

Children's rights, the digital era and freedom of expression: an analysis from the African perspective

Executive summary

This working paper reviews the intersection between child's rights, the digital era and freedom of expression from an African perspective. Commencing with a theoretical framework in which the provisions of the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are detailed, the relevance of the 4 'P's as a mode of analysis is applied to the variety of issues that link children's rights and digital technologies. The second chapter outlines a series of diverse considerations that might be regarded as African specific. These range from equity, gender and cultural factors, to questions about who is a child and the inappropriate use of the internet in intercountry adoption. Some regional specificities relating to regional governance and child hotlines are also mentioned.

Chapters 3 and 4 deal broadly with the regulatory environments in selected case studies drawn from the continent, and some examples of good practice. In determining good practice examples, particular care was taken to focus on a variety of countries so that South Africa (where there is comparatively much more literature) did not predominate. Best practice included best practice in international co-operation, in intersectoral governance structures, in self regulation, and in legislative drafting.

Chapter 5 proceeds beyond internet, broadcasting and media law to examine the role of mainstream criminal and civil law, especially the law of tort (or delict). Case studies are provided to illustrate the impact upon children. Concerns regarding holding children liable in both criminal and civil law are articulated, and a restorative justice response is advocated instead.

Chapter 6 contains a synthesis of individual recommendations flowing from the study.

The work as a whole proposes a number of further areas for both research and for enhanced multi- sectoral collaboration, noting that there is a dearth of literature which is specific to children's use of digital media in Africa. Since the vast preponderance of existing literature has a strong western bias, and because the internet is developing in a different paradigm in Africa (eg through mobile phones), customised research and evidence is required to inform policy makers and legal professionals who are active in this area.

Chapter 1 Theoretical Framework and backdrop to the study

1.1 Introduction

The rapid development of the Internet as a mass phenomenon has presented children with unprecedented opportunities to achieve their rights to learn, express themselves and participate in their communities in meaningful ways. It has also created new and sometimes threatening conditions in which children are or can be abused or exploited, with varying incidence and severity. The UN Secretary General's Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography points out,ⁱ "[t]he Internet brings tremendous positive opportunities, in particular for children and young people. Although the Internet may not represent a

determinant per se of the sale and sexual exploitation of children, it does nonetheless operate as an instrument for offenders, multiplying the possibilities of obtaining, distributing and selling child abuse material and facilitating access to children in all parts of the world, and consequently promoting the growth of this phenomenon”.

This is no less so for Africa than is the case in the developed world. As at 30 July 2014, it was estimated that 160 million Africans were connected to the internet. ⁱⁱ The African subcontinent has experienced an unprecedented uptake of technology, especially mobile telephony. Between 2003 and 2008, the number of cell phone subscriptions in Africa grew from 11 million to 246 million—faster than anywhere else in the world, according to the ITU. ⁱⁱⁱ And while less than 3 percent of rural areas in Africa have landline telephone connections, the ITU has estimated that over 40 percent of these areas have cell phone coverage. Digital access through mobile technology is growing with leaps and bounds.

Dominant concerns amongst researchers which emanate from the literature and which are pertinent to children include online safety^{iv}, the inappropriate use of digital media (sexting, cyberbullying,^v stalking, denigration^{vi} or outing^{vii}), concerns related to children’s privacy and the privacy of their personal information,^{viii} the inappropriate targeting of children as consumers, and the use of digital media for incitement (eg to self harm), for hate speech and for propaganda.

From the vantage point of the benefits of ICT for children and teenagers in Africa, the literature points to the educational role of digital media, especially in resource poor contexts,^{ix} enhanced access to information for children, benefits for increasing public (civic) participation of children, and the optimal use of ICT for development (ICT4D).^x The latter includes the use of ICT in birth registration, in the payment of social cash transfers which benefit vulnerable children, and in capturing and distributing information necessary to improve children’s access to health care.

A summary of the impact of digital media upon children is provided in the Table below developed by EUkidsonline, and quoted in (find on desktop).

	Commercial	Aggressive	Sexual	Values
Content (child as recipient)	Adverts Spam Sponsorship Personal info	Violent/hateful content	Pornographic or unwelcome sexual content	Bias Racist Misleading info or advice
Contact (Child as participant)	Tracking Harvesting Personal info	Being bullied, harassed or stalked	Meeting strangers Being groomed	Self-harm Unwelcome persuasions

Conduct (child as actor)	Illegal downloading Hacking Gambling Financial scams terrorism	Bullying or harassing another	Creating and uploading inappropriate material	Providing misleading info/advice
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Freedom of expression of children and the digital media in African context has received limited attention by scholars to date, as will be explained below.

1.2 Freedom of expression

Freedom of expression is regarded as part of the right to human dignity. The latter is non-derogable in South Africa's constitution, even in emergencies, whereas freedom of expression can be curtailed in the case of emergencies. There are many countries in Africa where freedom of expression is de facto extremely limited, eg Zimbabwe and Eritrea. Anti-government bloggers have reportedly been jailed in Ethiopia. Recent homophobic legislation in other African countries renders aspects of the right to freedom of expression nugatory (eg Uganda).

Generally, freedom of expression as a cardinal human right is enshrined in all the major international human right treaties, as well as in regionally relevant treaties such as the African Charter on Human and Peoples' Rights^{xi} (the international law specifically relevant to children's rights to freedom of expression is discussed in 1.3 below).

It has been stated that children's rights issues concerning digital media function within a predominantly liberal discourse

"which posits that the Internet should not be regulated if this undermines freedom of expression, that it cannot easily be regulated through law, and/or that there are higher priorities than those of children's interests. These include, from media reform activists, principles of 'net neutrality' and Internet 'generativity' and, from business interests, policies for market freedom and economic competitiveness. In this context, children's rights and protection measures are readily viewed as a threat to adult rights or as a secondary complication in the larger debate over citizens' rights versus the rights of the state or commerce"^{xii}.

However, there is now widespread acceptance of the need for some form of Internet governance, a wholly libertarian position (accommodating even illegal content) is no longer acceptable.^{xiii} Child protection commitments demand an ongoing engagement with the protection of children from abusive material reproduced digitally. At the same time, sceptics remain concerned about overregulation of the internet in the guise of child protection: "various acts of state or commercial intrusion or censorship [can] occur, whether deliberately (by politically motivated governments or for commercial exploitation) or inadvertently (by incompetent systems of Internet filtering or surveillance)." ^{xiv}

Freedom of expression of teenagers often arises – has often arisen – within the context of the school environment, not unsurprising given that as school is more

often than not the dominant environment for social interaction of teenagers. Freedom of expression of scholars and students has in first world countries such as the US traditionally been accorded a high level of tolerance.^{xv} A fairly high standard of limiting school's restriction of student expression to that which would "materially and substantially disrupt the work and discipline of the school" was set as early as 1969. However, recent US case law has grappled with applying pre-internet standards to offensive material in the digital era, especially where this has been generated outside the school property.^{xvi} Authors argue that the South African constitutional court decision in *Le Roux v Dey* (discussed substantively below in chapter 5) deviates from the US approach. In *Le Roux*, the court did not apply the objective standard of "substantive disruption of school discipline" as the measuring yardstick to determine the constitutionality of the students' conduct. The Constitutional Court set a subjective test –the injured feelings of the target of the communication - as the high standard by which the defamatory consequences of insulting or degrading action or content should be measured. In this case, it was not relevant whether the injurious or harmful expression originated in the school or externally. The extent to which this decision might be held up as a precedent in other African countries cannot be determined.

Namibian police training materials on women and children, developed in 2013 (copy on file with the author), contain a brief section on cyberbullying and child protection and the following notable point is made in the context of the inappropriate use of digital media in school settings:

"However, teacher misbehavior, especially towards learners, should be seen in a serious light as this is also an abuse of power. Where a teacher is a possible perpetrator, education authorities should be notified so that the necessary precautionary measures can be put in place (eg suspension pending finalization of the investigation)".^{xvii}

Given the high incidence of teacher misconduct in education settings in Africa,^{xviii} this warning can be of use to educator disciplinary authorities.

1.3 Children's rights

International children's rights are commonly analysed with regard to the 4 P's – protection, prevention, provision and participation. This is often done in relation to the Rights contained in the United Nations Convention on the Rights of the Child (UNCRC) (1989),^{xix} but can equally apply to the regional document, the African Charter on the Rights and Welfare of the Child (ACRWC), discussed in more detail hereunder.^{xx} All four 'Ps' bear relevance in the context of teenagers and freedom of expression. This point can be elaborated as follows:

- Protection: mechanisms aimed at shielding children from harm, such as removal of offensive online content, child pornography, filters (whether installed by parents and caregivers, or ISPs), reporting mechanisms such as hotlines, prosecution of perpetrators of online abuse, development of appropriate legislative responses
- Prevention: mechanisms enabling children to protect themselves, awareness raising and education programmes dealing with child online safety, teacher education

- Provision: provision for children’s access to recreation, play and leisure^{xxi}
- Participation: children use of digital media for expressing their views, for participating in online chatrooms, for peer to peer networking, for social media connections, for participation in civic and other initiatives

Mention must be made of the well known concept of children’s **evolving age and maturity** (article 5 of the CRC), which is of special relevance to teenagers as they near adulthood. The international child rights community has increasingly recognised children’s capacity to make independent decisions about their day to day lives, and has recognised these capacities at ever lower ages. Granting children rights to make decisions about contraception and about medical treatment are cases in point.^{xxii} The proven capacity of teenagers to interact using social media exemplifies their ability to interact with the world as maturing ‘near-adults’.

