear the loss and suffer with negative results. These activities will have wider ramifications and affect the apple cart of human rights in their realization as guaranteed to various players of international community.¹

Children being the most important players of society, the development, growth, concern, and future of theirs depend upon men. Adults in any society have a responsibility not only to mould the children as responsible citizens, but to protect them from all pervasive ill-effects including that of their cultural rights. However, the rapid growth of industrialization, urbanization, and the fourth phase of globalization of information society have brought in manifold problems to the survival and existence of children.² The expansion of Information and Communication Technology (ICT) has had a tremendous effect on the rights of children across the world. The unlimited accessibility of the internet and lack of control regimes, (especially in the area of social net working), mismatch between technology and legal systems mainly resulted in spreading the crime against children on the computer screen. In the contemporary era, every second a child's modesty is outraged for the sadistic pleasures of certain groups of people. The systematic exploitation of children ultimately brings in disastrous results in the growth and development of world community to achieve the tenets of peace and security as advocated by international law of human rights. The tender age of child exploitation is not arrested uniformly; it will certainly bring in catastrophic results in the all round future development of the humankind.

The increasing menace of child pornography, and the ill-effects associated with it and the impact that the world community is going to face, this chapter briefly examines the international standards on child protection, impact of science and technology, international, national legal scenario and the

responsibilities of states under international law in augmenting the rights of children.

CHILD PORNOGRAPHY : CONCEPT

The issue of what constitutes as child pornography is extremely complex. Because, standards applied in each society or country are highly subjective and are contingent upon different moral, cultural, sexual, social, religious beliefs that do not readily translate into law. Even if we confine ourselves to a legal definition of child pornography, the concept is elusive. Legal definitions of both "child" and "child pornography" differ globally and may differ even among legal jurisdictions within the same country. Lack of proper data regarding the production and distribution of materials of child pornography, and the shifting global niceties of production and usage and the development of technology, especially mobile technology are some of the important aspects³. Further, the employment of various words depending on the acts and the publication and circulation of material through internet also raises concern in defining the definition in accurate terminology.⁴

Apart from the above, the definition of child also varies between international and national legal systems. According to United Nations Convention on the Rights of Children, any person who is below the age of 18 years is a child. However, globally in the national jurisdictions it differs from 15 to 18 years, and further classified based on gender. In some countries, it is a male child below 15 years and female ranges between 16 to 18 years of age.⁵

Apart from the definitional differences in defining a child in various national legislations, the development of technology and its employment in different forms also makes it difficult to define what constitutes child pornography.⁶ Few definitions attempted by various international bodies amply makes it clear for the confusion that exist in developing a definition that suit to every act of child pornography.

According to the background paper of the International Conference on child pornography on the Internet, 1999 defined child pornography as, graphic material featuring naked or sexually active children used for sexual gratification. It also

maintained that, in the online pedophile community, the images have different functions beyond that of sexual gratification.⁷

According to the Special Rapporteur, child pornography on the Internet is a type of sexual exploitation of children that takes many forms, depicting a child 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.⁸ There may be one or several children, involved in sexual acts alone or with other children, with or without the participation of adults, who may or may not be visible. There may be highly repugnant images involving brutal anal or vaginal rape, bondage, zoophile, oral-genital sexual relations, or other degrading behaviour involving children of any age.

Virtual pornography is the production on the Internet of morphed or blended artificially created images of children involved in sexual activities. The realism of such images creates the illusion that children are actually involved.

In pseudo-infantile pornography or initiation pornography the models are recorded or photographed in child-like poses, staged with props to reinforce the impression of youth.⁹

According to Art 2 (C) of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, 2000*, child pornography means, any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes constitutes as child pornography.

According to Council of European Convention on Cyber crime, child pornography shall include pornographic material that visually depicts a minor engaged in sexually explicit conduct.¹⁰ According to the Committee on Crime Problems of Europe, child pornography constitutes by 'any audio-visual material which uses in sexual exploitation of children.'¹¹

According to Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 2007 of the Council of Europe, defines "child pornography" as any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes.¹²

International Criminal Police Organisation (INTERPOL) delegates define child pornography as "the visual depiction of the sexual exploitation of a child, focusing on the child's sexual behaviour or genitals."¹³

According to US Federal Law,¹⁴ child pornography is defined as any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct; or

- the visual depiction is a digital image, computer image, or computer-generated image that is, or
- is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
- the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Apart from the above differences in defining child pornography, there are some other inherent aspects coupled with the definition. In USA, the definition of pornography includes even harm-based. Since USA extends high regard for freedom of speech as promoter of this right to the world, it considers the child pornography from the perspective of preventing harm to child victims rather than censoring expression.¹⁵ New Zealand also made a similar reference through its *Films, Videos, and Publications Classification Act, 1993*.¹⁶

An examination of the above definitions clearly makes it clear that there is no universally acceptable definition exist defining child pornography. Further, as the differences exist between the nations in defining a child also is another impediment in framing an acceptable definition. However, for an easy understanding child pornography may be defined as, any video graphing of a child in obscene fashion, its publication or exhibiting the photos of children in any manner derogatory to the life, liberty, and privacy of a child up to the age of 18 years in electronic form.

