

Protecting Children from Cybercrime

Legislative Responses in Latin America
to Fight Child Pornography, Online Grooming, and Cyberbullying
through Information and Communication Technologies

2015

A joint report



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A joint report of the World Bank and the International Centre for Missing & Exploited Children

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1818 H Street, NW, Washington, D.C. 20433

Telephone: 202-473-1000; Internet: www.worldbank.org

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- Naomi Van Treuren, *Former Program Coordinator*, The Koons Family Institute on International Law & Policy, International Centre for Missing & Exploited Children
- Laura Murchie, *Legal Intern*, The Koons Family Institute on International Law & Policy, International Centre for Missing & Exploited Children

❖ Contributors and Researchers

- Clara Carvalho, *Law Student*, Federal University of Minas Gerais, Brazil
- Bernardo Souto, *Law Student*, Catholic University of Minas Gerais, Brazil
- Guilherme Flores Costa, *Law Student*, Milton Campos College of Law, Minas Gerais, Brazil
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DISCLAIMERS AND LIMITATIONS

Disclaimers

This Regional Study is based on information on domestic law, regulation, and policy available in English online, offline, or both, and based on information collected from research conducted, verified, and updated up to March 2015.

Because this Regional Study is carried out primarily based on information publicly available online, it has more than several hundred URLs and links to publicly available laws, regulations, and electronically published documents. All referenced URLs and links were checked at the time when they were inserted into the footnotes. There is no guarantee as to their continued accessibility. When possible, footnotes may include mention of “last visited month, date, and year”. In addition, in case of citing a published document in a footnote, the footnote may include information on an author (or an authoring institution), a year of publication, title, page range, and URL or a link where the referenced publication was uploaded. There is no guarantee as to the continued accuracy of this information after the last date on which it was verified.

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Limitations

This Regional Study is limited to 18 countries in Latin American including Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

I. INTRODUCTION

The Internet has created an exciting world of rapid information exchange, altering our cultural landscape with enormous new benefits and opportunities in education, socialization, and entertainment. Unfortunately, it has also proven to be a powerful tool for illegal endeavors helping fuel criminal activity. Illicit ventures are no longer constrained by physical limits related to presence, transportation, distribution, jurisdiction, and vigilance as the Internet has provided them a space to thrive without censorship and impunity.

The magnitude of this problem is enormous when related to the online exploitation of children,¹ which includes all forms of violence and sexual abuse of children with an online nexus. The impact of these heinous crimes has significantly increased. They can be committed in the safety of homes, without witnesses, and under circumstances that remove the fear of moral reprobation and social isolation, which was typically suffered by offenders in the past. The Internet has greatly increased the sheer volume of available illicit material, the efficiency and reach of its distribution, and the ease of its accessibility.

In addition, free software programs like Tor,² which allow people to participate in an open network where it is impossible to identify the user's IP address, are becoming increasingly popular. Originally developed to protect information for and from the U.S. Government, Tor ensures virtual anonymity online allowing uncontrolled uploads, downloads, and access to all kinds of material. It has become a powerful tool for gathering people who would normally be unable to freely communicate with their peers, such as pedophiles, who are forming communities to exchange their experiences. This environment allows the most experienced, best prepared, and technically trained offenders to teach their peers to be as efficient and skilled as they are. These communities provide permanent support to like-minded individuals thus reducing their sense of being a marginalized group that functions outside the norms of society.

Mobile phones (i.e., smart phones) are quickly becoming the most important tool for communication (not only for calls, but also through text and image), and the development of new mobile phone technology makes production and distribution of child abuse images easier because they are not stored anywhere. Cloud computing has also created a safe haven for child sex offenders by providing secure storage of illicit content and making it inaccessible to law enforcement.

The problem is notably worse in developing countries, where poverty increases the vulnerability of children and their families. High inequality in distribution of wealth, violence in the streets, and illiteracy amongst the older population are a dangerous combination of factors. It is not unusual for poor communities in developing countries to have centers with free access to the Internet or cybercafés providing Internet access for a small fee. Since many adults have a false sense of security in allowing their children to access a computer because they do not understand the technology well, these establishments provide a bridge to excessive and uncontrolled exposure to all kinds of violence.

¹ Consistent with footnote 1 of the Rio de Janeiro Pact to Prevent and Stop Sexual Exploitation of Children and Adolescents (also known as "Pact of Rio de Janeiro"), we consider a "child" to be under 18 years of age, and everyone under that age needs protection from sexual exploitation. Article 1 of the UN Convention on the Rights of the Child states, "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

² The Tor Project – Tor is a network of virtual tunnels that allows people and groups to improve their privacy and security on the Internet. It also enables software developers to create new communication tools with built-in privacy features. Tor provides the foundation for a range of applications that allow organizations and individuals to share information over public networks without compromising their privacy. The Tor Project, <https://www.torproject.org/>.

This generational gap in technological literacy between adults and young people exacerbates the problem. Parents and caregivers are often incapable of evaluating the risks their children face when exposed to online contacts for a long period of time and must make a huge effort to keep up with new technologies.

Children are natural inhabitants of the online world as they constantly seek exploration and adventure. And while they are mentally more prepared for the progress and challenges of technology, they are psychologically vulnerable to the aggressions that can come from its misuse. Younger generations are compelled to be online because many of their relationships and social interactions with peers are forged through this medium. But in some cases, it can lead to destructive consequences.

The creativity of perpetrators, vulnerability of children, and lack of awareness of parents, caregivers, teachers, and others responsible for protecting children, contribute to the size of this problem. This combination of forces creates an ideal atmosphere for the practice of illicit conduct.

Law, as a social phenomenon, follows the evolution of society. But changes in technology are happening so rapidly that lawmakers are unable to keep pace, and this growing gap is successfully exploited by those who seek to commit crimes with little fear of detection.

The international, multi-jurisdictional nature of child sexual abuse via the Internet and its cross-border activity brings more complexity to the investigation of such crimes. The discrepancies in defining crimes and concepts amongst different legislations, as well as difficulty in applying laws with traditional concepts of time and place, make it more challenging to protect children from abuses. Consequently, international cooperation is no longer an option, but a necessity.

Fortunately, international instruments are being developed to help countries solve conflicts of jurisdiction, harmonize the criminalization of conduct, and increase international cooperation. While the commitment may be demonstrated by the signature or ratification of these instruments, it is not always followed by the necessary changes in domestic legislation. However, international instruments continue to be the only available means for encouraging proactive collaboration and persuading countries to promote and support a “pro-child” agenda.

II. EXECUTIVE SUMMARY – OBJECTIVES AND METHODOLOGY

1. Objectives

This Regional Study is focused on the prevention and combat of violence against children through the Internet in Latin American countries in order to illuminate problems shared by the different countries, identify the gaps in legislation, and highlight good practices in the prevention and protection of minor victims of online sexual exploitation.

2. Methodology

Framed by international and regional standards on the protection of children from online exploitation, this Regional Study consists of an analysis of national legislation, regulation, and private and public policy responses to protect children from violence and sexual abuse through the use of the Internet and new media and technologies. The analysis reviewed Constitutions and domestic laws assessing their compliance with international instruments and verifying the progress made in harmonizing with international patterns.

The analysis of domestic legislation was based on the text of the laws available at the time, and may lack consideration for issues addressed in jurisprudence or solved in practice. Considering that many reforms are underway to improve the system of protection for children and adolescents, this assessment will require periodic review to reflect new developments.

This Regional Study is focused on child abuse images (CAI)³, more commonly identified as child pornography⁴, and online grooming⁵, cyberbullying⁶, and sexting⁷, which are the most common offenses perpetrated online that threaten a child's right to a healthy life and sexual dignity.

This Regional Study relies on resources already available, such as the official and alternative reports presented by the countries to the UN Committee on the Rights of the Child on the Implementation of the Convention on the Rights of the Child (CRC) and the UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC), and the reports from Special Representatives

³ The term 'child pornography' is usually used as a legal term, to describe child abuse images. However, as Taylor and Quayle point out (Child Pornography – An Internet Crime, page 7), it is sometimes associated with 'adult pornography' that is preceded by consent and does not involve any kind of aggression or abuse. Thus, the expression child abuse images (CAI) is preferred over the term child pornography, in order to give the clear idea that the children shown in these images are victims of sexual abuse. Despite this reservation, the term child pornography will be used throughout this Regional Study as the majority of laws and international instruments analyzed here use this term.

⁴ For the purposes of this Regional Study, child pornography refers to 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, as defined in Article 2, c of the UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. Doc. A/54/49, Vol. III, art. 2, para. C, entered into force Jan. 18, 2002 (hereafter referred to as the "Optional Protocol" or "OSPC").

⁵ In a more restricted definition, like that adopted by Article 23 of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation (the "Lanzarote Convention"), online grooming is the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age of sexual consent, for the purpose of engaging in sexual activities or producing child pornography, when this proposal has been followed by material acts leading to such a meeting. Some domestic legislation have a broader definition of online grooming (like the Code of Children and Adolescents from Brazil), considering it the online enticement of a child for sexual acts, which can include personal meetings or just the exchange of pornographic material to or from the child. For the purposes of this Regional Study, we have used the Council of Europe definition because it was adopted by an International Instrument.

⁶ Cyberbullying is the use of information and communication technologies to support deliberate, repeated, and hostile behavior by an individual or group that is intended to harm others. Bill Belsey, *What Is Cyberbullying?*, http://www.cyberbullying.org/pdf/Cyberbullying_Information.pdf.

⁷ A U.S. Federal Court defined "sexting" as the exchange of sexually explicit text messages, including photographs, via a cell phone. *United States v. Broxmeyer*, 2010 U.S App. LEXIS 160032 (2d Cir. 2010).

of the UN Secretary General on Violence against Children (SRSG). It takes into account research and studies related to the use and misuse of Information and Communication Technologies (ICTs), official statistics related to crimes committed against children through the Internet, and the use of ICTs by children, specifically reports produced by the International Telecommunication Union (ITU), Council of Europe (CoE), United Nations Children's Fund (UNICEF), End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT), and the International Centre for Missing and Exploited Children (ICMEC). Doctrine and interviews with national authorities dealing directly with these issues were also considered.

The theoretical framework of this Regional Study is the doctrine of integral protection of the child, who should be considered a person in development, and the subject of rights with absolute priority of attention.

III. RELEVANT INTERNATIONAL INSTRUMENTS

All of the international instruments directly or indirectly related to this subject are used as support, especially when discussing the concepts and definitions that they present.

1. UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child (CRC) aims to ensure a broad range of human rights for children including civil, cultural, economic, political, and social rights.⁸

States Parties are required to take all appropriate measures to address the sexual exploitation and sexual abuse of children, including measures to prevent the exploitative use of children in pornographic performances and materials (Article 34 of the CRC).

For the purposes of this Regional Study, every person under the age of 18 years is considered a child in need of protection from sexual exploitation in accordance with Articles 1 and 34 of the CRC.

All of the 18 Latin American countries analyzed in this Regional Study have ratified the CRC (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela).⁹

2. UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

The main international instrument that guides this Regional Study is the UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC).¹⁰

The OPSC has been ratified by all of the countries of Latin America including: Argentina, 2003; Bolivia, 2003; Brazil, 2004; Chile, 2003; Colombia, 2003; Costa Rica, 2002; Dominican Republic, 2006; Ecuador, 2004; El Salvador, 2004; Guatemala, 2002; Honduras, 2002; Mexico, 2002; Nicaragua, 2004; Panama, 2001; Paraguay, 2003; Peru, 2002; Uruguay, 2003; and Venezuela, 2002.¹¹

Although the OPSC was not drafted to deal specifically with crimes committed through the Internet, implementation of its requirements is still extremely important. Since the requirements of the OPSC are related to the constituent elements of these crimes, it is relevant regardless of the format or medium through which the crime is committed.

⁸ Convention on the Rights of the Child, G.A. Res. 44/25, 61st plen. mtg., U.N. Doc. A / RES / 44 / 25 (Nov. 20, 1989), entered into force 2 Sep. 1992. See the full text of the Convention on the Rights of the Child (CRC) at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

⁹ See the ratification status of the CRC available at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en.

¹⁰ The OPSC was drafted as a result of the conclusions obtained at the International Conference held in Vienna, Austria, which expressed great concern about the growing availability of child pornography on the Internet and other evolving technologies, and mobilized the States Parties to approve it in May 2000. This international instrument obtained ratification from 124 States Parties and set the basis for individual governments to show their commitment to the fight against the sexual exploitation of children, building an important legal framework to deal with such situations.

See the full text of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>.

¹¹ See the ratification status of the OPSC at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en.

2.a. The appropriateness of the definition of child pornography according to the OPSC

The appropriateness of the definition of child pornography in domestic legislation was analyzed based on the definition in Article 2 (c) of the OPSC. The OPSC is used to verify each country's compliance with the obligations to:

- 1) criminalize the acts of **producing, distributing, disseminating, importing, exporting, offering, selling, or possessing** child pornography for primarily sexual purposes (Article 3 (1) (c));
- 2) punish the offenses with **adequate penalties** (Article 3 (3));
- 3) establish the **liability of legal persons** who commit offenses established in Article 3 (1) (Article 3 (4));
- 4) establish an **effective extraterritorial jurisdiction** over the offenses referred to in Article 3 (1) and Article 4; and
- 5) establish the **forfeiture of assets** used to commit or facilitate offenses under the OPSC and the forfeiture of proceeds derived from such offenses (Article 7).

2.b. The requirement to establish general rules for attempted crimes, complicity or participation in child pornography offenses

Nearly all Latin American countries have civil law systems and Criminal Codes that establish general rules for attempted crimes, complicity or participation in criminal activity. Since these provisions are usually present in legislation, this Regional Study does not analyze each country's compliance with Article 3 (2) of the OPSC.

2.c. The requirement to establish territorial and extraterritorial jurisdiction

Article 4 (1) and 4 (2) of the OPSC requires that States Parties adapt their domestic legislation in order to exercise territorial and extraterritorial jurisdiction in child pornography offenses.

The territorial jurisdiction principle has a subjective and an objective aspect, both of which are directly linked to sovereignty. The subjective aspect is the basis for jurisdiction. All States have the power to choose, define, and adopt criminal laws that apply to crimes physically committed within their borders. The objective aspect is the exercise of jurisdiction, and is related to the power to apply criminal laws to a crime committed within the borders of a specific State, or when it produces its effects there.

The conceptual changes of place and space brought by the Internet require us to modify rules related to territorial jurisdiction. The deep web, cloud computing, and other technological developments have heightened the complexity of the issue. While in certain cases, the rules can be adapted and applied to the new reality, the international community must begin to establish rules related to the territorial jurisdiction of cyberspace.

Two Approaches for World Consideration

In the context of online crimes, cyberspace can be considered a "land of no one" or a "land of everyone" depending on the reach of the crime's effects and the way the crime is committed. Either of the following approaches to the problem could be considered depending on the characteristics of the situation. The point to be stressed is that an international effort to establish legal concepts and definitions that apply to this new reality and space where crimes can be committed is urgently needed.

As a "land of no one", the extension of territorial jurisdiction to cyberspace could be established when it is accessed by someone who is in the territory of the country, and the effects of crime are limited to its borders. People exchanging emails containing child abuse images, using instant messaging apps,

participating in chats, or using the Internet to entice children who live in that specific country would fit in this hypothesis. The same concept could be applied to web pages by considering them an extension of the country where their creator is located, regardless of the physical location of the headquarters for the hosting Internet Service Provider (ISP). The “cloud” could also be considered an extension of the territory where the person that stores the material lives. Thus, the territorial jurisdiction principle could be reformulated, amplified, and applied to a large number of situations that occur in cyberspace.¹² This concept is especially applicable when the crime committed produces effects only in one specific country and is an activity with no potential to reach citizens of other countries.

Cyberspace could be considered a “land of everyone” when crimes involve a large number of people (victims or offenders) or the criminal act is committed by an international criminal organization. In these situations, a universal jurisdiction principle with international regulation is essential and mandatory. A specific crime can spread its effects to other countries or at a minimum has the potential to do so. Thus, a universal jurisdiction principle is a justifiable solution because it would allow any country to prosecute the offender.

Though not specifically related to cybercrimes, the OPSC addresses the territorial jurisdiction principle in a classic way by recommending that States Parties take measures to establish jurisdiction over offenses committed within its territory or onboard a ship or aircraft registered in its territory. While this is a relevant application of the principle, this Regional Study does not address or verify States Parties’ compliance with the recommendations of the OPSC as it would require additional and irrelevant analysis of the United Nations Convention on the Law of the Seas¹³ and the extension of jurisdiction to the high seas and airspace. However, the relevant question that remains is – can we make any comparisons between the high seas and cyberspace to adapt existing rules and apply them to similar realities?

The analysis is concentrated on the second part of the OPSC, Article 4 (1), which is related to extraterritorial jurisdiction. It requires States Parties to adopt measures to guarantee that offenses committed abroad either by **nationals** or by **non-national residents in their territory** are punished under domestic criminal law, especially when there is no applicable extradition agreement. This principle is known as the **active personality principle** of extraterritorial jurisdiction and in the context of the OPSC, is limited to crimes committed by individuals (not by legal persons). This principle is analyzed from the perspective of the commission of a crime as committed by a national or a non-national with habitual residence in that country.

Article 4 of the OPSC requires States Parties to adopt measures to guarantee that offenses committed against nationals of the country are punished under domestic criminal law. This principle is known as the **passive personality principle**.

2.d. Universal Jurisdiction Principle

The universal jurisdiction principle allows States to claim criminal jurisdiction over an accused person, regardless of the location of the crime and the nationality of the perpetrator or the victim, especially when there is a serious violation of human rights or is a detriment to international interests. Its jurisdiction is

¹² Vineeth Narayanan, *Harnessing the Cloud: International Law Implications of Cloud-Computing*, 12 CHI. J. INT’L L. No. 2, Art. 11, 783, 791 (2012), available at <http://chicagounbound.uchicago.edu/cjil/vol12/iss2/11>.

¹³ The United Nations Convention on the Law of the Sea of 10 December 1982 was ratified by 166 countries, including almost all of the Latin American countries reviewed in this Regional Study.

based solely on the nature of the crime committed. While adoption of the universal jurisdiction principle is not directly recommended by the OPSC, if it were adopted, it could be considered a valid and useful substitute for the active and passive personality principles.

As defined in the Rome Statute¹⁴, the types of human rights abuses considered to be subject to universal jurisdiction of international courts include crimes against humanity, torture, genocide, and war crimes.¹⁵ Crimes perpetrated against children should be considered human rights abuses, including when they are transnational in nature. One of the most important obligations of countries to their citizens is to promote the healthy development of their children, who must be protected from any kind of abuse or exploitation. When they fail to do so, the international community or an individual country must act.

An obligation to adopt the universal jurisdiction principle should be included in current and future treaties to strengthen accountability for violence committed against children, particularly when the violence affects children as a specific group in need of protection. The domestic legislation of States Parties can establish this principle to effectively combat crimes related to child pornography that are perpetrated in a virtual space where there are no frontiers or boundaries – a crime that is transnational in nature.

3. International Labor Organization Convention No. 182 (1999)

The International Labor Organization (ILO) Convention No. 182 (1999) concerns the prohibition and immediate action for the elimination of the worst forms of child labor. It requires States Parties to take immediate and effective measures to secure the prohibition and elimination of the use, procuring, or offering of a child for prostitution, production of pornography, or for pornographic performance¹⁶ (Articles 1 and 3, item b).¹⁷

All 18 Latin American countries studied have ratified the ILO Convention (Argentina, 2001; Bolivia, 2003; Brazil, 2000; Chile, 2000; Colombia, 2005; Costa Rica, 2001; Dominican Republic, 2000; Ecuador, 2000; El Salvador, 2000; Guatemala, 2001; Honduras, 2001; Mexico, 2000; Nicaragua, 2000; Panama, 2000; Paraguay, 2001; Peru, 2002; Uruguay, 2001; Venezuela, 2005).¹⁸

4. Council of Europe Convention on Cybercrime

In 2001, the Member States of the Council of Europe (CoE) along with a number of non-member States, signed the Convention on Cybercrime (also known as the “Budapest Convention”) which in part states: “convinced of the need to pursue, as a matter of priority, a common criminal policy aimed at the protection of society against cybercrime, by adopting appropriate legislation and fostering international co-operation.”¹⁹ It is the first international instrument to recommend the special need to criminalize offenses committed by means of a

¹⁴ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> (last visited Oct. 22, 2015).

¹⁵ See Universal Declaration of Human Rights, available at <http://www.un.org/en/documents/udhr/> (last visited Oct. 13, 2014).

¹⁶ While the author does not agree with the mentioned classification and does not believe that any form of child exploitation should be considered as “work”; the caveat is irrelevant so long as classification is helping to eliminate child pornography.

¹⁷ See the full text of the ILO Convention on the Worst Forms of Child Labor (1999) (No. 182) at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm>.

¹⁸ See the ratification status of the ILO Convention on the Worst Forms of Child Labor (1999) (No. 182) at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327:NO.

¹⁹ See the full text of the Council of Europe Convention on Cybercrime at <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>.

computer system.²⁰ Unfortunately, few non-European countries have signed or acceded to the Budapest Convention.²¹ Accession has the same legal effect as ratification by the terms of the Convention (Articles 36 and 37).²²

Of the Latin American countries studied, only the Dominican Republic and Panama have acceded to this Convention. Argentina, Chile, Colombia, Costa Rica, and Mexico were invited to accede, but have not yet done so. Although it is not a binding instrument for Latin American countries, this Regional Study considers it an important source for definitions of terms related to computer systems and an indispensable guide on how to enhance cybercrime investigations.²³

As this Regional Study focuses on crimes committed through the Internet, special attention is given to Articles 17, 20, and 21, which provides for the obligation of real-time collection of content and traffic data by Internet Service Providers. These provisions are essentially “do-not-delete” orders for data related to a specific crime under investigation, and are important tools essential to any investigation involving the transmission of information through the Internet. While governments have a legitimate interest in accessing communications information to effectively fight crime, it is important to limit the scope and duration of this power to protect individual rights. Article 15 requires States Parties to respect obligations taken under the United Nations International Covenant on Civil and Political Rights (ICCPR) and other applicable international human rights instruments. It recommends that States Parties incorporate the principle of proportionality in their domestic law, require judicial supervision, and present grounds that justify application of these measures.

Data preservation policies reflect a balancing of the need to protect individual rights and privacy rights, with the need for this information to fight crime and protect the community. When these principles are at odds, the conflict should be resolved by taking into account the relative weight of each interest, which will change based on the specific situation.²⁴

As a general rule, authorities must have the right to collect and preserve data only when there are legitimate grounds for it, and the law must ensure that its disclosure is limited to the originally specified purpose and is proportional in scope to its need.

It is worth noting that there is a difference between data retention and data preservation. Internet Service Providers (ISPs) are obliged to retain data, regardless of whether the data is used for a criminal investigation. Data preservation concerns traffic data and content collected in real-time by order of competent authorities to allow for proper and full investigation of a potential crime.

²⁰ The main objective of the Budapest Convention is to pursue a common criminal policy against cybercrime, through international collaboration. It also regulated content-related offenses, like child pornography, establishing the need to criminalize the production of this kind of material for the purpose of its distribution through a computer system, as well as the offering, distributing or transmitting, or procuring through this same way (Article 9).

²¹ Accession has the same legal effect as ratification under the terms of the Budapest Convention (Articles 36 and 37).

²² See the ratification status of the Convention on Cybercrime at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=8&DF=&CL=ENG>.

²³ The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) is non-binding for Latin American countries. The Lanzarote Convention was opened for signature in October 2007 on the island of Lanzarote, and was ratified by Member States of the Council of Europe, although it is also open for accession by non-member-States. It will, however, be secondarily used because the OPSC is an equivalent instrument and it has been ratified by all of the Latin American countries.

²⁴ Ronald Dworkin, *A Special Supplement: Taking Rights Seriously*, 15 THE NEW YORK REVIEW OF BOOKS No. 1 (1970), available at <http://www.nybooks.com/issues/1970/dec/17/>.

The Budapest Convention does not recommend the retention of data. Data retention is a different and sometimes polemic measure, and is recommended by Directive 2006/24/EC of the European Parliament and Council.

This Regional Study analyzes whether objective requirements related to data preservation and real-time collection of traffic data are present in the domestic legislation of Latin American countries. Legislation may include provisions that:

- 1) allow real time collection of content and traffic data;
- 2) establish a reasonable period of time to preserve content of electronic communications;
- 3) establish the need to have a judicial order to preserve and disclose content of electronic communications; and
- 4) establish the need to maintain the confidentiality of the preservation order and of the content of the communication intercepted.

5. Directives 2002/58/EC and 2006/24/EC, both of the European Parliament and of the Council

The Directive 2002/58/EC of the European Parliament and the Council of July 12, 2002, also known as the “Directive on Privacy and Electronic Communications” regulates the processing of personal data and the protection of privacy in electronic communications. It was complemented by the Directive 2006/24/EC, known as “Directive on the Retention of Data”²⁵, which sought to establish rules on the retention of data generated or processed in connection with the provision of available communications services or public communication networks.

Directives 2002/58/EC and 2006/24/EC serve as guides for the analysis of data retention in this Report. Data retention is an expression that generally refers to the automatic retaining of “traffic data” such as IP address, subscriber information, date, time, and time zone for a set period of time. It reflects a legal obligation established for ISPs and ensures that data is available when necessary. The analysis in the context of these Directives looks at the competing interests of protecting privacy in electronic communications and the need for data retention laws to allow efficient investigations of child pornography offenses. Data retention provisions also reflect a need to balance the protection of individual rights against protection of the community, and require a weighing of interests to determine which will prevail.

It is important to note that the Court of Justice of the European Union (ECJ) has declared the Data Retention Directive **invalid** because it “does not meet the principle of proportionality and should have provided more safeguards to protect the fundamental rights to respect for private life and to the protection of personal data”.²⁶ However, the Court recognized that, “data retention serves, under clear and precise conditions, a legitimate and general interest, namely the fight against serious crime and the protection of public security”.²⁷

This decision did not exclude the importance of data retention provisions or invalidate the period of retention

²⁵ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006L0024>.

²⁶ Judgment of the Court (Grand Chamber), Joined Cases C-293 and C-594/12, decided on April 8, 2014, available at <http://curia.europa.eu/juris/document/document.jsf?docid=150642&doclang=EN>.

²⁷ *Id.*

recommended by Directive 2006/24 (not less than six months, not more than two years, according to Article 6). The ECJ considered it invalid, amongst other reasons, because:

- It should have been stated that the determination of the period of retention must be based on objective criteria in order to ensure that it is limited to what is strictly necessary;
- It did not make any distinction between the categories of data;
- It did not require any relationship between the data for which retention is provided and a threat to public security;
- It did not restrict retention in relation to: (i) data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) persons who could, for other reasons, contribute, by the retention of their data to the prevention, detection, or prosecution of serious offenses;
- It fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offenses that, in view of the extent and seriousness of the interference with the fundamental rights;
- It did not lay down any objective criterion by which the number of persons authorized to access and subsequently use the data retained is limited to what is strictly necessary in the light of the objective pursued;
- It did not make any distinction between the categories of data set out in Article 5 of the Directive on the basis of their possible usefulness for the purposes of the objective pursued or according to the persons concerned.

It is important to consider that data retention urgently needs a definition of the essential requirements for its implementation, as determined in the decision of the ECJ.

An independent external study on current approaches to data preservation in EU Member States and third countries²⁸, conducted by the Centre for Strategy and Evaluation Services from the United Kingdom, and commissioned by the Directorate-General of Migration and Home Affairs of the European Commission, concluded that “data retention and data preservation are complementary, rather than alternative instruments”, and that “data retention plays a role in ensuring that data are kept, which is sometimes a prerequisite for data preservation, as data may have already been deleted before a data preservation order is issued”.²⁹

Child pornography offenses committed through the Internet usually cannot be investigated if there is no automatic retention of traffic data that can be disclosed when needed and requested.

For the purposes of this Regional Study, we evaluate the existence of:

- 1) data retention provisions, limited to traffic data;
- 2) a reasonable period of time for the implementation of this measure, considered as not less than six months and not more than two years;

²⁸ Evidence of Potential Impacts of Options for Revising the Data Retention Directive: Current approaches to data preservation in the EU and in third countries, *available at* http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/data-retention/index_en.htm (last visited Dec. 20, 2014).

²⁹ Research study into evidence of potential impacts of options for revising the Data Retention Directive, 23 (Nov. 2012), *available at* http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/data-retention/docs/drd_task_2_report_final_en.pdf (last visited Oct. 18, 2015).

- 3) an identification of the offenses that shall authorize the future disclosure of data, in light of the extent and seriousness of the interference with fundamental rights.

6. Framework Decision 2004/68/JHA of the Council and Directive 2011/93/EU of the European Parliament and of the Council, of December 13, 2011, on combating the sexual abuse and sexual exploitation of children and child pornography

6.a. Harmonization of penalties

The reason a country criminalizes a certain conduct is necessarily linked to an evaluation of the degree of damage it causes to the community and harm it causes society. Therefore, it is very difficult to compare or harmonize penalties established by different countries to a certain crime as there are strong cultural influences on this subject.

However, the multi-jurisdictional nature of child sexual abuse via the Internet with its regular movement across borders is helping to change that understanding. The collective responses and shared responsibility at the heart of the current concept of sovereignty justifies the involvement of the international community in the fight against sexual exploitation of children, especially when the perpetrators are transnational criminal organizations and hundreds of children are victims. According to the UN General Assembly 2005 World Summit Outcome, sovereignty is closely linked to a State's responsibility to protect, and when not exercised, should attract a subsidiary action by the international community:

“In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community. But history teaches us all too clearly that it cannot be assumed that every State will always be able, or willing, to meet its responsibilities to protect its own people and avoid harming its neighbors. And in those circumstances, the principles of collective security mean that some portion of those responsibilities should be taken up by the international community, acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity of supply the necessary protection, as the case may be.

What we seek to protect reflects what we value. The Charter of the United Nations seeks to protect all States, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens. These are the values that should be at the heart of any collective security system for the twenty-first century”.³⁰

These crimes are not only committed against a specific child, but also against children who are considered part of a vulnerable group of persons who deserve special protection. When the crime is committed in a country that fails to protect its children, or cannot prosecute the offender for any reason, the responsibility should fall to the international community to ensure justice.

³⁰ UN General Assembly, *Resolution adopted by the General Assembly [without reference to a Main Committee (A/60/L.1)] 60/1. 2005 World Summit Outcome*, October 25, 2005, at <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf> (last visited Oct. 8, 2015).

In this context, it is important to encourage countries to establish the universal jurisdiction principle in their legislation, which allows the exercise of jurisdiction based on the nature of the crime, and to harmonize their penalties. These measures could help to prevent transnational crimes, such as the distribution of child pornography, where offenders move from one country to another to avoid punishment or to receive more lenient sentences. Unfortunately, there is no international instrument that recommends or requires equalized, similar, or proportional penalties.

While consensus has been reached at an international level that countries should punish offenses related to child pornography with **appropriate** penalties, this is a very subjective concept. Article 3 (3) of the OPSC requires appropriate penalties, but there is no binding international instrument that provides any parameters or requirements for the minimum and maximum terms of imprisonment, at least for Latin American countries.

In order to analyze the penalties established by Latin American countries to crimes related to child abuse material, and to avoid any subjective analysis, the viewpoints of the European Parliament are used, along with the viewpoint of the CoE, which provides an important decision and Directive related to this matter.

The Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography of the Council of Europe³¹ provides guidance for the punishment of the: a) production; b) distribution, dissemination; and c) possession of child pornography. Article 3 of this Framework Decision provides a list of punishable conduct that constitutes an offense related to child pornography, whether or not it is undertaken by means of a computer system, among others, as follows: a) production of child pornography; b) distribution or dissemination of child pornography; and c) possession of child pornography. Article 5 of the Framework Decision further articulates that such child pornography offenses as mentioned in Article 3 shall be punished by criminal penalties of a maximum of at least between one and three years of imprisonment.

The Directive 2011/92/EU of the European Parliament and of the Council on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography³², which replaced the Framework Decision 2004/68/JHA, attempts to ensure consistency of legislation on substantive criminal law, with particular regard to the level of penalties.

The Directive separates offenses related to child pornography into three groups. Article 5 of the Directive recommends that acquisition or possession of child pornography shall be punishable by a maximum term of imprisonment of at least one year; distribution, dissemination, or transmission of child pornography, as well as the offering, supplying, or making available of such material shall be punishable by a maximum term of imprisonment of at least two years; and production shall be punishable by a maximum term of imprisonment of at least three years.³³

³¹ See the full text of the Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography of the Council at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004F0068:EN:HTML>.

³² See the full text of the Directive 2011/93/EU of the European Parliament and of the Council on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, at http://srsq.violenceagainstchildren.org/sites/default/files/documents/political_declarations/europe/directive_european_parliament_on_combating_sexual_abuse_and_sexual_exploitation_of_children.pdf (hereafter Directive).

³³ EU Directive, Article 5 - Offences concerning child pornography

1. Member States shall take the necessary measures to ensure that the intentional conduct, when committed without right, referred to in paragraphs 2 to 6 is punishable.

It is important to realize that the Directive indicates the minimum acceptable level for the maximum penalties that should be prescribed for such offenses. The parameter is set too low, and does not sufficiently reflect the seriousness of the offense. Higher penalties are necessary to send a strong message that this conduct is not tolerated anywhere. In the U.S., for instance, a production offense carries a statutory mandatory minimum term of 25 years of imprisonment and a maximum term of 50 years (and higher minimum and maximum penalties if the offender has a predicate conviction for a sex offense).³⁴ In Canada, the Criminal Code establishes a penalty of one to ten years of imprisonment for the production of child pornography (six months to two years on summary conviction).³⁵

6.b. Different levels of penalty

Regardless of the penalties established, it is important to realize that the Directive recommends the punishment of conduct related to child pornography in three levels or categories. While all child pornography offenses are serious crimes, the categorization in different degrees according to the seriousness of the harm caused is important.

The production of child pornography involves the sexual abuse and exploitation of the child or adolescent. Because child pornography is often committed with the purpose of distribution, it carries also the potential and secondary harm of exposing minors to continuous and perpetual violation through the distribution of their image. Hence, the production of child pornography deserves higher penalties than other related offenses.

Conduct including distributing, disseminating, or transmitting child pornography, as well as the offering, supplying, or making available such materials, which are not necessarily linked to the abuse itself are at an intermediary level.

The possession with the intent to distribute (or to disseminate, sell, offer, and similar behaviors) is comparable to an attempt to distribute (when it does not effectively occur), deserving therefore a lesser sentence. In fact, when there is effective distribution, this last conduct will necessarily absorb the prior possession.

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2. Acquisition or possession of child pornography shall be punishable by a maximum term of imprisonment of at least 1 year.
 3. Knowingly obtaining access, by means of information and communication technology, to child pornography shall be punishable by a maximum term of imprisonment of at least 1 year.
 4. Distribution, dissemination or transmission of child pornography shall be punishable by a maximum term of imprisonment of at least 2 years.
 5. Offering, supplying or making available child pornography shall be punishable by a maximum term of imprisonment of at least 2 years.
 6. Production of child pornography shall be punishable by a maximum term of imprisonment of at least 3 years.
 7. It shall be within the discretion of Member States to decide whether this Article applies to cases involving child pornography as referred to in Article 2(c)(iii), where the person appearing to be a child was in fact 18 years of age or older at the time of depiction.
 8. It shall be within the discretion of Member States to decide whether paragraphs 2 and 6 of this Article apply to cases where it is established that pornographic material as referred to in Article 2 (c) (iv) is produced and possessed by the producer solely for his or her private use in so far as no pornographic material as referred to in Article 2 (c) (i), (ii), or (iii) has been used for the purpose of its production and provided that the act involves no risk of dissemination of the material.

³⁴ 18 USC §2251(e) *Sexual Exploitation of Children*, at <https://www.law.cornell.edu/uscode/text/18/2251> (last visited Oct. 8, 2015).

³⁵ Canadian Criminal Code, R.S.C. 1985, c. C-46 (Can.), at <http://laws-lois.justice.gc.ca/eng/acts/c-46/fulltext.html> (last visited Nov. 5, 2015).

In this sense, the adequate punishment of child pornography offenses can and will be analyzed by the presence of the three different levels of penalties.³⁶

6.c. Aggravating circumstances

Article 9 of the Directive also recommends that aggravating circumstances should be established in national law, when:

- the offense was committed by a member of the child’s family, a person cohabiting with the child or a person who has abused a recognized position of trust or authority;
- the offense was committed by several persons acting together;
- the offense was committed within the framework of a criminal organization;
- the offender has previously been convicted of offense offenses of the same nature;
- the offender has deliberately or recklessly endangered the life of the child; or
- the offense involved serious violence or caused serious harm to the child.

The first step for sentencing, which is usually established in the criminal procedure codes of Latin America countries, involves the identification of the penalty within range of minimum and maximum values as established by law. During this stage, judges must consider the magnitude of the harm caused and the potential damage cause by the conduct. After this, aggravating circumstances should be taken into consideration to determine the appropriate penalty. The two last circumstances indicated above will not be evaluated as “aggravating” because their occurrence generally requires a higher starting minimum penalty than is already established.

It is important to heighten penalties for the other aggravating circumstances to prevent child exploitation because the sexual abuse of children often occurs in a familiar environment. In Brazil, for instance, a study conducted by the Health Department found that 64.5% of abuses against children take place at home.³⁷ The Brazilian official notification system (Sinan) shows that 78% of sexual abuses against children under 12 years of age, and 67% of sexual abuses against adolescents (from 12 to 18 years of age) are perpetrated in their home.³⁸

This Regional Study considers whether a country has adequate legislation for heightened penalties for specific crimes with aggravating circumstances and if higher penalties are established for standalone offenses that correspond to a specific crime committed under those circumstances.

Considering the need to equalize penalties established by different countries, the importance of having different levels of punishment, and the need to aggravate penalties under certain circumstances, the Directive 2011/93/EC is used to verify the existence of:

- 1) a maximum term of imprisonment of at least one year for the acquisition or possession of child pornography;

³⁶ It is important to have a fourth level of penalties related to the mere possession of child pornography for “personal use”, which, in the opinion of the Author, deserves a lower sentencing than the other offenses, not because it is not morally reprovved, neither because it does not stimulate the sexual abuse of children, but for the reason that it is not linked to the sexual abuse itself, and does not contribute to the spread of child abuse material. Therefore, if States Parties choose to punish mere possession, different levels of punishment for this conduct should be established, although it has not been required for the purposes of this Regional Study.

³⁷ *Abuso sexual é o 2º tipo de violência mais comum contra crianças, mostra pesquisa*, PORTAL BRAZIL, May 22, 2012, <http://www.brasil.gov.br/saude/2012/05/abuso-sexual-e-o-segundo-maior-tipo-de-violencia-contra-criancas-mostra-pesquisa> (last visited Nov. 5, 2015).

³⁸ Sistema de Informação de Agravos de Notificação – Sinan, available at <http://dtr2004.saude.gov.br/sinanweb/> (last visited Nov. 5, 2015).