1.3.1 Rights linked to freedom of expression

The CRC provisions contain express recognition of the right to participate: the child’s right to express his or views and to have them accorded due weight in accordance with the age and maturity of the child is regarded as constituting the ‘soul’ of the CRC in recognising children as independent bearers of human rights. Additionally, children’s right to freedom of expression is encapsulated in article 13 of the CRC. The CRC Committee explains the relationship between the child’s right to be heard and the right to freedom of expression thus:

“The right to freedom of expression embodied in article 13 is often confused with article 12. However, while both articles are strongly linked, they do elaborate different rights. Freedom of expression relates to the right to hold and express opinions, and to seek and receive information through any media. It asserts the right of the child not to be restricted by the State party in the opinions she or he holds or expresses. As such, the obligation it imposes on States parties is to refrain from interference in the expression of those views, or in access to information, while protecting the right of access to means of communication and public dialogue. Article 12, however, relates to the right of expression of views specifically about matters which affect the child, and the right to be involved in actions and decisions that impact on her or his life”.(CRC General Comment no 12 par 81).^{xxiii}

The link to the right to freedom to receive and impart information (article 17) of the CRC is detailed by the CRC Committee as follows:

“Fulfilment of the child’s right to information, consistent with article 17 is, to a large degree, a prerequisite for the effective realization of the right to express views. Children need access to information in formats appropriate to their age and capacities on all issues of concern to them. This applies to information, for example, relating to their rights, any proceedings affecting them, national legislation, regulations and policies, local services, and appeals and complaints procedures (CRC GC no 12, par 82).

In principle ICTs can facilitate more equitable access to information, which can have a positive impact, for example on health and education outcomes.^{xxiv} ICT can facilitate children’s ability to participate in matters which affect them generally, including a very wide array of actions and decisions which affect their lives.

1.3.2 Protection

Article 19 of the CRC deals with the protection of children from all forms of abuse, neglect, violence and maltreatment, whether inflicted by care-givers or parents or others having responsibility for the child. The broad sweep of article 19 is complemented by specific protection against sexual exploitation contained in article 34 of the CRC, and by the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2000). Most national and international effort in the context of ICT and children's rights has gone into children's protection rights: protecting children against online sexual abuse has justifiably been one of the most important policy goals of online child protection since the earliest days of the Internet, and the subject of extensive international efforts in law enforcement, detection through various technological means, self-regulatory initiatives on the part of industry through an international network of hotlines, and wide international cooperation on 'notice and take down' procedures to make the Internet a safer place. Protection of children has also been addressed through self-regulatory initiatives to promote the use of parental controls and filters on devices and platforms, complemented by the development of advisory classification and labelling schemes.^{xxv}

At the same time, Livingston and O'Neill argue that the wholesale elimination of risk is neither feasible nor desirable: "society does not wish to keep children forever in a 'walled garden', recognising that they must explore, make mistakes and learn to cope in order to develop into resilient adults and responsible digital citizens. This leaves policy makers with the difficult balancing act of supporting and empowering children online, given that increased use and higher levels of digital skills also mean increased exposure to risk. Tricky issues include determining when rights to participate and to enjoy freedom of expression, thought, and association must be limited by children's responsibilities towards others, and by their best interests."

A further question that arises, according to Livingston and O'Neill, is who is best placed to determine what is in the child's best interests - parents? educators? Governments? Network administrators or servers? As they rightly point out, young people and children may themselves have views to proffer on this question. In this context it has been alleged that "parental tools (filters, monitoring software, age ratings, etc.) are still flawed in design and operation (e.g. they over-block legitimate content, and work poorly for user-generated content)".^{xxvi}

1.3.3 Privacy

There are rights-related concerns regarding children's privacy in the digital environment: they relates, amongst other, to privacy of personal information, reputation related issues and cyberbullying (which can be at the same time a protection issue). It is contested where the responsibility lies to protect children against these risks: should the main players be industry, parents, child welfare or law enforcement agencies or children themselves?

Article 16 of the UN CRC protects children from unwarranted interference with their privacy as well as from unlawful attacks against their honour and reputation. This potentially pits the rights of one child – the victim of an attack on his or her honour in a social media medium – with the rights of another child (the creator or purveyor of the offending materials). A balancing act might be required to determine the

appropriate response; but it should be borne in mind that because of their youthful age, children might experience attacks on their honour or reputation more deeply than adults who have “weathered the storms of life”.

Badenhost for instance, alleges that the impact of cyberbullying can be more severe than physical bullying: it can be very public, and the whole world can witness your humiliation. Cases of suicide, depression, and self-injury have been reported. In the United Kingdom, an 18 year old girl was sentenced to imprisonment in 2009 after cyberbullying and threatening another girl for four years.^{xxvii}

Responses to transgressions in such a way as to optimise children’s rights (both victims and perpetrators) is taken up in the concluding chapter of this paper.

Another current debate concerns the ‘right to be forgotten’, coming to the fore in litigation against Google in this year. Whilst legislation has been developed since the late 1800s to provide for sealing of juvenile court records once children graduate into adulthood, or expungement of records of offences committed whilst still a child,^{xxviii} the current internet environment does not offer the same right for children to make mistakes which they do not have to carry with them in their adult life. It is difficult to offer practical recommendations about this concern, as deletion of material that has ‘gone viral’ may be impossible. Education and preventive measures seem to provide the only option.

1.3.4 Right to learn and to play, leisure and recreation

The internet also provides huge opportunity for the fulfilment of children’s rights: their right to play leisure and recreation (article 31 of the CRC), for instance, as well as their right to education. Information and learning are not just valuable to children, but are indispensable to the process of maturation and the acquisition of the necessary digital skills that develop the ‘child’s personality, talents and mental and physical abilities’ and prepare young people ‘for responsible life in a free society’ (article 29 of the CRC).

1.3.5 The African Charter on the Rights and Welfare of the Child (1990)

The African Children’s Charter, currently ratified by 47 of the 53 member states of the African Union, contains strong guarantees for children’s rights to freedom of expression.

Article 7 provides as follows:

Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

The right is closely linked to the right to freedom of thought, conscience and religion (article 9 of the Charter), as well as the right to privacy (article 10). The Charter provides for these in the following terms:

Article 8: Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.

Article 9:

- (1) Every child shall have the right to freedom of thought, conscience and religion.
- (2) Parents and where applicable legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities and best interests of the child.
- (3) State parties shall respect the duty of parents, and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to national laws and policies.

Notable here – and differing from the CRC formulation - is the addition of a guiding role for parents in the child’s exercise of his or her right to freedom of thought, conscience and religion. ^{xxix} This formulation is in accordance with key international policy approaches to regulatory environments around children and digital media, namely that parents in the first instance provide the necessary guidance and control over digital content, rather than state authorities or other regulatory agencies. This also accords with commonly held views about children’s place within the family in African context (see to article 18(1) and article 20 of the Charter).

Reinforcing the role of parents alluded to in article 9(2) above is the protection of children’s privacy (article 10) which, too, is subject to parents or guardians having the right to exercise reasonable supervision over the conduct of children, unlike the formulation of this right in article 16 of the CRC, which does not allude in any way to a parental role.

Of note, potentially, is article 21 of the Charter, which is entitled “protection against harmful social and cultural practices”. The text of subarticle 21 (1) reads that ‘State Parties to the present charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child...’.

Usually, harmful social and cultural practices are those which, in African context, affect the life, health and wellbeing of the child (such as FGM, accusations of witchcraft, or of those which emanate from gender discrimination (son preference, disinheritance of girls and so forth). Conventional definitions of harmful practice have focussed exclusively on traditional and customary practices. ^{xxx} However, the extent to which children require protection from practices which could be described as harmful social practices which are linked to their (or others) use of digital technology has yet to be explored. This is a potential gap.

Article 31 of the Charter, providing for the responsibilities of the child, is unique in international human rights law. It provides, amongst others, that children have responsibilities towards their family and to society. They must preserve and strengthen African cultural values in their relations with other members of society, in the spirit of tolerance, dialogue and consultation, and they are required to contribute to the moral wellbeing of society. This particular provision mitigates against any view that freedom of expression in the context of children’s use of digital media is untrammelled in African context: rather, the child’s right to freedom of expression must be balanced with responsible and non-confrontational dealings with other members of society. With rights come responsibilities.

The African Children’s Charter provides for the Committee of Experts on the Rights of the Child to receive communications concerning violations of children’s rights by member states to the Charter. To date, three communications have been received but none concerns a violation of the right to freedom of expression.

1.4 The African Commission on Human and Peoples’ Rights

The African Commission, which oversees the implementation of the so-called mother treaty of the African Children's Charter, the African Charter on Human and Peoples' Rights, has a strong tradition of endorsing and standing up for the right to freedom of expression. It has appointed a Special Rapporteur on Freedom of Expression (with several extensions of the mandate having been agreed), and adopted the Declaration of Principles on Freedom of Expression in Africa at its 32nd Session^{xxxii}. Several decision on communications handed down by the Commission over the years have dealt with freedom of expression.^{xxxiii} The Commission has recently approved a Model Law on Access to Information, which was prepared under the auspices of the Special Rapporteur on Freedom of Expression.

The African Committee of Experts on the Rights and Welfare of the Child has made public its desire to draw inspiration from the jurisprudence of the Commission in its own work.^{xxxiii}

Chapter 2: Diverse aspects of the context relative to children, digital communication and freedom of expression in Africa

2.1. The equity issue

As Unicef-IRC identify,^{xxxiv} there are obvious risks that in advocating increased digital literacy in Africa, equity concerns will surface. This entails some children will join the fast modernising world whilst it is almost inevitable that others will be left behind. As markets continue to target the middle and upper classes, the poor and marginalised will be excluded and further marginalised. Similarly, those in far flung and remote places will be last to be reached, and children and teenagers in situations of vulnerability (those in refugee situations, children with disabilities, nomadic and indigenous peoples for instance) will become further disadvantaged. Because of their workload and the families' concern about preserving their reputation, girls can be among the most isolated people in society. Unicef-IRC cites informants who record that girls go home immediately after school to attend to chores, leaving computer laboratories at school frequented only by boys.^{xxxv}

Role players working on the children's rights and the ICT domain in African countries are not ignorant of this challenge. It is recorded that equity and access is not something that will occur organically, it has to be explicitly part of policy and a shared commitment.^{xxxvi} Otherwise there is a risk that only some children will be enabled to exercise their freedom of expression in the decades to come, further excluding those without access from what will then be mainstream modes of expression of ideas and connecting with others.