At the same time, child pornography is distinct from child erotica. Child erotica, which means "any material relating to children that serves a sexual purpose for a given individual". Child erotica includes items such as toys, games, children's clothing, sexual aids, manuals, drawings, catalogues, and non-pornographic photographs of children. Child erotica is not illegal but frequently used by prosecutors as corroborating evidence in cases against child molesters or child pornographers.

CAUSES AND SCOPE OF THE PROBLEM

The causes are of wide range and multi-dimensional and varies from society to society depending on the economic, social and cultural disparities. In the developing countries, issues such as population, illiteracy, poverty, lack of education, malnutrition, etc., play a vital role. In developed world, threats, physical or bodily infirmity, cultural advances play a role in child exploitation. However, discrimination on grounds of sex and consideration of fair sex as demigods is a common phenomenon all over the world towards exploitation of girl child.

Among the various causes that may hamper the effective remedies to implement in the prevention of the crime of child pornography, many a times it constitutes a difficult task to identify the victims. In majority of the cases, the exploited children belong to orphans, destitute, street children and marginalised sections of the society, especially in the developing world. At times, even rich class adolescent may take part in such activities due to loneliness or under the influence of drugs or other intoxicating materials. Even if the parents comes to know of such activities they try to keep it secret considering their social status and impinge effect on the image of the children as well of theirs.

Another important factor is to identification of child abusers. The child exploiters are mostly invisible, as they represent a cross-section of community of the populace across the world including highly esteemed members.

However, the UN Special Rapporteur on the sale of children, child prostitution and child pornography; child sex

clients have identified the abusers as coming primarily from the following groups: pedophiles', preferential child sex abusers; irregular situational customers; local prostitute users; tourists; travelling businessmen; migrant foreign workers; military personnel; public workers in isolated places and others.

There are further characteristics associated with it. They are :

- *It is invisible:* Since many a times the exploiters are underground and may exploit street children and other children easily.
- *It is Mobile:* The production and publishing material changes from hand to hand, country to country, and region to region in quick span of time.
- *It is global:* While the gravity of the situation for children may vary from region to region or from country to country, reports show that this kind of child abuse exists in practically all corners of the world.
- *It is escalating:* Children being inimical to the acts of perpetrators and no demand for greater amount exists, *inter alia*, leads to a greater demand for younger sexual partners. Children used to be substitutes for adult prostitutes; now, however, there is marked increase of preference for children over adults, pushing up the worth of children in the pornography industry.
- *It is a highly profitable business:* This is borne out by the fact that it involves not only *ad hoc* or individual "entrepreneurs", it is often conducted by international profiteers using systematic methods of recruitment within a highly organized syndicated network, which is often also involved in other criminal activities such as drug dealing¹⁷.
- Sex tourism one of the most horrified contributing factor.
- Every year nearly half a million children are dying due to their exposition to internet and communications.

Apart from the few issues discussed, there are innumerable facets and reasons that contribute for the exploitation of children.¹⁸

IMPACT OF SCIENCE AND TECHNOLOGY

Science and technology being component part of human rights, their advancement will bring in numerous benefits to humanity. Their progression will help in realising economic, social, and cultural rights of humankind and promotes harmony in bridging the differences whatsoever may be. However, any abuse of it results in upsetting the apple cart of peace and security, and in realization of the basic rights of life, liberty, freedom of individuals. Further, the stakes of few individuals would result in bringing problems to the vulnerable groups of people.

The misuse of technology only has resulted in the promotion of child pornography worldwide. The industry is experiencing a rapid development in cheap, user-friendly encryption software, employed by child pornographers. Decoding the files is often extremely difficult for law enforcement agencies. To make contacts with other pedophiles and child molesters, to distribute home-made and commercial child pornography internet became the common medium employed by the traffickers around the world. Any individual may now trade and/or sell images of almost any kind from one end of the world to the other.