- 2) a maximum term of imprisonment of at least two years for the distribution, dissemination, transmission, offering, supplying, or making available such material;
- 3) a maximum term of imprisonment of at least three years for the production of child pornography;
- 4) three levels of penalties for child pornography offenses;
- 5) aggravated circumstances when the offense is committed by a member of the child's family, a person cohabiting with the child or a person who has abused a recognized position of trust or authority;
- 6) aggravated circumstances when the offense is committed by several persons acting together;
- 7) aggravated circumstances when the offense is committed within the framework of a criminal organization; and
- 8) aggravated circumstances when the offender has previously been convicted of offenses of the same nature.

7. The Rio de Janeiro Pact to Prevent and Stop Sexual Exploitation of Children and Adolescents

Following the 1996 Stockholm³⁹ and 2001 Yokohama Global Forums⁴⁰, Brazil hosted the Third World Congress against the Sexual Exploitation of Children and Adolescents in Rio de Janeiro, from 25-28 November 2008. Participants included 739 delegates from 137 governments, representatives from civil society, UN agencies, international and intergovernmental organizations, representatives from the private sector, children and young people, industry, religious leaders, ombudspersons from several countries, and First Ladies, among others.⁴¹

One point of focus of the Third World Congress was the new dimension of commercial sexual exploitation of children. The participant States expressed their concerns at the increase in sexual exploitation of children and adolescents, in particular through abuse of the Internet and new and developing technologies. They produced the "Rio de Janeiro Pact to Prevent and Stop Sexual Exploitation of Children and Adolescents" (hereafter called "the Pact of Rio de Janeiro"), a document that is politically and technically significant, as it lays out specific parameters for the international community to address the issue.⁴² There was massive participation and representation of Latin American countries at the event.

Although not legally binding, the Plan of Action of the Pact of Rio de Janeiro serves as support for verification of compliance by Latin American countries with their commitments to:

- 1) provide a **clear definition** of child pornography, in accordance with international standards;
- 2) criminalize the production, distribution, commercialization, and possession of child pornography including **virtual images and the sexually exploitative representations of children**, that do not necessarily use real children in their production;

³⁹ The Stockholm Declaration and Agenda for Action (1996), although not legally binding, was adopted at the First World Congress against Commercial Sexual Exploitation of Children in Stockholm, Sweden on 27-31 August 1996.

See the full text of the Stockholm Declaration and Agenda for Action (1996) at http://www.childcentre.info/public/stockholm_declaration_on_action.pdf.

⁴⁰ The Yokohama Global Commitment (2001), although not legally binding, was adopted at the Second World Congress against Commercial Sexual Exploitation of Children in Yokohama, Japan on 17-20 December 2001.

See the full text of the Yokohama Global Commitment (2001) at http://www.childcentre.info/public/yokohama_commitment_2001.pdf.

⁴¹ ECPAT INTERNATIONAL, REPORT OF THE WORLD CONGRESS III AGAINST SEXUAL EXPLOITATION OF CHILDREN & ADOLESCENTS, available at http://www.ecpat.net/sites/default/files/ECPATWCIIIReport_FINAL.pdf.

⁴² See the full text of the Pact of Rio de Janeiro at <http://www.stopech.sacp.government.bg/file.php?fid=298>.

- 3) criminalize the **accessing and viewing** of such materials (also recommended by Resolution 2011/33 of the Economic and Social Council (ECOSOC) of the UN, that urges Member States to specify deliberate and repeated access of websites containing such images and viewing this type of content stored online as a criminal offense in their legal systems);
- 4) fulfill the obligation to undertake actions to prevent the use of the Internet and new technologies for the **grooming** of children into online and offline abuse and for the production and dissemination of child pornography, through the criminalization of this conduct (also recommended by the Directive 2011/33 of the Economic and Social Council of UN);
- 5) implement the necessary legislative measures to require Internet Service Providers, mobile phone companies, search engines, and other relevant actors to **report and remove child pornography websites** and child sexual abuse images, and develop indicators to monitor results and enhance efforts (also recommended by Resolution 2011/33 of the ECOSOC of the UN, that adds the obligation of saving and ensuring rapid access to electronic data during criminal investigations relating to the use of new information and communication technologies to abuse and/or exploit children);
- 6) adopt measures to encourage and support Internet Service Providers, mobile phone companies, Internet cafés, and other relevant actors to develop and implement, with the meaningful participation of parents, children, and adolescents, **voluntary Codes of Conduct** and other corporate social responsibility mechanisms and develop legal tools for enabling the adoption of child protection measures in these businesses (also recommended by the Directive 2011/33 of the Economic and Social Council of UN);
- 7) adopt measures in order to ensure that **child victims of sexual exploitation are not criminalized** or punished for crimes committed in the course of their exploitation, but are given the status of victims and treated accordingly;
- 8) prohibit the production and dissemination of **material advertising child sex tourism**, but alert travelers to criminal sanctions that will apply in cases of the sexual exploitation of children; and
- 9) encourage and support **telephone and online hotlines** to enable the public, including children, to report the sexual exploitation of children and adolescents⁴³ online, moving where possible towards harmonized numbers and URLs.

8. Directive 2011/33, July 28 2011, of the UN Economic and Social Council on the Prevention, Protection and International Cooperation Against the Use of New Information Technologies to Abuse and/or Exploit children

The Directive 2011/33 of the Economic and Social Council of the UN is an important document because it urges Member States to adopt a series of measures that are evaluated in this Regional Study. Some have already been indicated in the previous item, so in addition to those measures, the Directive 2011/33 is used as a guide to verify if countries are:

- 1) establishing, developing, and implementing public policies and good practices aimed at protecting and defending the rights of the child, referring to security, privacy and intimacy in spaces created using new information and communication technologies;
- 2) adopting measures, including legislation, designed to criminalize all aspects of the misuse of technology to commit child sexual exploitation crimes and to consider, in accordance with national and international law, appropriate measures to detect and remove child sexual abuse images from the Internet;

⁴³ Footnote 2 of the Pact of Rio de Janeiro provides that "Throughout this document, 'sexual exploitation of children and adolescents' is used to denote all forms of sexual abuse and exploitation of people under the age of 18 in all settings: in the home and family, in schools and educational settings, in care and justice institutions, in the community and in the workplace".

- 3) requiring Internet Service Providers to verify and report the existence of child sexual abuse images;
- 4) incorporating in their national legislation, in conformity with their legal systems, measures for saving and ensuring rapid access to electronic data during criminal investigations relating to the use of new information and communications technologies to abuse and/or exploit children;
- 5) establishing criminal liability for legal persons that participate in child pornography offenses;
- 6) establishing the forfeiture of assets used to commit or facilitate offenses and of the proceeds derived from such offenses;
- 7) requiring mandatory reporting for professionals who work with children when there is suspicion of child sexual exploitation.

9. Resolutions and concluding studies of the United Nations agencies and commissions

The following Resolutions and concluding studies of the United Nations agencies were considered:

- 1) Resolution 2011/33, of the Economic and Social Council, on the Prevention, Protection and International Cooperation Against the Use of New Information Technologies to Abuse and/or Exploit Children, as mentioned earlier;⁴⁴ and
- 2) Resolution 16/2 of 27 April 2007, of the Commission on Crime Prevention and Criminal Justice, entitled “Effective Crime Prevention and Criminal Justice Responses to Combat Sexual Exploitation of Children”, especially when it urges Member States to adopt legal measures to effectively criminalize, prosecute, and punish all aspects of sexual exploitation of children; to prevent and make efforts to eliminate the use of mass media and information technologies, including the Internet, to facilitate or to commit child sexual exploitation.⁴⁵

10. Reports of the UN Special Rapporteurs on the Sale of Children, Child Prostitution and Child Pornography

The reports by the UN Special Rapporteurs on the Sale of Children, Child Prostitution and Child Pornography are extremely important because they have unquestionable and valuable experience in the field, and have a realistic approach to problems faced by countries in the fight against those offenses by considering the roots of the problems. They are able to verify if provisions already created in the legal framework are being effectively implemented while maintaining a more globalized vision of the problem. Careful attention is given to the recommendations and observations of the:

- 1) Report on the Sale of Children, Child Prostitution and Child Pornography presented to the UN General Assembly in 1998 by Ofelia Calcetas-Santos;
- 2) Report on the Sale of Children, Child Prostitution and Child Pornography presented to the UN General Assembly in 2004 by Juan Miguel Petit; and
- 3) Report on the Sale of Children, Child Prostitution and Child Pornography presented to the UN General Assembly in 2009 by Najat Maalla M’jid.

⁴⁴ See the full text of Resolution 2011/33, of the Economic and Social Council at <http://www.un.org/en/ecosoc/docs/2011/res%202011.33.pdf>.

⁴⁵ See the full text of Resolution 16/2 of 27 April 2007, of the Commission on Crime Prevention and Criminal Justice at https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2000-2009/2007/CCPCJ/Resolution_16-2.pdf.

11. Evaluation of the countries

11.a. Evaluation according the OPSC, Pact of Rio, Convention on Cybercrime, Directives of the European Parliament and Council

The first evaluation of Latin American countries is based on the recommendations of the OPSC, Pact of Rio, Budapest Convention, and the Directives of the European Parliament and Council. These provide a benchmark against which the adequacy of legislation can be measured, even though most of the indicated instruments are not binding for Latin American countries. Points are attributed on a scale ranging from zero to 100 points according to the items listed below. The gradation of points is indicated on the maps that illustrate this Regional Study, followed by a list of the points attributed to each country.

Points will be distributed as follows:

1. Definition of child pornography (maximum possible number of points = 5 points)
 - 1.1. Existence of a clear definition of child pornography, which does not have all the elements indicated in the OPSC – 2 points
 - 1.2. Existence of a clear and complete definition of child pornography – 4 points
 - 1.3. Age of potential victim – all children under 18 years of age – 1 point
2. Criminal liability of children involved in the production of child pornography – 1 point
3. Criminalization of conduct related to child pornography (maximum possible number of points = 16 points)
 - a. Production – 4 points
 - b. Distribution – 4 points
 - c. Dissemination – 4 points
 - d. Offer – 4 points
4. Criminalization of conduct related to child pornography (maximum possible number of points = 12 points)
 - 4.1. Import – 4 points
 - 4.2. Export – 4 points
 - 4.3. Sale – 4 points
5. Criminalization of conduct related to child pornography (maximum possible number of points = 6 points)
 - 5.1. Possession for the purpose of commercializing the material – 4 points
 - 5.2. Criminalizes the mere possession of child abuse material – 2 points
 - 5.3. Criminalizes the storage of child abuse material – not graded
6. Virtual images and sexually exploitative representations of children (maximum 4 points)
 - 6.1. Specifically criminalized – 4 points
 - 6.2. Legislation is not clear, but interpretation can lead to this understanding – 2 points
7. Adequacy of penalties (maximum possible number of points = 4 points)
 - 7.1. Adequate minimum and maximum penalties – 1 point
 - 7.2. Three levels of penalties – 3 points
 - 7.3. Two levels of penalties – 2 points

- 7.4. One level of penalty – 1 point
- 8. Aggravating circumstances (maximum number of possible points = 6 points)
 - 8.1. Three personal circumstances (offender is a member of the family; is a person cohabiting with the child; has abused a recognized position of trust or authority) – 3 points
 - 8.2. Two of the three personal circumstances – 2 points
 - 8.3. One personal circumstance – 1 point
 - 8.4. Offense was committed by several persons working together – 1 point
 - 8.5. Offense was committed within the framework of a criminal organization – 1 point
 - 8.6. Criminal recidivism – 1 point
- 9. Commitment to establish extraterritorial jurisdiction for child pornography offenses (maximum possible points = 10 points)
 - 9.1. Active Personality Principle is applied:
 - 9.1.1. for nationals and foreigners, regardless of the existence of an extradition request – 4 points
 - 9.1.2. for nationals and foreigners, for whom a request of extradition was denied – 3 points
 - 9.1.3. for nationals only, regardless of the existence of an extradition request – 2 points
 - 9.1.4. for nationals only, for whom a request of extradition was denied – 1 point
 - 9.1.5. applied only for a certain crime, or offenses of certain nature – 1 point
 - 9.2. Passive Personality Principle is applied – 4 points
 - 9.3. Universal Jurisdiction Principle is applied – 2 points
- 10. Forfeiture of assets – (maximum possible number of points = 2 points)
 - 10.1. Forfeiture of assets used to commit or facilitate offenses – 1 point
 - 10.2. Forfeiture of proceeds derived from offenses – 1 point
 - 10.3. Forfeiture only of illicit assets used to commit or facilitate offenses, or only of some specific assets or specific crimes – 0.5 point
- 11. Mandatory reports for Internet Service Providers – 1 point
- 12. Liability of legal persons (maximum possible number of points = 1 point)
 - 12.1. Legal persons can be held criminally liable – 1 point
 - 12.2. Legal persons do not have criminal liability, but sanctions can be imposed when they are used to commit a crime – 1 point
 - 12.3. Legislation establishes criminal liability only for some conduct related to child pornography offenses – 0.5 point
- 13. Access and viewing of child abuse images – 1 point
- 14. Criminalization of online grooming (maximum possible number of points = 9 points)
 - 14.1. Online grooming is criminalized with a clear definition – 4 points
 - 14.2. Online grooming is criminalized, but does not have a clear definition – 3 points
 - 14.3. Only offline grooming is criminalized – 1 point
 - 14.4. Showing pornography to a child is criminalized – 4 points
 - 14.5. Potential victims of online grooming are children less than 18 years old – 1 point
- 15. Advertising of child sex tourism (maximum possible number of points = 4 points)

- 15.1. Specifically criminalizes the advertising of child sex tourism through the Internet – 2 points
 - 15.2. Generally criminalizes the advertising of child sexual exploitation, through any means – 2 points
 - 15.3. Criminalizes trafficking in persons specifically related to child pornography – 2 points
 - 15.4. Criminalizes trafficking in persons related to sexual exploitation – 1 point
 - 15.5. Criminalizes the organization, promotion or facilitation of child sex tourism – 1 point
16. Mandatory reporting requirement for professionals who work with children (maximum number of possible points = 8 points)
- 16.1. For child pornography and other offenses – 4 points
 - 16.2. For sexual abuse and sexual exploitation – 3 points
 - 16.3. For violence against children – 3 points
 - 16.4. Required from health care professionals and education professionals – 4 points
 - 16.5. Required from health care professionals only or education professionals only or more generic provision – 2 points
17. Data retention and preservation provisions (maximum number of possible points = 5 points)
- 17.1. Legislation has data retention and preservation provisions and a reasonable period of time for the retention – 3 points
 - 17.2. Legislation has data retention and preservation provisions – period of time for the retention is not established or is longer than recommended – 2 points
 - 17.3. Legislation only has data preservation provisions – 1 point
 - 17.4. Legislation requires prior judicial order for preservation measures – 1 point
 - 17.5. Legislation addresses confidentiality of the preservation measures – 0.5 point
 - 17.6. Legislation has provisions on real time collection of data – 0.5 point
18. Regulation of Internet Cafes' activities (maximum possible number of points = 3 points)
- 18.1. Legislation requires identification of users – 2 points
 - 18.2. Legislation requires installation of filters – 1 point
 - 18.3. Legislation has different measures of protection of children in Cybercafés – 1 point
 - 18.4. Legislative measures established at a Member State or Municipality level – 1 point
19. Existence of specific legislation on the use of ICTs to commit crimes against children (maximum number of possible points = 2 points)
- 19.1. Specific treatment of the subject – 2 points
 - 19.2. Generic, "by any means" – 1 point

11.b. Evaluation according the OPSC and Pact of Rio

The countries are evaluated according to the commitments they have made at an international level, specifically ratifying the OPSC and debating the Pact of Rio. Points are attributed in a scale ranging from zero to 100 points.

- 1. Definition of Child Pornography (maximum possible number of points = 6 points)
 - 1.1. Existence of a clear definition of child pornography, which does not have all the elements indicated in the OPSC – 2 points
 - 1.2. Existence of a clear and complete definition of child pornography – 5 points
 - 1.3. Age of potential victim – all children under 18 years of age – 1 point
- 2. Criminal liability of children involved in the production of child pornography – 1 point

3. Criminalization of conduct related to child pornography (maximum possible number of points = 20 points)
 - a. Production – 5 points
 - b. Distribution – 5 points
 - c. Dissemination – 5 points
 - d. Offer – 5 points

4. Criminalization of conduct related to child pornography (maximum possible number of points = 15 points)
 - 4.1. Import – 5 points
 - 4.2. Export – 5 points
 - 4.3. Sale – 5 points

5. Criminalization of conduct related to child pornography (maximum possible number of points = 5 points)
 - 5.1. Possession for the purpose of commercializing the material – 5 points
 - 5.2. Criminalizes the mere possession of child abuse material – 5 points
 - 5.3. Criminalizes the storage of child abuse material – not graded

6. Virtual images and sexually exploitative representation of children (maximum possible points = 5 points)
 - 6.1. Specifically criminalized – 5 points
 - 6.2. Legislation is not clear, but interpretation can lead to this understanding – 3 points

7. Commitment to establish extraterritorial jurisdiction for child pornography offenses (maximum possible points = 18 points)
 - 7.1. Active Personality Principle is applied:
 - 7.1.1. for nationals and foreigners, regardless of the existence of an extradition request – 8 points
 - 7.1.2. for nationals and foreigners, for whom a request of extradition was denied – 7 points
 - 7.1.3. for nationals only, regardless of the existence of an extradition request – 6 points
 - 7.1.4. for nationals only, for whom a request of extradition was denied – 5 point
 - 7.1.5. applied only for a certain crime, or offenses of certain nature – 4 point
 - 7.2. Passive Personality Principle is applied – 8 points
 - 7.3. Universal Jurisdiction Principle is applied – 2 points

8. Forfeiture of assets – (maximum possible number of points = 4 points)
 - 8.1. Forfeiture of assets used to commit or facilitate offenses – 2 points
 - 8.2. Forfeiture of proceeds derived from offenses – 2 points
 - 8.3. Forfeiture only of illicit assets used to commit or facilitate offenses or only of some specific assets or specific crimes – 2 points

9. Mandatory reports for Internet Service Providers – 1 point

10. Liability of legal persons (maximum possible number of points = 4 points)
 - 10.1. Legal persons can be held criminally liable – 4 points

- 10.2. Legal persons don't have criminal liability, but sanctions can be imposed when they are used to commit a crime – 4 points

- 11. Access and viewing of child abuse images – 1 point

- 12. Criminalization of online grooming (maximum possible number of points = 9 points)
 - 12.1. Online grooming is criminalized with a clear definition – 5 points
 - 12.2. Online grooming is criminalized, but does not have a clear definition – 3 points
 - 12.3. Showing pornography to a child is criminalized – 5 points
 - 12.4. Potential victims of online grooming are children less than 18 years old – 2 points

- 13. Advertising of child sex tourism (maximum possible number of points = 5 points)
 - 13.1. Specifically criminalizes the advertising of child sex tourism through the Internet – 5 points
 - 13.2. Generally criminalizes the advertising of child sexual exploitation, through any means – 3 points

- 14. Regulation of the activities of Internet Cafés (maximum possible number of points = 3 points)
 - 14.1. Legislation requires identification of users – 2 points
 - 14.2. Legislation requires installation of filters – 1 point
 - 14.3. Legislation has different measures of protection of children in Cybercafés – 1 point
 - 14.4. There are legislative measures established at a Member State or Municipality level – 1 point

12. Summary

At an international level, countries have reached an important and clear degree of harmonization concerning the measures and path to be followed in the fight against online sexual abuse of children. The next battle to be fought is to ensure that States take all the concrete steps to implement at the domestic level, the norms to which they committed themselves in international instruments.

IV. LATIN AMERICAN COUNTRIES

For this Regional Study the targeted group was limited to Latin America and includes the group of countries from North, Central, and South America that have Spanish or Portuguese as their official language. It includes Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

Cuba was not considered in part due to a combination of factors that restrict access and use of the Internet such as government policy, the U.S. trade embargo, and the low income of the population.



A. CUBA'S UNIQUE SITUATION AMONGST LATIN AMERICAN COUNTRIES

Cuba has one of the lowest *per capita* rates of computer and telephone ownership in the world. According to a global survey published by Freedom House, a NGO that monitors net access and restriction all over the world, Cuba ranked second to last, behind Iran, as the country with the least web freedom worldwide.⁴⁶

The Cuban Government has developed a national network or Intranet, accessible in universities, youth recreation centers, and post offices that allow users to access the State e-mail server and sites that are hosted in the .cu domain, which is administered by the Government. All .cu domain sites are subject to review by the Department of Revolutionary Orientation.⁴⁷ The Government blocks several websites and the U.S. embargo prevents Cubans from using services such as Google maps and Google Apps. Pornography pages are blocked, and attempting to access this kind of site can lead to the cancellation of web access points.⁴⁸ In Cuba, only previously authorized people can browse or surf the Internet from their homes (public officials, officers of the Communist Party, and doctors).⁴⁹ The private sale of computers is forbidden so people can only access the Internet from public access points, usually Internet cafés that require the identification of users.

Harvard University's Berkman Center for Internet and Society released a report on the current Internet use in Cuba. According to that research, until early 2013 all Internet connections in Cuba were via satellite. It was not until after the Government entered into a partnership with the Venezuelan Government and the ALBA Alliance (Bolivarian Alliance for the Americas) that Cuba oversaw the construction of an undersea fiber optic cable to drastically improve connectivity.⁵⁰ A number of American news agencies have reported that recently the Cuban Government opened 118 Internet access points, known as "Navigation Hall", marking a small step towards greater connectivity.⁵¹ But most Cubans are unable to afford Internet access at a cost of \$5 USD per hour, in a country where the minimum wage is just \$20 USD per month.⁵²

This same report clarifies that Cubans who wish to have an Internet connection installed in their home or place of business must apply for a connection through the Ministry of Information Technology and Communications, and that applications are rarely accepted.⁵³ Most Cubans do not own laptop computers or smart phones. Cell phone penetration rates have increased rapidly since 2008, but given the lack of 3G and Wi-Fi networks in the country, phones are not used to access the Internet.

As a result of the restricted Internet access and heavy government controls on access and blocking inadequate or illicit sites, there is little point in analyzing forms of prevention and control or violence against children through the Internet in Cuba.

⁴⁶ See FREEDOM HOUSE, <http://www.freedomhouse.org>.

⁴⁷ Ellery Roberts Biddle, *Rationing the Digital: The Politics and Policy of Internet Use in Cuba Today*, July 10, 2013, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2291721.

⁴⁸ Santiago Wills, *Cuba's Internet: It's Bad, But It Might Get Better*, ABC NEWS (Aug. 8, 2013), http://abcnews.go.com/ABC_Univision/internet-cuba-facts-myths-web-access/story?id=19895951 (last visited Oct. 8, 2014).

⁴⁹ See Decree-Law 188, available at *Country Profile: Cuba*, FAMILY ONLINE SAFETY INSTITUTE'S GLOBAL RESOURCE AND INFORMATION DIRECTORY, <http://www.fosigrid.org/caribbean/cuba> (last visited Oct. 8, 2014).

⁵⁰ Biddle, *supra* note 47.

⁵¹ Patrick Oppman, *Internet access now a reality for some Cubans, but not cheap at \$4.50 an hour*, CNN, Aug. 6, 2013, <http://edition.cnn.com/2013/08/05/world/americas/cuba-online-access/> (last visited Nov. 5, 2015).

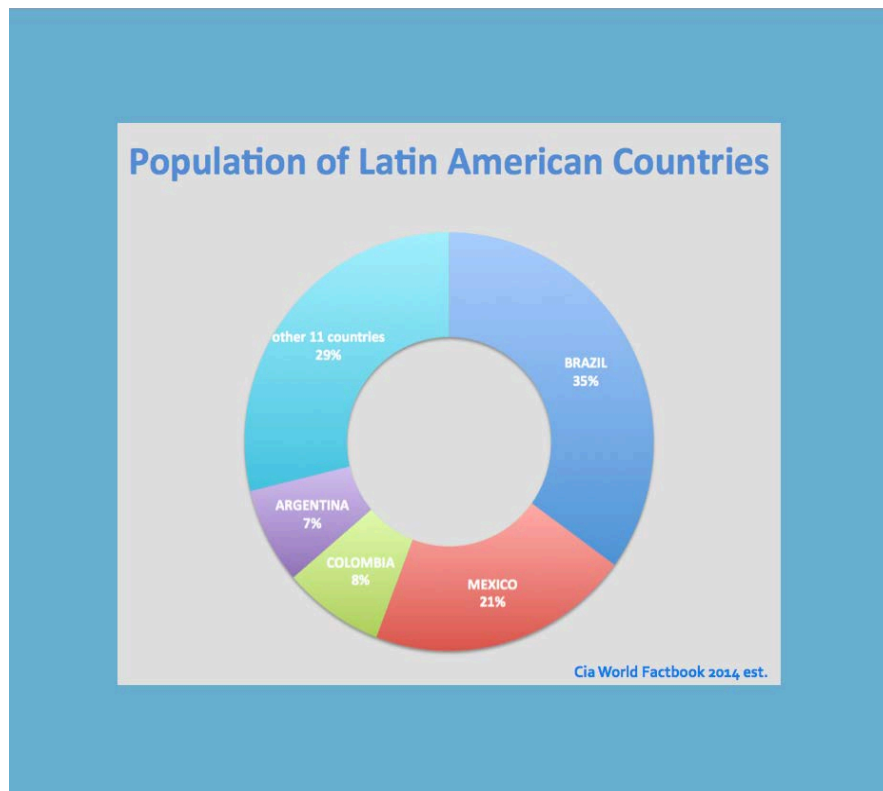
⁵² *Id.*

⁵³ Biddle, *supra* note 47.

B. SIMILARITIES AMONGST LATIN AMERICAN COUNTRIES – STATISTICAL FRAMEWORK AND INDICATORS

Latin America is geographically, culturally, socially, economically, and politically diverse. However, this Regional Study focuses on similarities amongst the countries because these help create a favorable environment for the existence and worsening of the problems addressed here. Unique initiatives for preventing or controlling the exploitation of children are also highlighted as examples of good practices.

According to the CIA World Factbook, this group of 18 countries has an estimated population of 589,896,612 inhabitants (July 2014).⁵⁴ Brazil and Mexico account for more than 60% of the total (Brazil with 202,656,788 and Mexico with 120,286,655 inhabitants).⁵⁵ While the countries are not evaluated according to the proportional weight of their population, their populations do reflect a correspondingly higher or lower proportion of children in need of protection.



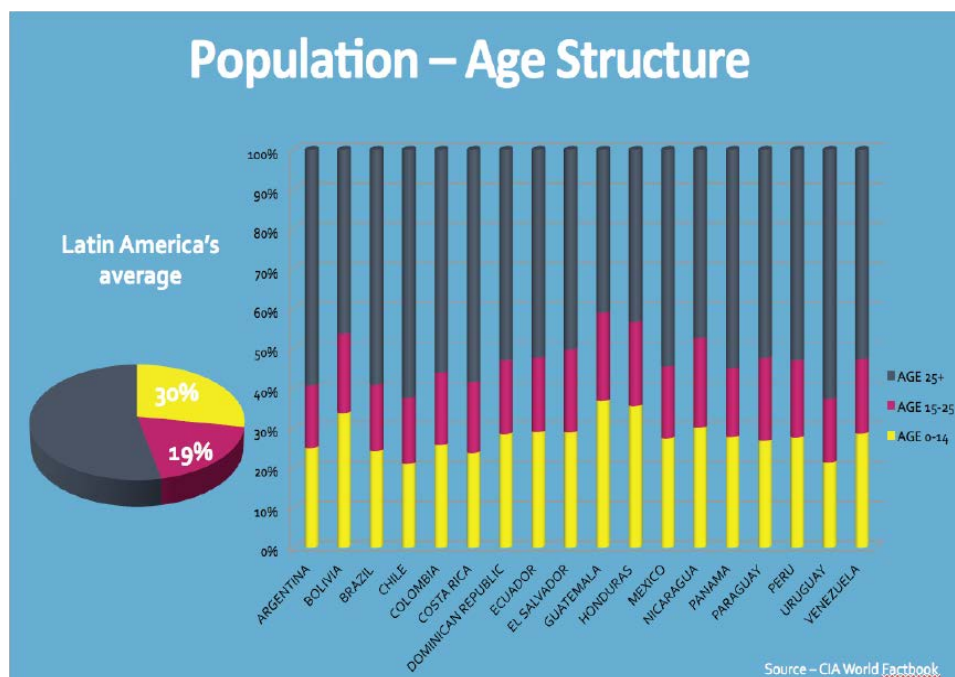
The population of the Latin American countries is very young. On average, the group of people under 14 years of age represents 28% of the total population, and the age group of 15 to 24 years represents 18.85%.⁵⁶ In countries like Guatemala and Honduras, more than 36% of their populations are under the age of 14.⁵⁷

⁵⁴ *Country Comparison: Population, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html> (last visited Oct. 8, 2014).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Guatemala, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/gt.html> (last visited Dec. 2, 2014); *Honduras, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ho.html> (last visited Dec. 2, 2014).



Latin American countries also generally have a high inequality of wealth, which increases the vulnerability of children from the lower economic classes, as demonstrated by the GINI index.^{58,59} According to the CIA World Factbook, out of 140 countries, 13 of the 30 lowest GINI indices belong to Latin American countries.⁶⁰

There are no universal definitions and standards of literacy or sufficient education in the world, but we can at least affirm that inequality of wealth causes in part, a problem of insufficient education amongst the lower class. Insufficient education is usually accompanied by digital illiteracy, which makes it more difficult for parents to monitor their children when they are online. On the other hand, youth have a natural ability to explore the Internet, and this combination of factors enhances their vulnerability. This close link between the exploitation of children and extreme poverty and lack of education, among other factors, was noted by the former Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Ofelia Calcetas-Santos, in her Report to the UN General Assembly in 1997.⁶¹ Unfortunately it is still a reality today, nearly 20 years later.

The ITU has collected important data on children's use of the Internet in developing countries, which includes all of the countries analyzed in this report.⁶² According to the findings of the ITU, children and youth in

⁵⁸ The GINI index is a coefficient proposed by the Italian statistician and sociologist Corrado Gini, created as a measure of inequality of income or wealth.

⁵⁹ GINI index ranges from 0, which represents complete inequality, to 100, which represents complete equality.

⁶⁰ *Country Comparison: Distribution of Family Income – GINI Index*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html> (last visited Oct. 8, 2014).

⁶¹ Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Fifty-fourth session rep.*, Comm'n on Human Rights, U.N. Doc. E/CN.4/1998/101 (Jan. 13, 1998) (by Ofelia Calcetas-Santos), at 28, available at <http://www.ohchr.org/EN/Issues/Children/Pages/AnnualReports.aspx>.

⁶² INT'L TELECOMM. UNION, CHILD ONLINE PROTECTION – STATISTICAL FRAMEWORK AND INDICATORS 2010, available at http://www.itu.int/dms_pub/itu-d/opb/ind/D-IND-COP.01-11-2010-PDF-E.pdf.

developing economies do not usually access the Internet from home, a circumstance that generally reflects the lowest level of home Internet access in those countries.⁶³

Internet access through cybercafés or LAN Houses is very common in Latin American countries. Countries do not generally have strong legislation concerning the control of material accessed by children, or the identification of users in cybercafés. Even when legislation exists, enforcement is a problem. The fact that cybercafés and LAN Houses are often informal businesses only aggravates the problem by hampering surveillance and monitoring. Thus, children are able to access the Internet without any kind of control or supervision, and adults are sharing all types of images, including child abuse material, with certainty of impunity.

Furthermore, the growing accessibility of tablets, mobile cellular phones, and gaming systems is increasing Internet access in developing countries. According to the ITU, mobile broadband (3G technology, that provides high speed access to the Internet) has been showing a growth of 40% annually since 2010, and is the fastest growing market segment over the past few years, not only in developed countries, but also in developing countries where subscriptions have doubled over the past two years.⁶⁴ There is strong growth in mobile Internet uptake. The expectations are that mobile broadband services will become as equally available as mobile cellular telephony in the near future.⁶⁵

A major difference between developed and developing countries on this subject is that in developed countries, mobile broadband is often a complement rather than a substitute for fixed-broadband access, while in developing countries it is the contrary.⁶⁶

This Regional Study provides an overview of the vulnerability of Latin American children facing technological development. It is clear that the situation is not very favorable and requires special attention.

⁶³ The average rate of households with Internet access in developing countries is quite low at only around 20%; while the rate of households with Internet access in developed countries is around 78%.

⁶⁴ INT'L TELECOMM. UNION, *supra* note 62.

⁶⁵ *Id.*

⁶⁶ *Id.*

V. RESEARCH TEMPLATES AND EXPLANATION OF COUNTRY REPORTS

Templates are attached and indicate the situation of each individual country to provide a visualization of the data considered with information about its source. Every provision indicated is noted in the respective country report in Section X of this Report, which should be examined for a greater analysis.

Template 1 – Data Related to the Countries Concerning Population and the Use of ICTs

COUNTRY	POPULATION JULY 2013 ⁶⁷	AGE 0-14 ¹⁵	AGE 15-24 ¹⁵	AGE 25+ ¹⁵	INTERNET USERS ⁶⁸ SEP. 2012	CELL PHONE SUBSCRIBERS ¹⁶ 2012	INTERNET ACCESS AT HOME ¹⁶	INTERNET HOSTS ⁶⁹	FACEBOOK SUBSCRIBERS ¹⁷
COUNTRY 1									
COUNTRY 2									

Template 2 – Table of Offenses and Penalties

Criminal Offenses	Production	Distribution	Dissemination	Offer	Import	Export	Sale	Possession	Online grooming
Country 1									
Country 2									

Template 3 – Conduct Related to the Creation/Facilitation of Child Pornography that are Criminalized

Criminalization of conduct related to the production of child abuse images – CAI	To seek a child to perform CAI	To require or recruit a child to perform CAI	To induce a child to perform CAI	To coerce a child to perform CAI	To mediate participation of a child in CAI	To facilitate the production of CAI	To share the stage with a child in the production of CAI	To use the voice of a child in the production of CAI
Country 1								
Country 2								

Template 4 – Conduct Related to the Production of Child Pornography that are Criminalized

Criminalization of conduct related to the production of child abuse images – CAI	To produce or manufacture	To reproduce	To organize the production or set	To print	To photograph	To film, videotape, record or register	To direct	To describe	To finance or pay
Country 1									
Country 2									

⁶⁷ Argentina, *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html> (last visited Dec. 2, 2014).

⁶⁸ Statistics, ITU, <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (last visited Oct. 13, 2014).

⁶⁹ Internet Users in the Americas, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats2.htm#americas> (last visited Oct. 13, 2014).

Template 5 – Conduct Related to the Distribution of Child Pornography that are Criminalized

Countries	To offer	To disseminate	To distribute	To transmit	To buy	To publish	To advertise	To transport or carry	To import	To export	To sell or commercialize
Country 1											
Country 2											

Template 6 – Other Criminalized Acts

Countries	To posses	To posses with intent	To download or access CAI	To upload CAI	To show pornography to a child	To exhibit, Display, or disclose CAI	To store CAI	Trafficking in persons with the intent of producing CAI or for sexual purposes	To advertise child sex tourism	To rent CAI
Country 1										
Country 2										

Explanation of Individual Country Summaries and Country Reports

Explanatory sheets and individual country reports are attached to this Regional Study in Section X. They first provide an overview of geographic and political aspects of the country, and provide information about the population, form of government, branches of government, and public policies on the protection of the rights of the child.

This information is followed by an analysis of the legal framework with information about the Constitution, Penal Code, Criminal Procedure Code, and legislation concerning children and violence against children. Extracts of relevant legislation is then presented. All of the points shown in the explanatory sheets are analyzed in their respective Country Report. Transcriptions of the corresponding legal provisions in the native language are given in the footnotes of the Country Reports.

Since 1980, after the end of authoritarian dictatorships, Latin American countries have been changing their Constitutions, Penal Codes, and Criminal Procedure Codes, allowing for more detailed legislation to provide all possible guarantees to citizens. The author notes that as recent legal reforms are still being implemented, changes in legislation may occur in *ad hoc* laws that are not immediately incorporated into the Penal Codes or Criminal Procedure Codes, and because very often legislation that is made available for open source consultation is not regularly updated, the information that is presented is the most current information that was available open source at the time this Report was drafted.

We recommend reading each Country Report to have a complete understanding of the conclusions presented in this Regional Study.

VI. ANALYSIS OF THE LEGAL FRAMEWORK AND ITS ALIGNMENT WITH INTERNATIONAL INSTRUMENTS

The adoption of appropriate legislation is central to achieving global cyber security. Domestic legislation must be harmonized with international instruments to allow for international cooperation, an essential component in this matter. Harmonization avoids impunity when the principle of double jeopardy is invoked, as it often is.

Political, religious, and cultural differences amongst countries make this objective hard to achieve. Subjective elements must be removed from domestic provisions to allow similar treatment of criminal offenders who are acting without concern for legal borders. That is the major role of international instruments concerning this subject: the approximation of diverse legislative frameworks and their harmonization according to more objective models.

The accession of countries to the same international agreements is the best way to protect children's rights, regardless of where they live, because it strengthens the prevention, detection, investigation, prosecution, and punishment of the exploitation of children. The importance of cooperative mechanisms is emphasized by Najat Maalla M'jid, former Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, in her 2009 report stating that "[t]hanks to the cooperation mechanisms developed by national police forces, child victims have been identified, sexual predators arrested and international networks dismantled. In 2007 Operation Carousel led to the arrest of 700 suspects in 35 countries, the confiscation of 76,000 of children, and the identification of 31 children involved".⁷⁰

This analysis starts with the most important crime perpetrated against children through the Internet: the production and distribution of child pornography.

A. DEFINITION OF CHILD PORNOGRAPHY

In the present section of the Regional Study, "child pornography" includes, but is not limited to, "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", the definition from Article 2 (c) of the OPSC, as well as the use of a child to create such a representation.⁷¹

A.1. Existence of specific legislation related to child pornography

All Latin American countries criminalize conduct related to child abuse material, especially the production of such material, and therefore have specific legislation related to it.

A.2. Existence of a clear and complete definition of child pornography

In spite of the fact that all Latin American countries criminalize the production of child pornography, not all have a clear definition of child pornography as measured against the above stated definition from Article 2 (c) of the OPSC. Guatemala, Honduras, and Venezuela do not have a proper definition of child pornography. Article 24 of Venezuela's Special Law on Information Technology Crimes criminalizes the use of the image of

⁷⁰ Special Rapporteur on the sale of children, child prostitution and child pornography, *Report on Child Pornography and the Internet*, Comm'n on Human Rights, U.N. Doc. A/HRC/12/23 (13 July 2009) (by Najat Maalla M'jid), at 21, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.23.pdf>.

