

Section 5: Offenses against Children

General Commentary

Two optional protocols to the Convention on the Rights of the Child have been drafted and have entered into force. They are the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. This section of the MCC seeks to implement aspects of the latter protocol, specifically on the criminalization of three offenses: sale of children, child prostitution, and child pornography. The criminalization of these offenses is an international obligation for states parties to the protocol. The Convention on the Rights of the Child also contains an international obligation for states parties to “protect the child from all forms of sexual exploitation and sexual abuse” (Article 34), with specific reference to child prostitution and child pornography. Similar sentiments are expressed in Article 27 of the African Charter on the Rights and Welfare of the Child.

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography goes into more detail than the Convention on the Rights of the Child or the African Charter on the Rights and Welfare of the Child, providing definitions of offenses and other provisions relating to the investigation and prosecution of these offenses. The definitions in the MCC are taken from the protocol. The protocol provides that the perpetrators, those who are complicit, or those who participate in any of the offenses be prosecuted. Reference should be made to Articles 28–33 of the MCC, which deal with participation in criminal offenses. Furthermore, Article 4 of the protocol provides that jurisdiction be asserted over these offenses when they are committed on the territory of a state, when the alleged offender is a national of the state, or when the victim is a national of the state. These grounds of jurisdiction are covered in Article 4 (“Territorial Jurisdiction”) and Article 5 (“Extraterritorial Jurisdiction”) of the MCC. Reference should be made to both articles and their accompanying commentaries. Finally, Article 3(4) of the protocol requires states to ensure that, where appropriate, liability over legal persons should be established for these offenses. This provision is covered in the MCC

under Article 19 (“Criminal Responsibility of Legal Persons”). Reference should be made to Article 19 and its accompanying commentary.

A state should consider other elements of the protocol when domestically implementing its provisions, including provisions on extradition (Article 5), mutual legal assistance and international cooperation (Articles 6 and 10), seizure and confiscation of goods and proceeds derived from crime (Article 7), and procedural issues in the investigation of these offenses (Article 8). On these issues, reference should be made to the following: Chapter 14, Part 2, of the MCCP on extradition; Chapter 14, Part 1, of the MCCP on international cooperation; Chapter 8, Part 3, Section 4, of the MCCP; Articles 61 and 70–73 of the MCC on seizure of instruments and proceeds of crime; and Chapter 8, Part 4, Section 2, of the MCCP on protection of witnesses and victims. The problems of sale of children, child prostitution, and child pornography, of course, cannot be solved through criminalization measures alone. Strategies and plans beyond the criminal justice system are required. Article 9 of the protocol discusses potential measures of prevention and should be looked at closely by a state wishing to combat these serious offenses.

Reference should also be made to the work of the United Nations Special Rapporteur of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography. The special rapporteur was appointed in 1990 by the Commission on Human Rights to consider matters relating to the sale of children, child prostitution, and child pornography. The special rapporteur has produced numerous reports and recommendations that should be taken into account by states considering the issue of offenses against children.

Article 115: Sale of Children

Article 115.1: Definition of Offense

A person commits the criminal offense of sale of children when he or she engages in any act or transaction whereby a child is transferred by any person or group of persons to another person or group of persons for remuneration or any other consideration. The criminal offense of sale of children includes:

- (a) the offering, delivering, or accepting, by whatever means, a child for the purpose of sexual exploitation of the child, transfer of organs of the child for profit, or engagement of the child in forced labor; and
- (b) improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable legal instruments on adoption.

Commentary

The wording of Article 115 is derived from Articles 2(a) and 3(1)(a) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. This provision sets out a number of specific aspects of the sale of children that are common around the world, including the sale of children for sexual exploitation, the sale of children's organs for profit, the sale of children into forced labor, and the improper inducement of consent to adoption of another person's child. This list is merely elaborative and is not exhaustive.

Article 115.2: Penalty

The applicable penalty range for the criminal offense of sale of children is three to fifteen years' imprisonment.

Article 116: Child Prostitution

Article 116.1: Definition of Offense

1. A person commits the criminal offense of child prostitution when he or she offers, obtains, procures, or provides a child for child prostitution.
2. *Child prostitution* means the use of a child in sexual activities for remuneration or any other form of consideration.