The African Union has recognised the potential marginalisation of girls in IT and addressed this with specific programmes targeting girls - the ITU Regional Office for Africa in collaboration with Africa Union Commission, UNECA, UNDP, UN Women, other UN Agencies and the private sector celebrated "Girls in ICT day" on 24th of April, 2014 in Addis Ababa.

In advocating measures to improve teenager's access to freedom of speech in the digital media, it is recommended that the equity considerations be flagged upfront.

2.2. The borderless context of the online environment

Whilst it is appropriate to focus on the fast developing technological revolution specifically in African context, it is worth keeping in mind that the continent is anything but immune from the global reach of the internet, both as regards the positive and negative dimensions of digital connectivity. Linked to the lack of geographical specificity are fast changing technologies (new social media networking sites and apps from the north are instantly available in Africa), as well as the fact that the new technologies are blind to age, treating children and adults alike in a manner that does not differentiate.

The global reach of digital technologies poses protection risks to children in Africa, who might be less sophisticated and adept at recognising risky situations than their counterparts in the developed world, who have had more exposure (and over a longer period) to online safety issues. The UN Secretary General's Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography reported in December 2013 that the internet has been significantly misused as a tool for the dissemination of child pornography. She records that estimates indicate that the number of child abuse images online runs into the millions and the number of individual children depicted is most likely in the tens of thousands.^{xxxvii} The numbers who might be of African origin are wholly unknown.

She notes further that the age of victims has tended to decrease and representations are becoming more graphic and violent. Images are increasingly disseminated through peer-to-peer networks, making them more difficult to detect. Data from the Internet Watch Foundation suggest that the number of domains hosting child sexual abuse content halved between 2006 and 2012 and that the 9,550 web pages reported were hosted on 1,561 domains from 38 countries in 2012. However, this does not mean that there has been a decrease in the circulation of child sexual abuse images. In 2011, the International Association of Internet Hotlines received 29,908 reports of child abuse material, 71 per cent involving prepubescent children and 6 per cent involving very young children. By 2012, that number had jumped to 37,404 reports, 76 per cent involving prepubescent children and 9 per cent involving very young children. By the beginning of 2013, the International Child Sexual Exploitation image database managed by INTERPOL had enabled identification of 3,000 victims and 1,500 offenders from more than 40 countries, as well as data related to numerous unidentified victims whose cases are yet to be investigated.^{xxxviii}

Since the above data is not disaggregated to indicate its likely impact on Africa, it could be worth advocating specific research to illuminate the reach and African targets of global technology related to child pornography. (One research study dealing with cybercrime in Ghana pointed out that only 15% of cybercrime victims in Ghana were in fact Ghanaians, the remainder being in Europe and North America. Similar evidence for the child protection context is not available).

Overall there is a dearth of data, evidence and analysis with regional specificity of use to the African context. Existing information exhibits a strong western bias. It is recommended that enormous potential exists for Africa-specific research on children's use of social media and the risks it may pose. Moreover, any such research should avoid focussing narrowly on South Africa which is arguably atypical, and should seek to understand the situation in mobile intensive environments such as Tanzania, Kenya, Ghana, Ivory Coast, Senegal and Nigeria, as well as North Africa.

2.3 Who is a child?

In the context of examining the issue of the impact of children's use of digital media and freedom of expression, there is the thorny problem of addressing the rights of children as a group in particular (rather than those of citizens and consumers in general) in the absence of reliable means of age verification (i.e. knowing whether a user is a child or not). Birth registration rates on the continent can be as low as 30% in many countries, meaning that it is impossible to determine who is a child for the purposes of the regulatory environment. (See the recent General Comment no 2 (2014) of the African Committee of Experts on the Rights and Welfare of the Child on article 6 of the ACRWC, which deals with birth registration and the obligations of states). The lack of reliable data as to a person's age can impeded efforts to introduce legislation specifically aimed at (eg) child pornography where proof of age (eg that the image was of a person below 18 years) may be required.

Some researchers dealing with ICT and teenagers appear to eschew the ACERWC definition of a child as a person under 18, and address adult consumers as being constituted by all those aged over 15 years. This is in the context of the commercial role of ICT. But considering all persons aged over 15 who are affected by marketing and online selling strategies as being adults is, for the purposes of this paper, not advocated. It is proposed that in the African context, where most countries have now adopted the age of 18 as the age for transition to adulthood in law, and where de facto most children are arguably not regarded as being as adult as their northern counterparts, protections (eg privacy protection) should apply to all those below 18.

2.4 Hotlines

The roll out of child abuse helplines is proceeding apace in Africa, spurred enormously by the growth in mobile phones. There are now toll free child helplines in more than 20 African countries. This could provide a starting point for protection within the context of the online environment for children.^{xxxix} Many are government supported, although some are managed by NGOs or are independent (stand alone) NGOs. They are all affiliated to Child Helpline International, based in Amsterdam. As Unicef-IRC (2013) aver, making information and advice more available about incident reporting and creating child helplines both have the potential to at least record, and at best reduce, violence against children (Pinheiro 2006).^{xl}

It is recommended that a specific ad hoc working group be established with Child Helpline International^{xli} to focus on children rights and digital media in African context and to collect data in standardized format from regional and country offices about online protection of children.

2.5 The Internet and intercountry adoption in Africa

A particular concern prevailing is the rise of intercountry adoption from African countries.^{xlii} Whilst this is not an issue which is especially significant for either teenagers (since babies and infants are far more likely to be adoptees) or freedom of expression, the online display of information concerning both "available" children

(their identities) and private agencies willing to facilitate such adoption gives rise to considerable regulatory dilemmas and fears for children's privacy and safety. Since the national agencies attempting to control intercountry adoption (especially in countries that have not yet ratified the Hague Convention on Inter-Country Adoption of 1993) are social welfare ministries who generally do not have the skills and know how to investigate or regulate internet usage, it is likely that human rights and other breaches committed online go undetected or unaddressed.

This is an area on which further research is needed, and the potential for collaboration with other stakeholders (eg the Permanent Bureau of the Hague Conference) exists. In addition, capacity building for both African Social Welfare Ministries engaged with intercountry adoption, and member states of the Hague Intercountry Adoption Convention from receiving countries on the role of ICT in intercountry adoption might be desirable.

2.6 The role of parents

A popular solution to the governance of an inappropriate or harmful (as opposed to illegal) digital media content, contact and conduct is to aver that parents bear the primary responsibility for their children's online experience. Parents are generally best placed to judge what their children should see or do (online as offline), and parental mediation is a frontline, flexible form of governance.

Parents' role in monitoring and sensitising their children on the issue of online protection was brought to the fore recently by CyberGuardian chief executive officer Max Thomas, who also provided insight on the technical solutions which the company has for child online protection. He shared that the company acknowledges that parents need to be in control and smarter than their children for online protection to be a success. However, he said that technology has to make it possible to put control at the ISP level, rather than relying on parental control.

The complicating factor in African context is that the generation gap is arguably much greater than in the north in a large majority of cases. With the huge success in many countries of the achievement of universal primary education since the launch of the Millenium Development Goals, today's teenagers are likely to be in a far superior position to engage with digital media, with their parents for the large part not 'techsavvy' (and many likely not literate).

Hence, an approach based on parental control is less likely to be appropriate than in the north. This places a greater burden on ISPs to develop and put in place the necessary controls. This should be encouraged by regulatory authorities and governments.

2.7 The ITU in Africa and ICT4D (ICT for development)

The ITU Regional Office for Africa in Addis Ababa represents the International Telecommunications Union in Africa and provides assistance to the 44 Member States of the Region. Its Area Offices in Dakar, Harare and Yaoundé provide assistance for their respective geographical zones. A full list of the relevant

regulatory agencies of member states of the ITU in Africa can be found at the following link:

<http://www.itu.int/en/ITU-D/Regional-Presence/Africa/Pages/MemberCountriesinAfrica.aspx>

The presence of the ITU at regional level illustrates that a potential coordinating mechanism for the development of regulatory policy exists. Some initiatives have already commenced. For instance, an African Child Online Protection Summit was held in Kampala in June 2013. It was aimed at addressing cybersecurity holistically for childhood protection in Africa, and dealt with issues such as legal, technical, organizational and capacity building issues as well as international cooperation in order to efficiently and thoroughly combat cybercrime targeting children.

2.8 Research and freedom of expression

Little in the way of research exists in African countries to illustrate the impact of mobile technology on teenagers and freedom of expression. It is widely acknowledged in the literature that current research on children and the digital media has a strong western bias. Moreover, it is easy to list what opportunities could be available African children's exercise of freedom of expression, but less easy to demonstrate what opportunities are actually being accessed by children, and how they may or may not be using the internet for civic or political participation. In addition, most research has focussed on a small number of mischiefs, leaving aside new and emerging risks of harm, and what protective factors could ameliorate these harms.^{xliii}

Noting the most research on child participation emanates from the global north, UNICEF-IRC report that Porter et al (2012) conducted an extensive three-country study across Ghana, Malawi and South Africa, finding that mobile phones play a central role in children's lives, especially as a communication tool strengthening family ties between dispersed family members. Chigona and Chigona (2008) analysed media discourses about youth's use of the Mxit mobile messaging system in South Africa, stating that these descriptions have been mostly negative, almost resembling a form of 'moral panic' by adults. Beger and Sinha (2012) review secondary data and state that South African youth are enthusiastic users of Mxit and Twitter via their phones, but face cyberbullying, sexting, privacy violations and exposure to sexually explicit images. The available research seems to be somewhat biased towards South Africa, which is arguably not a template for the rest of the continent as regards the issue of children's access to digital technology.

Some literature shows how ICT can be used to 'take children into account' and enhance civic participation. A cited example is U-Report in Uganda,^{xliiv} which has pioneered ways of giving young people a voice through text-based surveys.