⁷¹ INT'L CTR. FOR MISSING & EXPLOITED CHILDREN, *CHILD PORNOGRAPHY: MODEL LEGISLATION & GLOBAL REVIEW 2012*, (7th ed.), at iv, available at http://www.icmec.org/en_X1/pdf/Child_Pornography_Model_Law_English_7th_Edition_2012.pdf.

a child with “pornographic or exhibitionist purposes”, and Article 237 of the Organic Law on the Protection of Children and Adolescents only refers to “pornographic scenes”. In Guatemala, Articles 193 ter and 195 bis, both of the Penal Code, only mention “pornographic material”. In Honduras, Article 149-D of the Penal Code refers to the use of children in “pornographic and erotic activities”. All of these provisions open a dangerous space for subjective interpretation, which should be avoided.

All other Latin American countries reviewed have a clear definition of child pornography. However, some definitions are incomplete because they do not include all of the elements from Article 2 of the OPSC. Argentina and Colombia do not consider material that shows a child engaged in “simulated” activities as child abuse material. Panama’s legislation only punishes the presentation or virtual representation of one or several minors in activities with a sexual nature, not mentioning the representation of the sexual parts of minors. To be considered child pornography, the legislation of Paraguay requires that material related to sexual acts with minors has been produced to enhance sexual excitement; and that the exhibition of the sexual parts of children has been made with pornographic purposes. These requirements restrict the definition by adding subjective elements, which should be avoided. The legislation of El Salvador limits child pornography to material related to pictures and voice recordings (audio systems) rather than “any representations by whatever means” as required by the OPSC.

Based on the above, it can be asserted that the majority of Latin American countries fortunately have a clear and complete definition of child pornography, incorporating all of the elements required by Article 2 of the OPSC: Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Nicaragua, Mexico, Peru, and Uruguay (10 out of 18 countries, or 55%). However, this is still insufficient. Countries that did not fulfill the commitment made when ratifying the OPSC should be encouraged to amend their domestic legislation.

It should be noted, however, that while the Dominican Republic currently has a clear and complete definition of child pornography, it is being changed by a new Penal Code, which will enter into force in December 2015. The new definition in Article 194 of the new Penal Code, in spite of being clear, does not have all the elements recommended by the OPSC.

A.3. Age of the victim

The OPSC recommends that children under 18 years of age be considered victims of crimes concerning child pornography.

Some of the analyzed countries only consider persons younger than 12 years of age as children, treating those who are between 12 and 18 years of age as adolescents. This is a choice influenced by culture that is irrelevant to the subject, because all Latin American countries’ legislation consider that both children and adolescents can be victims of child pornography. Thus, because all of the 18 analyzed countries consider persons younger than 18 years of age as possible victims of child pornography, children should be defined as anyone less than 18 years of age.

The following map illustrates the situation in Latin American countries concerning the clear and proper definition of child pornography, and the age of the victim. Four points were given to countries that have a clear and complete definition of child pornography in their legislation; 2 points for those that, in spite of having a clear definition, do not have all of the elements required by the OPSC; 1 extra point was given to countries that consider every child less than 18 years old as a potential victim of child pornography offenses.



A.3.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pn	Par	Pe	Ur	Ve
total = 5	5	5	5	5	3	5	5	5	3	1	1	5	5	3	3	5	5	1

A.4. Criminal liability of children involved in pornography

In general, the legislation of Latin American countries does not specifically regulate the criminal liability of children involved in pornography, though they are most often treated as victims. This is based on the fact that criminal liability only begins after 18 years of age, making it unnecessary to consider the criminal liability of children involved in child pornography. Normally, persons under 18 years of age can be subjected to protective measures that do not have a punitive nature.

Because no Latin American country punishes children or adolescents who were sexually exploited through child pornography, one point is attributed to all of them. Below is a table of the points attributed, though this has no specific relation to the map below.

At a minimum, the conduct of producing, distributing, disseminating, importing, exporting, offering, selling, or possessing child pornography should be covered under the criminal laws of the States Parties, whether it has occurred at a domestic or transnational level.

B.1.a. Production, distribution, dissemination, and offer of child pornography

The analysis of the criminalization of the production of child pornography does not bring any special challenge because “production” is a term that has equal meaning in all of the considered languages. The need for its criminalization is without question as it causes undoubted and primary harm to children who need special safeguards and care by reason of their physical and mental immaturity, and thus should be protected against violence, injury or abuse, maltreatment, and exploitation.⁷³ Fortunately, the production of child pornography is considered a crime in all of the countries considered.

The same cannot be said of the propagation or diffusion of child pornography. Some decades ago, obtaining child pornography was not easy because it required a measure of physical exposure of the person, a reality that has changed significantly. The Internet has proven to be an efficient and fast vehicle for obtaining and accessing child pornography, which has enhanced the need to punish not only the conduct of producing this kind of material, but also its distribution, dissemination, and offer. Those acts represent an important link in the chain of exploitation, requiring effective punishment. Aware of this need, the OPSC adequately requires that those offenses be covered under the criminal law of States Parties.

The distribution, dissemination, or offer of child abuse images represents an indirect or secondary harm to the children involved, especially when she or he is aware of the fact that it can be accessed by a great number of people. Each download of child abuse material is another crime against the children who are depicted. Distribution repeats the victimization over and over again.

Furthermore, this conduct also causes the broader harm of objectifying children and the normalizing of viewing and possessing this kind of material. The ease of access to the material can create another category of viewers who may not have been especially interested in such material, but became interested due to its accessibility. Consequently, this conduct strengthens the commerce of child pornography and encourages the production of more and newer material, provoking more violence against children, which should be restrained.

Distribution is the action of sharing something out among a number of recipients, according to its usual definition.⁷⁴ To distribute is to circulate images physically or on the Internet. The distributor can be a different person from the producer or the seller.

Dissemination can be identified as a synonym of distribution.⁷⁵ However, as the OPSC contains both terms, for the purposes of this Regional Study a more strict interpretation will be used. Dissemination

⁷³ Convention on the Rights of the Child, *supra* at note 8.

⁷⁴ *Distribution*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/definition/american_english/distribution (last visited Oct. 13, 2014).

⁷⁵ *Dissemination*, OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/definition/english-thesaurus/dissemination> (last visited Oct. 13, 2014).

will be considered as the wide spreading of information or ideas about how to get images or access child abuse material.⁷⁶ It is important to note that this definition is closer to the French and Spanish versions of the OPSC, which refers to the *le fait de diffuser and divulgación*.

Offering will be considered as the proposition, proposal, suggestion, or presentation of child pornography, with commercial or non-commercial intent, making it available to others. Its meaning in the three official versions of the OPSC does not bring any special challenge to the interpreter.

Based on the indicated meaning of those acts, it can be said that most of the Latin American countries studied (94%) criminalize the distribution of child abuse material, except for Venezuela. It is important to note that Colombia, the Dominican Republic, and Ecuador punish the action of transmitting child abuse material, which is equivalent to distributing it online. Since this study focuses on crimes committed through the Internet, their legislation is considered in compliance with the OPSC.

The Dominican Republic has enacted a new Penal Code, which will enter into force by the end of 2015. The new Penal Code adequately and specifically criminalizes distribution.

Seventy-two percent of the Latin American countries criminalize the dissemination of child abuse material (Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, and Uruguay). Bolivia, Ecuador, Mexico, and Peru do not criminalize dissemination. It is important to note that Bolivia punishes the action of advertising child abuse material; however, this conduct does not perfectly correspond to dissemination. Advertising is usually related to commercial activity and is not necessarily linked to all kinds of dissemination.

Unfortunately, only Argentina, Brazil, Colombia, El Salvador, Honduras, Panama, Paraguay, Peru, and Uruguay, which represent 50% of Latin American countries, criminalize the offer of child abuse material. Bolivia, Chile, Costa Rica, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, and Venezuela do not.

The Dominican Republic's new Penal Code adequately criminalizes the offer of child pornography in Article 194 §4, but it is not considered in this study as it is not yet producing legal effects.

Among the 18 countries, only eight of them (44%), Argentina, Brazil, Colombia, El Salvador, Honduras, Panama, Paraguay, and Uruguay, are in compliance with the OPSC, ensuring that offenses related to the production, distribution, dissemination, and offer are covered under their criminal law.

Twenty-seven percent of the Latin American countries criminalize three of these four types of conduct. Among this group, most of them punish production, distribution, and dissemination (Chile, Costa Rica, Guatemala, and Nicaragua), and only one of them punishes the production, offer, and distribution of child abuse material (Peru).

Bolivia, Ecuador, and Mexico (16%) criminalize only the production and the distribution of child pornography. Thus, Bolivia, Chile, Costa Rica, Ecuador, Guatemala, Mexico, Nicaragua, Peru, and Venezuela should amend their laws to align with the OPSC.

⁷⁶ *Distribution* OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/definition/english-thesaurus/distribution> (last visited Oct. 13, 2014).

The Dominican Republic criminalizes production and dissemination. The new Penal Code also criminalizes the offer, as already pointed out, but does not criminalize the dissemination of child pornography.

Venezuela criminalizes only the production and exhibition of child pornography in its legislation, and does not refer to distribution, dissemination, or offer of this kind of material.

Thus, Bolivia, Chile, Costa Rica, Dominican Republic, Ecuador, Guatemala, Nicaragua, Peru, and Venezuela, should amend their laws in line with the OPSC.

When analyzing the production, distribution, dissemination, and offer of child pornography, we attributed four points to the criminalization of each one of these acts. The following map illustrates the point allocation for each country. All of the countries received the four points that are related to the production of child pornography.



B.1.a.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 16	16	8	16	12	16	12	8	8	16	12	16	8	12	16	16	12	16	4

B.1.b. Import, export, and sale of child pornography

The OPSC recommends the punishment of the import, export, and sale of child pornography. It would be more effective, however, to require the criminalization of buying and selling this kind of material, regardless of the destination or origin, because these terms are more basic and easier to understand. An importer is essentially buying, and an exporter is essentially selling. But since the language used is “importing” and “exporting”, it should be understood that exporting is not included in selling; if both actions are criminalized, they necessarily have different meanings. Consequently, the sale of child pornography will be considered as the action taken inside of the borders of the country, not comprising the export of material.

Interestingly, the OPSC recommends the criminalization of the import of child pornography, but does not require the criminalization of the buying of child pornography (different from exporting and selling). Thus, the OPSC essentially recommends that buying child abuse material from a “national” producer or distributor should not necessarily be criminalized by State Parties, but buying from a person or enterprise located in another country should. The reason for this is likely linked to the fact that State Parties made at least an indirect decision not to criminalize the mere possession of child pornography, and consequently, a person who domestically buys child abuse material for “personal use” will not necessarily be punished. Conversely, when the buyer plans to commercialize the materials, he necessarily possesses it with the intention of selling or exporting it, which will attract criminal responsibility to him or her. However, buying child pornography from another country (importing it) is an offense that the OPSC requires to be covered under a State’s criminal law, even for “personal use”.

We consider buying child pornography, domestically or internationally, a very important link in the chain of distribution. It fuels the market of child pornography, so it is necessary for international instruments to criminalize both, for the same reason that mere possession should have the same legal treatment.

The import, export, and sale of child pornography are adequately covered under the legislation of ten Latin American countries (55%). Bolivia, Chile, Ecuador, El Salvador, Mexico, and Uruguay specifically criminalize those three acts; and Guatemala, Honduras, Nicaragua, and Peru are considered in compliance with the OPSC because they criminalize the import, export, and commerce of child pornography (a broader term usually used to indicate the action of buying, selling, or exchanging goods and services).⁷⁷

Costa Rica criminalizes the commerce of child pornography in Article 174 of the Penal Code, and the import of this kind of material in Article 173 of the Penal Code. But the export of child pornography is not specifically criminalized.

Article 128 of the Penal Code of Argentina, and Article 184 of the Penal Code of Panama criminalize the commerce of child pornography, but do not criminalize the import and the export of this kind of material. In the Dominican Republic, Article 24 of Law 53-07 criminalizes the commerce of child pornography, but not its import or export. However, the Dominican Republic’s new Penal Code adequately and specifically criminalizes the import, export, and sale of child pornography.

⁷⁷ Commerce, *OXFORD DICTIONARIES*, <http://www.oxforddictionaries.com/definition/english-thesaurus/commerce>, (last visited Oct. 13, 2014).

Paraguay considers importing and exporting a crime, but does not specifically criminalize the selling of child abuse material. Paraguay should take legislative measures to adapt its legislation.

Brazil and Colombia criminalize only the selling of child pornography. As mentioned before, the act of exporting is separate from selling, because the OPSC requires the punishment of both.

Venezuela, unfortunately, does not criminalize any of these acts.

Thus, Argentina, Brazil, Colombia, Costa Rica, Panama, Paraguay, and Venezuela should adapt their legislation in order to fulfill the commitment made upon ratification of the OPSC.



B.1.b.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 12	4	12	4	12	4	8	12	12	12	12	12	12	12	4	8	12	12	0

B.1.c. Possession of child pornography for the purpose of production, distribution, dissemination, sale, import, export, or offer

The criminalization of mere possession of child pornography (meaning without the intent to sell, trade, export, distribute, or disseminate), is a very controversial subject. As mentioned before, it should be criminalized as it plays an important role in encouraging or facilitating the sexual exploitation of children.

A strict interpretation of the OPSC would require countries to punish the possession of child pornography only when it is done for the purposes of distributing, disseminating, importing, exporting, offering, or selling it.⁷⁸ In spite of this, the UN Committee on the Rights of the Child recommends States Parties to punish mere possession.⁷⁹ In the Concluding Observations for Costa Rica, the Committee recommended that the possession of child pornography in a computer system or on a computer-data storage device should be covered under criminal law.⁸⁰ The current Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Najat Maalla M'jid, in her last report to the UN General Assembly specifically encouraged States Parties to prohibit mere possession of child pornography.⁸¹

The mere possession of child abuse material is criminalized in Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Panama, and Peru.

Since the OPSC requires countries to criminalize possession with intent to distribute, disseminate, offer, sell, or export, countries that comply with this requirement, as well as those countries that criminalize the mere possession (possession without intent), are considered to be aligned with the OPSC. Hence, Argentina, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, and Peru have adequate legislation (72% of Latin American countries). Only Bolivia, Chile, Ecuador, Mexico, Uruguay, and Venezuela do not criminalize any kind of possession, with or without the intention to commercialize the material.

Amongst the group of countries that do not criminalize possession, the great majority of them punish the storage of child pornography (Bolivia, Chile, Mexico, and Uruguay), although Uruguay requires the action of storage with intent. Only Venezuela does not criminalize the storage of child pornography.

It is important to note that the term “storage” does not have the same meaning as the term “possession”. Storage evokes the idea of a larger quantity of material, or that the material is going to be commercialized. In fact, the dictionary definition of storage suggests keeping something in a special place for future use.⁸²

The Committee on the Rights of the Child recognizes the difference between possession and storage. In its 47th Session (2008), during the State Party Examination of Chile’s Initial Report on the OPSC, the

⁷⁸ In contrast, the Convention of Budapest or Convention on Cybercrime of the Council of Europe requires that countries implement laws to prevent the mere possession or storage of child pornography, recommending its criminalization (Article 9 (1) (e)). It contains, though, a provision that allows States Parties to reserve the right not to apply this provision, in whole or in part, especially when the material depicts a person appearing to be a minor engaged in sexually explicit conduct and when the material contains realistic images representing a minor engaged in sexually explicit conduct, but did not use any minors in its production (Article 9 (4)).

⁷⁹ UNICEF, HANDBOOK ON THE OPTIONAL PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY, at 12, available at http://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf.

⁸⁰ UN COMM. ON THE RIGHTS OF THE CHILD, *Consideration of reports submitted by State Parties Under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Concluding Observations: Costa Rica*, UN Doc. CRC/C/OPSC/CRI/CO/1 (May 2, 2007), at para. 14, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/146/27/PDF/G0914627.pdf?OpenElement>.

⁸¹ Special Rapporteur on the sale of children, child prostitution and child pornography, *Report on Child Pornography and the Internet*, Comm’n on Human Rights, U.N. Doc. A/HRC/12/23 (13 July 2009) (by Najat Maalla M’jid), at 8, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.23.pdf>.

⁸² *Storage*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/definition/american_english/storage (last visited Oct. 13, 2014).

Committee pointed to Chile’s failure to criminalize possession of child pornography. The delegation replied that the legislation criminalized storage rather than possession, explaining that the majority of judges thought that storage covered possession, even though some thought storage implied a significant quantity and the intent to distribute. But in the Committee’s Concluding Observations, the Committee recommended that the State Party should adopt and implement specific legislation adequately defining and punishing child pornography, including its possession, in accordance with Article 3 (1) (c) of the OPSC.⁸³ Consequently, Bolivia, Chile, Mexico, Uruguay, and Venezuela should consider amending their laws to align them with the OPSC.

The situation in Latin American countries regarding the criminalization of mere possession, possession with the intent to commercialize, and storage of child pornography is demonstrated in the map below.



B.1.c.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
Total = 6	4	0	6	0	6	6	6	6	6	6	6	0	4	6	4	6	0	0

⁸³ UN COMM. ON THE RIGHTS OF THE CHILD, *Consideration of Reports Submitted by State Parties Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Concluding Observations: Chile*, UN Doc. CRC/C/OPSC/CHL/CO/1 (Feb. 18, 2008), at 7, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2FOPSC%2FCHL%2FCO%2F1&Lang=en.

B.1.d. Production, distribution, commercialization, and possession of virtual images and sexually exploitative representations of children (Pact of Rio de Janeiro)

The OPSC is not specifically related to offenses committed through the Internet, thus it does not require the criminalization of conduct related to possession of virtual images and sexually exploitative representations of children, which are more common in cyberspace.

However, in a report presented to the UN General Assembly in 1998, the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Ofelia Calcetas-Santos, recommended that “pseudo-pornography” (virtual images) should be criminalized on the basis of Article 32 of the Convention on the Rights of the Child, which requires that States Parties recognize the right of the child to be protected from economic exploitation.⁸⁴ Juan Miguel Petit made the same observation in 2004, when he was the Special Rapporteur on the sale of children, child prostitution and child pornography.⁸⁵ Monitoring the implementation of the recommendations made by the previous Special Rapporteur, Najat Maalla M’jid, on the Report presented in 2009, also specifically recommended the criminalization of the distribution of virtual images.⁸⁶

The Pact of Rio de Janeiro, a result of the Third Congress against the Sexual Exploitation of Children and Adolescents, also calls for the criminalization of virtual images and sexually exploitative representations of children. This means that offenses related to production, distribution, dissemination, offer, import, export, sale, and possession of child abuse material produced without a real child should be criminalized. The distribution of altered images is also sexual exploitation of the child whose face is shown because it creates the illusion that a child is involved. So visual depictions of child abuse shown in morphed images (which are changed or shaped into another image through a seamless transition) and images modified by photo editing software should be criminalized.

Visual depictions of child abuse in comics, video games, cartoons, Japanese manga, and drawings should be covered under criminal law, even though they do not represent an act of sexual exploitation of one specific child. The nature of such material is polemic because some argue that it must be protected due to its artistic value or freedom of speech. We believe this material is as harmful as real pornography because it also plays an important role in supporting and facilitating sexual offenses against children. The same conclusion is valid for pseudo-infantile pornography, where adult models

⁸⁴ “The Special Rapporteur, therefore, encourages the Committee on the Rights of the Child to reaffirm that the scope of article 34 of the Convention on the Rights of the Child should be interpreted to include an absolute prohibition on “pseudo-child pornography”, including the “morphing” of child and adult bodies to create virtual child pornographic images.” Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Fifty-fourth session rep.*, Comm’n on Human Rights, U.N. Doc. E/CN.4/1998/101 (Jan. 13, 1998) (by Ofelia Calcetas-Santos), at 9, available at <http://www.ohchr.org/EN/Issues/Children/Pages/AnnualReports.aspx>.

⁸⁵ “Child pornography includes not only the use of real children but also artificially created imagery. This virtual material included digitally created images, and morphed or blended images of adults and children. Although this kind of pornography does not involve the direct abuse of a child, its power to “normalize” images of child sexual abuse and incite sexual exploitation of children should not be underestimated and must be adequately addressed.” Special Rapporteur on the sale of children, child prostitution and child pornography, *Report on Child Pornography and the Internet*, Comm’n on Human Rights, E/CN.4/2005/78 (Dec. 23, 2004) (by Juan Miguel Petit), at 8, available at <http://www.refworld.org/pdfid/42d66e480.pdf>.

⁸⁶ “Criminalize the production, distribution, intentional receipt and possession of child pornography, including virtual images and representations that exploit children, as well as the acts of intentionally using, accessing and watching such material even in the absence of any physical contact with the child.” Special Rapporteur on the sale of children, child prostitution and child pornography, *Report on Child Pornography and the Internet*, Comm’n on Human Rights, U.N. Doc. A/HRC/12/23 (13 July 2009) (by Najat Maalla M’jid), at 23, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.23.pdf>.

are photographed in a way that they look like children, because it simulates the sexual exploitation of children.

When analyzing the compliance of Latin American countries' legislation to the Plan of Action of the Pact of Rio de Janeiro, we divided the countries into three categories.

The first group includes countries that specifically criminalize the production, distribution, commercialization, and possession of virtual images and sexually exploitative representations of children. Identifying the countries in this group does not present a challenge, because the legislation is clear enough in order to allow the punishment of the indicated conduct. This group includes Brazil, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, and Panama, representing 39% of Latin American countries.

Brazil, for instance, criminalizes simulating the participation of a child in an explicit sex scene through the adulteration, installation, or modification of photography, video or any other form of visual representation (Article 241-D of the ECA). Costa Rica specifically criminalizes virtual pornography or pseudo-pornography (Article 174 Bis of the Criminal Code). Brazil and Costa Rica do not criminalize virtual pornography in the same articles that each criminalizes real child pornography.

Guatemala does not have such an explicit provision, but it criminalizes the use of the voice or image, real or simulated, in Article 193 III of the Penal Code; for purposes of this report, simulated images are considered as virtual images or fabricated images.

In Article 103 of its Penal Code, Ecuador includes in the definition of child pornography, any visual, audiovisual, computerized or electronic material that has been edited, or any material produced by other means or format that visually depicts child pornography. Article 173 of the El Salvador Penal Code is a confusing provision, because although it includes the word "virtual", it is not clear if it is related to the way the material is going to be distributed, or to the material itself.

The Chilean Penal Code does not have a definition of pornography that expressly includes terms related to virtual pornography, which would guarantee its punishment without any doubt. Law 20.526/2011 of Chile modified the definition in Article 366 quinquies of the Penal Code to include "any representation of minors in which their voice or image is used".⁸⁷ But the legislative intent seems to be clear, because the law is entitled "Law 20.526, which penalizes online grooming, virtual child pornography and the possession of child pornography".⁸⁸

In Article 193 ter of the Penal Code of Guatemala, the production of pornographic material with the image or voice, real or simulated, of one or more minors, in pornographic activities is criminalized. Simulated images are those that are modified, not reflecting reality, such as virtual pornography.

In Panama, Article 84 of the Penal Code specifically mentions the presentation or virtual representation of one or several minors in sexual activities, real or simulated, in the definition of child pornography.

⁸⁷ BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE, *Historia de la Ley Nº 20.546 Deroga derecho preferente para la adjudicación de permisos de los Servicios de Telecomunicaciones*, Nov. 11, 2011, at <http://www.leychile.cl/Navegar?idLey=20546> (last visited Oct. 8, 2015).

⁸⁸ Penal Code of Chile, at <http://www.wipo.int/edocs/lexdocs/laws/es/cl/cl020es.pdf> (last visited Oct. 8, 2015).

The second group includes countries that do not specifically criminalize virtual pornography, but have flexible legislation, meaning the provisions could be interpreted to criminalize this conduct. When the legislation mentions “any representation of children”, or “the use of images of children”, or equivalent expressions, we classified it in the second group. This includes Argentina, Dominican Republic, and Uruguay (representing 17% of Latin American countries).

The third group consists of countries that have very strict legislation that does not allow for a broader interpretation. These countries usually criminalize the “use of a child”, or a “child’s participation” in the production of pornography, but do not punish the production or distribution of virtual images depicting child sexual abuse. The legal frameworks of Bolivia, Colombia, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela (44% of Latin American countries) do not criminalize virtual images or sexually exploitative representations of children.

The following map illustrates the situation in each country with regard to virtual images and sexually exploitative representations of children. Countries with clear and specific legislation criminalizing the production, distribution, and dissemination of virtual child pornography received four points; countries with vague legislation, but with the possibility of interpretation allowing for the punishment of such conduct received two points.



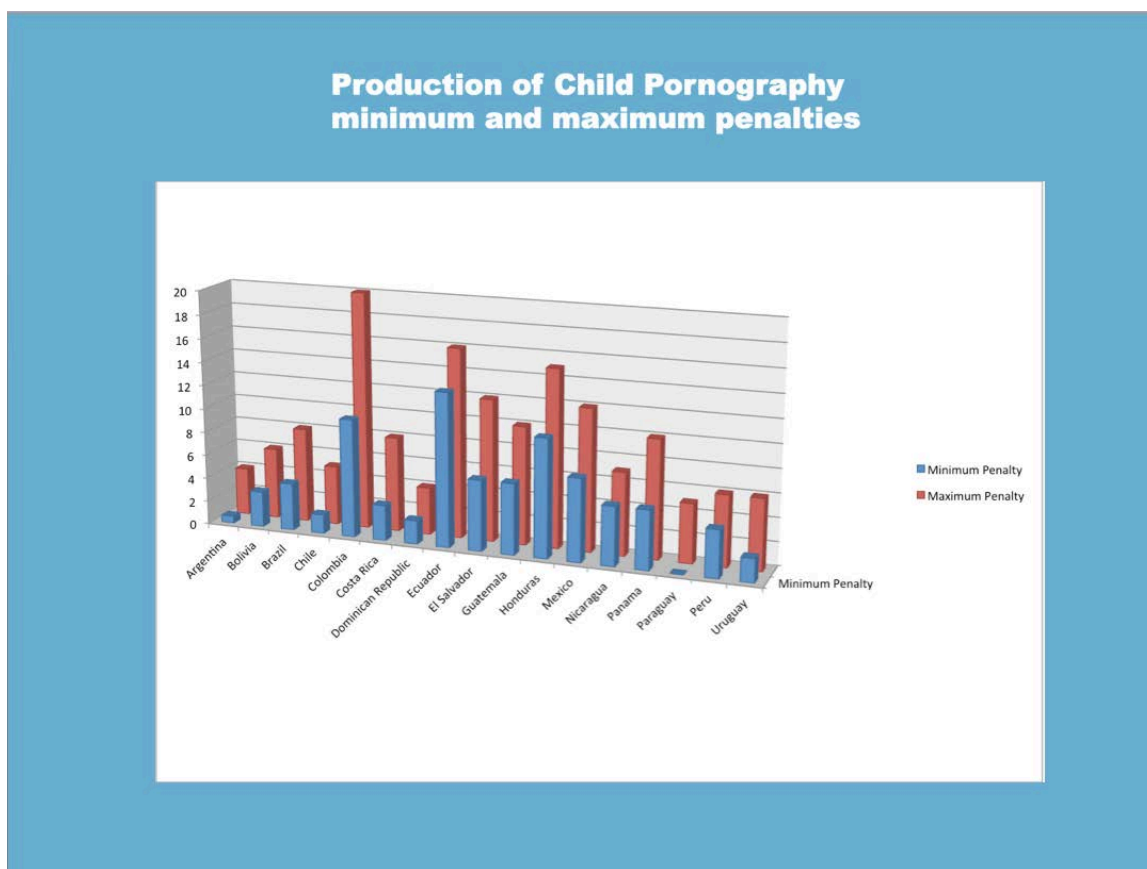
B.1.d.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 4	2	0	4	4	0	4	2	4	4	4	0	0	0	4	0	0	2	0

C. OBLIGATION TO PUNISH CHILD PORNOGRAPHY OFFENSES WITH APPROPRIATE PENALTIES

Article 3 (1) (c) of the OPSC requires States Parties to criminalize acts of producing, distributing, disseminating, importing, exporting, offering, selling, or possessing for the above purposes, child pornography as defined in its Article 2 (c), whether committed domestically or transnationally, on an individual or organized basis.

C.1. Adequacy of penalties prescribed for the production of child pornography

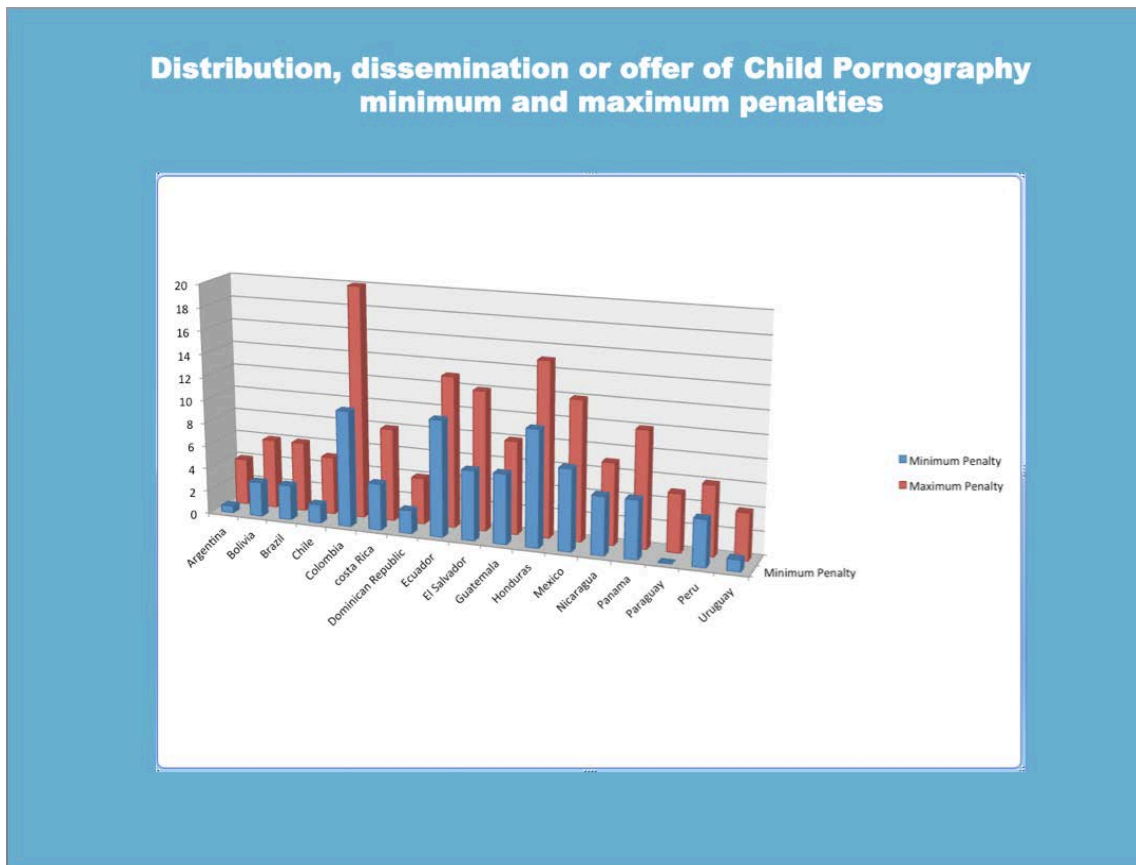
All of the Latin American countries analyzed here respect the recommendations of the Directive 2011/92/EU for offenses related to the production of child pornography. The lowest maximum penalty established for the **production** of child pornography is four years of imprisonment (Argentina and Dominican Republic), and the highest is 20 years (Colombia), while the Directive recommends having a maximum term of imprisonment of at least three years. Dominican Republic is raising the maximum penalty up to 20 years of imprisonment in the new Penal Code that will enter into force by the end of 2015.



C.2. Adequacy of penalties prescribed for the distribution, dissemination, offer, or transmission of child pornography

All of the Latin American countries that criminalize distribution, dissemination, offer, or transmission of child pornography also respect the limits recommended by the Directive 2011/92/EU. The lowest maximum penalty established for the crime of distribution is four years of imprisonment (Argentina), and the highest is 20 years of imprisonment (Colombia). In its new Penal Code, the Dominican Republic will have a

maximum penalty of 20 years of imprisonment for the distribution, dissemination, and offer of child pornography.



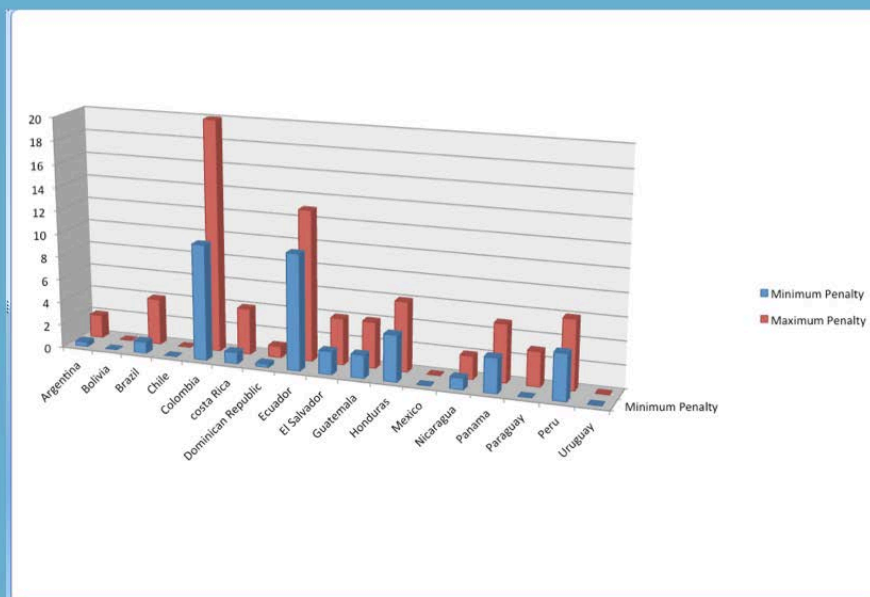
C.3. Adequacy of penalties prescribed for the possession of child pornography

Of the countries that have criminalized possession, regardless of whether it is with or without intent, the penalties have also respected the recommendations of the Directive.⁸⁹ However, possession is not criminalized in the following countries: Bolivia, Chile, Mexico, and Uruguay. The lowest maximum penalty established for the crime of possession is one year (Dominican Republic) and the highest is 20 years of imprisonment (Colombia) – while the Directive recommends having a maximum term of at least one year.

The Dominican Republic’s new Penal Code will substantially raise the penalty for possession from 10 to 20 years of imprisonment, making it equal to Colombia’s. Nicaragua (Article 175, § 3 of the Penal Code) and Argentina (Article 128 of the Penal Code) will then be the countries with the lowest maximum penalty with two years of imprisonment.

⁸⁹ Article 5 item 8 of the Directive leaves to the States Parties discretion the choice to punish possession with or without intent to commercialize.

Possession of Child Pornography minimum and maximum penalties



C.4. Different levels of penalties

Brazil and Guatemala have Penal Codes that establish three levels of penalties as suggested by the Directive 2011/93/EC. At the same time, they observe the recommended order of punishment: a higher penalty for production, and intermediate penalty for distribution, and a lower penalty for the possession of child pornography.

Chile and Uruguay punish the production with a higher penalty than the distribution, dissemination, or offer, but they do not criminalize possession.

Colombia, Peru, and Venezuela punish all the acts with the same penalties (10 to 20 years of imprisonment in Colombia; four to six years of imprisonment in Peru; four to eight years of imprisonment in Venezuela). They have harsh penalties for possession, equivalent to that established for the production of child abuse material, which is a much more harmful conduct.

Bolivia and Mexico establish the same penalties for distribution, dissemination, and offer, but do not criminalize possession.

Most of the considered countries punish the production of child pornography at the same level as distribution, dissemination, and offer, but they establish a lower penalty for possession (Argentina, Dominican Republic, El Salvador, Honduras, Nicaragua, Panama, and Paraguay).

Therefore, amongst the considered countries, only Brazil and Guatemala follow the Directive, by establishing both maximum penalties and three different levels of penalty according to gradation of the harm caused to society. Chile and Uruguay are in a different situation only insofar as they do not criminalize possession.

Costa Rica establishes two levels of penalty: one level of punishment for production and distribution, and a different one for the possession of child pornography. Ecuador is slightly different and has established one level of punishment for only production, and another for distribution and possession of child abuse material.

The following map illustrates the minimum and maximum penalties suggested by the Directive 2011/93/EU, and the observance of different levels of penalty.



C.4.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 4	3	1	4	3	2	3	3	3	3	4	3	2	3	3	3	2	3	2

C.5. Aggravating circumstances

C.5.a. Offense committed by a member of the child’s family, a person cohabiting with the child, or a person who has abused a recognized position of trust or authority

The first group of recommended aggravating circumstances is related to family relationships, cohabitation or to the fact that the offender has a recognized position of trust or authority. These situations weaken the possibility of children to defend themselves, greatly increasing their degree of vulnerability, so they deserve a special attention from lawmakers.

Brazil, Ecuador, El Salvador, Guatemala, and Nicaragua have provisions in their legislation that establish aggravated penalties for these three situations. However, Guatemala establishes these aggravated penalties generally to include all crimes. This group corresponds to 28% of the countries analyzed in this Regional Study.

Chile, Paraguay, Peru, and Venezuela do not consider the perpetration of the crime by a person cohabiting with the child as an aggravating circumstance, but do recognize it when the offender is a member of the family or a person who has abused a recognized position of trust or authority.

Colombia and Dominican Republic only recognize when the perpetrator is a member of the family as a circumstance that should enhance the penalty. Dominican Republic will recognize this aggravating circumstance in the new Penal Code.

Honduras only increases the penalties when the offense is committed by a person cohabiting with the child, and does so in a generic provision, not specifically related to crimes committed against children. Mexico’s Federal Criminal Code increases the penalty when the offense is committed by a person who has abused a recognized position of trust or authority.

Unfortunately, Argentina, Bolivia, Costa Rica, Panama, and Uruguay (27% of the considered countries) do not establish aggravated penalties for any of these three situations). In Argentina, this kind of aggravating circumstance is established for sexual abuses, but not for child pornography offenses without a reasonable motive for that difference of treatment.

C.5.b. Offense committed by several persons acting together

Countries often criminalize conspiracy to commit crimes, which requires a joint effort towards the perpetration of specific crimes; it is a partnership in criminal purposes that involves planning the offenses together.

The recommendation of the Directive 2011/93/UN is not related to conspiracy; it only requires that countries aggravate sentences because of the simple fact that the offense was committed by several persons acting together.

Only Chile, Dominican Republic, and Ecuador have legal provisions that enhance the penalty in this circumstance. It is worth noting that Ecuador does so generally, not specifically for child pornography offenses.

In Chile, Article 368 bis, item 2, of the Penal Code treats the commission, by two or more persons, of sexual abuses against children and other related crimes, such as child pornography, as an aggravating circumstance.

In the Dominican Republic, Article 195 of the Penal Code establishes an aggravating circumstance for crimes related to the exploitation of children and adolescents when they are committed by several people acting together, regardless of whether it constitutes a conspiracy.

Ecuador generally considers any crime being committed by more than two persons as an aggravating circumstance, according to Article 47, item 5, of the Organic Penal Code.

C.5.c. Offense committed within the framework of a criminal organization

El Salvador, Nicaragua, Panama, Paraguay, Peru and Venezuela have legal provisions that enhance the penalty when the offense is committed within the framework of a criminal organization. This group accounts for only 28% of the considered countries – a very low percentage.