Even if law enforcement officials discover the image, the ability to distribute it may not be impaired. Once an image is introduced on the Internet, due to advancement of technology, any number of users can download it making transmission increasingly faster. High speed modems of 28,800 bits per second (BPS) are currently available, but soon it will be possible to boost that capacity to 550,000 BPS via high speed modems using cable television wire. The invention of further capacity is inevitable as the current rate of transmission, downloading of images is time consuming and therefore costly.

Computer bulletin boards can be set-up exclusively to exchange information about sexual interest in minors or

specifically to allow for running conversations by computer on such subjects. Monitoring of such sex-oriented bulletin boards has indicated that these boards receive thousands of calls. In most countries, neither licenses nor registration for bulletin boards is required. The invention of bulletin boards helps the users to reproduce repeatedly without any loss of quality. Letter writing by pedophiles, extensive in the past, currently replaced by much more rapidly transmitted computer conversations.

Computers, cell phones now come with built-in microphones, speakers and with cameras became handy for the exploitation of children, and pose a challenge to law enforcing authorities. Monitors also frequently come with built-in speakers and microphones. This equipment will enhance the capacity for production and distribution of home videos. It is easy to alter the computer images through advanced microchips used in cell phones. For example, it is not difficult to add objects to an image. One can also delete objects or parts of a photo through photo software. Through this software, an individual may superimpose a girl child's face on an adult's body, erase pubic hair or facial hair, and reduce and minimize breasts so as to make adult images look like children.

While, it is still not all together possible to create an entirely computer generated images that appear lifelike, it is, however, possible to insert digital images of a person into a video in which they have not appeared. Technology will soon be able to facilitate the creation of lifelike child pornography without using any real children at all. The advancement of on-line capability greatly increases the possibility of extended contact—up to hundreds of hours—with children, by child molesters or pedophiles. Sex exploiters have easy access to children *via* computer—especially lonely or troubled teens—by tuning into chat sessions, such as Internet Relay Chat, and making contact with children.

Apart from the few disadvantages discussed above, the advancement of science technology without proper legal regulation would result in many more crimes in the exploitation of rights of innocent children. The technological developments, many a time, pose a problem to develop a holistic definition of child pornography apart from the legal penumbras.

LAW AND CHILD PORNOGRAPHY : INTERNATIONAL AND NATIONAL PERSPECTIVE

From ancient to modern periods, children have been considered as innocent persons and need to have a helping hand for their all round development. To protect, promote and to realise the rights of children at all times, a number of legal provisions are adopted both in the international and national dictum.

International Legal Standards

The League of Nations in 1924 for the first time to tackle the menace of child pornography and to develop a uniform law internationally adopted a declaration on the Rights of the Children. The declaration establishes children's rights to means for material, moral and spiritual development; special help when hungry, sick, disabled or orphaned; first call on relief when in distress; freedom from economic exploitation; and an upbringing that instills a sense of social responsibility.¹⁹

In continuation of the efforts of the League, the United Nations through the Universal Declaration of Human Rights urged the states to protect the children with special protective measures.²⁰ The 1959 declaration apart from the recognition of number of rights to children, clearly reiterates the duty of the nation-states to health care and special protection.²¹ The Covenants on Civil and Political Rights²² and Economic, social and Cultural Rights²³ reiterate the obligations of states to discharge in augmenting rights of children. In 1973, ILO enhanced the age of employment of children to 18 years in hazardous employment of any avocation in order to extend protection and to halt the exploitation of the tender age of children.²⁴ The Convention on the Elimination of All Forms of Discrimination against women, 1979 explicitly extended protection to girl child from any kind of exploitation with a request to states parties to take affirmative action to prevent any kind of abuse of their tender age.²⁵ It also declared the year 1979 as the International year of children for the promotion of their rights.

In 1989, the UN adopted legally binding convention on the rights of children. It explicitly made an appeal to the states

parties, to take necessary administrative, legislative steps to protect children from any form of abuse including sexual abuse and reiterates the need for special protection and care.²⁶ The ILO through another convention urged the states for immediate action for the elimination of all worst forms of child labour the international community adopted a number of legal instruments.²⁷ However, in order to bring in legally enforceable mechanism and to fix responsibility on the states to take necessary steps and corrective measures to arrest the violations on the growth and development of children, in 2000 the General Assembly adopted an additional protocol directly addressing the issue on the sale of children, child prostitution, and Pornography.²⁸ The Protocol explicitly prohibits of pornography in any form, and recognises it a serious extraditable crime of the offenders. As a follow up to take stock of the situation of the rights of children across the World, in 2005 the General Assembly called a special session on children. The leaders of the world expressed their determination to make the world free from offences against children in any form including pornography the cruelest one and to build a healthy child centered environment to lead a healthy life by every child of the world. The Human Rights Council adopted a number of resolutions urging the states to crack sternly on the child abusers.²⁹