"U-Report is a new communications technology application developed by UNICEF Uganda and launched in May 2011. By sending the text message, 'join,' to a toll-free number and submitting a few personal details, anyone with a mobile phone can become a volunteer, or a 'U-reporter', and share their observations and ideas on a wide range of development issues. UNICEF staff would send out a question twice a week and collect the views of young people on a particular topic, which would then be aggregated. UNICEF then brings these voices into the media and to policy

makers. Results are printed in newspapers and discussed with parliamentarians in a dedicated television programme which is also broadcast on radio. At the time of our interviews (2013) the number of 'U-reporters' had grown to 205,000 (ID 21) and this includes every Member of Parliament. U-report representatives speak about an approximate 20 per cent response rate to any given poll. For example when a youth entrepreneur fund was launched, feedback via U-report told the government that while youths were excited about the fund, many felt excluded by the strict A and O-level requirements (ID 19), points which were fed back to the government. U-report was frequently cited as a good example and had clearly captured the imagination of some experts....^{xlv}.

It is not clear that the initiative targets children only and it seems that youth generally are engaged.

In Namibia, mobile phones and message receiving systems were used in the public consultation around the child care and protection bill, developed in 2011. Children's voices and opinions on a diverse range of issues (from corporal punishment in the home to trafficking were solicited, and the poll results widely publicised and fed into the law making process).^{xlvi}

2.9 Platforms in African context

Much international research involving teenagers and children has focussed on fixed internet platforms, leaving much still to be learned regarding access to and patterns of use of mobile devices; in developing countries mobile access far exceeds fixed platforms, and this is especially true of African countries. This phenomenon potentially renders the mobile network operators more important players in the quest to ensure the protection of children's rights in Africa than is the case elsewhere. It is worth pointing out that mobile network operators wield a great deal of power as business entities in African economies (maybe more so than in the north). Nuanced research is required to investigate how children's rights to freedom of expression can be secured in this milieu, and the whole range of mobile operators operating in Africa engaged on this.

2.10 Cultural issues and gender

Gender was alluded to at 2.1 under the rubric 'equity'. There can be no doubt that gender disparity is rampant in Africa, which implies that the girls are likely to have less access to digital media overall than boys.

However, there are also cultural dimensions to gender and digital media usage. Early research shows that socially rooted gender differences play a role when teenagers internet usage is considered.^{xlvii} A Harvard study cites a report from Nigeria which indicated that girls constituted less than 20% of the cyberbercafe users in one study, and that most of the girls were sitting alongside boys who were operating the technology. They conclude that is it not only worth looking at how gender impacts the use of technology but also the converse: how technology impacts gender.

The educational context in Africa also arguably plays a role: with a minority of schools having interconnectivity, it is postulated that learning opportunities need to be maximised through peer to peer learning and other learning opportunities outside the class room, which need to be specifically developed for mobile use and cybercafés.^{xlviii}

2.11 The legal and institutional context

Harvard scholars correctly identify that in African contexts, the usual policy responses which revolve around creating stronger legal environments (eg relating to child pornography, awareness raising and more sophisticated filtering tools) may not be as useful in the developing world. They caution that these responses, though prevalent in developing countries, cannot ignore the African context: weak and underfunded legal systems, and 19th century police skills.^{xlix}

The authors point to another contingent risk for this continent: that increased surveillance of the internet purporting to monitor child safety can mask different less salubrious agendas (they use the word 'hijacked') aimed at increasing surveillance and censorship for other purposes.¹

A final point about the legal and institutional environment is the multiplicity of role players (department of communication, of social welfare, of children and so forth), and the fragmentation of legislative developments. This makes it difficult to get a coherent picture of what is protected or regulated, and who the duty bearers are.

Chapter 3 Regulatory frameworks relevant to children's rights in communication media

According to the ITU, an adequate regulatory environment requires first and foremost the necessary substantive criminal law provisions to criminalize acts such as computer fraud, illegal access, data interference, copyright violations and child abuse material. The fact that provisions exist in the criminal code that are applicable to similar acts committed in the real world does not mean that they can be applied to acts committed over the Internet as well. Therefore, a thorough analysis of current national laws is vital to identify any possible gaps. The next step would be to identify and define legislative language and reference material that can assist countries in the establishment of harmonized cybercrime laws and procedural rules. ITU guidelines in this regard can be accessed on their website.

Many countries broadly address child exploitation as it relates to labour or other offences or they may ban pornography in general; however, these laws are not enough as they do not specifically address the criminal aspects of various forms of child sexual exploitation and child abuse images. In order to be truly effective, the ITU recommends that countries should be encouraged to adopt specific legislation to criminalize child abuse materials and include offences specific to the use of technology and the Internet. A basic definition of child abuse material should include the visual representation or depiction of a child engaged in a real or simulated sexual display or act, or pseudo images of the same; it should also take into account how technology such as computers, the Internet, cell phones, PDAs, game consoles, video cameras, and DVDs, are used to facilitate creation and distribution of images, making it clear that child abuse material and everything connected with it is illegal, irrespective of the platform. Furthermore, legislation should provide protection for ISPs, ESPs and other private entities that report child abuse materials, and should further include guidance for the safe handling and transmission of images.

The international regulatory environment proposes that a "Notice and Takedown" regime should be established to allow ISPs, ESPs, domain registrars and web hosts to close an offending site or cancel an email account upon request. In most cases, such criminal use will be in violation of the "Terms of Use" contract that the user

agrees to with the ISP or ESPs, thus giving the company uncontested rights to take appropriate action. When possible, these actions should be closely coordinated with law enforcement in an effort to ensure that an investigation is launched that may save a child from abuse and that will allow for the capture of the criminals involved.

An adequate regulatory environment would also include protection of personal data privacy and protection of children in the consumer environment, it is suggested.

It is difficult to find adequate and comprehensive examples of good regulatory provisions in African contexts. UNESCO^{li} allude to a number of pending Nigerian Bills within the context of internet regulation and the right to privacy. South African has in 2014 released a Green Paper on National Integrated ICT policy.GN 37261 of 24 January 2014. The paper does not have substantive material relevant to children or teenagers. Souter and Kerrets Makau^{lii} describe the Kenyan regulatory framework as evolving terrain (2012), noting that the Kenya internet policy of 2006 was out of date and at the time of writing under review (p18). The Zambia Information and Communications Technology Authority (ZICTA) organised a workshop in March 2014^{liii} in Livingstone in collaboration with the Ministry of Transport, Works Supply and Communications and International Telecommunications Union (ITU), for key stakeholders with the objective of coming up with a National Child Online Strategy for the country.^{liiii} Namibia's Draft Electronic Transactions and Cybercrime Bill 2013 has yet to be finalised. Clause 59 provides for take down notifications to internet service providers, and Chapter 11, which has its own internal set of definitions, deals with cybercrime. Of note are proposed provisions dealing with child pornography.

It can be concluded that for the most part the development of regulatory frameworks in this area is an ongoing endeavour. More comprehensive research would be required to track legislative developments in their various permutations in the 53 African states, which is beyond the scope of this working paper. Thus a few limited examples of regulatory practice only are provided below.

3.1 Protection

3.1.1 Child Pornography

The South African Films and Publications Act as amended (2009)^{liv} seems to comprehensively address the issue of child pornography to bring the country in line with the international obligation incurred by ratification of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Child pornography is defined to include any image, however created, or any description of a person, real or simulated, who is, or who is depicted, made to appear, look like, represented or described as being under the age of 18 years— (i) engaged in sexual conduct; (ii) participating in, or assisting another person to participate in, sexual conduct; or (iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation. Possession, in relation to a film or publication, without derogating from its ordinary meaning, includes keeping or storing in or on a computer or computer system or computer data storage medium and also having custody, control or supervision on behalf of another person. visual presentation means— (i) a drawing, picture, illustration, painting, photograph or image; or (ii) a drawing, picture, illustration, painting, photograph or image or any

combination thereof, produced through or by means of computer software on a screen or a computer printout.

It is an offence for any person, except the publisher of a newspaper contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that contains sexual conduct which- (i) violates or shows disrespect for the right to human dignity of any person; (ii) degrades a person; or (iii) constitutes incitement to cause harm; (b) advocates propaganda for war; (c) incites violence; or (d) the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, without getting prior classification from the Classification board.^{lv} Section 24B specifically deals with unlawful possession, creation, production or contribution to, or assistance in the creation or production of, or import of or procurement, obtaining or access to, or in any way knowingly assisting in, or facilitating the importation, procurement, obtaining or accessing of; or knowingly making available, exporting, broadcasting or in any way distributing or causing to be made available, exported, broadcast or distributed or assists in making available, exporting, broadcasting or distributing, child pornography an offence.

A compulsory reporting obligation in relation to child pornography has been created in section 24B (2).

Specific regulation of internet service providers is also contemplated as follows in the Act:

“Obligations of internet access and service providers 24C (1) For the purposes of this section, unless the context otherwise indicates—

(a) **„child-oriented service“** means a contact service and includes a content service which is specifically targeted at children

(b) **„contact service“** means any service intended to enable people previously unacquainted with each other to make initial contact and to communicate with each other

(c) **„content“** means any sound, text, still picture, moving picture, other audio visual representation or sensory representation and includes any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated but excludes content contained in private communications between consumers

(d) **„content service“** means— (i) the provision of content; or (ii) the exercise of editorial control over the content conveyed via a network, as defined in the *Electronic Communications Act, 2005 (Act No. 35 of 2005)*, to the public or sections of the public; and

(e) **„operator“** means any person who provides a child-oriented contact service or content service, including Internet chat-rooms.