El Salvador generally establishes an aggravating circumstance for every crime committed in the framework of a criminal organization in Article 30, item 19 of the Penal Code. Nicaragua does the same in Article 176, b, of the Penal Code, but only for crimes of sexual exploitation or child pornography when the circumstance does not constitute conspiracy.

Panama specifically enhances the penalty for child pornography offenses when the offender is a member of a criminal organization, according to Article 180 of the Penal Code. Paraguay does the same in Article 140, item 5 of the Penal Code, Peru in Article 183-A of the Penal Code, and Nicaragua in Article 180 of the Penal Code.

In Venezuela, Article 14 of the Law on the Organized Crime establishes aggravated penalties for the production of child abuse material within the context of a criminal organization.

C.5.d. Offender has previously been convicted of offenses of the same nature

Criminal recidivism is usually treated at a general level in Latin American countries' Penal Codes. Most of them generally establish aggravated penalties for offenders that have a previous conviction of the same or similar nature. Only Colombia, Costa Rica, and Panama do not establish aggravated penalties for criminal recidivism; those three countries establish this aggravating circumstance for specific offenses, though offenses related to child pornography are not included.

El Salvador is the only country with a specific provision that considers a previous conviction for an offense of the same nature as an aggravating circumstance.



C.5.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 6	1	1	4	4	1	0	3	5	5	4	2	2	5	1	4	4	1	4

D. COMMITMENT TO ESTABLISH EXTRATERRITORIAL JURISDICTION FOR CHILD PORNOGRAPHY OFFENSES

In Article 4 (2), the OPSC requires that States Parties adapt their domestic legislation in order to exercise extraterritorial jurisdiction in child pornography offenses, at least in relation to individuals, describing in detail when they should prosecute crimes committed abroad. This provision complements Article 3 (1) that requires that certain offenses be covered under the State’s criminal law whether committed domestically or transnationally. The OPSC also requires States to assist each other in investigations or criminal or extradition proceedings, and to strengthen international cooperation by multilateral, regional, and bilateral arrangements to, among other things, investigate, prosecute, and punish offenders.

There is no recommendation to establish extraterritorial jurisdiction for crimes committed by legal persons.

D.1. Active Personality Principle: Extraterritorial jurisdiction when the alleged offender is a national of the State or a person who has his habitual residence in its territory

Article 4 of the OPSC requires States Parties to adopt measures to guarantee that offenses committed abroad by nationals or by non-national residents in its territory are punished under domestic criminal law,

especially when there is no extradition. This is the **active personality principle** of extraterritorial jurisdiction.

Most of the Latin American countries have general provisions in their constitutions or criminal codes establishing their jurisdiction over crimes committed abroad by nationals, regardless of the nature of the offense.

The ability to apply domestic legislation to nationals of a country usually corresponds to the fact that the extradition obligation likely does not extend to them. Civil law countries traditionally are strongly opposed to extraditing their own nationals, and usually forbid it in their constitutions or criminal codes. Moreover, most extradition treaties permit the contracting parties to refuse handing over their own nationals. To compensate for the negative effects of this choice and avoid impunity, civil law countries normally assume the obligation of prosecuting their citizens for crimes committed outside of their territory.

However, in order to try their nationals for crimes committed abroad, some countries require a prior request of extradition from the country where the offense was perpetrated, and that the request had been denied. This prevents citizens from simply being handed over, but impunity does not prevail. For these countries, mere knowledge that a citizen has committed a crime abroad is not enough to provide for extraterritorial jurisdiction.

The only Latin American country that does not apply the active personality principle for nationals is the Dominican Republic, and the new Penal Code will not change this. While Ecuador does not apply the active personality principle it does apply the universal jurisdiction principle for offenses related to child pornography, removing the need to change its legislation.

Argentina does not have a clear provision concerning the active personality principle in its Penal Code. However, Article 12 of the Extradition Act n. 24.767 does apply it indirectly by allowing a national who has committed crimes abroad to choose to be tried by Argentinian Courts, according to Argentinian Laws (if it is not the case of a compulsory extradition, according to international treaties), when there is a request of extradition. If the national can make a choice, the active personality principle will be applied, authorizing the extraterritorial jurisdiction of Argentinian Courts. The Penal Code of Panama has an equivalent norm.

We can classify Latin American countries into four groups, concerning the active personality principle as applied to nationals:

- 1) The first group includes the countries that have general provisions in their constitutions or criminal codes, clearly establishing their jurisdiction over crimes committed abroad by nationals, regardless of the nature of the offense, not requiring a prior and denied request of extradition. Among the 18 countries reviewed, eight countries (44%) are in this situation (Brazil, Bolivia, Colombia, Costa Rica, Mexico, Nicaragua, Peru, and Uruguay).
- 2) The second group includes the countries that apply this principle, but require a prior and denied request of extradition. Argentina, El Salvador, Guatemala, Honduras, and Panama are in this group.
- 3) The third group includes the countries that do not apply the active personality principle, but can exercise their jurisdiction over crimes committed by nationals by applying the universal jurisdiction principle. Currently, only Ecuador fits this category.

Ecuador used to have a specific provision in its Penal Code, approved in 1971, establishing extraterritorial jurisdiction for crimes committed by nationals abroad, which was recently replaced by the Organic Penal Code in February 2014. Article 7 of the former Penal Code specifically provided jurisdiction to Ecuadorian Courts to prosecute nationals that would have committed crimes abroad. The new legal framework prescribes, in a broader provision, extraterritorial jurisdiction for offenses regulated by international instruments ratified by Ecuador, and offenses against human rights. It is important to realize that the Ecuadorian legal framework is in compliance with the OPSC because it allows the prosecution of nationals or foreigners who have committed a crime abroad.

Brazil, Costa Rica, Ecuador, El Salvador, Honduras, and Nicaragua also have provisions in their criminal codes related to extraterritorial jurisdiction based on the universal jurisdiction principle, but they do not have to apply it because, as indicated above, they have more specific provisions concerning the extraterritorial jurisdiction over crimes committed abroad by their nationals.

- 4) The fourth group includes the countries that partly apply the active personality principle, through norms that have a narrower spectrum and restrain the extraterritorial jurisdiction of their courts only for certain offenses (Chile, Paraguay, and Venezuela).

Chile has a specific provision in the Código Orgánico de Tribunales (Court's Organic Code), that empowers National Courts to try persons for the crimes of production of child pornography (Article 366V), trafficking, and facilitation of child prostitution committed abroad, when those crimes are committed by a Chilean or by someone who lives in Chile. This also applies to the crimes of child pornography: commercialization, possession, distribution, dissemination, import, export, and buying child abuse images. However, for crimes related to child pornography, Chile has extraterritorial jurisdiction only when Chilean children are depicted.

During its 47th Session, the understanding of the Committee on the Rights of Child was that the Chilean legislation only punishes the crime of child pornography if the child is a Chilean national, which contradicts the Optional Protocol. The CRC Committee noted an incident in 2003 when a U.S. citizen caught in possession of pornography was deported rather than tried, reinforcing this concern.⁹⁰

Analysis of the Chilean legislation confirms that, for the crimes of importing, exporting, distributing, commercializing, and exhibiting child pornography, it establishes the jurisdiction of Chilean Courts only if the children depicted are Chilean, not prescribing the same rule for non-national victims. Hence, it is clear that Chile did not legislate integrally according to the Optional Protocol. But concerning the participation in the production of child pornography (Article 366V) abroad, foreigners can be tried in Chile if they have residence there.

Paraguay only applies the active personality principle of extraterritorial jurisdiction for trafficking in persons related to child pornography (Article 366 of the Paraguayan Penal Code); Nicaragua does so, for crimes related to sexual offenses against children and adolescents; and Venezuela does so only for the exploitation of pornography industry or the trade in pornography.

The situation differs for non-nationals, because the domestic legislation of civil law countries does not

⁹⁰ UN COMM. ON THE RIGHTS OF THE CHILD, *supra* note 83.

necessarily establish extraterritorial jurisdiction for crimes committed by them, even if they are living in the territory of the requested country. This is most likely because it is generally easier to extradite foreigners.

This reasoning does not always lead to the necessary punishment of crimes against children perpetrated by non-nationals outside of the territory of the country where the non-nationals are living. This happens because some exceptions may prevent the extradition of non-nationals, like the application of the principle of double criminality. This principle requires that a person be extradited only for conduct that is criminalized by the legislation of both States. So if there is not also a provision establishing extraterritorial jurisdiction for non-nationals and the conduct is not criminalized in the requested country, impunity will prevail.

When discussing offenses related to child abuse material, there are a number of acts punished by some countries that are not criminalized by others. For example, to offer child abuse material is a crime in Brazil, but not in Uruguay. Thus, if Brazil requests the extradition of an Argentinian, who is living in Uruguay, for offering child pornography in Brazilian territory, Uruguay will not extradite this person in spite of the fact that the person is not a national of Uruguay. This happens because Uruguay applies the principle of double criminality.

Though the OPSC does not require States Parties to relinquish the rule of double criminality, the Committee on the Rights of the Child often states the need to do so. In the Concluding Observations on the Report submitted by Guatemala, the Committee recommended that “the State party ensure that national legislation does not require double criminality for extradition and/or prosecution of offenses committed abroad.”⁹¹ Also, in the Concluding Observation on the Report presented by Paraguay, the CRC recommended that “the State party take all the necessary measures to ensure that domestic legislation explicitly enables it to establish and exercise extraterritorial jurisdiction over all offenses under the Optional Protocol, without the requirement of double criminality.”⁹²

The previous Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Najat Maalla M’jid, in the Report presented to the UN General Assembly on December 24, 2012, also affirmed that “for extraterritoriality to be of real value, however, it also requires the abolition of the double-criminality requirement.”⁹³

In some extradition treaties there are requirements related to the penalties established for crimes, in order for them to be extraditable. In addition, for a certain offense to be extraditable, it must be listed as such in the appropriate treaty. These obstacles can also prevent the extradition of non-nationals.

⁹¹ UN COMM. ON THE RIGHTS OF THE CHILD, *Consideration of Reports Submitted by State Parties Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Concluding Observations: Guatemala*, UN Doc. CRC/C/OPSC/GTM/CO/1 (June 8, 2007), at 5, at <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.OPSC.GTM.CO.1.pdf>.

⁹² UN COMM. ON THE RIGHTS OF CHILD, *Concluding observations on the initial report of Paraguay submitted under article 12 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, adopted by the Committee at its sixty-fourth session (16 September – 4 October 2013), U.N. Doc. CRC/C/OPSC/PRY/1 (Oct. 4, 2013), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/OPSC/PRY/CO/1&Lang=En (last visited Oct. 9, 2015).

⁹³ Special Rapporteur on the sale of children, child prostitution and child pornography, *Report on Child Pornography and the Internet*, Comm’n on Human Rights, U.N. Doc. A/HRC/22/54* (Dec. 24, 2012) (by Najat Maalla M’jid), at 11, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.54_en.pdf.

A State can also refuse to entertain a request for extradition if the person is likely to face the death penalty sentence, or to be subjected to torture or any other cruel treatment. This is not to say that the person should still be extradited, but these situations can lead to impunity when they prevent extradition and, at the same time, the requested country does not have domestic provisions to allow the exercise of extraterritorial jurisdiction over non-nationals living in its territory and who have committed a crime abroad.

The active personality principle that allows extraterritorial jurisdiction to be applied to non-nationals who are resident in the territory of a country is valid only in Colombia, Mexico, and Panama (17% of the considered countries). In Panama, this applies only after a request of extradition is denied. Provisions concerning the universal jurisdiction principle, which is applied in Brazil, Costa Rica, Ecuador, El Salvador, Honduras, and Nicaragua, may cause the same result and make it possible to prosecute foreigners who are in their territory and have committed a crime abroad.

Colombia has a broader provision exercising extraterritorial jurisdiction not only for foreigners that have habitual residence in its territory, but also for those who simply are within its territorial boundaries.

D.2. Universal Jurisdiction Principle

It is important to consider that, while some Latin American countries do not have provisions fully establishing the active personality principle over crimes committed by non-nationals outside of their territory, they do follow a more important and wider principle, which prevents impunity – the **universal jurisdiction principle**. This principle allows States to claim criminal jurisdiction over an accused person, regardless of the location of the crime and the nationality of the perpetrator or the victim, when serious human rights violations are perpetrated to the detriment of international interests. It is a jurisdiction based only on the nature of the crime. When adopted, it can be a useful substitute for the active and passive personality principles.

Some Latin American countries adopt the universal jurisdiction principle. Brazil, Costa Rica, Ecuador, El Salvador, Honduras, and Nicaragua have provisions in their Criminal Codes related to extraterritorial jurisdiction based on the universal jurisdiction principle. Brazil may apply extraterritorial jurisdiction for any crime that the country has agreed to punish according to international instruments, according to Article 7, item II of the Criminal Code; Costa Rica may apply extraterritorial jurisdiction for crimes related to trafficking in women and children, obscene publications, or other offenses against human rights, according to Article 7 of the Penal Code; Ecuador can apply it when serious offenses to human rights are committed, according to Article 14 of the Criminal Code; El Salvador can apply extraterritorial jurisdiction when there is an offense that undermines universally recognized human rights, according to Article 10 of the Penal Code; Honduras may apply extraterritorial jurisdiction when any crime is committed against human rights universally recognized, according to Article 5, item 5 of the Penal Code; Nicaragua may apply it to trafficking in persons for sexual exploitation and sexual crimes committed against children, according to Article 19 of the Penal Code.

Some other countries have provisions that adopt the universal jurisdiction principle with a narrower application. The Dominican Republic has a rule allowing the exercise of extraterritorial jurisdiction when certain crimes (such as genocide, war crimes, or crimes against humanity) are committed, but does not include child pornography. Panama only applies the universal jurisdiction principle to crimes against humanity, trafficking in persons and other crimes, amongst which child pornography is not included.

The Paraguayan and the Peruvian Penal Codes established the universal jurisdiction principle for offenses related to international instruments ratified by the country, but only when these instruments require the country to repress them.

In a similar way, the Panamanian and Uruguayan Penal Codes give extraterritorial jurisdiction to their courts when international instruments specifically establish their jurisdiction. As indicated above, the OPSC does not establish the grounds for extraterritorial jurisdiction; it simply recommends that domestic legislation shall be amended to allow it. Thus, we cannot say that those countries are fully in compliance with the OPSC when analyzing their application of the universal jurisdiction principle.

In conclusion, only Colombia and Mexico apply the active personality principle for nationals and non-nationals, fully meeting the requirements of the OPSC; Costa Rica and Nicaragua apply it only to nationals, at least directly, but their adoption of the universal jurisdiction principle exempts them of making any changes in their legislation.

Ecuador, El Salvador, Honduras, Paraguay, and Peru do not need to modify their legal frameworks, because the universal jurisdiction principle is broad enough to embrace the active personality principle, allowing them to adequately exercise their jurisdiction as requested by the OPSC.

Argentina, Bolivia, Brazil, Chile, Dominican Republic, Guatemala, Panama, Uruguay, and Venezuela should make an effort to modify their legal frameworks to conform to the requirements of the international instrument considered.

D.3. Passive Personality Principle: Extraterritorial jurisdiction when the victim is a national of the State

The extraterritorial jurisdiction when the victim is a national of the State is known as the **passive personality principle**.

Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Peru, and Uruguay have legal frameworks that allow them to exercise extraterritorial jurisdiction when the victim of child pornography offenses is a national of the State (66% of Latin American countries).

Most of these countries have general provisions concerning this matter, prescribed by the constitution or the criminal code. They are not specifically related to child pornography and can be applied to any crime committed abroad, regardless of the nature of the offense. Colombia applies it only for more serious crimes, which have a minimum penalty higher than an established limit, such as child pornography offenses.

The universal jurisdiction principle is broader than the passive personality principle, and can be equally used to justify the prosecution of child pornography crimes that are indicated in the OPSC. Thus, the same considerations made in the previous item (extraterritorial jurisdiction when the perpetrator is a national of the country, or a foreigner that lives in the country) are applied here, allowing Ecuador, El Salvador, and Honduras to be considered in compliance with the OPSC's requirement of establishing extraterritorial jurisdiction when the victim is a national of the State.

Chile has a specific provision in the Código Orgánico de Tribunales (Court's Organic Code), which empowers National Courts to try persons for the crimes of production of child pornography (Article 366V), trafficking, and facilitation of child prostitution committed abroad, when the integrity or sexual freedom of a Chilean is

affected. It also mandates that offenders who commit the crime of child pornography (Article 374 Bis – commercialization, possession, and other conduct) when Chilean children are depicted are subject to Chilean law.

Argentina, Bolivia, Dominican Republic, Nicaragua, Paraguay, and Venezuela have not complied with the obligation of enacting legislation to allow them to exercise extraterritorial jurisdiction when the victim of child pornography offenses is a national of the State. Hence, these countries should modify their legal frameworks in order to align them with the OPSC.

More specifically, Argentinian legislation does not establish its extraterritorial jurisdiction for these hypotheses. The understanding of the Argentinian Courts is that there is an optional clause under Article (4) (2) of the OPSC that gives the State discretionary power to institute criminal jurisdiction for certain crimes on the basis of the principle of nationality, but it has not been implemented in national law by Congress.⁹⁴ Thus, Argentina has chosen not to prosecute a crime committed outside of its territory, even when the perpetrators or the victims are Argentinian.

The following map illustrates the compliance of Latin American countries with the recommendations of the OPSC on extraterritorial jurisdiction, also informing where the universal jurisdiction principle is applied.

⁹⁴ Case of Cámara Nacional de Apelaciones en lo Criminal y Correccional, Abril 24, 2006 (case Recurso de Cámara de Apelaciones en lo Criminal y Correccional – Sala I n. 27.507 del 24 de Abril de 2006).

EXTRADICION. CONCURRENCIA DE SOLICITUDES DE EXTRADICIÓN.

Como la cláusula facultativa prevista en el art. 4.2 del Protocolo Relativo a la Venta de Niños, la Prostitución Infantil y la Utilización de los Niños en la Pornografía (aprobado por ley 25.763), que otorga al Estado parte una potestad discrecional de instituir su jurisdicción penal para determinados delitos sobre la base del principio de nacionalidad, no ha sido implementada en el derecho interno por el Congreso, cabe entender que la "oferta de jurisdicción" no ha sido aceptada, por lo que al no haberse instituido la jurisdicción penal para dichos supuestos, corresponde concluir que nuestro país no puede perseguir un delito cometido fuera de su territorio en circunstancias semejantes (art. 1 del Código Penal), razón por la cual no corresponde otorgar la extradición (art. 2.4 del Tratado de Extradición con Estados Unidos) (Disidencia del Dr. E. Raúl Zaffaroni).

Mayoría: Lorenzetti, Highton de Nolasco, Fayt, Petracchi, Maqueda, Argibay. H. 201. XLII: ROR

Hinojosa ROR Hinojosa Benavides, Isidro s/extradición 11/08/2009T. 332, P. 1743.



D.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 10	1	2	8	5	8	8	0	6	7	5	7	8	4	7	1	6	6	1

E. Forfeiture of assets used to commit or facilitate offenses and forfeiture of proceeds derived from offenses

Almost all of the countries reviewed establish in their Criminal Procedure Code as an effect of conviction, the forfeiture of assets used to commit a crime and of the proceeds derived from offenses.

Brazil's legislation, despite having provisions that establish the forfeiture of proceeds derived from offenses, only prescribes the forfeiture of assets used to commit or facilitate offenses when possession of the proceeds itself is illicit (according to Article 91, II of the Penal Code). Similarly, Paraguay establishes that the Judge can determine the forfeiture of the instruments used to commit a crime only when they offer a danger to society or when they can be used to commit other unlawful acts (according to Article 386 of the Penal Code).

Venezuela establishes the forfeiture of assets used to commit an offense and of proceeds derived from it only for specific crimes, which does not include the production, distribution, dissemination, offer, export, or import of child pornography. But the Law on Organized Crime (LODO), in Article 319, establishes those measures as accessory penalties that must be applied to the crime of exploitation of an industry or commerce of child abuse images.



E.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 2	2	2	1.5	2	2	2	2	2	2	2	2	2	2	2	1.5	2	2	0.5

F. Mandatory reports for Internet Service Providers concerning child abuse material

Many Latin American countries do not establish in their legislation a duty for ISPs to report the finding of child abuse material that is stored or distributed through them. This is a complex issue because ISPs often claim they are only required to obey the legislation of the country in which they are located. The largest ISPs are located in the U.S. and Russia.

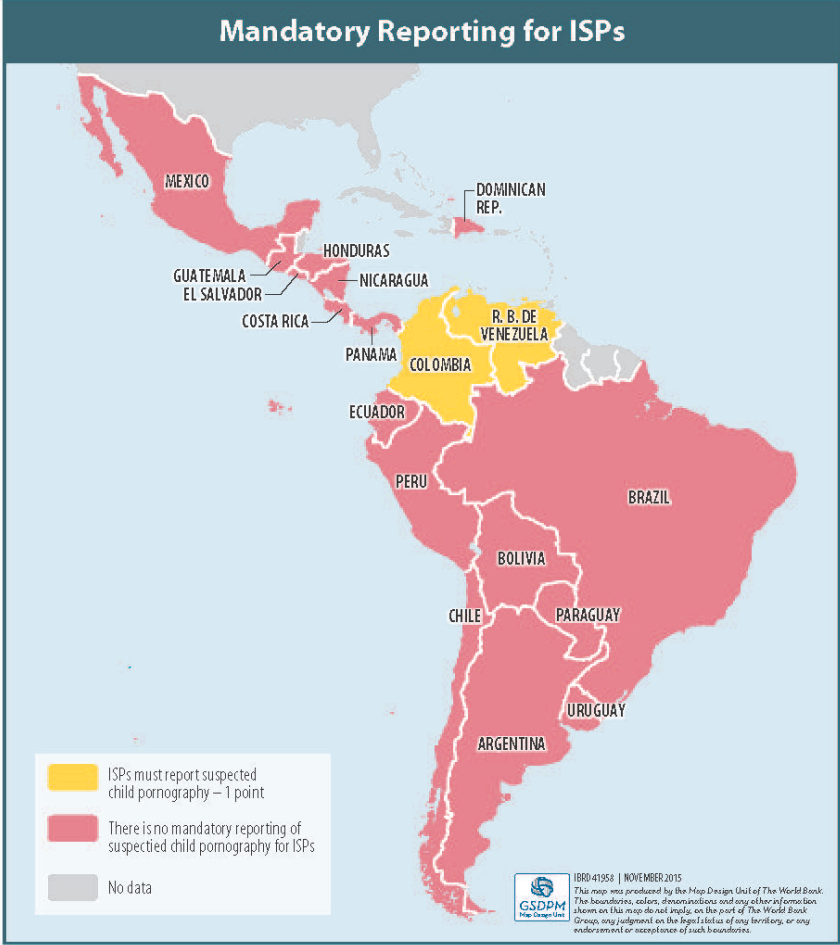
ISPs should only be allowed to offer their services if there is an obligation to provide systematic information about illicit content, regardless of a request for the information. However, this duty must be clearly established in the legislation.

Colombia is a good example of this kind of legislation. According to Law 679 and Decree 1524, ISPs must not only make mandatory reports about child pornography, but also combat the distribution of this kind of material by creating technical blocks and filters.

In 2011, Venezuela enacted the Law on the Social Responsibility of Radio, TV, and ICTs, also known as “RESORTE” or the “gag law”. In Article 27 it establishes that ISPs cannot allow the diffusion of any material that

is against the law, and that they are liable for it if they do not follow the orientations of the telecommunications agency CONATEL. Since analyzing this legislation’s adequacy in terms of the protection of the freedom of expression is outside of the scope of this Regional Study, it is important only to note that Venezuela is able to control the diffusion of child abuse images.

The following map illustrates the situation of Latin American countries with respect to legislative measures on the forfeiture of assets and obligations established to ISPs to report child pornography possession or distribution.



F.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
Total = 1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1

G. Criminal liability of legal persons

Child pornography has proved be a very profitable activity. It is said that criminal organizations are switching to this type of illicit activity because of the easy profits and the small risk the related crimes present.

In this context, criminal liability of legal persons is important to guarantee that criminal organizations and enterprises dedicated to committing crimes, or used to commit crimes, can be penalized. Criminal liability can help stop their activity, or at least make it more difficult for them to operate. This is a polemic subject because criminal organizations are not considered to have a willingness to commit crimes, which is necessary for a

conviction. While some countries have decided to simply apply penalties to criminal organizations, this only allows the criminal responsibility to be attributed to administrators or managers.

For the purpose of this Regional Study, it is important to verify the existence of effective criminal sanctions that can be applied to criminal organizations. This might include extinction, forfeiture of assets, fines, etc., and would discourage the continuation of the illicit activities.

In Latin America, only the Dominican Republic and Venezuela recognize criminal liability of legal persons concerning crimes related to sexual violence against children. In the Dominican Republic, Article 60 of Law 53-07 provides that when legal persons commit any crime, they can suffer penalties such as fines, forfeiture of assets and closure. However, the new Penal Code specifically establishes that enterprises used to commit an offense related to the exploitation of children are criminally liable, and can suffer penalties of fine, legal dissolution, forfeiture of proceeds, property, objects and assets derived directly or indirectly from it, permanent closure, temporary closure and temporary revocation of concessions, licenses, permits or authorizations given by the government. In Venezuela, the Law on Cybercrime (LEDI) establishes criminal liability of legal persons whose structure is used to exhibit child abuse images, when acting according to decisions of their board, in its regular activities, or when their resources are used. The Law on Organized Crime also establishes this kind of responsibility, prescribing the possibility of definitive closure, ban on the exercise of any activity, fines, revocation of concessions etc. However, the liability of legal persons is restricted to these crimes, and does not reach all of crimes under the OPSC.

Because of an international commitment to fight corruption, many Latin American countries established criminal liability for legal persons involved in crimes of this nature (Bolivia, Law 004; Brazil, Law 12.846; Guatemala, Article 442 bis of the Penal Code; México, Ley Federal Anticorrupción en Contrataciones Públicas, Dominican Republic, Law 448). Brazil adopted the same solution for crimes against the environment (Law 9.605). For other offenses, legal persons cannot be held criminally liable under the law in Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Uruguay; but in Argentina, Chile, Ecuador, El Salvador, Guatemala, Mexico, Panama, and Peru legal persons are subject to accessory penalties when used to commit crimes, such as extinction, closure, suspension of activities, and forfeiture of assets.

Argentina's legislation specifically excludes legal persons from criminal liability, but prescribes that judges can determine the confiscation of their assets when the perpetrator has acted as an organ, member or administrator of a corporate body, and the gains obtained have benefited the enterprise (Article 23 of the Penal Code).

In Chile, Article 368, III, of the Penal Code establishes that a commercial enterprise used in the commission of the crimes of distribution or production of child pornography can be closed by a judge's order. During the criminal investigation the judge can also rule for the temporary closure of the commercial business.

Ecuador does not recognize criminal liability of legal persons, but does establish accessory penalties when they are used to commit crimes (Article 363-A of the Penal Code).

In El Salvador, Article 126 of the Penal Code establishes the forfeiture of proceeds derived from offenses when they benefit a legal person.

In Guatemala, managers or representatives are responsible for the crimes committed by the company, depending on their participation. But Article 198, modified by Decree 9-2009, introduced a new kind of

accessory penalties for legal persons, meaning the company can lose authorization to function, or can be prevented from exercising commercial activities for a period corresponding to double the imprisonment received by directors or legal representatives.

Mexican Federal Legislation does not establish criminal liability for legal persons, but it does authorize their dissolution when they are used to commit a crime (Article 11 of the Federal Criminal Code).

In Panama, there is a general rule applicable to all crimes, which stipulates that when enterprises are used or created to commit a crime, a sanction will be imposed on them (Article 51 of the Penal Code).

Peru regulates the liability of legal persons in Article 105 of the Criminal Code, which lists the penalties that can be applied to them, such as temporary or definitive closure and extinction.

The following map illustrates the situation of Latin American countries concerning criminal liability of legal persons, and the possibility that they suffer accessory penalties when their representatives commit crimes using their structure or to benefit personally.



G.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
Total = 1	1	0	1	1	0	0	1	1	1	1	0	1	1	1	0	1	0	1

H. ACCESSING AND VIEWING CHILD PORNOGRAPHY (PACT OF RIO DE JANEIRO)

No country in Latin America criminalizes the accessing and viewing of child pornography. For the same reasons stated earlier that the mere possession of child pornography should be considered a crime, the repeated and systematic accessing of child pornography should also be covered under criminal law because each instance represents a re-victimization of the child.

Criminalization of knowingly obtaining access, by means of information and communication technologies, to child pornography is recommended in the Directive 2011/93/EU of the European Parliament and of the Council, of 13 December 2011, on combating the sexual abuse and sexual exploitation of children and child pornography.⁹⁵ It requires though, “that to be liable, the person should both intend to enter a site where child pornography is available and know that such images can be found there,” such that penalties are not applied to persons inadvertently accessing sites that offer such material.⁹⁶ It also recommends that “the intentional nature of the offense be deduced from the fact that it is recurrent or that the offense was committed via a service in return for payment.”⁹⁷

The Lanzarote Convention also recommends the criminalization of knowingly obtaining access to child pornography in Article 20 (f), but it is not a binding instrument for Latin American countries.⁹⁸

Despite the lack of criminalization of the access and viewing of child pornography in Latin America, one point is attributed to compliance with this requirement, especially because this study will serve as an instrument of comparison amongst other regions of the world.

H.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

I. ONLINE GROOMING (PACT OF RIO DE JANEIRO)

Online grooming is an alarming phenomenon that paves a path for the commission of more serious offenses committed against children. It is a preparatory step for the perpetration of sexual crimes against children, and it facilitates sexual abuses by allowing the construction of a relationship of trust between the perpetrator and the

⁹⁵ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, (Dec. 13, 2011), at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447190728317&uri=CELEX:32011L0093> (last visited Nov. 9, 2015). (Corrigendum to Directive 2011/92/EU, ‘2011/92/EU’ to be read as ‘2011/93/EU’, <http://db.eurocrim.org/db/en/doc/1715.pdf> (last visited Nov. 9, 2015).

⁹⁶ *Id.* at Artículo 18.

⁹⁷ *Id.*

⁹⁸ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse -- Article 20 – Offences concerning child pornography

1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalized:

- a. producing child pornography;
- b. offering or making available child pornography;
- c. distributing or transmitting child pornography;
- d. procuring child pornography for oneself or for another person;
- e. possessing child pornography; and
- f. knowingly obtaining access, through information and communication technologies, to child pornography.

victim. This diminishes the child's natural resistance to strangers, and bypasses the barrier of parental supervision. This behavior has immense potential to cause harm, and must be targeted and criminalized in order to reduce the sexual exploitation of children.

Although the OPSC does not regulate or require that States Parties criminalize online grooming, this need is recognized by the Plan of Action of the Pact of Rio de Janeiro. This Plan of Action was a result of the Third Congress against the Sexual Exploitation of Children and Adolescents, an informal but very important compromise assumed by all of the Latin American Countries. Criminalization of online grooming was also recommended in the 2004 report of Juan Miguel Petit, former Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, to the Commission on Human Rights of the Economic and Social Council of the United Nations (ECOSOC)⁹⁹, and in the 2009 report presented to the UN General Assembly by Najat Maalla M'jid¹⁰⁰, Mr. Petit's successor until April 2014.

The Lanzarote Convention recommends the criminalization of online grooming in Article 23, although it is not a binding instrument for Latin American countries.¹⁰¹

Amongst the Latin American countries only Argentina, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Panama, and Peru criminalize online grooming (44%). However, some of these countries only criminalize online grooming when the victims are children younger than 12 years of age (Brazil) or 14 years of age (Chile). Paraguay criminalizes offline grooming, but only when the victim is younger than 13 years of age.

Argentinian legislation defines online grooming in Article 131 of the Penal Code, recently modified by Law 20914/2013, as a contact with a minor through phone, Internet, or any other ICT, with the intent to commit any crime against his or her sexual integrity, and considers anyone younger than 18 years of age as a potential victim.¹⁰² The original bill approved by the House of Representatives, proposed a punishment of three months to two years of imprisonment, but it was enhanced by the Senate, establishing that it should be the same as the penalty for the production, distribution, dissemination, offer, and sale of child pornography.

⁹⁹ Many countries still do not have legislation on child pornography. This legal vacuum leaves a dangerous gap that exposes children to the risk of abuse, further increased by the impunity factor. The former Special Rapporteur recommends the ratification of the Optional Protocol on the sale of children, child prostitution and child pornography and the adoption of its definition of child pornography. He further recommends: (a) to attach criminal consequences to the conduct of each participant in the chain of child pornography, from production to possession; (b) to introduce legislation creating the offence of "Internet grooming or luring";

¹⁰⁰ In order to prevent and eradicate child pornography and prevent the Internet and new technologies from being used for the production and dissemination of child pornography and solicitation of children for sexual purposes both online and offline, the previous Special Rapporteur recommended:

(b) Adoption of clear and comprehensive domestic legislation that guarantees respect for children's rights and protects them from the crime of sexual exploitation on the Internet. Such legislation should:

(iv) Criminalize solicitation of children on the Internet for sexual purposes ("grooming");

¹⁰¹ Article 23 – Solicitation of children for sexual purposes

Each Party shall take the necessary legislative or other measures to criminalize the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set in application of Article 18, paragraph 2, for the purpose of committing any of the offenses established in accordance with Article 18, paragraph 1.a, or Article 20, paragraph 1.a, against him or her, where this proposal has been followed by material acts leading to such a meeting.

¹⁰² Artículo 131 - Será penado con prisión de seis (6) meses a cuatro (4) años el que, por medio de comunicaciones electrónicas, telecomunicaciones o cualquier otra tecnología de transmisión de datos, contactare a una persona menor de edad, con el propósito de cometer cualquier delito contra la integridad sexual de la misma.

(Artículo incorporado por art. 1 de la Ley 26.904, BO 111/12/2013)

Brazilian legislation defines online grooming as the act of enticing, harassing, embarrassing, or instigating a child, by any means of communication, in order to practice lewd acts, and also punishes those who facilitate or induce the child to access material containing scenes of explicit sex or pornography with the same intent (Article 241-D of the ECA¹⁰³). Brazil defines potential victims as persons younger than 12 years of age. The perpetrator must have specific intent of having online or offline sexual contact, and is subject to a penalty of one to three years of prison.

Costa Rican legislation establishes a penalty of four to ten years of imprisonment for those who use social media or any other computer or electronic medium or other means of communication, to seek sexual encounters with minors (second part of Article 167 of the Penal Code¹⁰⁴).

Chilean legislation criminalizes the act of grooming, defining it as making a child under 14 years of age send images or recordings where he or she performs acts of sexual significance, specifying that this crime can be committed through electronic means, without physical presence of the perpetrator. It enhances the penalty if the perpetrator uses a fake identification (Article 366 quarter of the Penal Code¹⁰⁵).

Dominican Republic criminalizes a conduct that is similar to online grooming, which, for the purposes of this Regional Study, is considered equivalent to it. Article 23 of Law 53-07¹⁰⁶ establishes a penalty of three to ten years of imprisonment for sexual assaults against children or adolescents with the use of ICTs.

¹⁰³ Artigo 241-D. Aliciar, assediar, instigar ou constranger, por qualquer meio de comunicação, criança, com o fim de com ela praticar ato libidinoso:

Pena – reclusão, de 1 (um) a 3 (três) anos, e multa.

Parágrafo único. Nas mesmas penas incorre quem:

I – facilita ou induz o acesso à criança de material contendo cena de sexo explícito ou pornográfica com o fim de com ela praticar ato libidinoso;

II – pratica as condutas descritas no caput deste artigo com o fim de induzir criança a se exhibir de forma pornográfica ou sexualmente explícita.

¹⁰⁴ Artículo 167.- Corrupción

Será sancionado con pena de prisión de tres a ocho años quien mantenga o promueva la corrupción de una persona menor de edad o incapaz, con fines eróticos, pornográficos u obscenos, en exhibiciones o espectáculos públicos o privados, aunque la persona menor de edad o incapaz lo consienta.

La pena será de cuatro a diez años de prisión, si el actor, utilizando las redes sociales o cualquier otro medio informático o telemático, u otro medio de comunicación, busca encuentros de carácter sexual para sí, para otro o para grupos, con una persona menor de edad o incapaz; utiliza a estas personas para promover la corrupción o las obliga a realizar actos sexuales perversos, prematuros o excesivos, aunque la víctima consienta participar en ellos o verlos ejecutar.”

¹⁰⁵ Artículo 366 quáter.- El que, sin realizar una acción sexual en los términos anteriores, para procurar su excitación sexual o la excitación sexual de otro, realizare acciones de significación sexual ante una persona menor de catorce años, la hiciere ver o escuchar material pornográfico o presenciar espectáculos del mismo carácter, será castigado con presidio menor en su grado medio a máximo.

Si, para el mismo fin de procurar su excitación sexual o la excitación sexual de otro, determinare a una persona menor de catorce años a realizar acciones de significación sexual delante suyo o de otro o a enviar, entregar o exhibir imágenes o grabaciones de su persona o de otro menor de 14 años de edad, con significación sexual, la pena será presidio menor en su grado máximo.

Quien realice alguna de las conductas descritas en los incisos anteriores con una persona menor de edad pero mayor de catorce años, concurriendo cualquiera de las circunstancias del numerando 1º del artículo 361 o de las enumeradas en el artículo 363 o mediante amenazas en los términos de los artículos 296 y 297, tendrá las mismas penas señaladas en los incisos anteriores.

Las penas señaladas en el presente artículo se aplicarán también cuando los delitos descritos en él sean cometidos a distancia, mediante cualquier medio electrónico.

Si en la comisión de cualquiera de los delitos descritos en este artículo, el autor falseare su identidad o edad, se aumentará la pena aplicable en un grado.

¹⁰⁶ Artículo 23.- Atentado Sexual.

The recently enacted Organic Penal Code of Ecuador (February 2014), criminalizes online grooming in Article 173, entitled “Contact with sexual purpose with minors electronically”.¹⁰⁷ It defines it as the use of a false identity to establish communications of a sexual or erotic content with a person under 18 years of age or disabled, by electronic or telematic means.

The legislation of Panama gives a more general definition, punishing those who use the Internet or any ICTs to entice minors to have online contact with sexual nature, or to simulate sexual intercourse (second part of Article 187 of the Penal Code).¹⁰⁸

In Peru, the Cybercrime Law (Law 300096) regulates online grooming in Article 5.¹⁰⁹ It criminalizes the conduct of contacting a minor, through any form of ICT, with the intent of soliciting or obtaining pornographic material, or to have sexual activity with him or her, establishing a penalty between four and eight years of imprisonment.

Colombia does not have specific legislation on online grooming; however Article 219A of the Penal Code criminalizes the use of the Internet to obtain sexual contact with minors, or to offer sexual activities with them.¹¹⁰ A more restrictive interpretation of this norm indicates that this crime is committed amongst adults (where one adult is offering sexual services of children to the other), and does not include contact between adults and children, where there is no intermediary. Under this interpretation, this provision cannot be used to combat online grooming.