Apart from these efforts, the UNICEF, which is the main organ, concerned with the protection and promotion of children adopted a number of resolutions, and guidelines for the protection of children including training manuals for the laws enforcing authorities.³⁰ In association with the nation-states, it has taken an active role in the organizing the world congress on the sexual exploitation of children³¹ and gave a clarion call to states to take serious steps to comply with the provisions of Child Rights Convention, especially to prevent all forms of sexual exploitation and sexual violence that is directed against children. This conference along with evolving a number of legal perspectives gave impetus to the role of civil society to undertake the responsibility in preventing sexual abuse of children.

INDIAN LEGAL SCENARIO

In India, there is no explicit definition in any of the laws dealing with child pornography. However, it is regarded as a serious crime under various laws of the country including the Constitution. Article 23 of the Constitution which generally prohibits traffic in human beings and other forms of forced labour, is normally employed in arresting the criminals against child pornography. The Directive Principles of State Policy explicitly directs the state to protect the tender age of children and to provide a healthy environment where in children can grow without any kind of exploitation that affects the dignity of childhood.³² *The Information Technology Act, 2008* is the only law, which makes it an offence of production, transmission, and browsing of obscene materials. According to the provisions of the Act any first time offender is punishable with an imprisonment of three years and a fine up to three lakh rupees and a for a subsequent offence it may extend to five years of imprisonment and a fine up to five lakh rupees.³³ In tune with the provision of the IT Act, through an amendment the Indian Penal Code brings electronic media also under purview of electronic documents.³⁴ However, if the intention and motive of such document transmitter is not corroborated with the above provisions of the law then the chance of punishing the offender becomes a rarity.³⁵ Further, the interpretation of Judiciary that viewing obscene material in private does not constitute an offence under section 67 of the Information technology complicates things for the prevention of cyber pornography in the absence of an exclusive definition.³⁶ The Child Rights Commission Act, 2005 state the objectives of the commission to eradicate child pornography, it has not made any explicit provision dealing with the child pornography in general or internet.

CONCLUDING OBSERVATIONS

No doubt everyone in the world unanimously agree with one voice, children being the gift of God and future generations

of the World, they need to be protected from all types of exploitation, especially sexual exploitation in whatever form it may be. The UN and the member states adopted a number of measures to prevent child pornography. However, the assertion that they made in adopting the legal documents vary in their implementation perspective. The definitional differences defining child pornography is a major obstacle in arresting it. The UN, taking into consideration the magnitude of the problem in spite of a plethora of international legal instruments, need to adopt a comprehensive definition to cover all types of situations of sexual exploitation of children including cartoon pornography and child erotica. A broad definition suitable to all situations will certainly drive the perpetrators to induce children for their selfish motives.

As the national context is concerned, the Government of India needs to adopt a uniform definition of child. The different definitional perspectives of child in various laws, lead to confusion in dealing with the issues of children. *The Commissions for Protection of Child Rights Act, 2005* be amended to suitably define child pornography and empowering the national and state child rights commission to deal with the issue of child pornography in a strict perspective. As a party to child rights convention, and optional protocol on prevention of sexual exploitation of children and other human rights instruments, the Government needs to compulsorily introduce human rights education in all types of education coupled with moral and value-based principles.

Apart from the governmental efforts, the member of the civil society needs to be vigilant in condemning all types of pornography especially child pornography. Such a cohesive act will alone develop a healthy society. As rightly observed by Nelson Mandela, "Safety and security don't just happen; they are the result of collective consensus and public investment. We owe our children, the most vulnerable citizens in our society, a life free of violence and fear."

The above words of a great leader of modern era of human rights, clearly advocate the responsibility of the contemporary society owes to end the cruel and degrading treatment to our future citizenry, namely, the children of today's world.