(2) Any person who provides child-oriented services, including chat-rooms, on or through mobile cellular telephones or the internet, shall—

(a) moderate such services and take such reasonable steps as are necessary to ensure that such services are not being used by any person for the purpose of the commission of any offence against children;

(b) prominently display reasonable safety messages in a language that will be clearly understood by children, on all advertisements for a child-oriented service, as well as in the medium used to access such child-oriented service including, where appropriate, chat-room safety messages for chat-rooms or similar contact services

- (c) provide mechanism to enable children to report suspicious behaviour by any person in a chat-room to the service or access provider
 - (d) report details of any information regarding behaviour which is indicative of the commission of any offence by any person against any child to a police official of the South African Police Service;
 - e) where technically feasible, provide children and their parents or primary caregivers with information concerning software or other tools which can be used to filter or block access to content services and contact services, where allowing a child to access such content service or contact service would constitute an offence under this Act or which may be considered unsuitable for children, as well as information concerning the use of such software or other tools.
- (3) Any person who fails to comply with the provisions of subsection (2) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment.”^{lvi}

Extraterritorial jurisdiction is also contemplated by section 30A, insofar as it is made a criminal offence for any citizen or permanent resident to who commits any act outside the Republic which would have constituted an offence under this Act had it been committed within the Republic, to be guilty of the offence which would have been so constituted and liable to the penalty prescribed for such offence in this Act

3.1.2 Cyberstalking

The Protection from Harassment Act of 2011 (in force from April 2013) contains specific provisions aimed at compelling internet service providers to provide information when digital means of stalking are employed.^{lvii}

3.1.3 Hate speech/derogatory proclamations

Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 arguably offers some assistance here. It provides that:

“No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; or (c) promote or propagate hatred”.

The prohibited grounds listed in the Constitution and in the Promotion of Equality and Prevention of Unfair Discrimination Act are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The extensive nature of this section means that if the cyberbullying is based on one or more of the prohibited grounds listed immediately above, it would obviously constitute unprotected expression.

However neither the Constitution nor the Promotion of Equality and Prevention of Unfair Discrimination Act appear to prohibit instances of cyber bullying that are meant to merely embarrass, ostracise, criticise or threaten others.^{lviii}

Ghanaian law has specific legal provisions that target the production, possession and dissemination of child pornography. Section 136(2) of Ghana’s Electronic Transactions Act, 2008 (Act 772) provides a definition of child pornography, Additionally, under section 136(2)(a) of the Act, publish is expansively defined to include digital media.^{lix}

There are probably other good practices on prohibiting and regulating child pornography to be found, since many African states have ratified the Optional Protocol to the CRC which requires legislative action in this regard to be taken. A full analysis lies beyond the scope of this paper.

3.2 Promotion of freedom of expression

According to a 2010 report,^{lx} the right-to-know revolution of the last twenty years has largely bypassed Africa. Lack of political will on the part of African leaders is largely responsible for the absence of clear progress. The rhetoric of transparency has not been accompanied by the required actions. South Africa, Zimbabwe, Angola, Uganda, and most recently Liberia are the only countries with access to information legislation. However, many present significant weaknesses and problems.^{lxi} As regards teenagers and the digital media, there is little of relevance that could be traced. The discussion in Chapter 5 below remains relevant.

Chapter 4 Good practices in developing regulatory and policy frameworks

4.1 National Internet Governance Forum: Kenya

According to Souter and Kerrets Macau, the relationship between global and national governance of the Internet is complex. The Internet is often described as inherently global rather than national in character, with technical characteristics, values and structures that bypass national governance arrangements. In practice, however, national governance arrangements are also highly significant – in technical areas such as the management of country level domains (ccTLDs); in the deployment of the underlying infrastructure on which the Internet depends, which is subject to national regulation; and at the interface between the Internet and other policy domains which are subject to national laws and social norms. This report is concerned with these national dimensions of Internet governance and with the ways in which they interact with international or global governance arrangements.^{lxii}

According to these authors, Kenya was one of the first countries in the world to establish a national Internet Governance Forum (IGF) – and East Africa the first world region to establish a regional IGF – following the creation of the global IGF in 2007. The first meeting of the Kenya IGF was held in Nairobi in October 2008, followed by the first meeting of the East African IGF in November of that year. The best-known innovative “success story” in Kenya’s ICT market is the exceptionally rapid growth of mobile financial transactions following the launch of Safaricom’s MPESA service in 2007. A household survey undertaken by Research ICT Africa in 2011 indicated that, in practice, 87% of Kenyans aged over 15 had a mobile phone or active SIM card at the time of the survey.

The most recent Kenya IGF was held in July 2014, and the Forum appears to be provide a good practice multi –stakeholder forum, one which is taking the lead on the continent in driving internet issues in a development context.^{lxiii} There is no specific focus on children, as far as could be ascertained.

4.2 Self regulation by the media: South Africa

In South Africa, the recently developed press code,^{lxiv} although not directly pertinent to digital technology (though not excluding digital media), provides concretely for the best interests of the child in reporting as follows:

The media must:

“8.1 exercise exceptional care and consideration when reporting about children. If there is any chance that coverage might cause harm of any kind to a child, he or she

shall not be interviewed, photographed or identified without the consent of a legal guardian or of a similarly responsible adult and the child (taking into consideration the evolving capacity of the child), and a public interest is evident.

8.2 not publish child pornography.

8.3 not identify children who have been victims of abuse, exploitation, or who have been charged with or convicted of a crime, without the consent of their legal guardians (or a similarly responsible adult) and the child (taking into consideration the evolving capacity of the child), a public interest is evident and it is in the best interests of the child.”

This press code has been hailed as one of the best in the world, and children were involved in formulating and presenting the proposals to strengthen the child rights orientation of the code.^{lxv}

4.3 Child Online safety: Mauritius

Mauritius set up a child safety online committee in 2009, comprising representatives from government, the police, representatives from internet community and other organisations, and released an action plan in 2009. A set of safety measures followed which included:

Public awareness campaign on TV and radio; awareness sessions for schools and at women and community centres; safety measures for schools and at public internet access points, including IT security policies and filtering tools and codes of conduct for schools; best practice guides for ISPs, encouraging them to provide filtering tools and including codes of conduct for voluntary compliance; enforcement and reporting measures, creation of a cyber patrol; international co-operation and creation of a committee to monitor the plan.^{lxvi}

4.4. Protection of the privacy of children’s information: South Africa

Collection of personal information from children can be either passive (collecting personal data such as age, gender, addresses, etc from chat rooms) or active (direct solicitation). South African has only recently enacted the Protection of Personal Information Act (POPI) (in November 2013), and its provisions will only kick in once a commencement date has been promulgated. It is intended to give effect to the constitutional right to privacy.

“Personal information” means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to—

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- (b) information relating to the education or the medical, financial, criminal or employment history of the person;
- (c) any identifying number, symbol, e-mail address, physical address, telephone number or other particular assignment to the person;
- (d) the blood type or any other biometric information of the person;
- (e) the personal opinions, views or preferences of the person;
- (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;

(g) the views or opinions of another individual about the person; and
(h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person”

Section 25 provides that a ‘responsible party’ may not process personal information concerning a child who is subject to parental authority under the law (child is defined as a person aged below 18 years). Exemptions relating to health or sexual life are provided regarding certain specified bodies eg child protection or probation agencies (section 30).

The Act is notable for its extensive references to modern digital communications and records. Chapter 8, for instance, is entitled “Rights of data subjects regarding unsolicited electronic communications and automated decision making”. The definition provided of a “public communications network” means an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services. An array of examples of the Act’s full engagement with modern technology is evident.

4.5 Restrictions on advertising to children: The Nigerian Code of Advertising Practice and Sales Promotion (“NCAP”) and The Nigeria Broadcasting Code, 5th edition, 2005 (“NBC”)^{lxvii}

For the purpose of regulation of advertising practices, advertisements in Nigeria are categorised into those meant for “controlled products” and those for “general goods and services”. Advertisements relating to controlled products are required to undergo vetting, usually conducted by the Advertising Standards Panel (ASP), a statutory standing committee of APCON. The other category of advertisement does not require vetting but must however conform to the standards laid down in the NCAP. Advertising directed at children falls under the “controlled products” category.

Specifically in relation to advertisements directed at children, the NCAP provides as follows:

- No advertisement is allowed to encourage children to unduly pressurise their parents, guardians, other adults or any person whatsoever to purchase the advertised product.
- No advertisement shall contain an exaggeration of the use of the product or a situation.
- Advertisement for a commercial product is prohibited if it leads children to believe they are inferior to or less likeable than other children who buy or use the advertised product.
- Children should not be encouraged to copy behavioural practices, which may be unsafe or in any way dangerous for them, such as: walking on unguarded stairways or leaning over balconies, or darting across busy highways.
- Children should not be shown attempting to pick items far above their heads, as trying to copy such postures in real life could lead to accidents.
- No advertisement shall violate the precept that all medicines, disinfectants, antiseptics etc, should be kept out of reach of children. Where such products are shown in use, they must be so demonstrated with adults supervising.

- Children must not be shown using cooking gas, matches, kerosene, petrol, inflammable materials, electrical appliances and such other items that could lead to their suffering electric shock, burns or any accident.
- Advertisements showing children driving cars or operating any motorised machine are prohibited.
- All advertisements directed at children must promote their physical and moral well-being and must not exploit their natural innocence or trusting nature.
- Advertisements using children as models must not expose them or the child audience to values that are not approved by the society in general.

The NBC contains provisions that are similar to those in the NCAP on advertisements to children. However, in addition to those provisions, the NBC also provides as follows:

- Exploitation of children and youths in any form should be avoided.
- Particular care must be taken to ensure that an advertisement targeted at children contains nothing which might result in physical or psychological harm, or which exploits their natural credulity.
- An advertisement shall not encourage children and youths to enter strange places, converse with, or receive gifts from strangers.

Olubanwo asserts however, that there are certain areas not currently covered by Nigerian laws, which require immediate attention.^{lxviii} For instance, there are no specific laws relating to online advertising to children in Nigeria. He says that the closest attempt at protecting children in this regard is the Nigerian Child Online Protection (NCOP) initiative, set up by the Nigerian Communication Commission which aims to protect children and young people from being exposed to violence, bullying, extremism, gambling, pornography, drugs, violent games and other Child Abuse materials hosted on the internet.