El hecho de ejercer un atentado sexual contra un niño, niña, adolescente, incapacitado o enajenado mental, mediante la utilización de un sistema de información o cualquiera de sus componentes, se sancionará con las penas de tres a diez años de prisión y multa desde cinco a doscientas veces el salario mínimo.

¹⁰⁷ Artículo 173. Contacto con finalidad sexual con menores de dieciocho años por medios electrónicos.- La persona que a través de un medio electrónico o telemático proponga concertar un encuentro con una persona menor de dieciocho años, siempre que tal propuesta se acompañe de actos materiales encaminados al acercamiento con finalidad sexual o erótica, será sancionada con pena privativa de libertad de uno a tres años. Cuando el acercamiento se obtenga mediante coacción o intimidación, será sancionada con pena privativa de libertad de tres a cinco años. La persona que suplantando la identidad de un tercero o mediante el uso de una identidad falsa por medios electrónicos o telemáticos, establezca comunicaciones de contenido sexual o erótico con una persona menor de dieciocho años o con discapacidad, será sancionada con pena privativa de libertad de tres a cinco años.

¹⁰⁸ Artículo 187. Quien utilice, consienta o permita que una persona menor de edad participe en actos de exhibicionismo obsceno o en pornografía, sea o no fotografiada, filmada o grabada por cualquier medio, ante terceros o a solas, con otra persona u otras personas menores de edad o adultos, del mismo o de distinto sexo o con animales, será sancionado con prisión de seis a ocho años.

Igual sanción será aplicada a quien se valga de correo electrónico, redes globales de información o cualquier otro medio de comunicación individual o masiva, para incitar o promover el sexo en línea en personas menores de edad o para ofrecer sus servicios sexuales o hacer que lo simulen por este conducto, por teléfono o personalmente.

¹⁰⁹ Artículo 5 Ley 300096 – Ley de los Delitos Informáticos

El que, a través de las tecnologías de la Información o de la comunicación, contacta con un menor de catorce años para solicitar u obtener del material pornográfico, o para llevar a cabo actividades sexuales con el, será reprimido con pena privativa de libertad no menor de cuatro ni mayor de ocho años e inhabilitación conforme a los numerales 1, 2 y 4 del artículo 36 del Código Penal.

Cuando la víctima tiene entre catorce y menos de dieciocho años de edad y medie engaño, la pena será no menor de tres ni mayor de seis años e inhabilitación conforme a los numerales 1, 2 y 4 del artículo 36 del Código Penal.

¹¹⁰ Artículo 219A. Utilización o facilitación de medios de comunicación para ofrecer servicios sexuales de menores. El que utilice o facilite el correo tradicional, las redes globales de información, o cualquier otro medio de comunicación para obtener contacto sexual con menores de dieciocho (18) años, o para ofrecer servicios sexuales con éstos, incurrirá en pena de prisión de cinco (5) a diez (10) años, y multa de cincuenta (50) a cien (100) salarios mínimos legales mensuales vigentes.

Las penas señaladas en el inciso anterior se aumentarán hasta en la mitad (1/2) cuando las conductas se realizaren con menores de doce (12) años.

Paraguay does not criminalize online grooming. However, Article 135 of the Penal Code criminalizes conduct similar to offline grooming.¹¹¹ It states that it is a crime to contact a child, through verbal obscene manifestations or pornographic publications, with the intention of sexually stimulating him/her. Besides that, Paragraph 1 of the same Article criminalizes the conduct of inducing a child to have sexual activity. This Article does not indicate the means or methods for doing so, which likely means it can be committed through the Internet or associated technologies. The legislation of Paraguay clearly criminalizes offline grooming, but should be amended to clearly criminalize online grooming.

Therefore, Bolivia, Colombia, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Uruguay, and Venezuela should amend their legislation in order to adequately criminalize online grooming.

J. DISPLAYING OF CHILD PORNOGRAPHY TO CHILDREN

Offenders often display child pornography to children in order to desensitize and sexually stimulate the child victim, making them believe that pornographic activity is normal. It can be considered an element of grooming or as an autonomous offense depending on the legislation. It is criminalized in Argentina, Brazil, Chile, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, and Peru (61%), and is not considered a crime in Bolivia, Colombia, Costa Rica, Dominican Republic, Honduras, Uruguay, and Venezuela. It worth noting that the Dominican Republic has included this offense in Article 195 of the new Penal Code, establishing a penalty of 10 to 20 years of imprisonment.

¹¹¹ Artículo 135. Abuso sexual en niños.

1º El que realizara actos sexuales con un niño o lo indujera a realizarlos en sí mismo o a terceros, será castigado con pena privativa de libertad de hasta tres años o con multa.

Con la misma pena será castigado el que realizara actos sexuales manifiestamente relevantes ante un niño y dirigidos a él, o lo indujera a realizarlos ante sí o ante terceros.

2º En los casos señalados en el inciso anterior la pena privativa de libertad será aumentada hasta cinco años cuando el autor:

1. al realizar el hecho haya maltratado físicamente a la víctima en forma grave;
2. haya abusado de la víctima en diversas ocasiones; o
3. haya cometido el hecho con un niño que sea su hijo biológico, adoptivo o hijastro, o con un niño cuya educación, tutela o guarda esté a su cargo.

3º Cuando concurren varios agravantes de los señalados en el inciso 2º, el autor será castigado con pena privativa de libertad de hasta seis años.

4º En los casos señalados en el inciso 1º, la pena privativa de libertad será de dos a diez años cuando el autor haya realizado el coito con la víctima.

5º Será castigado con pena de multa el que:

1. realizara delante de un niño actos exhibicionistas aptos para perturbarle; o
2. con manifestaciones verbales obscenas o publicaciones pornográficas en los términos del artículo 14, inciso 3º se dirigiera al niño para estimularlo sexualmente o causarle rechazo respecto al sexo.

6º Cuando el autor sea menor de diez y ocho años, se podrá prescindir de la pena.

7º En los casos de los incisos 1º y 5º se podrá prescindir de la persecución penal, cuando el procedimiento penal intensificara desproporcionadamente el daño ocasionado a la víctima.

8º Se entenderá por niño, a los efectos de este artículo, a la persona menor de catorce años.

Argentina criminalizes the conduct of showing pornography to a child younger than 14 years of age, regardless of the intent (Article 128 of the Criminal Code).¹¹²

Brazil only criminalizes the act when done with the intent of having sexual contact, and only when the victim is younger than 12 years of age.¹¹³

Chile criminalizes showing pornography to a child, regardless of the intent, when the victim is younger than 14 years of age; if the victim is between 14 and 18 years old, it is a crime only if there is use of force or intimidation.¹¹⁴

Ecuador criminalizes the conduct of disseminating, selling, or giving pornographic material to children or adolescents (Article 168 of the Penal Code).

In El Salvador, the conduct of showing pornography to a child is criminalized in Article 172 of the Penal Code, which prescribes that those who transfer, disseminate, distribute, rent, sell, offer, produce, implement, exhibit, or show movies, magazines, or any other pornographic material to children under 18 years of age shall be punished with imprisonment from three to five years.

Guatemala criminalizes the distribution of pornography to children in Article 189 (c) of the Penal Code.

Article 175 of the Penal Code of Nicaragua criminalizes the possession of child abuse images with the intent of sexual exploitation, a step behind showing pornography to a child.¹¹⁵ Nicaragua is considered in compliance with this requirement of Pact of Rio, since the criminalization of that conduct leads to the same result as the criminalization of showing pornography to a child. The person who is caught showing pornography to a child necessarily possesses this material for sexual exploitation of children.

¹¹² Artículo 128. Será penado con prisión de seis (6) meses a cuatro (4) años el que, por medio de comunicaciones electrónicas, telecomunicaciones o cualquier otra tecnología de transmisión de datos, contactare a una persona menor de edad, i con el propósito de cometer cualquier delito contra la integridad sexual de la misma.

(Artículo incorporado por art. 1 de la Ley 26.904, BO 111/12/2013)

¹¹³ Artículo 241-D. Aliciar, assediar, instigar ou constringer, por qualquer meio de comunicação, criança, com o fim de com ela praticar ato libidinoso:

Pena – reclusão, de 1 (um) a 3 (três) anos, e multa.

Parágrafo único. Nas mesmas penas incorre quem:

I – facilita ou induz o acesso à criança de material contendo cena de sexo explícito ou pornográfica com o fim de com ela praticar ato libidinoso;

¹¹⁴ Artículo 366 quáter.- El que, sin realizar una acción sexual en los términos anteriores, para procurar su excitación sexual o la excitación sexual de otro, realizare acciones de significación sexual ante una persona menor de catorce años, la hiciere ver o escuchar material pornográfico o presenciar espectáculos del mismo carácter, será castigado con presidio menor en su grado medio a máximo.

Si, para el mismo fin de procurar su excitación sexual o la excitación sexual de otro, determinare a una persona menor de catorce años a realizar acciones de significación sexual delante suyo o de otro o a enviar, entregar o exhibir imágenes o grabaciones de su persona o de otro menor de 14 años de edad, con significación sexual, la pena será presidio menor en su grado máximo.

Quien realice alguna de las conductas descritas en los incisos anteriores con una persona menor de edad pero mayor de catorce años, concurriendo cualquiera de las circunstancias del numerando 1º del artículo 361 o de las enumeradas en el artículo 363 o mediante amenazas en los términos de los artículos 296 y 297, tendrá las mismas penas señaladas en los incisos anteriores.

Las penas señaladas en el presente artículo se aplicarán también cuando los delitos descritos en él sean cometidos a distancia, mediante cualquier medio electrónico. Si en la comisión de cualquiera de los delitos descritos en este artículo, el autor falseare su identidad o edad, se aumentará la pena aplicable en un grado.

¹¹⁵ Artículo 175 (...) Quien con fines de explotación sexual, posea material pornográfico o erótico en los términos expresado en el párrafo anterior, será castigado con la pena de uno a dos años de prisión.

In Mexico, Article 200 of the Criminal Code criminalizes the trade, distribution, exposure, and offer of books, texts, records, movies, photographs, pictures, or objects with pornographic connotation to minors. Therefore, it is possible to consider the showing of pornography to a child as a standalone offense.

Article 183 of the Criminal Code of Peru makes it a crime to show, sell, or give pornographic images to a child or adolescents.¹¹⁶

The following map gives an idea of the situation of Latin American countries concerning the criminalization of online grooming, and of the conduct of showing pornographic material to children.



¹¹⁶ Artículo 183. (...)

Será reprimido con pena privativa de libertad no menor de tres ni mayor de seis años:

1. El que muestra, vende o entrega a un menor de dieciocho años, por cualquier medio, objetos, libros, escritos, imágenes, visuales o auditivas, que por su carácter obsceno, pueden afectar gravemente el pudor, excitar prematuramente o pervertir su instinto sexual.
2. El que incita a un menor de dieciocho años a la práctica de un acto obsceno o le facilita la entrada a los prostíbulos u otros lugares de corrupción.
3. El administrador, vigilante o persona autorizada para controlar un cine u otro espectáculo donde se exhiban representaciones obscenas, que permita ingresar a un menor de dieciocho años.

I.-J.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 9	9	0	8	8	0	4	3	9	4	4	0	4	4	9	5	9	0	0

K. CRIMES RELATED TO CHILD PORNOGRAPHY: TRAFFICKING WITH THE INTENT OF PRODUCING CHILD PORNOGRAPHY AND ADVERTISING OF CHILD SEX TOURISM

Child pornography is a hidden multi-billion dollar industry, to which trafficking in children and child sex tourism are both strongly related. Trafficking in persons is a heinous crime that needs a strong response from the States, and should be criminalized regardless of the intent of the offender. Article 3 (a) of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, supplementing the UN Convention against Transnational Organized Crime, specifies that Trafficking in Persons shall have the purpose of exploitation, which shall include, at minimum, the exploitation of prostitution or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs; and Article 3 (c) states that it should be criminalized when it is related to the exploitation of children, even when it does not involve any of the acts described in Article 3 (a).

To emphasize that trafficking in persons is a form of sexual exploitation, it is good practice to include the production of child pornography as one of its purposes. However, some Latin American countries only criminalize the trafficking in persons with the generic intent of sexual purposes.

Among Latin American countries, Argentina, Brazil, Colombia, Costa Rica, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Uruguay criminalize trafficking in persons for sexual purposes (61%).

In Argentina, Article 3 of Law 26364 criminalizes the trafficking in children with the intent of exploitation.¹¹⁷ Article 4 of the same law defines exploitation, which does not include, in a clear way, the production of child pornography.¹¹⁸ According to this Article, child exploitation is related to treating one as a slave, compelling him/her to do forced work, or promoting, facilitating, or developing any form of sexual commerce.

The Brazilian Penal Code specifically punishes domestic and international trafficking with the intent of sexual exploitation of the victim (Article 231 and 231-A¹¹⁹). Nicaragua does the same in Article 182 of the Penal Code¹²⁰; Panama in Article 183 of the Penal Code¹²¹; and Paraguay in Article 129B of the Penal Code.¹²²

¹¹⁷ Artículo 3º. Trata de menores de DIECIOCHO (18) años. Se entiende por trata de menores el ofrecimiento, la captación, el transporte y/o traslado – ya sea dentro del país, desde o hacia el exterior-, la acogida o la recepción de personas menores de DIECIOCHO (18) años de edad, con fines de explotación. Existe trata de menores aun cuando no mediare engaño, fraude, violencia, amenaza o cualquier medio de intimidación o coerción, abuso de autoridad o de una situación de vulnerabilidad, concesión o recepción de pagos o beneficios para obtener el consentimiento de una persona que tenga autoridad sobre la víctima.

El asentimiento de la víctima de trata de personas menores de DIECIOCHO (18) años no tendrá efecto alguno.

¹¹⁸ Artículo 4º. Explotación. A los efectos de la presente ley, existe explotación en cualquiera de los siguientes supuestos:

- a) Cuando se redujere o mantuviere a una persona en condición de esclavitud o servidumbre o se la sometiere a prácticas análogas;
- b) Cuando se obligare a una persona a realizar trabajos o servicios forzados;
- c) Cuando se promoviere, facilitare, desarrollare o se obtuviere provecho de cualquier forma de comercio sexual;
- d) Cuando se practicare extracción ilícita de órganos o tejidos humano.

¹¹⁹ Tráfico internacional de pessoa para fim de exploração sexual

Artículo 231. Promover ou facilitar a entrada, no território nacional, de alguém que nele venha a exercer a prostituição ou outra forma de exploração sexual, ou a saída de alguém que vá exercê-la no estrangeiro.

In Colombia, trafficking in persons for sexual exploitation of the victim is criminalized in Article 188-A of the Penal Code, modified by Law 985-2005.¹²³ The original wording of this Article specifically criminalized trafficking in persons for production of pornography, but upon amendment, the text now only mentions prostitution and other forms of sexual exploitation, including sex tourism.¹²⁴

In Costa Rica, trafficking in persons is criminalized by Article 172 of the Penal Code, which requires the intent to subject the victim to prostitution, exploitation, sexual servitude, and slavery, amongst others, though not referring to pornography specifically.¹²⁵

Pena - reclusão, de 3 (três) a 8 (oito) anos.

(...)

¹²⁰ Artículo 182 Trata de personas con fines de esclavitud, explotación sexual o adopción

Quien en ejercicio de poder o valiéndose de amenazas, ofrecimientos, engaños, promueva, facilite, induzca o ejecute la captación, reclutamiento, contratación, transporte, traslado, retención, acogida o recepción de personas, con fines de esclavitud, explotación sexual o adopción, para que la misma sea ejercida dentro o fuera del territorio nacional, aun con el consentimiento de la víctima será sancionado con pena de prisión de siete a diez años.

Si la víctima es una persona menor de dieciocho años, o persona con discapacidad, o el hecho fuere cometido por algún familiar, tutor o encargado de la educación, guarda o custodia, guía espiritual o comparta permanentemente el hogar familiar de la víctima, o medie una relación de confianza, la pena será de diez a doce años de prisión.

Quien venda, ofrezca, entregue, transfiera o acepte a una niña, niño, o adolescente en la que medie o no, pago o recompensa con fines de explotación sexual, será sancionado con pena de ocho a doce años de prisión. Igual pena se aplicará a quien oferte, posea, adquiera o acepte la venta de una niña, niño o adolescente con fines de adopción ilegítima

¹²¹ Artículo 183. Quién promueva, favorezca, facilite o ejecute la captación, el transporte, el traslado, la acogida o la recepción de personas menores de edad, dentro o fuera del territorio nacional con fines de explotación sexual o para someterlas a servidumbre sexual será sancionado con prisión de ocho a diez años.

¹²² Artículo 129b.- Trata de personas con fines de su explotación sexual.

1º.- El que, valiéndose de una situación de constreñimiento o vulnerabilidad de otro por encontrarse en un país extranjero, le induzca o coaccione al ejercicio o a la continuación del ejercicio de la prostitución o a la realización de actos sexuales en sí, con otro o ante otro, con fines de explotación sexual, será castigado con pena privativa de libertad de hasta ocho años. Con la misma pena será castigado el que induzca a otra persona menor de dieciocho años al ejercicio o la continuación del ejercicio de la prostitución o a la realización de los actos señalados en el párrafo 10.

(...)

El consentimiento dado por la víctima a toda forma de explotación no se tendrá en cuenta cuando se haya recurrido a cualquiera de los medios enunciados en este artículo.

¹²³ Artículo 188A. Trata de personas. El que capte, traslade, acoja o reciba a una persona, dentro del territorio nacional o hacia el exterior, con fines de explotación, incurrirá en prisión de trece (13) a veintitrés (23) años y una multa de ochocientos (800) a mil quinientos (1.500) salarios mínimos legales mensuales vigentes".

Para efectos de este artículo se entenderá por explotación el obtener provecho económico o cualquier otro beneficio para sí o para otra persona, mediante la explotación de la prostitución ajena u otras formas de explotación sexual, los trabajos o servicios forzados, la esclavitud o las prácticas análogas a la esclavitud, la servidumbre, la explotación de la mendicidad ajena, el matrimonio servil, la extracción de órganos, el turismo sexual u otras formas de explotación.

El consentimiento dado por la víctima a cualquier forma de explotación definida en este artículo no constituirá causal de exoneración de la responsabilidad penal.

¹²⁴ Artículo 188 A. Trata de personas. El que promueva, induzca constriña facilite financie, colabore o participe en el traslado de una persona dentro del territorio nacional o al exterior recurriendo a cualquier forma de violencia, amenaza, o engaño, con fines de explotación, para que ejerza prostitución, pornografía, servidumbre por deudas, mendicidad, trabajo forzado. Matrimonio servil, esclavitud con el propósito de obtener provecho económico o cualquier otro beneficio, para sí o para otra persona incurrirá en prisión de diez (10) a quince (15) años y una multa de seiscientos (600) a mil (1000) salarios mínimos legales vigentes mensuales al momento de la sentencia condenatoria

¹²⁵ Artículo 172.- Delito de trata de personas

Será sancionado con pena de prisión de seis a diez años, quien promueva, facilite o favorezca la entrada o salida del país, o el desplazamiento dentro del territorio nacional, de personas de cualquier sexo para realizar uno o varios actos de prostitución o someterlas a explotación,

Article 194 of the Dominican Republic's new Penal Code specifically criminalizes the conduct of presenting the country as a destination of sex tourism with children, through electronic means, magazines, newspapers, or any other means.¹²⁶

Honduras defines trafficking in persons in Article 6 of Decree 59-2012, mentioning the intent to promote sexual exploitation, forced labor, or slavery.¹²⁷ Honduras criminalizes trafficking in persons in Article 52 of this same Decree, adding more elements to the mentioned definition.¹²⁸ Child pornography is not mentioned as a specific intent of trafficking in persons.

In Peru, trafficking in person is criminalized in Article 153 of the Penal Code, which specifically links it to the commercial sexual exploitation of children.¹²⁹ In Uruguay, Article 6 of Law 17.815 criminalizes trafficking in children for sexual exploitation.¹³⁰

servidumbre sexual o laboral, esclavitud o prácticas análogas a la esclavitud, trabajos o servicios forzados, matrimonio servil, mendicidad, extracción ilícita de órganos o adopción irregular.

La pena de prisión será de ocho a dieciséis años, si media, además, alguna de las siguientes circunstancias:

(...).

¹²⁶ Artículo 194. Tipificación de la explotación sexual de niños, niñas y adolescentes. La explotación sexual de niños, niñas y adolescentes quedará tipificada por una cualquiera de las actuaciones punibles siguientes:

(...)

3) Si se promueve, ofrece o vende la República Dominicana como destino sexual de niños, niñas y adolescentes, a través de medios electrónicos, revistas, periódicos, folletos o por cualquier otra vía.

(...)

¹²⁷ Artículo 6. Definiciones. Para los efectos de la presente ley, se entenderá por:

1. Trata de personas: la captación, el transporte, el traslado, la acogida o la recepción de personas, recurriendo a la amenaza o al uso de la fuerza u otras formas de coacción, al rapto, al fraude, al engaño, al abuso de poder o de una situación de vulnerabilidad o a la concesión o recepción de pagos o beneficios para obtener el consentimiento de una persona que tenga autoridad sobre otra, con fines de explotación. Esa explotación incluirá, como mínimo, la explotación de la prostitución ajena u otras formas de explotación sexual, los trabajos o servicios forzados, la esclavitud o las prácticas análogas a la esclavitud, la servidumbre o la extracción de órganos.

¹²⁸ Artículo 52. Incurrir en el delito de Trata de Personas, quien facilite, promueva o ejecute la captación, la retención, el transporte, el traslado, la entrega, la acogida o la recepción de personas, dentro o fuera del territorio nacional, para someterlas a servidumbre, esclavitud o sus prácticas análogas, trabajos o servicios forzosos, mendicidad y embarazo forzado, matrimonio forzado o servil, tráfico ilícito de órganos, fluidos y tejidos humanos, venta de personas, explotación sexual comercial, adopción irregular y el reclutamiento de personas menores de dieciocho (18) años para su utilización en actividades criminales y será sancionado con pena de diez (10) a quince (15) años de reclusión, mas inhabilitación absoluta por el doble del tiempo que dure la reclusión y multa de ciento cincuenta (150) a doscientos cincuenta (250) salarios mínimos.

Las penas anteriores aumentara en un medio (1/2), en los casos siguientes:

1) Cuando la víctima sea menor de dieciocho (18) años de edad;

(...)

¹²⁹ Artículo 153.- Trata de personas

El que promueve, favorece, financia o facilita la captación, transporte, traslado, acogida, recepción o retención de otro, en el territorio de la República o para su salida o entrada del país, recurriendo a: la violencia, la amenaza u otras formas de coacción, la privación de libertad, el fraude, el engaño, el abuso del poder o de una situación de vulnerabilidad, o la concesión o recepción de pagos o beneficios, con fines de explotación, venta de niños, para que ejerza la prostitución, someterlo a esclavitud sexual u otras formas de explotación sexual, obligarlo a mendigar, a realizar trabajos o servicios forzados, a la servidumbre, la esclavitud o prácticas análogas a la esclavitud u otras formas de explotación laboral, o extracción o tráfico de órganos o tejidos humanos, será reprimido con pena privativa de libertad no menor de ocho ni mayor de quince años.

La captación, transporte, traslado, acogida, recepción o retención de niño, niña o adolescente con fines de explotación se considerará trata de personas incluso cuando no se recurra a ninguno de los medios señalados en el párrafo anterior.

¹³⁰ Artículo 6. Tráfico de personas menores de edad o incapaces.

Mexico specifically criminalizes trafficking in persons younger than 18 years of age in Article 366 of the Penal Code, which requires the purpose of obtaining an economic benefit for the action.¹³¹

Bolivia only criminalizes trafficking in persons with the intent of prostitution, according to Article 321 Bis of the Penal Code, introduced by Law 054-2010.¹³²

Recently, new legislation was enacted in El Salvador concerning trafficking in persons. Article 54 of Legislative Decree 824-2014 criminalizes trafficking in persons with intent of sexual exploitation, and specifically included child pornography amongst the acts that characterize sexual exploitation in Article 5.¹³³ The penalty is enhanced when the victim is a child, according to Article 55 of Legislative Decree 824-2014.¹³⁴ The conduct of requesting, paying, or promising any type of benefit to a person, in order for her to perpetrate the crime of trafficking in person is also criminalized by Article 56 of Legislative Decree 824-2014.¹³⁵

Chile, Ecuador, El Salvador, and Guatemala criminalize trafficking in person for the production of child pornography.

As noted before, the Internet is a very powerful instrument that has been used by some for illicit purposes. Therefore, the specific criminalization of the online advertising of sexual abuse of children, or child sex tourism,

El que de cualquier modo favorezca o facilite la entrada o salida del país de personas menores de edad o incapaces, para ser prostituidas o explotadas sexualmente, será castigado con pena de dos a doce años de penitenciaría.

¹³¹ Artículo 366 Ter.- Comete el delito de tráfico de menores, quien traslade a un menor de dieciséis años de edad o lo entregue a un tercero, de manera ilícita, fuera del territorio nacional, con el propósito de obtener un beneficio económico indebido por el traslado o la entrega del menor.

¹³² Artículo 321. Bis (Tráfico de Personas). Quien induzca, promueva o favorezca la entrada o salida del país o traslado dentro del mismo, de personas para que ejerzan la prostitución, mediante engaño, violencia, amenaza o las reduzca a estado de inconsciencia para este fin, será sancionado con privación de libertad de cuatro a ocho años. En caso de ser menores de dieciocho años, se aplicará la pena privativa de libertad de seis a diez años. Cuando la víctima fuera menor de catorce años, la pena será de quince a veinte años, pese a no mediar las circunstancias previstas en el párrafo anterior."

¹³³ Artículo 54.- El que entregue, capte, transporte, traslade, reciba o acoja personas, dentro o fuera del territorio nacional o facilite, promueva o favorezca, para ejecutar o permitir que otros realicen cualquier actividad de explotación humana, definidas en el artículo 3 de la presente Ley, será sancionado con pena de diez a catorce años de prisión.

Artículo 3.- Para los efectos de la presente Ley, se entenderá por:

- a) Explotación Humana: cuando una persona dispusiere de la integridad física de otra para realizar actividades de explotación sexual en sus distintas modalidades; explotación sexual comercial en el sector del turismo; esclavitud; servidumbre; trabajo forzado; explotación de la mendicidad; embarazo forzado; matrimonio o unión forzada; adopción fraudulenta; así como para extraer, traficar, fecundar u obtener ilícitamente órganos, tejidos, fluidos, células, embriones humanos o para la utilización de personas en la experimentación clínica farmacológica; así como la utilización de niñas, niños o adolescentes en actividades criminales.

¹³⁴ Agravantes del Delito de Trata de Personas

Artículo 55.- El Delito de Trata de Personas será sancionado con la pena de dieciséis a veinte años de prisión e inhabilitación especial en el ejercicio de la profesión, cargo o empleo público o privado, durante el tiempo que dure la condena, en los siguientes casos:

- a) Cuando la víctima sea niña, niño, adolescente, persona adulta mayor o persona con discapacidad;

(...)

¹³⁵ Remuneración en el Delito de Trata de Personas

Artículo 56.- El que solicite, prometa, pague o retribuya con cualquier tipo de beneficio a terceras personas, para ejecutar actos que involucren a víctimas del Delito de Trata de Personas, indistintamente de las modalidades contempladas en la presente Ley, será sancionado con prisión de cuatro a diez años.

Cuando la víctima fuere niña, niño, adolescente, persona adulta mayor o persona con discapacidad, la pena de prisión se incrementará en una tercera parte del máximo.

should be heavily penalized.¹³⁶ Fortunately, some Latin American countries have already taken the initiative to criminalize this kind of conduct.

Colombia is a good example of a country that, in an innovative way, has legislated on this matter. The use of ICTs to offer sexual activities with minors is punished in Article 219-A of the Penal Code.¹³⁷ Colombia has created a tax of \$1 USD that is paid by every foreigner who leaves the country. It is used to finance programs for preventing and combatting sexual exploitation of children and child pornography (Article 23 of Law 679, enacted in 2001¹³⁸).

Article 194 of the new Penal Code of Dominican Republic specifically criminalizes the conduct of presenting the country as a destination of sex tourism with children, through electronic means, magazines, newspapers, or any other means.¹³⁹

In Honduras, the online advertising of sex tourism with children is criminalized by Article 149-E of the Penal Code, and establishes a penalty of 8 to 12 years of imprisonment, which is increased by half when the child is under 18 years old.¹⁴⁰

The advertising of sex tourism with children is also a criminalized conduct in Panama, according to Article 190 of the Penal Code.¹⁴¹ It prescribes that whoever promotes, directs, organizes, publishes, invites, facilitates or

¹³⁶ Child sex tourism is an expression that identifies tourism for the purpose of engaging in child prostitution, but it can also be related to the production of child pornography when the offender travels with this specific intent. It is a problem that is growing thanks to the relative ease of international travel, and it causes devastating and long-lasting psychological and physical consequences for victims.

¹³⁷ Artículo 219A. Utilización o facilitación de medios de comunicación para ofrecer servicios sexuales de menores. El que utilice o facilite el correo tradicional, las redes globales de información, o cualquier otro medio de comunicación para obtener contacto sexual con menores de dieciocho (18) años, o para ofrecer servicios sexuales con éstos, incurrirá en pena de prisión de cinco (5) a diez (10) años, y multa de cincuenta (50) a cien (100) salarios mínimos legales mensuales vigentes.

Las penas señaladas en el inciso anterior se aumentarán hasta en la mitad (1/2) cuando las conductas se realizaren con menores de doce (12) años.

¹³⁸ Artículo 23. Impuesto de salida

El extranjero, al momento de salida del territorio colombiano, cubrirá el valor correspondiente a un dólar de los Estados Unidos de América, o su equivalente en pesos colombianos, con destino a la financiación de los planes y programas de prevención y lucha contra la explotación sexual y la pornografía con menores de edad.

¹³⁹ Artículo 194. Tipificación de la explotación sexual de niños, niñas y adolescentes. La explotación sexual de niños, niñas y adolescentes quedará tipificada por una cualquiera de las actuaciones punibles siguientes:

- 1) Si de cualquier forma se promueve, facilita, instiga, recluta u organiza la utilización de niños, niñas y adolescentes en publicaciones o actividades pornográficas, espectáculos sexuales, turismo sexual, o en la práctica de relaciones sexuales remuneradas.
- 2) Si se paga o se promete pagar, con dinero u otra ventaja de cualquier naturaleza, a un niño, niña o adolescente para que realice actos o sostenga relaciones sexuales.
- 3) Si se promueve, ofrece o vende la República Dominicana como destino sexual de niños, niñas y adolescentes, a través de medios electrónicos, revistas, periódicos, folletos o por cualquier otra vía.

(...)

¹⁴⁰ Artículo 149-E. Quien, para atraer la afluencia de turistas, promueva o realice programas publicitarios o campañas de todo tipo, haciendo uso de cualquier medio para proyectar el país a nivel nacional e internacional como un destino turístico accesible para el ejercicio de actividades sexuales con personas de uno y otro sexo, será sancionado con pena de reclusión de ocho (8) a doce (12) años más multa de ciento cincuenta (150) a doscientos cincuenta (250) salarios mínimos. Las penas se agravarán en un medio (1/2) cuando las víctimas sean personas menores de dieciocho (18) años de edad.

¹⁴¹ Artículo 190. Quien promueva, dirija, organice, publicite, invite, facilite o gestione por cualquier medio de comunicación individual o de masas, turismo sexual local o internacional, que implique el reclutamiento de una persona mayor de catorce años y menor de dieciocho, para su explotación sexual, aunque esta no llegara a ejecutarse o consumarse, será sancionado con prisión de ocho a diez años.

coordinates sex tourism with minors through any communication means shall be punished with imprisonment of 8 to 10 years. The penalty is increased by half when the victim is less than 14 years old. The legislation also punishes the owners, landlords or managers of establishments where this conduct is practiced.¹⁴²

In Peru, an autonomous crime was introduced in the Penal Code by Law 29408 related to the commercial sexual exploitation of a child or an adolescent in tourism. There is progress in the criminalization of incorrect uses of the Internet, since Article 181-A (modified in 2009 by the Law 29408) establishes that it is a crime to promote, publish, assist or facilitate the commercial sexual exploitation linked to tourism, by any written means, folder, printed, visual, audio, electronic, magnetic or through the Internet, offering sexual activities with children or adolescents.¹⁴³ In Peru, the managers (directors) of newspapers or other companies that publish advertisements of child prostitution, child sex tourism, or trafficking in children are committing a crime, according to Article 182-A of the Penal Code, and shall be punished with a penalty of imprisonment of six years, loss of work authorization, and shall pay a fine.¹⁴⁴

In Mexico, it is a crime to promote, publish, invite, facilitate or administrate the entrance or exit of persons of the territory with the intent of practicing real or simulated sexual acts (Article 203 of the Penal Code¹⁴⁵).

In Nicaragua, there is an article that criminalizes the conduct of promoting the country as a sexual tourist destination, but it is not related to the use of Internet (Article 177 of the Penal Code¹⁴⁶).

La pena de prisión será aumentada hasta la mitad del máximo si la víctima es una persona con discapacidad o que no haya cumplido catorce años.

¹⁴² Artículo 191. El propietario, arrendador o administrador de un establecimiento o lugar que lo destine a la realización de algunos de los delitos tipificados en este Capítulo será sancionado con prisión de diez a quince años

¹⁴³ Artículo 181-A.- Explotación sexual comercial infantil y adolescente en ámbito del turismo

El que promueve, publicita, favorece o facilita la explotación sexual comercial en el ámbito del turismo, a través de cualquier medio escrito, folleto, impreso, visual, audible, electrónico, magnético o a través de Internet, con el objeto de ofrecer relaciones sexuales de carácter comercial de personas de catorce (14) y menos de dieciocho (18) años de edad será reprimido con pena privativa de libertad no menor de cuatro (4) ni mayor de ocho (8) años.

Si la víctima es menor de catorce años, el agente, será reprimido con pena privativa de la libertad no menor de seis (6) ni mayor de ocho (8) años.

El agente también será sancionado con inhabilitación conforme al artículo 36 incisos 1, 2, 4 y 5.

Será no menor de ocho (8) ni mayor de diez (10) años de pena privativa de la libertad cuando ha sido cometido por autoridad pública, sus ascendientes, maestro o persona que ha tenido a su cuidado por cualquier título a la víctima.”

¹⁴⁴ Artículo 182-A.- Publicación en los medios de comunicación sobre delitos de libertad sexual a menores

Los gerentes o responsables de las publicaciones o ediciones a transmitirse a través de los medios de comunicación masivos que publiciten la prostitución infantil, el turismo sexual infantil o la trata de menores de dieciocho años de edad serán reprimidos con pena privativa de la libertad no menor de dos ni mayor de seis años.

El agente también será sancionado con inhabilitación conforme al inciso 4 del artículo 36 y con trescientos sesenta días multa.” (*)

¹⁴⁵ Artículo 203- Comete el delito de turismo sexual quien promueva, publicite, invite, facilite o gestione por cualquier medio a que una o más personas viajen al interior o exterior del territorio nacional con la finalidad de que realice cualquier tipo de actos sexuales reales o simulados con una o varias personas menores de dieciocho años de edad, o con una o varias personas que no tienen capacidad para comprender el significado del hecho o con una o varias personas que no tienen capacidad para resistirlo. Al autor de este delito se le impondrá una pena de siete a doce años de prisión y de ochocientos a dos mil días multa.

Artículo 203 BIS.- A quien realice cualquier tipo de actos sexuales reales o simulados con una o varias personas menores de dieciocho años de edad, o con una o varias personas que no tienen capacidad para comprender el significado del hecho o con una o varias personas que no tienen capacidad para resistirlo, en virtud del turismo sexual, se le impondrá una pena de doce a dieciséis años de prisión y de dos mil a tres mil días multa, asimismo, estará sujeto al tratamiento psiquiátrico especializado.

¹⁴⁶ Artículo 177 Promoción del Turismo con fines de explotación sexual

Los que dentro o fuera del territorio nacional, en forma individual o a través de operadores turísticos, campañas publicitarias, reproducción de textos e imágenes, promuevan al país como un atractivo o destino turístico sexual, utilizando personas menores de dieciocho años, serán

In Costa Rica, there is not a specific crime related to online advertising of sex tourism with children, but Article 168bis of Law 8811¹⁴⁷ states that anyone in charge of a travel agency can lose permission to work in this field if they promote or facilitate the exploitation of children and adolescents.

Guatemala does not specifically criminalize the advertising of child sex tourism, but Article 195 quarter of the Penal Code criminalizes the organization, facilitation, or permission of sex tourism with minors, establishing a penalty of 6 to 10 years of imprisonment.¹⁴⁸ This is the same in Panama, which criminalizes this conduct in Article 190 of the Penal Code.¹⁴⁹

Ecuador criminalizes the advertising or offer of sexual contact with minors, through electronic means, in Article 174 of the Penal Code.¹⁵⁰

The advertising of child exploitation or child sex tourism is not a crime in Argentina, Bolivia, Brazil, Chile, Paraguay, Uruguay, and Venezuela, nor are acts related to it, such as the organization, promotion, or facilitation of child sex tourism.

sancionados con la pena de cinco a siete años de prisión y de ciento cincuenta a quinientos días multa.

¹⁴⁷ Ley 8811. Artículo 168. Incentivo de la Responsabilidad Social Corporativa Turística.

Se impondrá la inhabilitación para el ejercicio del comercio de 3 a 10 años al dueño, gerente o encargado de una agencia de viajes, de un establecimiento de hospedaje, aerolínea, tour operador y de un transporte terrestre que promueva o facilite la explotación sexual comercial de personas menores de 18 años.

¹⁴⁸ Artículo 195 quáter. Utilización de actividades turísticas para la explotación sexual comercial de personas menores de edad.

Quien facilite, organice, promueva o permita de cualquier forma la realización de los delitos contemplados en este capítulo, a través de actividades relacionadas con el turismo, será sancionado con prisión de seis a diez años y multa de cien mil a quinientos mil Quetzales.

¹⁴⁹ Artículo 190. Quien promueva, dirija, organice, publicite, invite, facilite o gestione por cualquier medio de comunicación individual o de masas, turismo sexual local o internacional, que implique el reclutamiento de una persona mayor de catorce años y menor de dieciocho, para su explotación sexual, aunque esta no llegara a ejecutarse o consumarse, será sancionado con prisión de ocho a diez años.

pena de prisión será aumentada hasta la mitad del máximo si la víctima es una persona con discapacidad o que no haya cumplido catorce años.

¹⁵⁰ Artículo 174.- Oferta de servicios sexuales con menores de dieciocho años por medios electrónicos.- La persona, que utilice o facilite el correo electrónico, chat, mensajería instantánea, redes sociales, blogs, foto blogs, juegos en red o cualquier otro medio electrónico o telemático para ofrecer servicios sexuales con menores de dieciocho años de edad, será sancionada con pena privativa de libertad de siete a diez años.