NOTES AND REFERNECES

1. Mary Kay Camille P. Andal, What is My Role in Nation-Building as a Child of an Expat Pinoy; <http://www.mybpinomag.com/images/pdfbepinoy/08ESSAY1MaryKayCamilleP.Andal.pdf>
2. Steven Hick and Edward Halpin, "Children's Rights and Internet", Vol. 575, 2001, *Annals of the American Academy of Political and Social Sciences* at 59.
3. Georgiann, G. Greece and others, A report on Child Pornography, An International Perspective Submitted by ECPAT, 1996.
4. The terms generally employed to describe child pornography are: paedo-pornography, pedophilia, infant pornography, juvenile pornography, pseudo-infant pornography, simulated pornography, virtual pornography, online sexual abuse and pornography, child erotica, etc.
5. For example in India itself, a number of differences are found in various legislations.
6. Child erotica which is display of images of children or graphical representation of children either half naked/sexually dressed/naked with an emphasis on sexualizing the child, there are doubts persists whether such depiction of images of a child/child toys constitutes as part of child pornography or not.
7. *Supra note 2* at pp. 61-62.
8. Najat M. Maalla of the UN on Sale of Children, Child Prostitution, and Child Pornography.
9. UNGA A/HRC/12/23;13 July, 2009, p. 7.
10. CETS NO. 185, Art 9 2(a).
11. Council of Europe, Recommendation R (91) 11 and the Report of the European Committee on Crime Problems, 1993.
12. Council of Europe CETS No. 201; The Convention also contains a provision prohibiting the solicitation of children for sexual purposes (also known as "grooming" using information technologies).
13. Interpol Recommendations on Offences Against Minors, INTERPOL 61st General Assembly, 1995.
14. 18 U.S.C. §2256.
15. Ann Wolbert Burgess, Children Traumatized in Sex Rings, Report of the National Centre for Missing and Exploited Children, March 1988.
16. Act No. 93, 1993 see section 3(B).
17. A look into some of the statistics clear reveal the picture: Every second—\$ 3,075.64 is spent on pornography in which case about half of it on child Pornography. Every second—28, 258 Internet users are viewing pornography. In this, about 16,000 are viewing child pornography. Every year at least a minimum of one million children are introduced to the internet for sexual purposes. U.S. Department of Justice: Post Hearing Memorandum of Points and Authorities, at 1, *ACLU v. Reno*, 929 F. Supp. 824 (1996).

18. For the varied reasons see n.3, n.10, background paper of ECAPT for World Congress I on Child pornography, 1996.
19. This declaration was adopted basing on the initial draft written by Eglantyne Jebb the founder of the Save the children in 1923.
20. Art 25(2) makes an explicit reference to children. It guarantees special care and assistance to all children born in or out of wedlock on equal basis without any discrimination.
21. UN GAOR 1386 (XIV), 10 December 1959.
22. Apart from all the civil and political rights, Art. 25 of the Covenant makes an explicit reference to the protection of child rights.
23. Art 10 (3) impose an explicit obligation on the states to extend all kinds of protection for the protection of children and young persons without any discrimination, apart from other rights.
24. The Convention (138) wording though refers to industrial employment, since pornography is much more dangerous to the health, safety of children, and also constitute as an industry through its commercial activity, the wording of the convention need to be inferred to this activity as also part of industrial activity.
25. UN GAR 34/180, December 1979.
26. Convention on the Rights of the Child 1989, UN GAOR 33/25, November 20, 1989, see Articles 19 and 20.
27. ILO convention 182, 1999.
28. UN GAOR A?RES?54/263, May 25, 2000.
29. The HRC and its predecessor Human Rights Committee adopted a number of resolutions on this subject, see the website for a detailed discussion and resolutions.
30. www.unicef.org
31. The First World Congress was held at Stockholm in 1996, which formulated the sexual exploitation of children as "A sexual exploiter is someone who unjustly profits from a certain disequilibrium of power between himself and a person less than 18 years of age in the hope of sexually exploiting that person either for profit or for personal pleasure." Followed by the first to review and to evolve further steps the Second Conference was held in 2001 in Yokohama and the third in Brazil in 2008. For the comprehensive report of the third conference http://www.ecpat.net/WorldCongressIII/PDF/Publications/ECPATWCIIIReport_FINAL.pdf
32. Article 39(e) and (F).
33. Section 67-B of the IT Act, 2000.
34. Section 29(A) of IPC inserted in 2000.
35. Section 35 of IPC which speaks about the intention and motive of the transmitters need to be examined in each case. Section 292 deals obscenity and pornography, however, it does not cover online obscenity and further the exceptions provided in it many a times makes it difficult for the prosecution to substantiate their cases.

36. In 2010 the Bombay High Court interpreting the provisions of section 67 of the IT Act observed that "Simply viewing an obscene object is not an offence," Justice Tahilramani said. "It becomes an offence only when someone has in possession such objects for the purpose of sale, hire, distribution, public exhibition, or putting it into circulation. If the obscene object is kept in a house for private viewing, the accused cannot be charged (for obscenity)." *Cyber Lawyer*, 25 November 2010, <http://www.cyberlawtimes.com/viewing-porn-not-a-crime-rules-mumbai-high-court>. A similar view was held by High Court of Karnataka in 2008.