The Nigerian Broadcasting Code was updated in 2010 specifically with an eye to the digital era. For several months, veteran broadcasters from across the country, professionals in broadcast industry, scholars from tertiary institutions that offer Mass Communication and other interested members of the public met and deliberated on the provisions of the Code, especially the aspect of digitization and democratization of the airwaves, according to the Preamble.

Chapter 4 lays down broadcasting standard as regards children. These entail that broadcasters shall:

- Not broadcast a programme which violates social values, shows disrespect for law and order or departs from an honourable life-style
- Not broadcast a programme containing sexually explicit or obscene material
- Avoid the use of foul or blasphemous language
- Employ tact and maturity in programmes dealing with conflict
- Protect children from programmes that are likely to lower their self esteem
- Promote indigenous values and present foreign folklores and values with care to avoid negative influence in children
- Devote at least 10 per cent of total airtime to children's programming and this shall be within the children's belt
- Protect the identity of children involved in crime or other negative social

influences

- Not broadcast content containing exorcism, occultism and paranormal
- Take due care in dealing with themes which children could imitate, like the use of dangerous items as play items or copying of violent sports
- Not broadcast programmes, including cartoons, that glamorise violence and crime and leave criminality unpunished
- not allow the portrayal of violence, whether physical, verbal or emotional, unless essential to the development of character and or story
- not promote realistic scenes of violence which creates the impression that violence is the preferred or only method to resolve conflict between individuals; and
- children shall be protected from racial inferiority or other complexes resulting from careless or deliberate comparisons or information.

Whilst for some this catalogue might be seen as being overprotective of children, for others it does attempt meaningfully to address social and cultural ills that may affect children's interaction with others and with their society.

4.6 International co-operation: Ghana

It was recently reported that as a positive step toward the development of comprehensive online child protection tools and mechanisms, Ghana recently signed a memorandum of understanding (MoU) with the Commonwealth Cybercrime Initiative (CCI).^{lxix} The CCI is an initiative of the Commonwealth Secretariat designed to assist member countries "build the requisite capacity to address cybercrime by building legislative, technical, institutional and human capacity through a holistic and sustainable approach." The MoU, which is focused, *inter alia*, on child protection and cyber security schemes, underlines the government's commitment to developing its cyber security capabilities, particularly in the area of online child protection.^{lxx}

The relevant Ministry (MOWAC) reported that the Department of Children (DOC) has carried out a study on the use of Internet by children as well as Internet abuse in the country and disseminated study findings in a few schools in Accra. These results could help to outline the scope of child pornography and child "grooming" in the country and increase awareness about exploitation on the Internet. MOWAC, however, reports that there was a call for more funds because the DOC was unable to share their findings and carry out public education on child Internet abuse in the country due to a lack of resources.^{lxxi}

Ghana acknowledges the need for IT legislation reform. At the First Digital Family Forum held in Accra in March 2014, under the auspices of the Ministry of Communications, child online security was discussed. The objective of the forum was to create a common platform for industry players, Internet service providers, Telecom operators, mobile phone dealers and consumers, to engage in meaningful dialogue, share ideas on successes, failures and challenges and evolve strategies to address these identified challenges. International co-operation can assist to reach these goals.

4.7 Regional model laws: SADC and ECOWAS

The SADC has a model law on data protection and ICT which was sponsored by 'Support for Harmonization of the ICT Policies in Sub-Sahara Africa' (HIPSSA). Executed by the International Telecommunication Union (ITU), co-chaired by the AU, the project has been undertaken in close cooperation with the Regional Economic Communities (RECs) and regional associations of regulators which are members of the HIPSSA Steering Committee. It was further adopted by the SADC Ministers responsible for Telecommunications, Postal and ICT at their meeting in Mauritius in November 2012.

According to the Model Law, a child is to be defined by national law. The personal data of a child may be processed only subject to the rules set out in article 37 of the model law, which in turn provides that If the data subject is a child, his/her rights pursuant this model law may be exercised by his/her parents or legal guardian unless the law states that the child may act by himself without being represented by his/her parents or legal guardian. If however in terms of domestic law a child is able to furnish consent independently according to his other age and ability, this shall be permitted.

This formulation suitably respects the evolving maturity of the child, a key tenet of international child rights law.

The model law provides a useful framework for SADC African countries wishing to enact legislation in this field. Similar initiatives could lay the ground work for modernised legislation in other areas relevant to digital technology, such as Child Online Protection.

Similarly, the Economic Community of West African States (ECOWAS) adopted a *Draft Supplementary Act on a Uniform Framework for Freedom of Expression and the Right to Information* which sets out key sub-regional standards on access to information to be observed by its Member States (2011). Regional co-operation in respect of regulating ICTs is therefore clearly on the rise, and can assist fill gaps where members states do not have well versed legal drafters to develop legislation that takes account of the digital era.

Chapter 5 Risks to be mitigated in addressing freedom of expression and teenager's use of digital media

5.1 Criminal Law and Tort (Delict)

The legal environment cannot be addressed only by reference to media, communications, films and broadcasting legislation. Two additional areas warrant consideration: the relevance of criminal law (statutory or otherwise),^{lxxii} and the private law of delict (tort). Only Ghana and Lesotho have fully decriminalized defamation.

The relevance of the latter area of law came to the fore in the South African Constitutional Court case of *Le Roux v Dey* (2011 (3) SA 274 (CC)). The case is heralded as the first ever in which children were sued for damages for defamation for creating a manipulated image of the principal and vice principal of their school, by attaching to the heads of the authorities a photograph of two gay body builders in a sexually compromising position, whilst superimposing the school badge on the hands and genitals of the bodies depicted. The image was circulated via mobile

phones throughout the school. The vice principal, Dey pressed criminal charges (for the criminal offence of defamation – the children were diverted to perform community service); they were, in addition, disciplined for breaching school disciplinary codes by the school authority; and furthermore, sued under the civil law of defamation, on the grounds that the image depicted the vice principal as being of low moral character and in a homosexual relationship. The claim succeeded in both the high court and on appeal, albeit that the amount of damages awarded was decreased on appeal. On further appeal to the Constitutional Court of South Africa, it was contended that the vulnerability and immaturity of children was not catered for in the existing test for defamation,^{lxxiii} and it was further claimed that children had the right to experiment with satire as part of their right to freedom of expression.

The majority decision in the Constitutional Court found that the respondent had been defamed by the image. Once established that defamatory materials had been published, the onus would then shift to the publisher to prove absence of wrongfulness or intent, it was held. The Court was mindful of the need to preserve school discipline and felt that once learners lose respect for their teachers, they could lose both credibility and control. The Court stated that “there was a line that cannot be crossed”, alluding to the fact that a learner who damaged property belonging to a teacher, or attacked a teacher’s bodily integrity, would not escape penalties.

Several judges of the Constitutional Court disagreed, as emerges from the minority judgements. Their reasons differ. Judge Yakoob, for instance, averred that the interpretation of the image as defamatory or not should in the first instance be undertaken from a vantage point rooted in children’s rights. Hence, the fact that the image was crudely and clumsily produced, as well as the context of it having being effected in the school environment, would render it improbable that the reasonable viewer would have thought that the image had been produced by an adult – it’s childish origins would have been apparent. Second, noting that children traditionally poke fun at teachers and that their jokes are sometimes bland, crass and tasteless, the learned judge held that the Constitution nevertheless required that children’s freedom of expression be afforded appropriate protection, to the full extent that this contributes to their best interests. The judge summarised that the object of attack was authority, and the institution of the school, rather than the person himself. This was, however, one of the minority judgements: the majority held the schoolboys liable, swayed by the objective construction of the image as derogatory and the need to maintain school discipline.

Commenting on the case and its construction of childhood, Sloth-Nielsen and Kruuse^{lxxiv} opine that the judges all recognise the evolving maturity of the teenager and the need to recognise increasing levels of responsibility which go with it. However, it is argued that they disagree on the level of liability to be afforded a schoolboy prank,^{lxxv} with the minority far more tolerant of teenage experimentation and exuberance (and poor judgement), and the majority emphasising the belittling and degrading nature of the image. Mawsdley et al are of the opinion that the South African court essentially followed US jurisprudence in applying the test as to whether disruption of the school activities would ensue.^{lxxvi} (See *MEC for Education, KwaZulu-Natal v Pillay*,^{lxxvii} for a contrary result: the Constitutional Court upheld the right to freedom of expression of a student at Durban Girls High School to wear a gold nose-stud to school, in keeping with her South Indian family traditions, Hindu religion and culture. It must be noted, however, that no derogatory displays or action demeaning

to others were involved. Also, the Constitutional Court has consistently emphasised the need to accommodate religious diversity)

The *Dey* case sets a precedent: it indicates that the reach of private delictual claims cannot be excluded from consideration where teenagers ‘cross the line’ and use digital media in such a way as to damage reputations or defame others.

A similar risk is evident relating to a pending case on review in South Africa. It involves a teenager who took sexualised “selfies” and sent them to her boyfriend and another man. She pleaded guilty to, and was convicted of manufacturing child pornography, ratcheting up not only a criminal conviction and sanction, but also ensuring that her name will be included on the national sex offender register^{lxxviii} for life.^{lxxix} The risk to teenagers who transgress national laws in the exercise of their right to freedom of expression may therefore proceed to formal criminal sanctions and attendant drastic civil disability consequences.

In the only cases thusfar involving defamatory material on Facebook that could be tracked (one in Namibia and one in South Africa) judges ordered the removal of the offensive material by way of an interdict. On 25 January 2013, a Windhoek judge ordered a disaffected ex-lover to remove all defamatory materials related to his former girlfriend, whose lawyers noted that this was one of the worst cases of cyberstalking that Namibia experienced. It endured for a year before the smutty material was ordered to be removed.^{lxxx}

A similar finding was made in *H v W*.^{lxxxi} The matter concerned derogatory material circulated on social media including on twitter and on facebook between an estranged former husband and wife.