K.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 4	1	0	1	2	3	2	4	4	2	3	3	3	3	3	1	3	1	0

L. PREVENTION AND COMBAT OF CYBERBULLYING

No domestic legislation regarding cyberbullying was found in the 18 analyzed Latin American countries. Cyberbullying is the use of information and communication technologies to support deliberate, repeated, and hostile behavior by an individual or group, intended to harm others. Several countries do however have some provisions related to the offense of the dignity of a person through the Internet (Dominican Republic, Ecuador, Panama, and Paraguay).

M. PREVENTION AND COMBAT OF SEXTING

Sexting is an expression that refers to sending self-generated images of nude, semi-nude or even of a sexual activity to a trusted person, usually a boyfriend or girlfriend.

We do not consider that children under 12 years of age as able to give consent to the images being taken, as they do not have a full understanding of what they are doing when taking nude or semi-nude pictures of themselves. If the image depicted is related to any sexual activity, they are, as a matter of fact, being sexually abused. Thus, any person who receives this kind of picture or message must delete it, under penalty of being considered in possession of child abuse material.

There is international concern about the criminalization of sexting practiced by adolescents and its qualification as child pornography material, because there is an understanding that it should be considered an expression of

their sexual identity, which should be protected according to human rights instruments. However, the person who receives and keeps the sexting material can be held responsible for possession of child pornography, regardless of the spontaneous sending of the material by the person depicted. These situations require a close and individual analysis of the context, and cannot be generalized.

Countries that have criminal codes that establish criminal liability for adolescents are more likely to have this kind of problem and, consequently, have to define a more rigid limit between the commission of a crime and the exercise of a right of self-expression.

In general, Latin American countries do not consider persons under 18 years old as criminally liable. No domestic legislation related to sexting was found in the 18 analyzed countries of Latin America.

A different problem is created when pictures that were part of a sexting process are distributed to other persons, different from the original recipient, and are commercialized or disseminated. This situation deserves to be treated as distribution or selling of child abuse material, regardless of the consensual origin of the picture. It is similar to situations that involve family, artistic or medical pictures that end up in the hands of pedophiles, and also characterizes at least the possession of illicit material. Thus, it deserves the same legal treatment that legal frameworks reserve for child abuse images that come from an effective sex abuse of a child.

VII. ADEQUACY OF THE LEGISLATIVE FRAMEWORK TO DEAL WITH OFFENSES COMMITTED THROUGH THE INTERNET AND ASSOCIATED TECHNOLOGIES

A. MANDATORY REPORTING REQUIREMENT FOR PROFESSIONALS WHO WORK WITH CHILDREN

For the purposes of this Regional Study, only countries that specifically require professionals who work with children to report suspected online child pornography activities or offenses to law enforcement have been included as having mandatory reporting laws for professionals.

Colombia has a specific provision that requires professionals to report child pornography. It creates a duty based on omission (failure to act) and can be committed by those who, by reason of office, function, or activity, become aware of child pornography or any other violence against children and do not report it to the authorities. Furthermore, in Colombia every individual person and corporation is required to report any violation of Law 679/2001, which created the Statute for the Prevention of Exploitation, Pornography, and Sex Tourism with Children.

Panama has a similar crime, but it is not specifically related to child pornography. The Penal Code specifically creates a duty, criminalizing the failure to report offenses against children by anyone who, because of their work or profession, discovers it. There is a penalty of six months up to two years of imprisonment (Article 189 of the Penal Code).

Argentina, Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru, and Venezuela have general provisions that require professionals who work with children to report suspected child abuse incidents when they learn of the circumstances. Nicaragua's legislation establishes obligations only for school principals, according to Article 48 of the Code of Childhood and Adolescence.

No specific legal obligation for professionals who work with children to report child abuse was found in the legislation of El Salvador or Uruguay.

The following map illustrates the situation of Latin American countries regarding the mandatory reporting requirement for professionals who work with children, concerning child abuse, child sexual abuse or child pornography:



A.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 8	7	7	7	7	8	7	7	7	0	7	5	7	5	7	7	5	5	7

B. DATA RETENTION AND PRESERVATION POLICIES OR PROVISIONS

As mentioned earlier, data retention refers to retaining data generally, without a specific initial purpose, such as IP address, date, time, and time zone for a set period of time. Data preservation however, refers to preserving the specific data of an identified user who is currently under investigation by law enforcement in order to prevent loss or modification of that data for a specific period of time. It is very important to have both regulated by law.

Some Latin American countries have unsuccessfully tried to establish data retention provisions. In 2004, Argentina enacted a data retention law that established an obligation to storing traffic data for 10 years, Law 25.873, which incorporated Articles 45 bis, 45 ter, and 45 quarter to Law 19.798, known as the Telecommunication Law. It faced considerable opposition and its enforcement was suspended by the President in 2005. In 2009, Argentina’s Supreme Court confirmed a decision annulling the data retention legislation, considering it a “drastic interference with the private sphere of the individual”; these provisions were considered unconstitutional under Articles 18 and 19 of the Federal Constitution, which protects the right to privacy.

In Ecuador, there was an attempt to regulate the retention of data in the Organic Penal Code, recently

promulgated, but the Congress did not approve the respective article.

Currently, only five of the considered countries have provisions in their legislation regulating the automatic retention of traffic data. These countries are Brazil, Chile, Colombia, Dominican Republic and Mexico, representing only 27% of Latin American countries.

Brazil regulates data retention with Articles 10, 13, and 15 of the Brazilian Civil Rights Framework for the Internet. Connection records have to be kept for one year, and the content of private communication may only be available by Court order, in the cases and manner established by the law.

In Chile, Article 222 of the Criminal Procedure Code regulates the retention of data, establishing that ISPs have to maintain a record of IP numbers used by their clients for at least six months.

The Dominican Republic, according to Article 56 of Law 5307, ISPs must maintain traffic, connection and access data for 90 days. Mexico regulates data retention in Article 190 of the Mexican Telecommunications and Broadcasting Law.

In Colombia, Article 4 of Decree 1704 determines that ISPs have to continuously collect and store records for five years, documenting the online location and subscriber information of their clients. It is the only country that did not establish a reasonable time for this measure, which is considered to be a two year maximum.

None of the five indicated countries identify the offenses for which the future disclosure of the information shall be allowed.

The situation involving data preservation measures is substantially different. Latin American legislators usually have legal frameworks regulating the intervention in communications (particularly telecommunications) when there is a previous judicial order.

Costa Rica, Guatemala, and Nicaragua are the only countries that do not allow the interception of electronic communication to be used in the investigation of crimes related to child pornography.¹⁵¹ In Costa Rica, Article 9 of Law 7425 only allows this measure for the production of pornography generally, not for distribution, dissemination and related conduct, and does not specify child pornography. Guatemala allows it only for crimes related to the Law on Organized Crime, according to Law 21-2006. Nicaragua has a provision regulating the interception of electronic communication, Article 214 of the Penal Code, but it only applies to crimes that are indicated, amongst which child pornography offenses are not included.

Almost all of the considered countries require a prior judicial order for an interception of communication, with the exception of Colombia (though the legislation still requires a subsequent judicial review).

A prior judicial order is required in Argentina, but exceptions apply for *flagrante delicto* (serious crimes). This provision does not give the necessary protection to the privacy of citizens, since authorities can always argue that a crime is being committed online in order to get access to the information without having to require an authorization from a judge.

¹⁵¹ Interception means real-time collection by technical means conducted by an interceptor (e.g., a government authority or an ISP compelled by the latter) of content data of specified communications transmitted by means of a computer system before they reach the intended recipient. *See also* CONVENTION ON CYBERCRIME (CETS 185) at Article 21 – Interception of content data.

Bolivia, Honduras, Paraguay, and Uruguay have very broad provisions in their Criminal Procedure Codes, which simply allow the interception of any kind of communication with a prior judicial order.

Bolivia, Brazil, Dominican Republic, Honduras, Mexico, Nicaragua, Paraguay, and Uruguay do not establish in their legislation any limitation of time for the interception of content data nor for the preservation of content data.

Panama establishes in Article 311 of the Criminal Procedure Code a renewable period of 20 days for the preservation of data; Argentina, Peru, and Venezuela establish a renewable period of 30 days, according to Articles 236, 230, and 205 of the respective Criminal Procedure Codes; Chile establishes a maximum period of 60 days, according to Article 113, III, of the Criminal Procedure Code; Ecuador, a period of 90 days, renewable once, according to Article 476 of the Organic Penal Code; El Salvador and Costa Rica, a period of 90 days, renewable three times, if necessary (Decree 285 and Law 7425, respectively); and Colombia establishes a period of six months, which can be renewed if necessary, according to Articles 235 and 236 of the Criminal Procedure Code.

There should not be, at an international level, the establishment of a rigid time limit for the interception of communications related to crimes being committed, because it depends on the nature of the investigation and many other individual aspects related to a specific situation under investigation. The ability to obtain this information is usually subject to a judge's discretion, and any decisions for extension of the time period have to be properly motivated.

Few countries have specific provisions that guarantee the real-time collection of data (only Argentina and Mexico). In Argentina, Article 45 bis of Law 25.873 determines that ISPs have to divert the communications when requested; the second paragraph of Article 190 of the Mexican Telecommunications and Broadcasting Law specifically requires the real-time delivery of the information guaranteed by mechanisms indicated by the authorities.

Most of the considered countries have provisions concerning the confidentiality of the measure and secrecy of the content accessed, except for Bolivia, Honduras, Paraguay, Uruguay, and Venezuela. The following map illustrates the situation of Latin American countries concerning data retention and preservation provisions.



B.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 5	2.5	2	4.5	4.5	2.5	0.5	4.5	2.5	2.5	0.5	2	5	0	2.5	2	2.5	2	2

C. REQUIREMENT TO IDENTIFY USERS OF PUBLIC COMPUTERS

Most of the Latin American countries do not regulate the activity of offering Internet access through public computers, such as cybercafés (or LAN houses in Brazil) and libraries, despite the fact that children from the lower classes, who are more vulnerable to becoming victims of crimes committed through the Internet, often use this kind of service. Further, adults are able to use computers in these locations without having to identify themselves, and thus have a free and uncontrolled space to potentially exploit children. Since children often have uncontrolled access to the web in cybercafés, adults are able to obtain, distribute, and disseminate child abuse material through the Internet without the risk of being caught. This anonymity leads to impunity, a situation that should be avoided.

Colombia, Dominican Republic, and Peru are the exceptions among the Latin American countries.

Colombia has created a system of auto-regulation of cybercafés, requiring them to adopt measures to prevent children from being exploited and from having access to any form of pornography (Law 1336/2009). Colombia has, in fact, adopted the recommendations of the Rio de Janeiro Plan of Action.

In the Dominican Republic, Article 16 of the Regulation of Law 53-07 specifically requires the identification of users of public computers. Article 17 of the same regulation establishes some obligations for owners of cybercafés, which are very useful for criminal investigations, such as:

- creating a compulsory user's registration, indicating their names, date of birth, nationality, ID;
- not allowing the Internet access of unidentified persons;
- maintaining a list of web pages visited and time spent on each one, as well as the IP address used and time of connection; and
- forbidding the access to any web page, chats or programs with child abuse material.

In Peru, Law 29137 requires Internet cafés to register every person who is willing to use their services, maintaining their identification (ID number), identification of the computer used, and time of use for a period of six months. It also requires the use of filters and software to prevent minors from accessing pornographic sites, or the participation in chats involving sexual content. Countries have the obligation of verifying compliance by cafés.

In Chile there was an attempt to force Internet cafés to keep records of personal information of their clients (Bill n. 4438), but it was considered unconstitutional by the Constitutional Court of Chile.

Costa Rica's legislation does not require Internet cafés to have records of their clients. However, all cafes must be registered with SUTEL, an independent regulatory agency. The Law on the Protection of Children and Adolescents requires Internet cafés to install filters in computers used by minors to block access to harmful content. They are also required to display a visible sign warning minors of the dangers of revealing information that could have an impact on their moral and physical integrity on social networks, chatrooms, etc. SUTEL issues certifications for establishments that are compliant with regulations. It sends inspectors to visit Internet cafés to verify compliance with the Law on the Protection of Children and Adolescents. Decree 31.763, enacted in 2004, sets out the identification of establishments that provide a service free of pornography.

It is worth noting that amongst the countries targeted in this Regional Study, four are federal States (Argentina, Brazil, Mexico, and Venezuela), which have a more complex political and administrative organization. Normally, rules about regulation of commerce and enterprises require legislative action from Member States, Municipalities or Counties. These regulations can vary significantly, creating circumstances that make it very difficult to analyze a country's situation regarding the regulation of cybercafés.

In Brazil, most cybercafés work as non-registered enterprises, or informal services. They are known as "LAN houses" – Local Area Network. There is no federal law that regulates their activities, but there is a bill currently being discussed in Congress about transforming LAN Houses in places of "public interest", because of their importance towards the universalization of Internet access. Some States regulate the use of computers in LAN houses, like Rio de Janeiro, São Paulo, Mato Grosso do Sul, Rio de Janeiro, Santa Catarina, Distrito Federal, and Rio Grande do Sul, requiring the identification of the user and information about the date and time of access, and the equipment used. But due to the size of Brazil – with 26 States – and the difficulty of enforcement, surveillance is lacking.

In Argentina, does not have any federal legislation on cybercafés' activity. However, according to Article 1 of Law 945 of Buenos Aires, educational establishments, libraries, and other areas under the Government of the City of Buenos Aires that provide computers for students or the general public are required to install and activate filters to block pornographic websites. Considering that almost 40% of the country's population is concentrated in the Buenos Aires' region, regulating the access to Internet Cafés is very important.

In Venezuela, the Law for the Protection of Children and Adolescents in Cybercafés or similar establishments also requires them to install and activate filters to block pornographic websites, and establishes the periods of time that children can be there. However, no provisions could be found regarding the identification of users of this kind of establishment.

In Mexico, the General Law for Prevention, Punishment and Ending of Crimes on Trafficking in Persons establishes, in Article 115, IV, that municipalities should legislate on this subject. There is information about the regulation of cyber cafés in the Mexican States of Sonora and Nuevo Leon.¹⁵²

The regulation of activities at Internet cafés (the requirement of identification of users and retention of data) is needed in Latin American countries to avoid the lack of control over children’s access, and the anonymity and impunity of perpetrators to commit crimes in this sphere. The following map illustrates which countries are effectively trying to do implement such regulations.



C.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 3	1	0	1	0	2	2	2	0	0	0	0	1	0	0	0	3	0	2

¹⁵² GUADALUPE MARIA BECERRA SANCHEZ, *Los Cybercafés de Guadalajara*, 2011, at [http://biblioteca.udgvirtual.udg.mx/eureka/pudgvirtual/cibercafes de Guadalajara.pdf](http://biblioteca.udgvirtual.udg.mx/eureka/pudgvirtual/cibercafes_de_Guadalajara.pdf) (last visited Oct. 9, 2015).

D. EXISTENCE OF SPECIFIC LEGISLATION THAT ADDRESSES THE USE OF ICTs TO COMMIT CRIMES AGAINST CHILDREN

In the last few decades, international instruments have been written to guarantee that countries incorporate in their domestic legislation technical terms related to telecommunications, computers, traffic of information on the Internet, and related areas.

This Regional Study looked specifically for mention of the use of a computer, computer system, Internet technology, electronic means, social media, telematics means, transmission of data files in public or private network telecommunication, and the downloading, accessing, and uploading of data.

Among the 18 Latin American countries analyzed 13 have specific legislation addressing the use of ICTs to commit crimes against children: Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Peru, and Venezuela.

Bolivian legislation specifically states that the distribution or dissemination of child pornography can occur by transmission of data files in public or private network telecommunications, computer, or electronic systems.

Brazil's legislation specifically mentions the use of telematics means or computers to offer, trade, transmit, distribute, publish, or disseminate child abuse material.

Colombia criminalizes the uploading of child abuse material to a site, with or without intent to profit (Article 218 of the Penal Code), and uses many computer terms in the legislation.

Costa Rica specifically mentions the use of social media or any computing or telematics means to commit the crime of online grooming (Article 167 of the Penal Code).

In the Dominican Republic, Law 53-07 is specifically related to crimes committed with the use of ICTs.

Ecuador's Penal Code specifically addresses the use of ICTs in Articles 103, 173, and 174 of the Penal Code, related to child pornography, advertising of child exploitation, and online grooming.

Article 173 of the El Salvador Penal Code criminalizes the production and distribution of child pornography, specifically through computers.

Article 149-D of the Criminal Code of Honduras refers to the distribution or commercialization of child pornography through computers or any electronic means.

Article 202 of the Mexican Penal Code makes note that the transmission of data can occur through public or private communication nets, computer systems, electronics or similar means.

Nicaragua criminalizes the distribution and dissemination of child abuse images through any electronic form.

Panama refers to the Internet when describing the crime of distribution of child pornography, as well as in regards to online grooming (Articles 184 and 187 of the Penal Code).

Venezuelan legislation addresses the use of ICTs to commit crimes against children by referring to the use of information technologies, computer and electronic means (Article 24 of the LEDI, and Article 235 of the LOPNNA).

Peru specifically enhances the penalties for child pornography when the Internet is used.

Argentina, Chile, and Guatemala have legislation that uses the expression “by any means” when referring to crimes related to child abuse material, allowing the conclusion that use of the Internet to distribute and disseminate such material is also criminalized.

Only the legislation of Paraguay and Uruguay do not mention computer terms or use the expression “by any means”. In Paraguay, Law 2861 did use the expression “by any means” for the commission of child pornography offenses until it was revoked by Law 3340. It is necessary to review case law in order to determine whether Law 3340 applies to crimes committed through the Internet.

The following map illustrates the situation of Latin American countries, concerning the use of terms related to ICTs in the legislation that defines crimes of child pornography.



D.	Arg	Bo	Br	Ch	Co	CR	DR	Ec	ES	Gu	Ho	Mx	Ni	Pan	Par	Pe	Ur	Ve
total = 2	1	2	2	1	2	2	2	2	2	1	2	2	2	2	0	2	0	1

VIII. INTERESTING LEGISLATIVE INITIATIVES FOR PREVENTING AND COMBATING CRIMES AGAINST CHILDREN THROUGH THE INTERNET

The use of the Internet to commit crimes creates the potential for heightened effects. When a certain type of crime migrates to the Internet, it should have an enhanced penalty. While there is no international instrument that recommends that States Parties consider the use of the Internet to commit crimes as an aggravating circumstance, there are a number of countries that have done so in their national legislation.

Peru treats the use of the Internet as an aggravating circumstance for child pornography offenses. Recently, Article 183-A of the Penal Code, amended by Law 300096 (Cybercrimes Law), elevated the penalty for child pornography from “6 to 10 years of imprisonment” to “10 to 12 years of imprisonment” when the material is disseminated with the help of ICTs. Similarly, Panamanian legislation enhances penalties for crimes that offend the dignity of a person when they are committed online.

In particular, the Internet has the potential to heighten the effects of the storage and distribution of child abuse material. Accordingly, some countries have created a duty for Internet Service Providers to monitor use of their platforms. Some Latin American countries have included in their legislation the duty for ISPs to develop Codes of Conduct, a measure that is recommended by the Pact of Rio.

Colombian legislation adequately promotes and encourages the creation of systems for auto-regulation and codes of conduct for the Internet, and the creation of a group formed by representatives of ISPs and users. However, it does not seem that this measure is adequate as it leaves it largely to the discretion of ISPs.

In Brazil, those who provide storage services access to this kind of material through computer networks are subject to the same penalties as perpetrators of the crimes of distributing or disseminating child pornography. This only applies when they are notified to suspend or stop access to people who are illegally using the Internet to store or spread child pornography, and subsequently fail to do so. This special kind of criminal liability is regulated by Article 240 (1) and (2) of the Estatuto da Criança e do Adolescente. This is an important provision because it emphasizes the social responsibility of ISPs due to the kind of services they offer.

The Internet creates another dimension for a possible “crime scene” for the dissemination and distribution of child abuse material, thus countries should adopt measures to address it. As mentioned earlier, though international instruments do not require countries to adopt the universal jurisdiction principle, some countries have done so through provisions applicable to crimes committed against children. Costa Rica can exercise its jurisdiction over crimes committed abroad, regardless of where or by whom they were committed, when the crimes are related to pornography or human rights regulated by treaties signed by the country. El Salvador applies the universal jurisdiction principle when the offenses committed affect rights protected by international law, or seriously undermine universally recognized human rights. Brazil applies the universal jurisdiction principle for crimes that the country has committed to combat by signing treaties or ratifying conventions; Ecuador applies it for crimes related to human rights protected by international instruments that have been ratified by the country; Honduras applies it for crimes committed against human rights recognized by the international community; and Nicaragua applies it for crimes related to sexual offenses committed against children or adolescents.

It is time for the international community to recognize the joint responsibility among all countries to combat child pornography offenses by adopting the universal jurisdiction principle to allow the effective punishment of offenders.

It is beyond the scope of this Regional Study to analyze child sex tourism and trafficking in persons, but as these issues are closely related to child pornography, and because the Internet is also used in the commission of these crimes, countries are urged to adopt legislative measures to combat these practices as well.

Amongst the Latin American countries, Panama criminalizes the conduct of promoting, organizing, facilitating, or coordinating sex tourism with minors through any communication means; Guatemala criminalizes the organization or facilitation of sex tourism; Mexico punishes the conduct of promoting, publishing, inviting, facilitating, or coordinating the entrance to its territory or exit from it by people with the intent of practicing real or simulated sexual acts. All Latin American countries, which are considered destination countries for this kind of crime, should criminalize sex tourism and any kind of advertising related to the sexual exploitation of children.

Regardless of the absence of a regional instrument, some countries are criminalizing conduct as needed in the region. Bolivia, Brazil, Dominican Republic, Honduras, and Mexico include in their Penal Codes crimes related to conduct that precedes the production of child pornography itself, such as seeking, requiring, recruiting, inducing, coercing a child to perform child sexual abuse scenes; or to mediate the participation of a child in a production that involves sexual abuse. Facilitating the production of child pornography, by any means, is criminalized in Bolivia, Brazil, Honduras, and Nicaragua. The same is true of the mere exhibition, display, or disclosure of child abuse material, which is criminalized in Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Guatemala, Mexico, Panama, Peru, Paraguay, Uruguay, and Venezuela.

Brazil and Venezuela have also criminalized the act of sharing the stage with a child in a production involving child pornography. It is worth noting that the actor/actress is not necessarily responsible for the production, and would not be prosecuted if this conduct were not criminalized.

Argentina, Chile, Costa Rica, Dominican Republic, El Salvador, Honduras, Nicaragua, and Venezuela criminalize the financing of child pornography productions, which discourages the pornography industry.

Though many Latin American countries criminalize the viewing or accessing of child pornography material, Bolivia, Brazil, Ecuador, and Mexico criminalize the acquisition of this kind of material. This is a very interesting initiative as acquisition does not imply possession; rather it is equivalent to "paid access".

Colombia is the only Latin American country to criminalize the uploading of child pornography; Bolivia and Mexico criminalize the renting of this kind of material. These are very interesting initiatives that should be followed.

IX. CONCLUSION

In Latin American countries, international instruments are generally hierarchically superior to domestic laws, and may even have constitutional hierarchy. However, most of the constitutions require approval by the Congress, which then must legislate to adequately adjust the domestic legal framework according to the recommendations of the convention.

In analyzing the Latin American countries' domestic legislation, many regularly internalize the international instruments by legislative vehicle, but do not take the extra step to adapt the legislation according to the instrument they have approved. It is preferable that these steps be taken at the same time to prevent this gap.

In Peru, for instance, the Congress enacted the Supreme Decree 045-2011-Re, which internalized the OPSC, but did not legislate in order to incorporate into the Penal Code a clear and complete definition of child pornography. The Peruvian Penal Code has an incomplete definition of child pornography, simply referring to it as pornographic material. This is the same in Guatemala, Honduras, and Venezuela. The lack of this subsequent legislative action is responsible for each of the detected problems because all of the countries have ratified the CRC and the OPSC and have internalized them adequately.

The internal approval of an international instrument, by itself, is not enough to produce the desired legal effects. This happens because some international instruments, such as the OPSC, have provisions specifically prescribing that a States Party's Congress must legislate in order to adapt their legal framework. In the Dominican Republic, a Constitutional Court gives an international treaty or convention constitutional effect prior to its ratification by the Congress. Sometimes though, its constitutional and legal authority is subsequent to the ratification. Therefore, it is important to have a constant dialogue amongst the three branches of government, to prevent the country from simultaneously moving in different directions.

Most of the Latin American countries have legal frameworks that are reasonably aligned with international instruments regarding violence against children, specifically the CRC and OPSC.

Numerous legal reforms were made during the last decade, and many are still in effect. Unfortunately, draft bills can take a long time to be approved by the Congresses of some countries, even taking decades for approval. The new Penal Code enacted in the Dominican Republic had been discussed in both Houses of the Congress for more than ten years. It was finally approved in November 2014 and submitted for presidential sanction, but unfortunately, it was sent back to the Congress, which must now analyze the presidential restrictions imposed upon it.

In Uruguay, the "Marco Regulatorio de Ciber Café" bill, which transfers authority to supervise and monitor the use of computers in cybercafés to the Instituto del Niño y Adolescente del Uruguay, was presented to the House of Representatives in 2008 and has not yet been voted on.

After the constitutional reform of 2008, Mexico initiated an effort to unify the criminal justice system. In February 2014 the National Code of Criminal Procedures was enacted, but the Congress has not yet been fully successful in federalizing or unifying the Penal Code. Further, a bill presented by Deputy Ricardo Mejía that criminalizes online grooming has been awaiting approval for more than one year.¹⁵³

¹⁵³ Gaceta Parlamentaria, Número 3959-III, martes 11 de febrero de 2014, available at: <http://gaceta.diputados.gob.mx/Black/Gaceta/Anteriores/62/2014/feb/20140211-III/Iniciativa-10.html> (last visited Nov. 4, 2015).

In Argentina, it took more than three years for the Congress to discuss and approve a bill that amended the Penal Code and criminalized online grooming (Law 20.914, November 2013).

In some cases, even when there is an attempt to amend existing legislation, the Congress may not approve the legislation, although the provisions were written according to an international instrument. Some drafted laws suffer many changes, or are even rejected, creating an unfortunate setback. In Ecuador, for instance, there was an attempt to regulate data retention. While the respective article was discussed in Congress, ultimately it was not approved, and the Organic Penal code was promulgated without it.

Sometimes the Judiciary Power declares unconstitutional an amendment seeking to adapt legislation according to the international instrument's requirements. In Chile, there was an attempt to force Internet Cafés to keep records of personal information of their clients (Bill n. 4438), including ID card number, identification of the computer used by a specific client, date, time, and length of time of the access. It was approved in the House of Representatives, but was archived in the Senate in 2009. There was another attempt to regulate this subject by Article 4 of Law 20526/2011, but it was considered unconstitutional by the Constitutional Court of Chile.

In 2004, Argentina enacted Law 25.873, a data retention law that established an obligation to store traffic data for ten years, incorporating Articles 45 bis, 45 ter and 45 quarter into Law 19.798 (the Telecommunication Law).¹⁵⁴ It faced considerable opposition, and had its enforcement suspended by the President in 2005. In 2009, Argentina's Supreme Court confirmed a decision annulling data retention legislation, considering it a "drastic interference with the private sphere of the individual".¹⁵⁵ The provisions were considered unconstitutional under Articles 18 and 19 of the Federal Constitution, which protect the right to privacy.¹⁵⁶ While data retention policies are not yet a settled matter, especially with regard to time and requirements for implementation, the measure itself is very important for combatting child pornography offenses.

These examples of a lack of harmony between branches of government are not highlighted to suggest that there is improper interference. However, it is important to stress that there is a clear need for more congruity, especially when international commitments are at stake.

As a general observation, weakness in the domestic legislation that regulates child pornography offenses is related to a lack of provisions on data retention and data preservation, and the absence of mandatory monitoring and reporting requirements for ISPs about illicit activities occurring online. Requirements to adopt codes of conduct and legislation regulating the activity of cybercafés are also very important, considering that this kind of Internet access is very common in Latin American.

The lack of a comprehensive and systematic mechanism of data collection has made it very difficult to obtain specific data on child sexual abuse, child pornography, grooming, and other online offenses, which would improve the analysis of each country and help identify potential strategies for dealing with violence against children through the Internet. It seems that most of the targeted countries are facing problems related to

¹⁵⁴ The transcription of this Article is available in the Argentina Country Report on page 106 of this Report.

¹⁵⁵ 7°.- Constitucionalidad de la normativa impugnada paragraphs 7.1 to 7.3 at <http://www.hfernandezdelpech.com.ar/JurisprudenciaArgHalabiFalloCamara.html>.

¹⁵⁶ CONSTITUTION OF THE ARGENTINE NATION, Aug. 22, 1994, articles 18-19, available at: <http://www.biblioteca.ius.gov.ar/argentina-constitution.pdf> (last visited Nov. 5, 2015).

public security, violent crimes against life, insufficient structure of the police force, and lack of training of officers that are considered a priority and may hamper the ability to combat cybercrime.

As mentioned in the introduction of this Regional Study, there is no binding international instrument regarding cybercrime that has been signed or ratified by all of the analyzed countries. Only a few of the countries were invited to accede to the Convention on Cybercrime, and even fewer have effectively ratified it. Ultimately, with such common problems in this region, the most effective would be a regional instrument that guides the countries through the process of improving their domestic laws to help prevent and combat violence against children through the Internet.

A. Analysis of general compliance with recommendations from the: OPSC, Pact of Rio, Convention on Cybercrime, and Directives of the European Parliament and Council

After analyzing all of the countries' legislation, we verified that they have reached an average score of 63% of the maximum number of points attributed to the selected items of these five instruments. As most of the indicated instruments are not binding on Latin American countries, this analysis serves to provide an idea of the adequacy of the legislation when compared to an ideal pattern.

The highest average scores reached by the 18 countries were the items related to:

- adequate treatment of children as victims, not offenders (100%)
- criminalization of the production of child pornography (100%)
- appropriateness of provisions regulating the forfeiture of assets (95%)
- criminalization of the distribution of child pornography (94%)
- criminalization of the sale of child pornography (89%)
- existence of legislative provisions related to violence against children committed through the Internet (80%)
- existence of legislative provisions related to mandatory reporting requirements for professionals who work with children (75%)
- existence of clear and complete definitions of child pornography, indicating children less than 18 years of age as victims (78%)
- criminalization of the dissemination of child abuse images (72%)

The lowest average scores reached by the 18 countries were the items related to:

- criminalization of accessing and viewing child abuse material (0%)
- existence of mandatory requirements for ISPs to monitor and inform the existence of child pornography on the Internet (11%)
- criminalization of virtual child pornography (48%)
- criminalization of online grooming (49%)
- retention and data preservation provisions (50%)

The recommendations for all of the countries to improve their legal frameworks are related to the items that achieved lowest averages. The highest scores were achieved by Brazil (78%), Ecuador (77.5%), Peru (73.5%), El Salvador (70.5%), Chile (69.5%), and Panama (69.5%).

In addition to the general recommendations, the following are areas where each of the countries having the highest scores may consider making legislative improvements:

Brazil could improve its legislation by:

- criminalizing the import and export of child abuse material;
- considering the commission of child pornography offenses by several persons working together or within the framework of a criminal organization as aggravating circumstances for child pornography offenses;
- establishing criminal liability for legal persons used to commit child pornography offenses;
- criminalizing the advertising of child sex tourism;
- considering every child younger than 18 years of age as potential victims of online grooming; and
- establishing extraterritorial jurisdiction for crimes committed by non-nationals who are resident in Brazil

Ecuador could improve its legal framework by:

- criminalizing the dissemination and offer of child abuse material;
- specifically criminalizing conduct related to virtual images and sexually exploitative representations of children;
- devising three different levels of penalty in the legislation for: 1) offenses related to production; 2) for offenses related to distribution; and 3) offenses related to possession of child abuse material;¹⁵⁷
- prescribing aggravated penalties for child pornography offenses committed within the framework of a criminal organization; and
- regulating data retention in the legislation.

Peru could improve its legislation by:

- criminalizing the dissemination and offer of child abuse material;
- specifically criminalizing conduct related to virtual images and sexually exploitative representations of children;
- prescribing aggravated penalties for child pornography offenses committed by a person cohabiting with the child and for offenses committed within the framework of a criminal organization;
- establishing extraterritorial jurisdiction for crimes committed by non-nationals who are residents in Peru;
- establishing different levels of penalty for child pornography offenses; and
- regulating data retention in the legislation.

El Salvador could improve its legislation by:

- enhancing the definition of child pornography to consider it as every representation of a child engaged in real or simulated explicit sexual activity, or any representation of the sexual parts of a child for primarily sexual purposes (not limited to pictures and voice);
- considering the commission of child pornography offenses by several persons working together as aggravating circumstances for child pornography offenses;
- establishing extraterritorial jurisdiction for crimes committed by non-nationals who are residents in the country;
- criminalizing online grooming;
- criminalizing the advertising of child pornography; and

¹⁵⁷ Ecuador's legislation prescribes the same level of penalty for offenses related to the distribution and possession of child pornography.

- having mandatory reporting requirements for professionals who work with children, related to child pornography offenses.

Chile could improve legislation by:

- criminalizing the possession of child abuse material;
- criminalizing the offer of child abuse material;
- considering the perpetration of the crime by a person cohabiting with the child as an aggravating circumstance;
- considering the commission of child pornography offenses within the framework of a criminal organization as an aggravating circumstance;
- establishing extraterritorial jurisdiction for the trade, import, export, distribution, dissemination, or exhibition of child pornography committed by nationals or non-nationals who are residents in Chile, when the victim is not Chilean; and
- criminalizing the advertising of child pornography.

Panama could improve its legislation by:

- including the representation of the sexual parts of a child for primarily sexual purposes in the definition of child pornography;
- criminalizing the importation and exportation of child abuse material;
- considering the commission of child pornography offenses by a member of the child's family, a person cohabiting with the child, or a person who has abused a recognized position of trust or authority as aggravating circumstances for child pornography offenses; and
- considering the commission of child pornography offenses by several persons working together as aggravating circumstances for child pornography offenses.

The lowest scores were achieved by Venezuela (27.5%), Bolivia (43%), and Paraguay (56.5%). These countries should coordinate efforts within their governments to improve legislative measures that will help combat and prevent child pornography offenses.

Bolivia, Paraguay, and Venezuela should criminalize all conduct related to virtual images and sexually exploitative representations of children. The advertising of child sex tourism should also be criminalized, and data retention policies should be established.

Venezuela has made good progress by adequately defining child pornography with all elements required by the OPSC through an amendment to the Penal Code, and by criminalizing the distribution, dissemination, offer, import, export, sale, and possession of child abuse material. However, the penalties should be enhanced when the offender is a person cohabiting with the child and when it was committed by several persons working together.

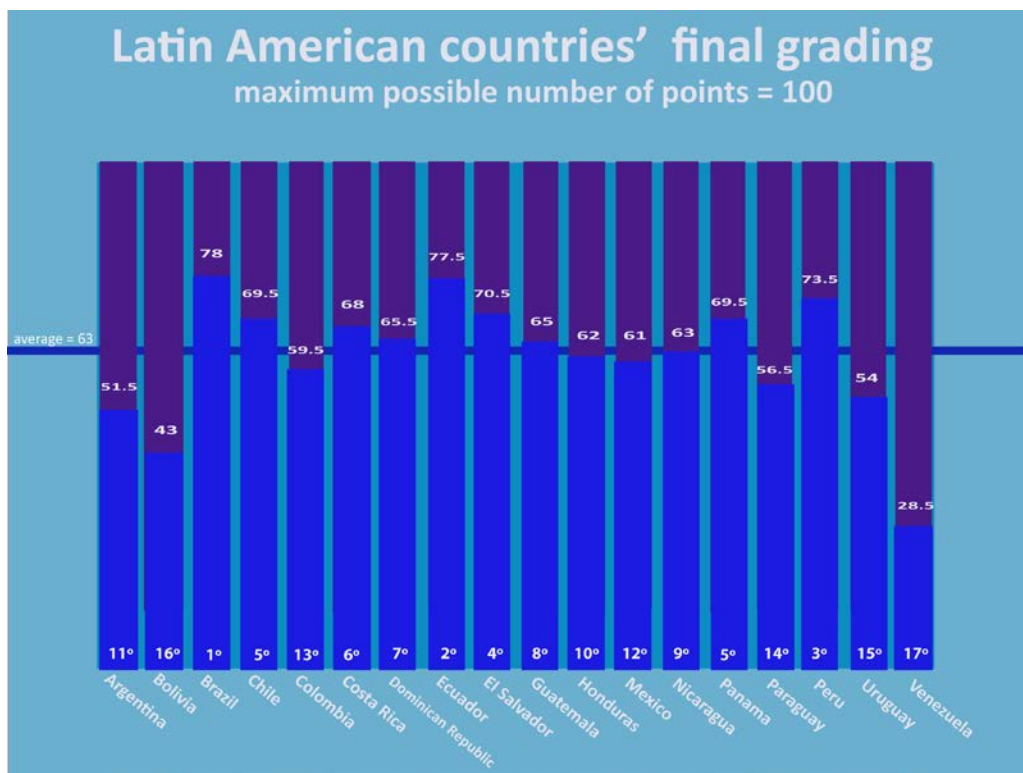
The Penal Code should also be amended to adequately prescribe rules regarding extraterritorial jurisdiction, observing the active and passive jurisdiction principles for all offenses related to child pornography. The forfeiture of assets used to commit or facilitate offenses, and forfeiture of proceeds derived from offenses must be prescribed for child pornography offenses. Criminal liability of legal persons should be established for all offenses related to child pornography.

Bolivia should enact legislation to better define child pornography, including 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. Bolivia should also criminalize the dissemination, offer, and possession of child pornography.

The Bolivian Penal Code should establish aggravating penalties for offenses committed by a member of the family, a person cohabiting with the child, or a person who has abused a recognized position of trust or authority; and also for offenses committed by several persons working together and committed within the framework of a criminal organization. The possibility of establishing criminal liability for legal persons should be analyzed. Online grooming and the showing of pornography to a child should both be criminalized. Extraterritorial jurisdiction provisions must be amended to include the passive personality principle, allowing the country to exercise its jurisdiction when the victim is a national, and when the alleged offender is a non-national resident in the country.

Bolivia and Paraguay should consider whether the criminal liability of legal persons should be allowed, especially for offenses against recognized human rights, such as child pornography crimes.

The following chart illustrates the score Latin American countries achieved out of 100 points. The average reached is indicated on the left.



B. Analysis of compliance with the OPSC and the Pact of Rio recommendations

The analysis of compliance with the OPSC and the Pact of Rio recommendations is important because all 18 countries have ratified the former, and made commitments to the latter. The average score was 64% of the maximum number of points attributed to selected aspects of these two instruments.