Commentary

In many states, the issue of child prostitution is dealt with under ordinary legislation relating to prostitution, which often criminalizes the child prostitute. The provision in the MCC on child prostitution does not criminalize the actions of the child, who is in fact an innocent victim. States should reconsider the classification of child prostitutes as criminals and focus more on adults who force children to commit such acts. The MCC penalizes adults who offer, obtain, procure, or provide a child prostitute. The wording of Article 116 is derived from Articles 2(b) and 3(1)(b) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The definition of child prostitution not only refers to the use of children for the purpose of sexual intercourse but is broader and may cover all sexual activities.

Article 116.2: Penalty

The applicable penalty range for the criminal offense of child prostitution is five to twenty years' imprisonment.

Article 117: Child Pornography

Article 117.1: Definition of Offense

1. A person commits the criminal offense of child pornography when he or she produces, offers, makes available, distributes, disseminates, transmits, imports, exports, offers, or sells child pornography.
2. The criminal offense of child pornography includes:
 - (a) the production of child pornography for the purpose of its distribution through a computer system;
 - (b) offering, making available, distributing, disseminating, and transmitting child pornography through a computer system; and
 - (c) procuring child pornography through a computer system for oneself or for another person.
3. For the purposes of Article 117:
 - (a) *child pornography* means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes; child pornography includes a person appearing to be a minor engaged in sexually explicit conduct or realistic images representing a child engaged in sexually explicit conduct; and
 - (b) *computer system* means any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data.

Commentary

In many states, the issue of child pornography is dealt with under ordinary legislation relating to pornography. The issue of pornography is not dealt with under the MCC, except as it relates to child pornography. In a post-conflict state with a shattered crimi-

nal justice system, organized gangs are often quick to prey upon young children for the purposes of making child pornography. Child pornography operations have been found in a number of post-conflict states, all of which lack sufficient legislation on child pornography to prosecute the perpetrators of this offense.

Reference should be made to Chapter 8, Part 3, Section 4 of the MCCP, which provide police with the power to search and seize information from computer systems that may be relevant to the investigation of child pornography.

Paragraph 1: The wording of Article 117 is derived from Article 3(1)(c) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

Paragraph 2: The wording of Paragraph 2 comes from Article 9(1) of the Council of Europe Convention on Cybercrime, and it covers child pornography perpetrated through the medium of computers. For a detailed discussion of the substantive content of these provisions, reference should be made to paragraphs 91–106 of the explanatory report to the Convention on Cybercrime.

Paragraph 3(a): This paragraph comes from Article 2(c) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and Article 9(2) of the Council of Europe Convention on Cybercrime.

Paragraph 3(b): This paragraph is derived from Article 1(a) of the Council of Europe Convention on Cybercrime. For a discussion on the meaning of *computer system*, reference should be made to paragraphs 23–24 of the explanatory report to the Convention on Cybercrime.

Article 117.2: Penalty

The applicable penalty range for the criminal offense of child pornography is three to fifteen years' imprisonment.

Article 118: Possession of Child Pornography

Article 118.1: Definition of Offense

1. A person commits the criminal offense of possession of child pornography when he or she possesses child pornography.
2. The criminal offense of possession of child pornography includes possessing child pornography in a computer system or on a computer data-storage medium.
3. For the purposes of Article 118:
 - (a) *child pornography* means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes; child pornography includes a person appearing to be a minor engaged in sexually explicit conduct or realistic images representing a child engaged in sexually explicit conduct; and
 - (b) *computer system* means any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data.

Commentary

The issue of possession of child pornography, in addition to the other child pornography offenses set out in Article 117, is dealt with in Article 3(1)(c) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Possession of child pornography has been placed in a separate provision because it is subject to a different penalty range than offenses that involve the making or distribution of child pornography—offenses that were considered more serious by the drafters of the MCC and consequently are subject to a higher penalty range.

Paragraph 2: The wording of Paragraph 2 comes from Article 9(1) of the Council of Europe Convention on Cybercrime, and it covers child pornography that is perpetrated through the medium of computers. For a detailed discussion of the substantive content of these provisions, reference should be made to paragraphs 91–106 of the explanatory report to the Convention on Cybercrime.

Paragraph 3(a): This paragraph comes from Article 2(c) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and Article 9(2) of the Council of Europe Convention on Cybercrime.

Paragraph 3(b): This paragraph comes from Article 1(a) of the Council of Europe Convention on Cybercrime. For a discussion on the meaning of *computer system*, reference should be made to paragraphs 23–24 of the explanatory report to the Convention on Cybercrime.

Article 118.2: Penalty

The applicable penalty range for the criminal offense of possession of child pornography is one to five years' imprisonment.