Noting that “We have ancient, common law rights both to privacy and to freedom of expression. These rights have been enshrined in our Constitution. The social media, of which Facebook is a component, have created tensions for these rights in ways that could not have been foreseen by the Roman Emperor Justinian’s legal team (footnotes omitted)”, the Court continues to describe in detail the privacy policy of Facebook and the ways in which privacy settings can be determined (this is arguably rather useful to the uninitiated). The Court concludes that although one can control one’s own Facebook profile, there is no method, within the Facebook system itself, by which one can control what other people place on their profiles about oneself and who can look at that. “Tweets” using Twitter are publicly visible by default. Google and ‘cookies’ are also discussed.

The judge concluded that “It is in respect of the remedy where infringements of privacy take place in the social media that the common law needs to develop. The social media form a subset of the electronic media but are not coextensive with it: the social media are all part of the electronic media but not all the electronic media are social media”.^{lxxxii} The Court argued that the social media is qualitatively different from the electronic news media when it comes to suppression of publication. Such important news as may travel through the social media will also, in most instances, be widely and readily available in the news media as well. Attitudes by the courts to the removal of items from the social media may be justifiably different in the case of the news media, even where the news media appear in electronic rather than print form. The insinuation was that the same fears about “stopping the press” and stifling the free flow of news do not arise in the context of social media. The interdict was therefore granted.

5.2 Responses to misuse of social media by teenagers

It is cautiously argued, less cautiously by those in the child rights sector, that responses to teenagers' overstepping the mark on social media should, instead of being based on criminal sanctions, employ restorative justice approach. Such an approach accords well with (for instance) the African guidelines on child friendly justice of 2011, endorsed by the African Committee of Experts on the Rights and Welfare of the child, and some domestic legislation such as South Africa's Child Justice Act 75 of 2008, the Child Justice and Protection law of Botswana (2011) and the child justice and welfare statute enacted by Malawi in 2011. Restorative justice responses seek to restore the relationship breached by the offending behaviour, seeking for accountability through acceptance of the harm done, and making the wrong right. It stands in contrast to a retributive or punitive response.

Much advocacy will have to take place to entrench restorative approaches rather than criminal justice measures. For instance, the headline to the sanctioning of the UCT student for cyberbullying was headed "slap on the wrist for UCT cyberbully".^{lxxxiii} Part of the sanction in question was that the student had to write a reflective essay detailing the consequence and the effect of the student's actions upon others. (UCT did not disclose what other aspects of the sanction were put in place.) Public education will need to take place to encourage the understanding that teenagers must be assisted to become digital citizens, rather than being visited with criminal sanctions.

It is obvious that a great deal more effort must be placed on the two aspects of prevention (teaching children how to stay safe online) and public education about the misuse of social media. Criminal sanctions against children (even where they are diverted) should be a very last resort, if used at all.

Chapter 6:

Summary of Recommendations from the preceding Chapters

Chapter 1: Theoretical context

1. Within the school environment, a zero tolerance attitude towards educator misconduct involving ICT and digital media targetting learners should be adopted. Where a teacher is a possible perpetrator, education authorities should be notified so that the necessary pre-cautionary measures can be put in place (eg suspension pending finalization of the investigation). Education policies should be examined or amended to ensure that inappropriate conduct involving digital media is included as a disciplinary offence.
2. Responses to cyberbullying which can be as devastating and have greater impact than physical bullying should. While the effects should not be underestimated, criminal sanctions should not be the first resort in most instances.
3. Whilst legislation has been developed since the late 1800s to provide for sealing of juvenile court records once children graduate into adulthood, or expungement of records of offences committed whilst still a child, the current internet environment does not offer the same right for children to make mistakes which they do not have to carry with them in their adult life. It is difficult to offer practical recommendations about this concern, as deletion of material that has 'gone viral' may be impossible. Education and preventive measures seem to provide the only option.
4. In the context of article 21 of the ACRWC, a gap exists insofar as existing literature appears to focus exclusively on customary practices in elaborating the reach of this right. The extent to which children require protection from

practices which could be described as 'harmful social practices' linked to the use of digital technology in Africa has yet to be explored.

Chapter 2: The African Context

5. In advocating measures to improve teenager's access to freedom of speech in the digital media, it is recommended that the equity considerations be flagged upfront to ensure that the marginalised do not become further excluded from participating in the knowledge economy.
6. Overall there is a dearth of data, evidence and analysis with regional specificity of use to the African context. Existing information exhibits a strong western bias. It is recommended that enormous potential exists for Africa-specific research on children's use of social media and the risks it may pose. Moreover, any such research should avoid focussing narrowly on South Africa which is arguably a-typical, and should seek to understand the situation in mobile intensive environments such as Tanzania, Kenya, Ghana and Nigeria as well as North Africa.
7. Considering all persons aged over 15 who are affected by marketing and online selling strategies as being adults is, for the purposes of this paper, not advocated. It is proposed that in the African context, where most countries have now adopted the age of 18 as the age for transition to adulthood in law, and where de facto most children and teenagers are arguably not regarded as being as adult as their northern counterparts, it is recommended that protections (eg privacy protection) should apply to all those below 18
8. It is recommended that a specific ad hoc working group be established with Child Helpline International to focus on children rights and digital media in African context and to collect data in standardized format from regional and country offices about online protection of children.
9. The place of online media in intercountry adoption from Africa is an area on which further research is needed, and the potential for collaboration with other stakeholders (eg the Permanent Bureau of the Hague Conference) exists. In addition, capacity building for both African Social welfare ministries engaged with intercountry adoption, and member states of the Hague intercountry adoption convention from receiving countries on the role of ICT in intercountry adoption might be desirable.
10. Because parents in Africa are due to existing underdevelopment likely to be less 'techsavvy' than their northern counterparts, approaches which privilege parental control over online content for children is less likely to be appropriate than in the north. This places a greater burden on ISPs to develop and put in place the necessary controls. This should be encouraged by regulatory authorities and governments.
11. Little in the way of research exists in African countries to illustrate the impact of mobile technology on teenagers and freedom of expression, with most studies having a strong western bias. The available research seems to be somewhat biased towards South African teenagers use of digital media, which is arguably not a template for the rest of the continent.
12. Because digital access is largely through mobile platforms, mobile network operators more important players in the quest to ensure the protection of children's rights in Africa than is the case elsewhere. Additionally research has

focussed far more centrally on fixed platforms at the international level, with far less attention having been paid to access through mobile devices.

13. Scholars caution identify that in African contexts, the usual policy responses which revolve around creating stronger legal environments (eg relating to child pornography, awareness raising and more sophisticated filtering tools) may not be as useful in the developing world. They caution that these responses, though prevalent in developing countries, cannot ignore the African context: weak and underfunded legal systems, and 19th century police skills.

Chapter 3: Regulatory environment

14. ITU recommends that countries should be encouraged to adopt specific legislation to criminalize child abuse materials and include offences specific to the use of technology and the Internet. legislation should provide protection for ISPs, ESPs and other private entities that report child abuse materials, and should further include guidance for the safe handling and transmission of images. a “Notice and Takedown” regime should be established to allow ISPs, ESPs, domain registrars and web hosts to close an offending site or cancel an email account upon request. actions should be closely coordinated with law enforcement in an effort to ensure that an investigation is launched that may save a child from abuse and that will allow for the capture of the criminals involved.

Chapter 4: Good practice

15. Some are documented in the paper, but a more comprehensive array of examples should be collected and disseminated. The role of regional economic communities in establishing model frameworks for states to utilise might be an entry point.

Chapter 5: Risks to be mitigated

16. Examples are provided of recent cases where the use of criminal law, interdicts and tort (delict) were adduced: however, it is recommended that where children are perpetrators of inappropriate online behaviour, restorative justice approaches are preferable
17. School discipline codes should be examined to ensure that children are not necessarily overharshly subjected to discipline for online misbehaviour. But where teachers are perpetrators of online abuse against pupils, strong responses are required and educator disciplinary codes must reflect this.

i Report to the Human Rights Council of December 2013.

ii ELAW@LEGALBRIEF.CO.ZA of the week of 28 July 2014.

iii ITU Telecom 2008.

iv Digital safety is not a coherent concept. Rather it is a vague term that refers to a diverse set of issues that are directly or indirectly related to the physical and psychological wellbeing of children in the context of the digital media: Harvard article 2010 p 6.

v Badenhorst (xxi below) avers that the extent of sexting and cyberbullying is not well researched, but a recent South African study indicated that as many as 20% of children have received messages with unwanted talk about sex, and 16% had opened messages with pictures of naked people or people having sex.

vi Such as posting malicious gossip to harm personal relationships, or sending digitally altered photographs of someone to others, particularly pictures that portray someone in a sexualised or harmful way.

vii Such as sharing someone's secrets or embarrassing information or images with people who were never intended to know about it.

viii Like breaking into someone's social networking account and posting information calculated to damage that person's reputation or relationships.

ix Notably projects such as the laptop for every child initiative.

x United Nations Children's Fund (2013). Children, ICT and Development: Capturing the potential, meeting the challenges, *Innocenti Insight*, Florence: UNICEF Office of Research.

xi Article 9 of the ACHPR provides that:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

xii S Livingston and B O 'Neill "Children's Rights Online: Challenges, Dilemmas and Emerging Directions" in S van 't Hof et al (eds) *Minding Minors Wandering the Web: Regulating Online Child Safety, Information Technology and Law Series 24*, DOI: 10.1007/978-94-6265-005-3_2, _ T.M.C. ASSER PRESS, The Hague, The Netherlands, 2014.

xiii As above.

xiv As above.

xv R Mawdsley, M Smit and C Wolhuter "Students, websites and freedom of expression in the United States and South Africa" *De Jure* vol 46 (1) p 132.

xvi As above.

xvii Nampol Advanced Child Protection Module p25 (copy on file with the author).

xviii See for instance African Child Policy Forum, Violence against Children in Africa (forthcoming 2014).

xix All African countries with the exception of Somalia and South Sudan have ratified the UN CRC.