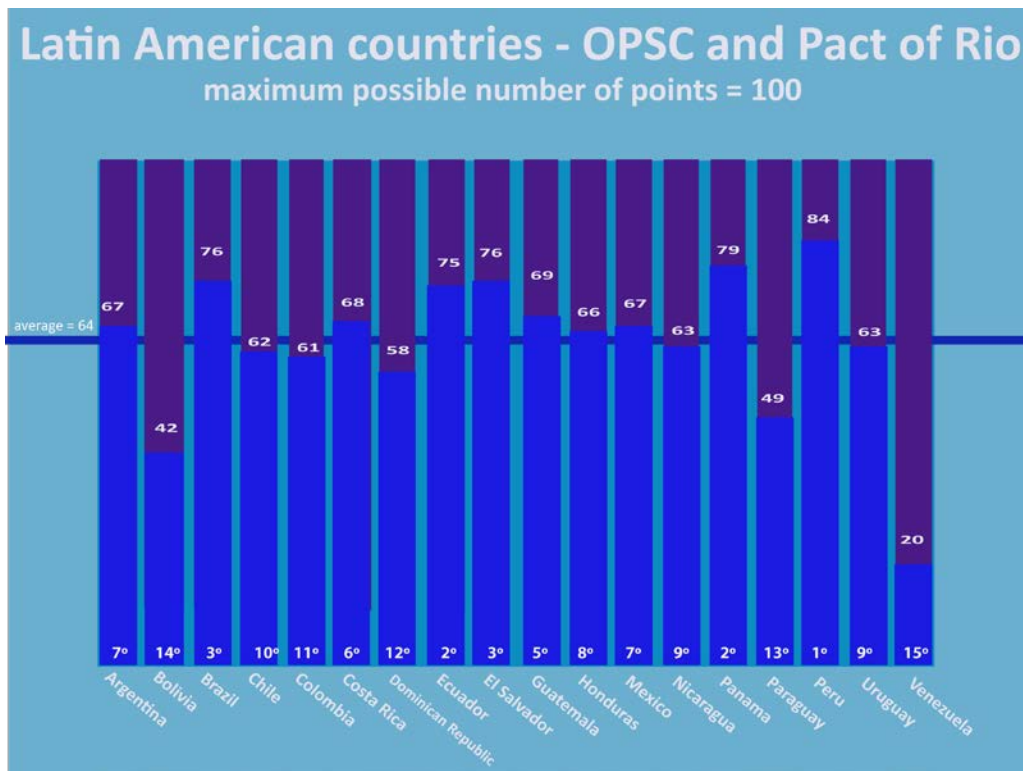
Peru (84%), Panama (79%), Brazil (76%), El Salvador (76%), Ecuador (75%), and Guatemala (69%) reached the highest scores. The recommendations from the previous section for Peru, Panama, Brazil, El Salvador, and Ecuador are also relevant here.

Guatemala could improve its legal framework by:

- creating a better definition of child pornography, with all of the elements recommended by the OPSC;
- criminalizing the offer of child pornography;
- establishing the active and passive personality principles for extraterritorial jurisdiction as they are recommended in the OPSC;
- adequately criminalizing online grooming, indicating children younger than 18 years of age as potential victims;
- criminalizing the advertising of child sex tourism.

The lowest scores were found in Venezuela (20%) and Bolivia (42%). As indicated above, there are many areas both countries can make efforts to improving legislative measures to help combat and prevent child pornography offenses.

The following chart illustrates the scores each country achieved out of 100 points, based on the major components of these two instruments:



X. APPENDICES

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TEMPLATE 1 – DATA RELATED TO THE COUNTRIES CONCERNING POPULATION AND THE USE OF ICTs

COUNTRY	POPULATION JULY 2013 EST ¹⁵⁸	AGE 0-14 ¹	AGE 15-24 ¹	AGE 25 + ¹	INTERNET USERS ¹⁵⁹ SEPT. 2012	CELL PH SUBSCRIBERS ² 2012	INTERNET ACCESS AT HOME ²	INTERNET HOSTS ¹⁶⁰	FACEBOOK SUBSCRIBERS ³
ARGENTINA	42,610,981	25%	15.8%	59.2%	55.80%	142.51	34%	11.232	20,048,100
BOLIVIA	10,461,053	33.8%	19.9%	46.3%	34.19%	92.64	9.4%	180,988	1,753,060
BRAZIL	201,009,622	24.2%	16.7%	59.1%	49.85%	125.19	37.8%	26,577,000	58,565,700
CHILE	17,216,945	21%	16.6%	62.5%	61.42%	138.50	35%	2,152,000	9,687,720
COLOMBIA	45,745,783	25.8%	18.2%	56%	48.98%	103.19	48.98%	4,410,000	17,322,000
COSTA RICA	4,695,942	23.8%	17.8%	58.4%	47.5%	128.32	33.6%		1,889,620
DOMINICAN REPUBLIC	10,219,630	28.5%	18.5%	53%	45%	88.75	11.8%		2,793,220
ECUADOR	15,439,429	29%	18.7%	52.3%	35.13%	110.71	28.8%	170,538	4,970,000
EL SALVADOR	6,108,590	28.9%	20.9%	50.2%	25.5%	138.07	8%		1,491,480
GUATEMALA	14,373,472	36.8%	22.2%	41%	16%	137.32	Nd		2,104,160
GUYANA	739,903	30.2%	20.7%	49.2%	34.31%	72.21	6.1%	24,936	134,800
HONDURAS	8,448,465	35.5%	21.2%	43.3%	18.12%	93.15%	6.8%		1,213,800
MEXICO	116,220,947	27.4%	18.1%	54.5%	38.42%	86.77	23.3%	31,200,000	38,463,860
NICARAGUA	5,788,531	30%	22.5%	47.3%	13.5%	89.77	2%		783,800
PANAMA	3,559,408	27.7%	17.4%	54.9%	45.2%	186.73	20.7%		1,014,160
PARAGUAY	6,623,252	26.8%	20.8%	52.3%	27.8%	101.66	19.3%	280,651	1,214,080
PERU	29,849,303	27.6%	19.4%	53%	38.20%	98.84	14%	234,102	9,351,460
SURINAME	566,846	26.8%	17.5%	55.6%	34.68%	182.90	17.5%	188	99,820
URUGUAY	3,324,460	21.4%	16%	62.6%	55.1%	147.30	33.3%		1,646,740
VENEZUELA	28,459,085	28.6%	18.8%	52.6%	44.05%	102.10	11%	1,016,000	9,766,540

¹⁵⁸ Argentina, *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html> (last visited Oct. 30, 2015).

¹⁵⁹ Statistics, ITU, <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (last visited Oct. 30, 2015).

¹⁶⁰ Internet users in the Americas, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats2.htm#americas> (last visited Oct. 30, 2015).

TEMPLATE 2 – OFFENSES AND PENALTIES

Criminal offenses	Production	Distribution	Dissemination	Offer	Import	Export	Selling	Possession	Online grooming
Argentina	½ to 4 years	½ to 4 years	½ to 4 years	½ to 4 years	-----	-----	½ to 4 years	1/3 to 2 years	½ to 4 years
Bolivia	3 to 6 years	3 to 6 years	-----	-----	3 to 6 years	3 to 6 years	3 to 6 years	-----	-----
Brazil	4 to 8 years and a fine	3 to 6 years and a fine	3 to 6 years and a fine	3 to 6 years and a fine	-----	-----	4 to 8 years and a fine	1 to 4 years and a fine	1 to 3 years and a fine
Chile	3 to 5 years	1 ½ to 5 years	1 ½ to 5 years	-----	1 ½ to 5 years	1 ½ to 5 years	1 ½ to 5 years	-----	3 to 5 years
Colombia	10 to 20 years and a fine	10 to 20 years and a fine	10 to 20 years and a fine	10 to 20 years and a fine	-----	-----	10 to 20 years and a fine	10 to 20 years and a fine	-----
Costa Rica	4 to 8 years	3 to 7 years	3 to 7 years	-----	3 to 7 years	-----	3 to 7 years	1 to 4 years	4 to 10 years
Dominican Republic	2 to 4 years and a fine	-----	2 to 4 years and a fine	2 to 4 years and a fine	2 to 4 years and a fine	2 to 4 years and a fine	-----	1/4 to 1 year	3 to 10 years and a fine
Ecuador	13 to 16 years	10 to 13 years	10 to 13 years	-----	10 to 13 years	10 to 13 years	10 to 13 years	10 to 13 years	1 to 3 years
El Salvador	6 to 12 years	6 to 12 years	6 to 12 years	6 to 12 years	6 to 12 years	6 to 12 years	6 to 12 years	2 to 4 years	-----
Guatemala	6 to 10 years and a fine	6 to 8 years and a fine	6 to 8 years and a fine	-----	6 to 8 years and a fine	6 to 8 years and a fine	6 to 8 years and a fine	2 to 4 years	-----
Honduras	10 to 15 years and a fine	10 to 15 years and a fine	10 to 15 years and a fine	10 to 15 years and a fine	10 to 15 years and a fine	10 to 15 years and a fine	10 to 15 years and a fine	4 to 6 years	-----
Mexico	7 to 12 years and a fine	7 to 12 years and a fine	-----	-----	7 to 12 years and a fine	7 to 12 years and a fine	7 to 12 years and a fine	-----	-----
Nicaragua	5 to 7 years and a fine	5 to 7 years and a fine	5 to 7 years and a fine	-----	5 to 7 years and a fine	5 to 7 years and a fine	5 to 7 years and a fine	1 to 2 years	-----
Panama	5 to 10 years	5 to 10 years	5 to 10 years	5 to 10 years	-----	-----	5 to 10 years	3 to 5 years	6 to 8 years
Paraguay	up to 5 years and a fine	up to 5 years and a fine	up to 5 years and a fine	up to 5 years and a fine	up to 5 years and a fine	up to 5 years and a fine	-----	up to 3 years and a fine	up to 3 years and a fine
Peru	6 to 10 years and a fine	6 to 10 years and a fine	-----	6 to 10 years and a fine	6 to 10 years and a fine	6 to 10 years and a fine	6 to 10 years and a fine	6 to 10 years and a fine	4 to 8 and a fine
Uruguay	2 to 6 years	1 to 4 years	1 to 4 years	1 to 4 years	1 to 4 years	1 to 4 years	1 to 4 years	-----	-----
Venezuela	3 to 6 years	-----	-----	-----	-----	-----	-----	-----	-----

TEMPLATE 3 – CONDUCT RELATED TO THE CREATION / FACILITATION OF CHILD PORNOGRAPHY

Criminalization of conduct related to the production of child abuse material (CAM)	To seek a child to perform scenes involving CAM	To require or recruit a child to perform scenes involving CAM	To induce a child to perform scenes involving CAM	To coerce a child to perform scenes involving CAM	To mediate the participation of a child; to allow this participation	To facilitate the production of child abuse material	To share the stage with a child, in a production that involves CAM	To use the voice of a child in the production of CAM
Argentina	✗	✗	✗	✗	✗	✗	✗	✗
Bolivia	✓	✓	✓	✓	✗	✓	✗	✗
Brazil	✓	✓	✓	✓	✓	✓	✓	✗
Chile	✗	✗	✗	✗	✗	✗	✗	✗
Colombia	✗	✗	✗	✗	✗	✗	✗	✗
Costa Rica	✗	✗	✗	✗	✗	✗	✗	✗
Dom. Rep.	✓	✓	✓	✗	✗	✓	✗	✓
Ecuador	✗	✗	✓	✗	✗	✗	✗	✗
El Salvador	✗	✗	✗	✗	✗	✗	✗	✓
Guatemala	✗	✗	✗	✗	✗	✗	✗	✗
Honduras	✗	✓	✓	✓	✓	✓	✗	✗
Mexico	✓	✓	✓	✓	✓	✗	✗	✗
Nicaragua	✗	✓	✓	✗	✗	✓	✗	✗
Panama	✗	✗	✗	✗	✓	✗	✗	✗
Paraguay	✗	✗	✗	✗	✗	✗	✗	✗
Peru	✗	✗	✗	✗	✗	✗	✗	✗
Uruguay	✗	✓	✓	✗	✗	✗	✗	✗
Venezuela	✗	✗	✓	✗	✗	✗	✓	✗

TEMPLATE 4 – CONDUCT RELATED TO THE PRODUCTION OF CHILD PORNOGRAPHY

Criminalization of conduct related to the production of child abuse material (CAM)	To produce or manufacture	To reproduce	To organize the production or to set	To print	To photograph	To film, videotape record or register	To direct	To describe	To finance or pay
Argentina	✓	✗	✗	✗	✗	✗	✗	✗	✓
Bolivia	✓	✓	✓	✓	✓	✓	✓	✓	✗
Brazil	✓	✓	✗	✗	✓	✓	✓	✗	✗
Chile	✓	✗	✗	✗	✗	✗	✗	✗	✓
Colombia	✓	✗	✗	✗	✓	✓	✗	✗	✗
Costa Rica	✓	✓	✗	✗	✗	✗	✗	✗	✓
Dom. Rep.	✓	✓	✗	✗	✗	✗	✗	✗	✓
Ecuador	✓	✗	✗	✗	✓	✓	✗	✗	✗
El Salvador	✓	✓	✗	✗	✗	✗	✗	✗	✓
Guatemala	✓	✓	✗	✗	✗	✗	✗	✗	✗
Honduras	✓	✓	✗	✗	✗	✗	✗	✗	✓
Mexico	✓	✓	✓	✓	✓	✓	✓	✓	✗
Nicaragua	✓	✓	✗	✗	✗	✗	✗	✗	✓
Panama	✓	✓	✗	✗	✗	✗	✗	✗	✗
Paraguay	✓	✓	✗	✗	✗	✗	✗	✗	✓
Peru	✓	✗	✗	✗	✗	✗	✗	✗	✗
Uruguay	✓	✗	✗	✗	✗	✗	✗	✗	✗
Venezuela	✓	✗	✗	✗	✓	✗	✓	✗	✓

TEMPLATE 5 – CONDUCT RELATED TO THE DISTRIBUTION OF CHILD PORNOGRAPHY

Countries	To offer	To disseminate	To distribute	To transmit	To buy	To publish	To advertise	To transport or carry	To import	To export	To sell/commercialize
Argentina	✓	✓	✓	✗	✗	✓	✗	✗	✗	✗	✓
Bolivia	✗	✗	✓	✓	✓	✓	✗	✗	✓	✓	✓
Brazil	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✓
Chile	✗	✓	✓	✗	✗	✗	✗	✗	✓	✓	✓
Colombia	✓	✓	✓	✓	✓	✗	✓	✓	✗	✗	✓
Costa Rica	✗	✓	✓	✗	✗	✗	✗	✓	✓	✗	✓
Dom. Rep.	✗	✓	✓	✓	✗	✗	✓	✗	✗	✗	✓
Ecuador	✗	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓
El Salvador	✓	✓	✓	✗	✗	✓	✗	✗	✓	✓	✓
Guatemala	✗	✓	✓	✗	✗	✗	✓	✓	✓	✓	✓
Honduras	✓	✓	✓	✗	✗	✗	✗	✗	✓	✓	✓
Mexico	✗	✗	✓	✓	✓	✓	✗	✗	✓	✓	✓
Nicaragua	✗	✓	✓	✗	✗	✓	✗	✗	✓	✓	✓
Panama	✓	✓	✓	✗	✗	✓	✓	✗	✗	✗	✓
Paraguay	✓	✓	✓	✗	✗	✗	✗	✗	✓	✓	✗
Peru	✓	✗	✓	✗	✗	✓	✗	✗	✓	✓	✓
Uruguay	✓	✓	✓	✗	✗	✗	✗	✗	✓	✓	✓
Venezuela	✗	✗	✗	✗	✗	✓	✗	✗	✗	✗	✗

TEMPLATE 6 – OTHER CRIMINALIZED ACTS

Countries	To possess child abuse material	To possess with intent	To download or access child abuse material	To upload child abuse material	To show pornography to children	To exhibit, display or disclose child abuse material	To store child abuse material	To traffic with the intent of producing child abuse material – or for sexual purposes	To advertise child sex tourism	To rent child abuse material
Argentina	✗	✓	✗	✗	✓	✗	✗	✗	✗	✗
Bolivia	✗	✗	✗	✗	✗	✓	✓	✗	✗	✓
Brazil	✓	✓	✗	✗	✓	✓	✓	✓	✗	✗
Chile	✗	✗	✗	✗	✓	✓	✓	✓	✗	✗
Colombia	✓	✓	✗	✓	✗	✓	✓	✓	✗	✗
Costa Rica	✓	✓	✗	✗	✗	✓	✗	✗	✗	✗
Dom. Rep.	✓	✓	✗	✗	✓	✓	✗	✓	✓	✗
Ecuador	✗	✓	✗	✗	✓	✗	✓	✓	✗	✗
El Salvador	✓	✓	✗	✗	✓	✗	✗	✓	✗	✗
Guatemala	✓	✓	✗	✗	✓	✓	✗	✓	✗	✗
Honduras	✓	✓	✗	✗	✗	✗	✗	✓	✓	✗
Mexico	✗	✗	✗	✗	✓	✓	✓	✓	✗	✓
Nicaragua	✓	✓	✗	✗	✗	✗	✗	✓	✗	✗
Panama	✓	✓	✗	✗	✓	✓	✗	✓	✓	✗
Paraguay	✗	✓	✗	✗	✓	✓	✗	✓	✗	✗
Peru	✓	✓	✗	✗	✓	✓	✗	✓	✓	✗
Uruguay	✗	✗	✗	✗	✗	✓	✓ ¹⁶¹	✓	✗	✗
Venezuela	✗	✗	✗	✗	✗	✓	✗	✓	✗	✗

¹⁶¹ Store with the intention to commercialize.

1. ARGENTINA – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 128 of the Penal Code
2 – Has a clear definition of child pornography	Yes, Article 128 of the Penal Code
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 128 of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, but only with the intent to distribute
6 – Criminalizes virtual images or sexually exploitative representations of children	Possibly, Article 128 of the Penal Code
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No, but assets can be confiscated
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	No
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	No
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Article 23 of the Penal Code
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Article 23 of the Penal Code
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 1 and 2 of Law 24.417 and Article 177 of the Penal Code
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes, Línea 102
16 – Creates data retention or data preservation policies or provisions	No
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	Only in some provinces
18 – Has a national plan to combat violence against children	Yes. The Plan Nacional de Acción por los Derechos de Niñas, Niños y Adolescentes) was approved in 2012, to be developed during the period of 2012/2015
19 – Has ratified international instruments	CRC, OPSC and others
20 – Age of criminal liability	16 years – under certain conditions 18 years – plain liability
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Partly, Article 128 of the Penal Code mentions “by any means”
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	No
23 – Has specific legislation on online grooming, considering it a standalone offense	Yes, Article 131 of the Penal Code
24 – Has a clear definition of online grooming	Yes, Article 131 of the Penal Code
25 – Considers everyone under 18 as a potential victim of online grooming	Yes, Article 131 of the Penal Code
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	With a specific intent according to Article 131 of the Penal Code
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	Yes, Article 128 of the Penal Code, but only to children under 14
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	2 levels – lower for possession
31 – Law establishes aggravating circumstances for child abuse offenses	No

ARGENTINA – COUNTRY REPORT

Argentina is unique among Latin American countries because its high literacy rate (98%) is unlike other countries in the region.¹⁶² According to the CIA World Factbook, Argentina experienced recurring economic crises over the last few years that led to a depression in 2011 culminating in the most serious economic crisis in its history.¹⁶³ The Government expanded state intervention in the economy in 2012, following President Kirchner's ten turbulent years in power.

80% of the population resides in cities, with one third living in the Greater Buenos Aires area, a city that is among the 23 largest cities in the world, and the third largest in Latin America. Argentina is divided into 23 Provinces and the city of Buenos Aires.

Argentina has a representative, republican, and federal form of government. The Supreme Court of Justice (Corte Suprema de Justicia de La Nación Argentina) is its highest Court. The Congress is bicameral (Senate and House of Representatives).

In 2010, following the 2008 Argentinian report to the UN Committee on the Rights of the Child, on the OPSC, the Committee presented concluding observations about the situation of children in the country. The Committee acknowledged the efforts made by Argentina to collect data on the areas covered by the OPSC. However, the Committee expressed concern about the absence of a comprehensive and systematic mechanism for data collection as well as the analysis and monitoring of the sale of children, child prostitution, and child pornography and on the number of children involved in these activities.¹⁶⁴ The Committee recommended that a comprehensive data collection system should be established to ensure that the data, disaggregated, *inter alia*, by age, sex, minority group, socio-economic background, and geographical area is systematically collected.¹⁶⁵ It also welcomed the adoption of the National Code of Conduct on tourism, but regretted the lack of sufficient attention to and information on issues of child sex tourism.

In the report to the Committee on the Rights of the Child, Argentina noted that it had established the National Office for Children, Youth and Family (SENNAF), which focuses on the prevention of sexual exploitation of children and trafficking in persons. SENNAF has a specialized team to monitor activities of pedophiles and child pornographers on the Internet, to detect situations in which rights were being violated, and to identify the circuits in which pedophiles operate, their methodology, and their constant changes. This team coordinates its work with the Division of Cybercrime, and the Division of Criminal Analysis and of Offenses against Minors, which is part of the Argentine Federal Police (PFA).

There is little information available on the work being done in schools to educate children on Internet safety, and ICTs in general, but it is clear that, at a minimum, teachers are being taught how to use ICTs in the classroom effectively through the portal Educ.ar.¹⁶⁶

¹⁶² Literacy, *The World Factbook*, CIA, at https://www.cia.gov/library/publications/the-world-factbook/fields/print_2103.html (last visited Oct. 8, 2015).

¹⁶³ *Argentina*, *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html> (last visited Oct. 30, 2015).

¹⁶⁴ OPSC Concluding Observations, *Argentina*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, at <http://www.ohchr.org/EN/countries/LACRegion/Pages/ARIndex.aspx> (last visited Oct. 8, 2015).

¹⁶⁵ *Id.*

¹⁶⁶ *Country Profile: Argentina*, FAMILY ONLINE SAFETY INSTITUTE'S GLOBAL RESOURCE AND INFORMATION DIRECTORY, www.fosigrid.org/south-america/argentina (last visited Oct. 13, 2014).

Unfortunately, Argentina ranked third in child pornography downloads in Latin America in 2012, according to research conducted by the Catholic University of Uruguay.¹⁶⁷ Uruguay ranked first in Latin America, followed by Venezuela which ranked second.¹⁶⁸

Legal Framework: Constitution and Legislation – Norms related to children and violence against children

As a federal republic, Argentina has a federal Constitution, and both federal and regional statutes. Article 75, item 23 of the Argentinian Constitution prescribes that the Congress must legislate and promote positive measures to guarantee the rights recognized by the Constitution, and by international treaties on human rights, especially those related to children, women, elderly and persons with disabilities.¹⁶⁹ Item 22 of the same Article establishes that international treaties and conventions are superior to domestic laws, and that they may even have constitutional hierarchy (when approved by two-thirds of the members of each chamber).¹⁷⁰ It also notes that some treaties have constitutional hierarchy, indicating the UN Convention on the Rights of the Child as one of them. It allows the Executive Power to denounce treaties, but only with the authorization of two-thirds of each of the chambers of Congress.

The Argentine Constitution is the authority for certain federal areas, leaving to the Provinces a residual power to legislate. According to Articles 75 and 126 of the Federal Constitution, the penal code is a federal matter but procedural law depends on legislative power of each Province.^{171, 172}

¹⁶⁷ Omar França Tarrago & Sergio Delgado Coto, *Child Pornography Online Traffic of Contents: An Exploratory Research Among 10 Countries in Latin America With Focus on Uruguay*, available at http://www.scielo.edu.uy/scielo.php?pid=S1688-42212014000100006&script=sci_arttext.

¹⁶⁸ *Id.*

¹⁶⁹ *Constitution of Argentina*, Article 75, ítem 23. Legislar y promover medidas de acción positiva que garanticen la igualdad real de oportunidades y de trato, y el pleno goce y ejercicio de los derechos reconocidos por esta Constitución y por los tratados internacionales vigentes sobre derechos humanos, en particular respecto de los niños, las mujeres, los ancianos y las personas con discapacidad.

Dictar un régimen de seguridad social especial e integral en protección del niño en situación de desamparo, desde el embarazo hasta la finalización del período de enseñanza elemental, y de la madre durante el embarazo y el tiempo de lactancia.

¹⁷⁰ 22. Aprobar o desechar tratados concluidos con las demás naciones y con las organizaciones internacionales y los concordatos con la Santa Sede. Los tratados y concordatos tienen jerarquía superior a las leyes.

La Declaración Americana de los Derechos y Deberes del Hombre; la Declaración Universal de Derechos Humanos; la Convención Americana sobre Derechos Humanos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; el Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo; la Convención sobre la Prevención y la Sanción del Delito de Genocidio; la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial; la Convención sobre la Eliminación de todas las Formas de Discriminación contra la Mujer; la Convención contra la Tortura y otros Tratos o Penas Cruelles, Inhumanos o Degradantes; la Convención sobre los Derechos del Niño; en las condiciones de su vigencia, tienen jerarquía constitucional, no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos. Sólo podrán ser denunciados, en su caso, por el Poder Ejecutivo Nacional, previa aprobación de las dos terceras partes de la totalidad de los miembros de cada Cámara.

Los demás tratados y convenciones sobre derechos humanos, luego de ser aprobados por el Congreso, requerirán del voto de las dos terceras partes de la totalidad de los miembros de cada Cámara para gozar de la jerarquía constitucional.

¹⁷¹ Artículo 75.- Corresponde al Congreso:

(...)

12. Dictar los Códigos Civil, Comercial, Penal, de Minería, y del Trabajo y Seguridad Social, en cuerpos unificados o separados, sin que tales códigos alteren las jurisdicciones locales, correspondiendo su aplicación a los tribunales federales o provinciales, según que las cosas o las personas cayeren bajo sus respectivas jurisdicciones; y especialmente leyes generales para toda la Nación sobre naturalización y nacionalidad, con sujeción al principio de nacionalidad natural y por opción en beneficio de la argentina: así como sobre bancarrotas, sobre falsificación de la moneda corriente y documentos públicos del Estado, y las que requiera el establecimiento del juicio por jurados.

The Penal Code of Argentina was enacted in 1984, Law n. 11.179. The First Book of the Criminal Code has general rules on liability, attempt, criminal participation, recidivism, etc. (Articles 1 to 78); in the Second Book, crimes against sexual integrity are regulated in Articles 118 to 133.

It was modified in 2008 by Law 26388, which partially aligned the definition of child pornography with the definition provided in the CRC. In 2005, the enactment of Law 26.061, for the Integral Protection of the Rights of Children and Adolescents, ended a history of years of patronage changing the concept that children and adolescents were objects under the tutelage of the State. In keeping with this law, the National Agency for Childhood and Adolescence (Secretaría Nacional de Niñez, Adolescencia y Familia - SENNAF) and the National Council of Childhood, Adolescence and Family (Consejo Federal de Niñez, Adolescencia y Familia - COFENAF) were created to help enforce and implement the new legal requirements.

As Argentina has a decentralized federalism, the provinces must legislate in order to adapt their legislation to the Law 26.061 and the CRC. Some have done so, including the Provincia de Buenos Aires (Law 13.298/2005), Entre Ríos (Law 9861/08), Rio Negro (Law 4109/06), Santa Fé (Law 12.967/09) and Santiago del Estero (Law 6915/08).

The Federal Justice is competent to try crimes of child pornography offenses committed online.¹⁷³

A new Criminal Procedure Code was enacted in Argentina in 2014 (Law 27.063).

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

Article 128 of the Penal Code (as amended by Law 26.388/08) punishes whoever produces, finances, offers, trades, publishes, facilitates, discloses or distributes, by any means, any representation of a child under 18 engaged in explicit sexual activities or any representation of her/his genitals with

¹⁷² Artículo 126. Las provincias no ejercen el poder delegado a la Nación. No pueden celebrar tratados parciales de carácter político; ni expedir leyes sobre comercio, o navegación interior o exterior; ni establecer aduanas provinciales; ni acuñar moneda; ni establecer bancos con facultad de emitir billetes, sin autorización del Congreso Federal; ni dictar los Códigos Civil, Comercial, Penal y de Minería, después que el Congreso los haya sancionado; ni dictar especialmente leyes sobre ciudadanía y naturalización, bancarrotas, falsificación de moneda o documentos del Estado; ni establecer derechos de tonelaje; ni armar buques de guerra o levantar ejércitos, salvo el caso de invasión exterior o de un peligro tan inminente que no admita dilación dando luego cuenta al Gobierno federal; ni nombrar o recibir agentes extranjeros.

¹⁷³ JURISDICCIÓN Y COMPETENCIA: Competencia federal. Por la materia. Causas regidas por normas federales.

Resulta competente la justicia federal para seguir entendiendo en la causa si el objeto de la pretensión se encuentra dirigido a garantizar la protección de los menores contra la prostitución infantil y su utilización por medio de Internet, con fundamento en acuerdos internacionales como la Convención sobre los Derechos del Niño y el Protocolo Relativo a la Venta de Niños, la Prostitución Infantil y la Utilización de los Niños en la Pornografía, aprobado por ley 25.763, instrumentos de naturaleza federal. -Del dictamen de la Procuración General, al que remitió la Corte Suprema-

E.D. 17-02-06. Mayoría: Petracchi, Highton de Nolasco, Maqueda, Zaffaroni, Lorenzetti.

Competencia N° 737. XLI.; P. S.A. c/ Prima S.A. y U.S. S.A. s/ acción de amparo. 25/11/2005T. 328, P. 4087

predominantly sexual purposes.¹⁷⁴ It determines that offenders shall be sentenced to between six months and four years of imprisonment. This article almost exactly reproduces the definition of child pornography given by Article 2 (c) of the OPSC. This Article also punishes with the same penalties the production of live shows with children or adolescents involved in representations of sexual activity.

Parents, relatives, guardians, and caregivers who cooperate with perpetrators are subject to the same penalty (Article 133 of the Penal Code).¹⁷⁵

The age of the victim is defined as anyone less than 18 years of age, and consent is irrelevant.

Article 128 also penalizes the displaying of child pornography to children less than 14 years of age (which is also one element of grooming), without the requirement of demonstration of intent, although with a different penalty. This specific crime can only be committed against victims under age 14, an age limit different from that related to child pornography (18).

4 – Criminalizes accessing or downloading child pornography images

No. The conduct of accessing or downloading child pornography is not a crime under Argentinian law.

5 – Criminalizes possession of child pornography

The mere possession of child pornography is not a crime. Possession is a crime only if the person intends to commercialize or distribute the material.

6 – Criminalizes virtual images or sexually exploitative representations of children

The definition for the crime of child pornography provided by Article 128 refers to *any* representation of a child; so, virtual images or sexually exploitative representations of children may be punished according to the law. It is necessary, however, to verify the interpretation that judges are giving to this expression.

7 – Addresses the criminal liability of children involved in pornography

The law does not address the criminal liability of children involved in pornography.

8 – Establishes the criminal liability of legal persons for child pornography offenses

Legal persons cannot be held criminally liable under Argentinian law. The last paragraph of Article 23 of the Penal Code does however stipulate that when the perpetrator has acted as an organ, member, or administrator of a body corporate, and the gains obtained from the offense have benefited the principal or the body corporate, confiscation shall be ordered against the latter.¹⁷⁶ The Supreme Court of Justice

¹⁷⁴ Artículo 128. Será reprimido con prisión de seis (6) meses a cuatro (4) años el que produjere, financiare, ofreciere, comerciare, publicare, facilitare, divulgare o distribuyere, por cualquier medio, toda representación de un menor de dieciocho (18) años dedicado a actividades sexuales explícitas o toda representación de sus partes genitales con fines predominantemente sexuales, al igual que el que organizare espectáculos en vivo de representaciones sexuales explícitas en que participaren dichos menores.

Será reprimido con prisión de cuatro (4) meses a dos (2) años el que tuviere en su poder representaciones de las descritas en el párrafo anterior con fines inequívocos de distribución o comercialización.

Será reprimido con prisión de un (1) mes a tres (3) años el que facilitare el acceso a espectáculos pornográficos o suministrare material pornográfico a menores de catorce (14) años.

(Artículo sustituido por art. 2° de la Ley 26.388, B.O. 25/6/2008)

¹⁷⁵ Artículo 133. Los ascendientes, descendientes, cónyuges, convivientes, afines en línea recta, hermanos, tutores, curadores y cualesquiera persona que, con abuso de una relación de dependencia, de autoridad, de poder, de confianza o encargo, cooperaren a la perpetración de los delitos comprendidos en este título, serán reprimidos con la pena de los autores.

¹⁷⁶ Artículo 23. En todos los casos en que recayese condena por delitos previstos en este Código o en leyes penales especiales, la misma

recently issued a specific decision reinforcing this lack of criminal responsibility of legal persons.¹⁷⁷

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

Argentina's Penal Code does not have a clear provision regarding the active personality principle for nationals; but Article 12 of the Extradition Act n. 24.767 includes it indirectly by allowing a national who has committed crimes abroad to choose to be tried by Argentinian Courts, according to Argentinian laws (if it is not the case of a compulsory extradition, according to international treaties).¹⁷⁸ If the national can make a choice, the active personality principle can be applied authorizing the extraterritorial jurisdiction of Argentinian Courts; but it presupposes a prior request for extradition.

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

Argentinian Courts cannot prosecute child pornography offenses committed outside of the territory of Argentina against Argentinian victims.

11 – Establishes forfeiture of assets used to commit or facilitate offenses; and

12 – Establishes forfeiture of proceeds derived from such offenses

Argentinian legislation prescribes the forfeiture of assets used to commit or facilitate offenses, and also of the proceeds derived from such offenses. According to Article 23 of the Penal Code, when a sentence is handed down for offenses enumerated in the Penal Code or in a special criminal law, the sentence must include a decision on the seizure of the instruments used to commit the crime and of the proceeds

decidirá el decomiso de las cosas que han servido para cometer el hecho y de las cosas o ganancias que son el producto o el provecho del delito, en favor del Estado nacional, de las provincias o de los municipios, salvo los derechos de restitución o indemnización del damnificado y de terceros.

Si las cosas son peligrosas para la seguridad común, el comiso puede ordenarse aunque afecte a terceros, salvo el derecho de éstos, si fueren de buena fe, a ser indemnizados.

Cuando el autor o los partícipes han actuado como mandatarios de alguien o como órganos, miembros o administradores de una persona de existencia ideal, y el producto o el provecho del delito ha beneficiado al mandante o a la persona de existencia ideal, el comiso se pronunciará contra éstos.

Cuando con el producto o el provecho del delito se hubiese beneficiado un tercero a título gratuito, el comiso se pronunciará contra éste.

¹⁷⁷ Persona Jurídica. Ausencia de capacidad de conducta. Imposibilidad de atribuir responsabilidad penal. Desestimación por inexistencia de delito.

Las personas jurídicas carecen de capacidad de conducta, en tanto el concepto de delito según surge de la ley de fondo, se construye sobre la base de una acción humana individual lo cual se advierte de los distintos supuestos contenidos en el art. 34 de dicho ordenamiento, que se refieren a conductas humanas dando una acabada muestra de la adopción del principio "societas delinquere non potest" en ese cuerpo legal (*). La posibilidad de atribuir responsabilidad penal a las personas jurídicas debe ser rechazada, y en caso de comisión de un delito en su seno, la responsabilidad criminal sólo puede alcanzar a las personas físicas que actúan en su representación. Si no existe indicio alguno que permita presumir que los responsables de las áreas de los bancos y entidades financieras hayan actuado con conocimiento de las maniobras imputadas a los responsables de la Asociación Mutual, corresponde homologar la resolución que dispuso desestimar por inexistencia de delito la denuncia de los damnificados.

Barbarosch, Bruzzone, Rimondi. (Sec.: Cantisani).27507_1 PENNA, Alfredo J. y otros. 24/04/06 c. 27.507.

C.N.Crim. y Correc. Sala I.

¹⁷⁸ Artículo 12. Si el requerido para la realización de un proceso fuese nacional argentino, podrá optar por ser juzgado por los tribunales argentinos, a no ser que fuere aplicable al caso un tratado que obligue a la extradición de nacionales. La calidad de nacional argentino deberá haber existido al momento de la comisión del hecho, y deberá subsistir al momento de la opción. Si el nacional ejerciere esta opción, la extracción será denegada. El nacional será entonces juzgado en el país, según la ley penal argentina, siempre que el Estado requirente preste conformidad para ello, renunciando a su jurisdicción, y remita todos los antecedentes y pruebas que permitan el juzgamiento. Si fuere aplicable al caso un tratado que falta la extradición de nacionales, el Poder Ejecutivo, en la oportunidad prevista en el artículo 36, resolverá si se hace o no lugar a la opción.

or benefits derived from its commission. Property can also be sequestered as a precautionary measure in order to end the commission of crimes or their effects.

13 – Establishes mandatory reporting requirements for professionals who work with children

The Criminal Procedure Code establishes, in Article 177 that health professionals generally have the obligation to report any suspicion of the commission of crimes against life or physical integrity.¹⁷⁹

Law 24.417 Protection from Family Violence states in Articles 1 and 2 that every professional who is in contact with children (social workers, teachers, doctors, nurses, public servants) has the obligation to report ill treatment or abuse suffered by minors.¹⁸⁰

14 – Requires Internet Service Providers to report child pornography

The law does not require Internet Service Providers to report suspected child pornography found on their networks to law enforcement.

15 – Has a support telephone or online hotline to enable the public to report child abuse

The Council on the Rights of Children and Adolescents (CDNNA) maintains a hotline (Línea 102) that is free of charge and operates 24 hours day/7 days a week, which the public can use to report violations of the rights of children and adolescents.¹⁸¹ Reports may be made anonymously. The hotline is only accessible locally and is not accessible from the entire territory of the country.

16 – Creates data retention and preservation policies or provisions

Argentina has a Penal Data Protection Statute, Law 25.326, enacted in October 2000. It establishes general principles on the protection of data, rights of the owners, users of databases, and judicial remedies for their protection.¹⁸²

In 2004, Argentina enacted a data retention law establishing an obligation to store traffic data for 10 years (Law 25.873, which incorporated Articles 45bis¹⁸³, 45ter¹⁸⁴, and 45quarter¹⁸⁵ to Law 19.798,

¹⁷⁹ Artículo 177. - Tendrán obligación de denunciar los delitos perseguibles de oficio:

1º) Los funcionarios o empleados públicos que los conozcan en el ejercicio de sus funciones.

2º) Los médicos, parteras, farmacéuticos y demás personas que ejerzan cualquier rama del arte de curar, en cuanto a los delitos contra la vida y la integridad física que conozcan al prestar los auxilios de su profesión, salvo que los hechos conocidos estén bajo el amparo del secreto profesional.

¹⁸⁰ Artículo 1º.- Toda persona que sufriese lesiones o maltrato físico o psíquico por parte de alguno de los integrantes del grupo familiar podrá denunciar estos hechos en forma verbal o escrita ante el juez con competencia en asuntos de familia y solicitar medidas cautelares conexas. A los efectos de esta Ley se entiende por grupo familiar el originado en el matrimonio o en las uniones de hecho.