xx The African Committee of Experts on the Rights and Welfare of the Child has informally adopted this analytical framework as well.

xxi See General Comment of 17 (2014) of the UN CRC Committee on Child's Rights to Play, Leisure and Recreation.

xxii See for instance section 129 and 134 of the South African Children's Act 38 of 2005.

xxiii The CRC Committee issued General Comment no. 12 (2009): The right of the child to be heard.

xxiv UNICEF 2013 (note x above).

xxv Livingston and O'Neill, note xii above.

xxvi As above.

xxvii Charmain Badenhorst "Legal Responses to cyber bullying and sexting in South Africa" Centre for Justice and Crime Prevention Occasional Paper no 10, 2011.

xxviii See the South African Child Justice Act 75 of 2008 for a chapter on the expungement of juvenile records.

xxix The formulation discussed here differs to this extent from the formulation of the child's right to freedom of expression in the 1989 UN Convention on the Rights of the Child (articles 12 and 13). Note that all the African states which have ratified the African Children's Charter are also states parties to the UN Convention on the Rights of the Child.

xxx See the recent report Protecting Children from Harmful Practices in Plural Legal Systems (2012) available at www.srsg.violenceagainstchildren.org

xxxi Held from 17 - 23 October, 2002: Banjul, The Gambia

xxxii See the checklist developed for NGOs to submit shadow reports to the African Commission by the international organisation advocating for freedom of expression, "Article 19" at <http://www.article19.org/data/files/pdfs/tools/africa-foe-checklist.pdf>

xxxiii See the decision on the communication in the Nubian Children case (available at www.acerwc.org).

xxxiv Note x above.

xxxv Note x above at p 16.

xxxvi Note x above at p 19,

xxxvii Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography to the Human Rights Council of 23 December 2010³ (A/HRC/25/45).

xxxviii As above

xxxix The European Safer Internet Programme (renamed: Better Internet for Children) has provided an overarching framework for European initiatives for combating illegal content, promoting safer use of Internet and communication technologies and for awareness-raising activities. An international network of hotlines for reporting illegal child abuse images has been established for Europe and a parallel network of awareness-raising centres, together with a programme to build the knowledge base regarding emerging trends in children's use and consequences of online technologies. A similar continental initiative for Africa did not emerge from this research.

xl Frontline SMS and Ushahidi (an initiative in Uganda) can be also be used for violence reporting – UNICEF-IRC 2013.

xli www.childhelplineinternational.org

xlvi African Child Policy Forum 2012.

xlvi Unicef –IRC (note x above).

xlvii It seems there is also a U=report project in Zambia, although this could not be confirmed. Also, from observation of a youtube clip, it is targeted at youth generally rather than at children as defined for the purposes of this paper.

xlviii Unicef-IRC (note x above) at p 34.

xlvix Legal Assistance Centre, Windhoek: Consultations around the Child Care and Protection Bill (2012).

xlvi Urs Gasser, Colin M Maclay and John Palfrey "Working Towards a Deeper Understanding of Digital Safety for Children and Young People in Developing Nations" Harvard Law School Public Law & Legal Theory Working Paper Series Paper No. 10-36 (2010) p 29.

xlvi As above.

xlix As above p 29.

i As above p 30.

ii UNESCO Global Survey on Internet Privacy and Freedom of Expression (2012).

iii D Souter and M Kerrets Makau "Internet governance in Kenya – an assessment for the Internet Society, ICT Development, 2012.

iiii The workshop brought together international child online protection experts from the ITU, Ikeep Safe, Internet Watch Foundation, Cyber Guardian as well as e World Wide Group (eWWG). On the local front, it attracted resource persons from UNICEF, the ministries of Education, Science Vocation Training and Early Education, Ministry of Youth and Sport, Ministry of Justice, Ministry of Community Development, Mother and Child Health. Other participants included those from the Zambia Police, Childline Zambia, University of Zambia, media participants, Samsung Zambia and members of youth groups.

liv Regulations to the amended act were released on 20 March 2014.

lv s16(2) read with the offences created in section 24A and s 24B. Section 24B makes it a criminal offence for any person to (a) unlawfully possesses; (b) creates, produces or in any way contributes to, or assists in the creation or production of; (c) imports or in any way takes steps to procure, obtain or access or in any way knowingly assists in, or facilitates the importation, procurement, obtaining or accessing of; or (d) knowingly makes available, exports, broadcasts or in any way distributes or causes to be made available, exported, broadcast or distributed or assists in making available, exporting, broadcasting or distributing, any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children, shall be guilty of an offence. The Regulations to the Act, promulgated in March 2014, require specific steps to be taken when material containing child pornography is tabled for classification purposes, including notifying the national Director of Public Prosecutions and the South African Police service: see regulation 19(1).

lvi s27A (1) is also relevant: Every Internet service provider shall- (a) register with the Board in the manner prescribed by regulations made under this Act; and (b) take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography. (2) If an Internet service provider has knowledge that its services are being used for the hosting or distribution of child pornography, such Internet service provider shall- (a) take all reasonable steps to prevent access to the child pornography by any person; (b) report the presence thereof, as well as the particulars of the person maintaining or hosting or distributing or in any manner contributing to such Internet address, to a police official of the South African Police Service; and (c) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities. (3) An Internet service provider shall, upon request by the South African Police Service, furnish the particulars of users who gained or attempted to gain access to an Internet address that contains child pornography. (4) Any person who— (a) fails to comply with subsection (1) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment; or (b) fails to comply with subsections (2) or (3) shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

lvii Electronic communications service provider to furnish particulars to court:

4. (l) If an application for a protection order is made in terms of section 2 and the court is satisfied in terms of section 3(2) that a protection order must be issued as a result of the harassment of the complainant or a related person by means of electronic communications or electronic mail over an electronic communications system of an electronic communications service provider and the identity or address of the respondent is not known, the court may- (a) adjourn the proceedings to any time and date on the terms and conditions which the court deems appropriate; and (b) issue a direction in the prescribed form directing an electronic communications service provider to furnish the court in the prescribed manner by means of an affidavit in the prescribed form with-

(i) the electronic communications identity number from where the harassing electronic communications or electronic mail originated;

(ii) the name, surname, identity number and address of the respondent to whom the electronic communications identity number has been as-

(iii) any information which indicates that electronic communications or electronic mail were or were not sent from the electronic communications identity number of the respondent to the electronic communications identity number of the complainant; and

(iv) any other information that is available to an electronic communications service provider which may be of assistance to the court to identify the respondent or the electronic communications service provider which provides a service to the respondent. Failure to comply within 5 days is an offence.

lviii

lix ECPAT Global Monitoring – Status of action against commercial sexual exploitation of children: Ghana (2nd Edition, 2014).

lx A Callamard “Accountability, Transparency, and Freedom of Expression in Africa” vol 77(4) Social Research: From Impunity to Accountability: Africa’s Development in the 21st Century (WINTER 2010), pp. 1211-1240.

lxi As above.

lxii D Souter and M Kerrets Makau (note lii above).

lxiii www.kenyaigf.org.ke

lxiv <http://www.presscouncil.org.za/ContentPage?code=PRESSCODE>

lxv William Bird, MMA at a Policy Advocacy Network (PAN) briefing at the HSRC, Monday 28th July 2014 and at the APC meeting on 11 August I Johannesburg.

lxvi Urs Gasser, Colin M Maclay and John Palfrey “Working Towards a Deeper Understanding of Digital Safety for Children and Young People in Developing Nations” Harvard Law School Public Law & Legal Theory Working Paper Series Paper No. 10-36 (2010).

lxvii Femi Olubanwo, (2012) "Advertising to children in Nigeria", Young Consumers: Insight and Ideas for Responsible Marketers, Vol. 13 Iss: 2,

lxviii As above.

lxix. Ecpat Global Monitoring (note lix above) at p16.

lxx As above.

lxxi As above, p 26.

lxxii Eg common law, for instance the crime of *crimen iniuria* in South Africa, Namibia, Botswana, Swaziland and Zimbabwe, all Roman Dutch law based legal systems.

lxxiii Namely that the reasonable person would have thought that the defamatory nature of the image was probable.

lxxiv *International Journal on Children's Rights*, 2013(4).

lxxv Par 110 of the majority judgment. Showin that the image as a joke or a jest could be a defence which excludes *animus inuriandi*. That the image was intended to be a joke was supported by the Freedom of Expression Institute acting as *amicus curiae*. However, the majority found that there is a distinction between a good clean joke and one which is offensive, insulting or degrading. A fuller consideration of the FXI contention (that the image was satire and that satire is part of the functioning of democracy and the right of children to develop their satirical skills, and was a ground for justification, is to be found at paras120-128). However, it seems that in dismissing the alleged defence, the majority was mindful of the need to preserve school discipline and to uphold the status and authority of teachers, which are under threat.

lxxvi Mawdesly et al (note xv above).

lxxvii 2008 1 SA 474 (CC).

lxxviii Established in terms of the Criminal Law (Sexual Offences) Amendment Act, 2007. It appears from informal inquiries that South Africa is the only African country at present with a sex offenders register to contain the names of persons convicted of sexual offences, who are then prohibited (*inter alia*) from certain types of employment.

lxxix Details of the matter initially appeared in national newspaper in the first half of 2014; they have been confirmed with the Centre for Child Law who are now acting for the teenager in taking the matter on judicial review.

lxxx All.africa.com 'Namibia Court Orders Removal of Facebook Smut of 25 January 2013 (accessed 23 July 2014). In July 2014, the University of Cape Town in South Africa dealt with a case of cyberbullying, in a blog set up to bully students and pit people against each other. The matter was dealt with in an internal university disciplinary enquiry. The student plead guilty and was sanctioned (www.iol.co.za/scitech/technolog/internet/slap-on-the-wrist-for-uct-cyberbully (accessed 30 July 2014).

lxxxi Case no 12 /10142, judgment handed down in January 2013, Gauteng South High Court.

lxxxii Par 31.

lxxxiii As above.