Artículo 2º.- Cuando los damnificados fuesen menores o incapaces, ancianos o discapacitados, los hechos deberán ser denunciados por sus representantes legales y/o el Ministerio Público. También estarán obligados a efectuar la denuncia los servicios asistenciales sociales y educativos, públicos o privados; los profesionales de la salud y todo funcionario público en razón de su labor. El menor o incapaz puede directamente poner en conocimiento de los hechos al Ministerio Público.

¹⁸¹ *Guía de Derivaciones: Menores E incapaces*, MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS, <http://www.jus.gob.ar/atencion-al-ciudadano/guia-de-derivaciones/menores-e-incapaces.aspx> (last visited Oct. 13, 2014).

¹⁸² LEY 25.326 PROTECCION DE LOS DATOS PERSONALES, <http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/64790/norma.htm>.

¹⁸³ Artículo 45 bis — Todo prestador de servicios de telecomunicaciones deberá disponer de los recursos humanos y tecnológicos necesarios para la captación y derivación de las comunicaciones que transmiten, para su observación remota a requerimiento del Poder Judicial o el Ministerio Público de conformidad con la legislación vigente.

Los prestadores de servicios de telecomunicaciones deberán soportar los costos derivados de dicha obligación y dar inmediato cumplimiento a la misma a toda hora y todos los días del año.

known as the Telecommunication Law). It faced considerable opposition and had its enforcement suspended by the President in 2005. In 2009, Argentina's Supreme Court confirmed a decision annulling data retention legislation, considering it a "drastic interference with the private sphere of the individual."¹⁸⁶ These provisions were considered unconstitutional under Articles 18 and 19 of the Federal Constitution, which protects the right to privacy.

Article 236 of the former Penal Procedural Code generally authorized the intervention on all kinds of communications, establishing preservation of content and traffic data measures according to a prior order from a judge, as related to a criminal investigation.¹⁸⁷ It did not regulate the period of time of the measure and the type of data to be preserved.

Article 143 of the new Criminal Procedure Code regulates the interception of communications.¹⁸⁸ It

El Poder Ejecutivo nacional reglamentará las condiciones técnicas y de seguridad que deberán cumplir los prestadores de servicios de telecomunicaciones con relación a la captación y derivación de las comunicaciones para su observación remota por parte del Poder Judicial o el Ministerio Público.

Artículo incorporado por art. 1° de la Ley n. 25.873, B.O. 9/2/2004)

¹⁸⁴ Artículo 45 ter. Los prestadores de servicios de telecomunicaciones deberán registrar y sistematizar los datos filiatorios y domiciliarios de sus usuarios y clientes y los registros de tráfico de comunicaciones cursadas por los mismos para su consulta sin cargo por parte del Poder Judicial o el Ministerio Público de conformidad con la legislación vigente. La información referida en el presente deberá ser conservada por los prestadores de servicios de telecomunicaciones por el plazo de diez años.

(Artículo incorporado por art. 2° de la Ley n. 25.873, B.O. 9/2/2004)

¹⁸⁵ Artículo 45 quáter. El Estado nacional asume la responsabilidad por los eventuales daños y perjuicios que pudieran derivar para terceros, de la observación remota de las comunicaciones y de la utilización de la información de los datos filiatorios y domiciliarios y tráfico de comunicaciones de clientes y usuarios, provista por los prestadores de servicios de telecomunicaciones.

(Artículo incorporado por art. 3° de la Ley n. 25.873, B.O. 9/2/2004)

¹⁸⁶ Halabi Ernesto v. PEN, Ley 25.873 D to 1563/2004 s/amparo ley 16.986, Fallo de la Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal, sala 2ª, confirmando Sentencia de Primera Instancia, paragraphs 7.1 to 7.3, available at <http://www.hfernandezdelpech.com.ar/JurisprudenciaArgHalabiFalloCamara.html>.

¹⁸⁷ Artículo 236. El juez podrá ordenar, mediante auto fundado, la intervención de comunicaciones telefónicas o cualquier otro medio de comunicación del imputado, para impedir las o conocerlas.

Bajo las mismas condiciones, el Juez podrá ordenar también la obtención de los registros que hubiere de las comunicaciones del imputado o de quienes se comunicaran con él. (Párrafo incorporado por art. 7° de la Ley N° 25.760 B.O. 11/8/2003).

En las causas en que se investigue alguno de los delitos previstos en los artículos 142 bis y 170 del CODIGO PENAL DE LA NACIÓN, o que tramiten en forma conexas con aquéllas, cuando existiese peligro en la demora, debidamente justificado, dichas facultades podrán ser ejercidas por el representante del MINISTERIO PUBLICO FISCAL, mediante auto fundado, con inmediata comunicación al Juez, quien deberá convalidarla en el término improrrogable de veinticuatro horas, bajo pena de nulidad del acto y consecuente ineficacia de la prueba introducida a partir de él. (Párrafo incorporado por art. 7° de la Ley N° 25.760 B.O. 11/8/2003).

¹⁸⁸ Artículo 143. Interceptación. Siempre que resulte útil para la comprobación del delito, el juez podrá ordenar, a petición de parte, la interceptación y secuestro de correspondencia postal, telegráfica, electrónica o cualquier otra forma de comunicación o de todo otro efecto remitido por el imputado o destinado a éste, aunque sea bajo nombre supuesto.

Se procederá de modo análogo al allanamiento.

La intervención de comunicaciones tendrá carácter excepcional y sólo podrá efectuarse por un plazo máximo de TREINTA (30) días, pudiendo ser renovada, expresando los motivos que justifican la extensión del plazo conforme la naturaleza y circunstancias del hecho investigado.

La solicitud deberá indicar el plazo de duración que estime necesario según las circunstancias del caso. El juez controlará la legalidad y razonabilidad del requerimiento y resolverá fundadamente.

Rige para los funcionarios encargados de efectuar la intervención el deber de confidencialidad y secreto respecto de la información obtenida por estos medios, excepto respecto de la autoridad que la haya requerido. Quienes incumplan este deber incurrirán en responsabilidad penal.

Las empresas que brinden el servicio de comunicación deberán posibilitar el cumplimiento inmediato de la diligencia, bajo apercibimiento de incurrir en responsabilidad penal.

allows the preservation of the content of an electronic communication, limited to 30 days, renewable for another period upon a justified request (determined according to the nature and circumstances of the object of the investigation). The Public Prosecutor must indicate the period of time needed, which is ultimately determined by the Judge according to the proportionality principle.

ISPs have to ensure the immediate execution of the order, and their employees have the duty to maintain the secrecy of the measure.

Article 143 allows the observance of the search and seizure procedure to measures related to the preservation of content, though the meaning of this is vague. However, since Article 135 allows the search and seizure without judicial order when a crime is being committed; this paragraph is understood to mean that the police force can also do so when cybercrimes are being committed.¹⁸⁹

Article 144 of the new Criminal Procedure Code regulates the preservation of data.¹⁹⁰ It refers to Article 129, which requires the demonstration of the existence of sufficient grounds for the measure, and that it is necessary to help an investigation in course. The rules regarding the request of documents are applied to the preservation of data.

Recently, Law 27.078 (known as “Argentina Digital”) was enacted on December 18, 2014 to regulate the telecommunication system in the country. It expressly prescribes that provisions of Law 19.798 are still in force only when not conflicting with its provisions.¹⁹¹ Article 5 maintains the inviolability of communications through any means, including e-mails and traffic data, requiring prior judicial order for

Si los elementos de convicción tenidos en consideración para ordenar la medida desaparecieren, hubiere transcurrido su plazo de duración o ésta hubiere alcanzado su objeto, deberá ser interrumpida inmediatamente.

¹⁸⁹ Artículo 135. Allanamiento sin orden judicial. No obstante lo dispuesto en los artículos anteriores de este Título, la policía u otra fuerza de seguridad podrán proceder al allanamiento sin previa orden judicial si:

- a. por incendio, explosión, inundación u otro estrago se hallare amenazada la vida de los habitantes o la propiedad;
- b. mediare denuncia, cuya entidad resulte verosímil de acuerdo a las circunstancias, de que una o más personas han sido vistas mientras se introducían en una casa o local con indicios manifiestos de comisión de un delito;
- c. se introdujere en una casa o local algún sospechado de delito a quien se persigue para su aprehensión;
- d. voces provenientes de una casa o local pidieren socorro o anunciaren que allí se está cometiendo un delito;
- e. se tuvieren sospechas fundadas de que en una casa o local se encuentra la víctima de una privación ilegal de la libertad y corriere peligro inminente su vida o integridad física; el representante del Ministerio Público Fiscal deberá autorizar la medida.

En el acta se deberá dejar constancia de la existencia de alguna de las causales de excepción descriptas en este artículo.

¹⁹⁰ Artículo 144. Incautación de datos. El juez podrá ordenar a requerimiento de parte y por auto fundado, el registro de un sistema informático o de una parte de éste, o de un medio de almacenamiento de datos informáticos o electrónicos, con el objeto de secuestrar los componentes del sistema, obtener copia o preservar datos o elementos de interés para la investigación, bajo las condiciones establecidas en el artículo 129.

Regirán las mismas limitaciones dispuestas para el secuestro de documentos.

El examen de los objetos, documentos o el resultado de la interceptación de comunicaciones, se hará bajo la responsabilidad de la parte que lo solicitó.

Una vez secuestrados los componentes del sistema, u obtenida la copia de los datos, se aplicarán las reglas de apertura y examen de correspondencia.

Se dispondrá la devolución de los componentes que no tuvieran relación con el proceso y se procederá a la destrucción de las copias de los datos. El interesado podrá recurrir al juez para obtener la devolución de los componentes o la destrucción de los datos.

¹⁹¹ Artículo 89. La ley 19.798 y sus modificatorias sólo subsistirá respecto de aquellas disposiciones que no se opongan a las previsiones de la presente ley.

their interception.¹⁹² ISPs have to ensure confidentiality of messages and secrecy of communications, and must provide information required by the public authorities concerning national defense and public security.¹⁹³ It did not bring substantial changes in the subject.

Therefore, Argentina does not have retention provisions, and concerning preservation provisions:

- 1) There are provisions that allow real-time collection of content and traffic data;
- 2) There is not a specification of the type of offenses for which the measure can be authorized;
- 3) There is no provision related to the preservation of content related to child pornography offenses;
- 4) The time established for preservation of data is only 30 days, but is renewable;
- 5) A judicial order is necessary, but it can be done without one (i.e., *flagrante delicto*).

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

No, federal legislation does not require that users of public computers be identified. However, according to Article 1 of Law 945 (Buenos Aires), educational establishments, libraries, and other areas under the Government of the City of Buenos Aires that provide computers for students or the general public are required to install and activate filters to block pornographic websites.

A 2007 report by Telefónica entitled *Situation Analysis of Children & Youth in Argentina with Respect to ICT*, reported the following information about children's use of the Internet:

- Only 15% of young people aged 11 to 17 have Internet access at home. However, in 2005, 2,799 cybercafés existed in Buenos Aires alone;
- Between January 23 and March 25, 2005, inspections were carried out on cybercafés in Buenos Aires and of the 61 premises checked, 36 were closed down for not having filters to block minors' access to pornography for (a local requirement not replicated nationally);
- Of the young people aged between 7 and 17 living in metropolitan areas that are connected to the Internet, 83% accessed it without parental supervision; and
- 65% of young people aged 11 to 17 use the Internet for chat, 45% for music, 50% look for information, and 45% use email.

18 – Has a national plan to combat violence against children

The latest National Plan of Action for the Rights of Children and Adolescents (Plan Nacional de Acción por los Derechos de Niñas, Niños y Adolescentes) was approved in 2012, to be developed during the period of 2012-2015.¹⁹⁴ It is intended to create conditions for effective implementation of the rights of

¹⁹² Artículo 5°. Inviolabilidad de las comunicaciones. La correspondencia, entendida como toda comunicación que se efectúe por medio de Tecnologías de la Información y las Comunicaciones (TIC), entre las que se incluyen los tradicionales correos postales, el correo electrónico o cualquier otro mecanismo que induzca al usuario a presumir la privacidad del mismo y de los datos de tráfico asociados a ellos, realizadas a través de las redes y servicios de telecomunicaciones, es inviolable. Su interceptación, así como su posterior registro y análisis, sólo procederá a requerimiento de juez competente

¹⁹³ Artículo 62. Obligaciones. Los licenciatarios de Servicios de TIC tienen las siguientes obligaciones:

(...)

f) Garantizar a los usuarios la confidencialidad de los mensajes transmitidos y el secreto de las comunicaciones.

(...)

i) Atender los requerimientos en materia de defensa nacional y de seguridad pública formulados por las autoridades competentes.

(...)

¹⁹⁴ See *Familia Argentina*, MINISTERIO DE DESARROLLO SOCIAL, <http://www.desarrollosocial.gov.ar/ninez/139> (last visited Oct. 13, 2014).

children and adolescents, in their capacity as citizens, through the development of comprehensive public policies implemented through interagency and intersectoral means with a territorial approach. One of its goals is to strengthen active policies (procedures, services, networks, etc.) to protect children and adolescents against abuse, neglect, trafficking, exploitation, violence, and all forms of discrimination. Argentina signed a cooperation agreement with UNICEF to implement it.

It is important to note that a Special Unit to Promote the Eradication of Sexual Exploitation of Children and Adolescents is responsible for promoting policies for the promotion, protection, defense, and restoration of the rights of children and adolescent victims of sexual abuse. It is presided over by the Human Rights Secretariat.

19 – International instruments ratified

Argentina ratified the CRC in 1990, making this reservation and declarations:

- **Reservation:** The Argentine Republic enters a reservation to subparagraphs (b), (c), (d), and (e) of Article 21 of the Convention on the Rights of the Child and declares that those subparagraphs shall not apply in areas within its jurisdiction because, in its view, before they can be applied, a strict mechanism must exist for the legal protection of children in matters of inter-country adoption, in order to prevent trafficking in and the sale of children.
- **Declarations:** Concerning Article 1 of the Convention, the Argentine Republic declared that the Article must be interpreted to the effect that a child means every human being from the moment of conception up to the age of 18.
- Concerning Article 38 of the Convention, the Argentine Republic declared that it would have liked the Convention categorically to prohibit the use of children in armed conflicts. Such a prohibition exists in its domestic law, which, by virtue of Article 41 of the Convention, it shall continue to apply in this regard.
- Upon ratification, **Declaration:** Concerning subparagraph (f) of Article 24 of the Convention, the Argentine Republic considers that questions relating to family planning are the exclusive concern of parents, in accordance with ethical and moral principles, and understands it to be a State obligation, under this Article, to adopt measures providing guidance for parents and education for responsible parenthood.

Argentina ratified the OPSC in 2003, making some declarations:

- **Declaration:** With reference to Article 2, the Argentine Republic would prefer a broader definition of sale of children, as set out in the Inter-American Convention on International Traffic in Minors, which Argentina has ratified and which, in its Article 2, expressly defines traffic as the abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means. Therefore, under Article 41 of the CRC, this meaning shall continue to apply. For the same reasons, the Argentine Republic believes that the sale of children should be criminalized in all cases and not only in those enumerated in Article 3 (1) (a).
- **Declaration:** Concerning Article 3, the Argentine Republic further states that it has not signed international instruments on the international adoption of minors, has entered a reservation in respect of subparagraphs (b), (c), (d), and (e) of Article 21 of the Convention on the Rights of the Child dealing with international adoption, and does not permit international adoption of children domiciled or resident in its jurisdiction.
- **Declaration:** Concerning Article 7, the Argentine Republic construes the term 'confiscation' (confiscación) to mean the seizure of goods and proceeds as part of a sentence or penalty (decomisar). **Translator's note: The meaning of the Spanish term "decomisar" is not as*

broad as the English "seizure". "Decomisar" means "seizure" during the sentencing or penalty phase only. Seizure as a preventive measure is rendered with "incautación".

20 – Age of criminal liability

Law n. 22.278 establishes that children under 16 years of age are not subject to any kind of penalty.¹⁹⁵ Children between 16 and 18 years of age only have criminal liability if the crime is a felony that does not require legal standing by the victim (most severe offenses) or if it is punished by more than two years of imprisonment. If guilty, they must serve time in special facilities separate from adult prisoners. Argentina has a special juvenile justice system (Articles 28 and 29 of the Criminal Procedure Code).¹⁹⁶ Full criminal liability starts at the age of 18 years old.

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

Partly. Article 128 of the Penal Code (as amended by Law 26.388) uses the expression “by any means” to clarify the possibility of commission through Internet or any other ICTs.

22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism

The crime of abducting or retaining a person for sexual purposes, with the use of force, intimidation or fraud, included in Article 130 of the Penal Code, provides for a penalty of one to four years of imprisonment, diminishing the penalty to six months to two years when there is consent and the victim is under 16.¹⁹⁷ When the victim is under 13 years of age, and the perpetrator uses force, intimidation, or fraud, there is an enhanced penalty of two to six years of imprisonment.

¹⁹⁵ Artículo 1º. No es punible el menor que no haya cumplido dieciséis años de edad. Tampoco lo es el que no haya cumplido dieciocho años, respecto de delitos de acción privada o reprimidos con pena privativa de la libertad que no exceda de dos años, con multa o con inhabilitación.

Si existiere imputación contra alguno de ellos la autoridad judicial lo dispondrá provisionalmente, procederá a la comprobación del delito, tomará conocimiento directo del menor, de sus padres, tutor o guardador y ordenará los informes y peritaciones conducentes al estudio de su personalidad y de las condiciones familiares y ambientales en que se encuentre.

En caso necesario pondrá al menor en lugar adecuado para su mejor estudio durante el tiempo indispensable. Si de los estudios realizados resultare que el menor se halla abandonado, falto de asistencia, en peligro material o moral, o presenta problemas de conducta, el juez dispondrá definitivamente del mismo por auto fundado, previa audiencia de los padres, tutor o guardador.

Artículo 2º. Es punible el menor de dieciséis a dieciocho años de edad que incurriere en delito que no fuera de los enunciados en el artículo 1º.

En esos casos la autoridad judicial lo someterá al respectivo proceso y deberá disponerlo provisionalmente durante su tramitación a fin de posibilitar la aplicación de las facultades conferidas por el artículo 4º. Cualquiera fuese el resultado de la causa, si de los estudios realizados apareciera que el menor se halla abandonado, falto de asistencia, en peligro material o moral o presenta problemas de conducta, el juez dispondrá definitivamente del mismo por auto fundado, previa audiencia de los padres, tutor o guardador.

¹⁹⁶ Artículo 28. - El tribunal de menores juzgará en única instancia en los delitos cometidos por menores que no hayan cumplido dieciocho (18) años al tiempo de la comisión del hecho, aunque hubiese excedido dicha edad al tiempo del juzgamiento, y que estén reprimidos con pena privativa de la libertad mayor de tres (3) años.

Artículo 29. - El juez de menores conocerá:

1) En la investigación de los delitos de acción pública cometidos por menores que no hayan cumplido dieciocho (18) años al tiempo de la comisión del hecho.

2) En el juzgamiento en única instancia en los delitos y contravenciones cometidos por menores que no hayan cumplido dieciocho (18) años al tiempo de la comisión del hecho y que estén reprimidos con pena no privativa de la libertad o pena privativa de la libertad que no exceda de tres (3) años.

3) En los casos de simple inconducta, abandono material o peligro moral de menores que no hayan cumplido dieciocho (18) años al tiempo de encontrarse en esa situación, conforme lo establecen las leyes especiales.

¹⁹⁷ Artículo 130. Será reprimido con prisión de uno a cuatro años, el que sustrajere o retuviere a una persona por medio de la fuerza,

The advertisement of child sex tourism is not a crime in Argentina. But the country has worked on administrative measures to avoid it. The Tourism Secretariat created the National Committee on the Code of Conduct for the Protection of Children and Adolescents from Sexual Exploitation in Travel and Tourism. According to the report presented by Argentina to the Committee on the Rights of the Child, the Code of Conduct is an initiative of the World Tourism Organization (WTO) and End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT International), in which Argentina participates.

Accession to the instrument is voluntary and requires a formal declaration. Its aim is to guide and regulate the ethical conduct of companies, organizations, and professionals that are directly or indirectly involved in the tourism industry, to promote the protection of child and adolescent rights, and to prevent sexual or labor exploitation and trafficking for both purposes. Argentina is the first country to sponsor the instrument through its national tourism authority.

23 – Existence of specific legislation on online grooming, considering it a standalone offense

Online grooming is criminalized. The Congress enacted Law 20914 in November 2013, including Article 131 in the Penal Code, which criminalizes the act of grooming. It is defined as the contact with a minor through phone, Internet, or any other ICTs with the intent to commit any crime against his/her sexual integrity. This law was originated from the Bill 3064-D-2013 (Proyecto de Ley 3064-D-2013) that proposed penalty of imprisonment for two to six years, but the final text reduced the penalty to six months to four years of imprisonment.

24 – Has a clear definition of online grooming

There is a clear definition of online grooming in the legislation. Article 131 of the Penal Code defines it as the contact with a minor through phone, Internet, or any other ICTs with the intent to commit any crime against his/her sexual integrity.¹⁹⁸

25 – Age of potential victims of online grooming

Argentinian law considers everyone under 18 as a potential victim of online grooming because it refers to minors.

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child; or grooming regardless of the intent

It criminalizes grooming with a specific intent.

intimidación o fraude, con la intención de menoscabar su integridad sexual.

La pena será de seis meses a dos años, si se tratare de una persona menor de dieciséis años, con su consentimiento.

La pena será de dos a seis años si se sustrajere o retuviere mediante fuerza, intimidación o fraude a una persona menor de trece años, con el mismo fin.

¹⁹⁸ Artículo 131. Será penado con prisión de seis (6) meses a cuatro (4) años el que, por medio de comunicaciones electrónicas, telecomunicaciones o cualquier otra tecnología de transmisión de datos, contactare a una persona menor de edad, con el propósito de cometer cualquier delito contra la integridad sexual de la misma.

(Artículo incorporado por art. 1 de la Ley 26.904, BO 111/12/2013)

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense; or considers it to be an aspect of grooming

Yes. The displaying of child pornography to children under age 14, which is one element of grooming, is penalized by Article 128 of the Penal Code by one month to three years of imprisonment. It does not require demonstration of intent. This specific crime can only be committed against victims under 14 years of age, an age limit different from that related to child pornography (18).

28 – Has specific legislation on cyberbullying

No. There is currently no legislation specific to cyberbullying.

29 – Has specific legislation concerning sexting

No. There is currently no legislation specific to sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution or possession of child pornography

According to Article 128 of the Penal Code, there are only two levels of penalties for offenses related to child pornography in Argentina. The Penal Code punishes offenses related to the production with the same penalties established for offenses related to distribution of child abuse images, establishing a lower penalty only for the possession of this kind of material.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

Argentina’s legislation does not establish aggravated penalties for situations that involve personal relationships amongst the offender and the victim (member of the child’s family, person cohabiting with the child or a person who has abused a recognized position of trust or authority). No legal provisions were found establishing an increase in the penalty for the commission of a crime by several persons acting together or within the framework of a criminal organization.

2. BOLIVIA – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 323 bis of the Penal Code
2 – Has a clear definition of child pornography	Yes, Article 323 bis of the Penal Code
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 323 bis of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	No, but storage is a crime
6 – Criminalizes virtual images and sexually exploitative representations of children	No
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Partly; only for nationals
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	No
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Article 323 bis of the Penal Code
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Article 323 bis of the Penal Code
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Articles 106, 110, 119, 159, and 202 of the Child and Adolescents Code
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	No
16 – Creates data retention or data preservation policies or provisions	Only preservation policies
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No
18 – Has a national plan to combat violence against children	Yes. Plan Nacional de Niños, Niñas y Adolescentes para Vivir Bien 2009/13
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	16 years of age
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes, Article 323 bis of the Penal Code
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	No
23 – Has specific legislation on online grooming, considering it a standalone offense	No
24 – Has a clear definition of online grooming	Does not apply
25 – Considers everyone under 18 as a potential victim of online grooming	Does not apply
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Does not apply
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	No
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	No
31 – Law establishes aggravating circumstances for child abuse offenses	No

BOLIVIA – COUNTRY REPORT

The Bolivian Constitution defines the country as a Social Unitarian State, which has a plurinational communitarian law.¹⁹⁹ It is divided into nine departments – Beni, Chuquisaca, Cochabamba, La Paz, Oruro, Pando, Potosí, Santa Cruz, and Tarija.

The legislative power is bicameral.

The highest Courts in Bolivia are the Constitutional Court and the Supreme Court of Justice. The latter works as a court of cassation. Law n. 073/3010 established two parallel jurisdictions within the court system in Bolivia: the traditional community approach (indigenous justice) and the positive law system (ordinary justice system). The first cannot be used when public interests are involved.

Article 2 of the Constitution recognizes the existence of both indigenous and peasant population, and their ancestral dominion over their territory.²⁰⁰ It recognizes their right to autonomy and self-government. Article 5 recognizes the existence of more than 37 official languages.²⁰¹

Bolivia is one of the poorest and least developed countries in Latin America. It faces a huge problem of sexual exploitation of children, but its technological lag also prevents a manifestation of this same problem through the Internet. Poverty comes with lack of a good educational structure, which increases the vulnerability of children.

In 2005, the UN Committee on the Rights of the Child recommended that Bolivia should take all necessary measures to eradicate violence against children through the Internet. In the official report presented to the CRC Committee in 2009, the Delegation of Bolivia explained that the country is still trying to deal with the problem and that national and local committees were working together to provide a national response.²⁰²

“Overall, Bolivia is at the beginning of its technological journey and children and adults are just beginning to understand the possibilities that the Internet can bring. It is a country of high poverty, particularly in rural areas and the government has focused its efforts on improving the standards of education which have historically been low. Roofs need to be fixed and chairs and

¹⁹⁹ Artículo 1. Bolivia se constituye en un Estado Unitario Social de Derecho Plurinacional Comunitario, libre, independiente, soberano, democrático, intercultural, descentralizado y con autonomías. Bolivia se funda en la pluralidad y el pluralismo político, económico, jurídico, cultural y lingüístico, dentro del proceso integrador del país

²⁰⁰ Artículo 2. Dada la existencia pre colonial de las naciones y pueblos indígena originario campesinos y su dominio ancestral sobre sus territorios, se garantiza su libre determinación en el marco de la unidad del Estado, que consiste en su derecho a la autonomía, al autogobierno, a su cultura, al reconocimiento de sus instituciones y a la consolidación de sus entidades territoriales, conforme a esta Constitución y la ley.

²⁰¹ Artículo 5.

I. Son idiomas oficiales del Estado el castellano y todos los idiomas de las naciones y pueblos indígena originario campesinos, que son el aymara, araona, baure, bésiro, canichana, cavineño, cayubaba, chácobo, chimán, ese ejja, guaraní, guarasu'we, guarayu, itonama, leco, machajuyaikallawaya, machineri, maropa, mojeño-trinitario, mojeño-ignaciano, moré, mosetén, movima, pacawara, puquina, quechua, sirionó, tacana, tapiete, toromona, uru-chipaya, weenhayek, yaminawa, yuki, yuracaré y zamuco.

(...)

²⁰² State Party Examination of Bolivia's Fourth Periodic Report – 52nd Session of the Committee on the Rights of the Child, 14th September – 2nd October 2009.

tables provided for children before wider technology issues are addressed. There is little home use of computers over much of the country at present, so we will see the most visible changes in behavior taking place in schools.

Regulation does not, as yet, take account of the Internet as an aid to commit offenses and it remains to be seen whether laws are updated as threats become apparent. Some laws require an assessment of the victim's character. Further details can be found in the Legislation section below.

No organizations could be found which offer Internet safety advice to families in Bolivia at the present time.

There are several projects to provide access to computers in schools and communities. No information was available about any efforts which may exist to teach children about using the Internet safely. Bolivia is still in the early stages of introducing children to ICTs."²⁰³

Bolivia began a process of social and democratic change with President Evo Morales. A new Constitution was enacted in 2010, and it included provisions related to children, especially Articles 60 and 61, which establish that the State, the civil society, and the family must guarantee the best interests of the children, punishing all forms of violence against them.²⁰⁴

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

The Bolivian Penal Code is relatively new as it was enacted in 2000, and then amended in 2010 by Law 054 (*Ley de Reformas al Código Penal para la Protección Legal de Niñas, Niños y Adolescentes - LRCPPLNNA*) in order to guarantee the necessary protections for children, especially against all forms of violence.

The Child and Adolescent Code stipulates that it must be interpreted according to the best interests of the minor, to the Constitution, Conventions and International Treaties in force, as well as the laws of the land.²⁰⁵

²⁰³ *Country Profile: Bolivia*, FAMILY ONLINE SAFETY INSTITUTE'S GLOBAL RESOURCE AND INFORMATION DIRECTORY, <http://www.fosigrid.org/south-america/bolivia> (last visited Oct. 13, 2014).

²⁰⁴ Artículo 60. Es deber del Estado, la sociedad y la familia garantizar la prioridad del interés superior de la niña, niño y adolescente, que comprende la preeminencia de sus derechos, la primacía en recibir protección y socorro en cualquier circunstancia, la prioridad en la atención de los servicios públicos y privados, y el acceso a una administración de justicia pronta, oportuna y con asistencia de personal especializado.

Artículo 61. Se prohíbe y sanciona toda forma de violencia contra las niñas, niños y adolescentes, tanto en la familia como en la sociedad. Se prohíbe el trabajo forzado y la explotación infantil. Las actividades que realicen las niñas, niños y adolescentes en el marco familiar y social estarán orientadas a su formación integral como ciudadanas y ciudadanos, y tendrán una función formativa. Sus derechos, garantías y mecanismos institucionales de protección serán objeto de regulación especial.

²⁰⁵ Artículo 6° (Interpretación). Las normas del presente Código deben interpretarse velando por el interés superior del niño, niña y adolescente, de acuerdo con la Constitución Política del Estado, las Convenciones, Tratados Internacionales vigentes y las leyes de la República. Conc. (Art. 3 C.D.N.)

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

A special law enacted in 2010, Law 054, amended many articles of the Penal Code in order to provide greater protection to children. Through Article 25 and Article 323 Bis, the amendments criminalize child pornography.²⁰⁶

“Article 323 bis – The crime of child pornography and pornography of incapable persons: whoever seeks, requires, facilitates, or induces, by any means, a child, adolescent, or incapable person to perform sexual acts or physical exhibitionism for sexual purposes (real or simulated), in order to create a video, photograph, film, display, or whoever describes such acts through print ads, data files in public or private network telecommunications, computer systems, electronic or substitutes. Whoever commits this crime will be punished by imprisonment of five to ten years.

Whoever sets, prints, video records, photographs, films or describes acts of indecent or lewd or sexual bodily acts, real or simulated, involving one or more children or adolescents or disabled people shall be liable to the penalty of three to six years imprisonment and the confiscation of all objects, instruments and proceeds of the crime.

The same sentence of the preceding paragraph shall be imposed on anyone who reproduces, stores, distributes, sells, purchases, leases, displays, advertises, transmits, imports or exports the materials referred to above.

The penalty shall be increased by a quarter when the perpetrator or participant is a parent, guardian or who has under his care, supervision or authority of the child or young person.”²⁰⁷

Article 2 of the Child and Adolescent Code (*Código del Niño, Niña y Adolescente*), Law 2026/1999 establishes that a child is deemed to be under 12 years of age, and adolescents are between 12 and 18 years old.²⁰⁸ As Article 323 Bis of the Penal Code refers to children and adolescents, victims of child pornography are persons under 18 years old. In case of doubt, minority is presumed.²⁰⁹

²⁰⁶ Artículo 323 Bis. (Pornografía de Niñas, Niños o Adolescentes y de Personas Jurídicamente Incapaces). Comete el delito de pornografía de Niñas, Niños o Adolescentes y de Personas Jurídicamente Incapaces, quien procure, obligue, facilite o induzca, por cualquier medio, a una o varias de estas personas a realizar actos sexuales o de exhibicionismo corporal con fines lascivos o sexuales, reales o simulados, con el objeto de video grabarlos, fotografiarlos, filmarlos, exhibirlos o describirlos a través de anuncios impresos, transmisión de archivos de datos en red pública o privada de telecomunicaciones, sistemas de cómputo, electrónicos o sucedáneos. Al autor de este delito se le impondrá pena de cinco a diez años de presidio.

A quien fije, imprima, video grabe, fotografíe, filme o describa actos de exhibicionismo corporal o lascivos o sexuales, reales o simulados, en que participen una o varias Niñas, Niños o Adolescentes y de Personas Jurídicamente Incapaces, se le impondrá la pena de tres a seis años de reclusión, así como el decomiso de los objetos, instrumentos y productos del delito.

La misma pena del párrafo anterior, se impondrá a quien reproduzca, almacene, distribuya, venda, compre, arriende, exponga, publicite, envíe archivos, importe o exporte el material a que se refieren los párrafos anteriores.

²⁰⁷ *Id.*

²⁰⁸ Artículo 2° (sujetos de protección).- Se considera niño o niña a todo ser humano desde su concepción hasta cumplir los doce años y adolescentes desde los doce a los dieciocho años de edad cumplidos.

En los casos expresamente señalados por Ley, sus disposiciones se aplicarán excepcionalmente a personas entre los dieciocho y veintiún años de edad. Conc. (Art. 1 C.D.N.)

²⁰⁹ Artículo 4° (presunción de minoridad).- En caso de duda sobre la edad del sujeto de este Código, se presumirá su minoridad, en tanto no se pruebe lo contrario mediante documento público o por otros medios, previa orden judicial. Conc. (Art. 218° C.N.N.A.)

4 – Criminalizes accessing or downloading child pornography images

Viewing (accessing or downloading) child pornography material is *not* a crime, but conduct such as displaying or transmitting (uploading) are crimes.

5 – Criminalizes possession of child pornography

The possession of child pornography material is not a crime, even though Article 323 Bis punishes the “storage” of child abuse images. In order to align the norms with the CRC, this article would be more precise if it punished mere possession, because storage implies that only the possession of a large quantity of pornographic material is a crime.²¹⁰ After analyzing Chile’s report, the Committee on the Rights of the Child determined that “storage” did not prohibit “possession,” but only the storage of child abuse images, and is therefore insufficient law for the country to be in compliance with the CRC.²¹¹

6 – Criminalizes virtual images or sexually exploitative representations of children

The legislation does not criminalize the production or distribution of virtual images or sexually exploitative representations of children. Article 323 Bis does not leave any space for such a conclusion, because it specifically refers to “the use of children and adolescents” without mentioning representations of children and adolescents.

7 – Addresses the criminal liability of children involved in pornography

The criminal liability of children involved in pornography is not addressed under the law.

8 – Establishes criminal liability of legal persons for child pornography offenses

The liability of legal persons for the production or commercialization of child pornography is not addressed under the law.

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

This is partially met. The Penal Code states, in Article 1, that a Bolivian can be punished in Bolivia for a crime he/she has committed abroad, if he/she was not punished in the place it was committed, and if he/she is in the Bolivian territory. It does not say anything about a foreigner who has habitual residence in its territory.²¹²

²¹⁰ We are aligning our understanding to the one espoused by the Committee on the Rights of the child that, after analyzing Chile’s report, decided that that country was not prohibiting possession as expected, but only the storage of child abuse images. Comm. On the Rights of the Child, Consideration of Reports Submitted by State Parties Under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 47th Session (Feb. 1, 2008), available at <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-OPSC-CHL-CO-1.pdf>.

²¹¹ *Id.*

²¹² Artículo 1° (en cuanto al espacio)

1. (...)

2. (...)

3. A los delitos cometidos en el extranjero por un boliviano, siempre que éste se encuentre en territorio nacional y no haya sido sancionado en el lugar en que delinquiró.

4. (...)

5. (...)

6. (...)

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

Bolivia does not recognize its extraterritorial jurisdiction when the victim is a national of the State. Article 1, item 7 of the Penal Code prescribes that Bolivia can apply its legislation to punish a crime committed abroad if it has ratified a relevant Convention. It would be possible to apply this standard when a ratified Convention is very clear about this obligation or power. But the OPSC, in Article 4, determines that each State Party *has to take measures* to establish its jurisdiction over the offenses referred to in Article 3, 1 when the alleged offender is a national of that State or a person who has his habitual residence in its territory, or when the victim is a national of that State.

The combination of these laws does not allow the punishment of crimes committed against Bolivian children abroad as they are insufficient to establish extraterritorial jurisdiction in Bolivian Courts.

11 – Establishes forfeiture of assets used to commit or facilitate offenses; and

12 – Establishes forfeiture of proceeds derived from such offenses

Article 323 Bis of the Penal Code requires the forfeiture of assets used to commit or facilitate offenses. It also requires the forfeiture of the proceeds derived from such offenses as an accessory penalty to be applied to whoever commits the crime of child pornography.²¹³

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 106 and Article 159 of the Child and Adolescent Code establish that every person in general, and especially principals and teachers of educational institutions, are required to report to authorities any sign or indication of abuse, violence, or exploitation.^{214,215} Article 110 and 119 create a general duty to report maltreatment.^{216,217} Article 202 establishes the duty to report to Prosecutors or to the

7. A los delitos que por tratado o convención de la República se haya obligado a reprimir, aún cuando no fueren cometidos en su territorio.

²¹³ Artículo 323 Bis. (Pornografía de Niñas, Niños o Adolescentes y de Personas Jurídicamente Incapaces).

(...)

A quien fije, imprima, video grabe, fotografíe, filme o describa actos de exhibicionismo corporal o lascivos o sexuales, reales o simulados, en que participen una o varias Niñas, Niños o Adolescentes y de Personas Jurídicamente Incapaces, se le impondrá la pena de tres a seis años de reclusión, así como el decomiso de los objetos, instrumentos y productos del delito.

La misma pena del párrafo anterior, se impondrá a quien reproduzca, almacene, distribuya, venda, compre, arriende, esponga, publicite, envíe archivos, importe o exporte el material a que se refieren los párrafos anteriores.

²¹⁴ Artículo 106°. (Dignidad) Es deber de todos velar por la dignidad del niño, niña o adolescente, ampararlos y ponerlos a salvo de cualquier tratamiento inhumano, violento, deshumanizante, vejatorio o represivo, así como denunciar ante la autoridad competente los casos de sospecha o confirmación de maltrato.

²¹⁵ Artículo 159° (obligación de comunicar). Toda persona en general, y los directores y maestros de establecimientos educativos en especial, que detecte cualquier señal o indicio de maltrato, violencia, explotación, abuso, tenencia o consumo de bebidas alcohólicas o drogas prohibidas, está obligada a comunicar inmediatamente estas situaciones a los padres o responsables y a la Defensoría de la Niñez y Adolescencia de su jurisdicción. Conc. (Art. 33, 34 C.D.N. - Art. 159° C.N.N.A.)

²¹⁶ Artículo 110° (obligación de denunciar). Los casos de malos tratos serán obligatoriamente denunciados ante las Defensorías de la Niñez y Adolescencia, Fiscal de Materia u otra autoridad competente de la niñez y la familia, quienes deberán tomar las medidas pertinentes, debiendo presentar la denuncia en el término de veinticuatro horas ante el Juez de la Niñez y Adolescencia.

Están obligados a denunciar:

1. Los familiares, convivientes, cónyuges o parientes;
2. Toda persona que, en el desempeño de sus actividades, funciones o en su vida cotidiana, tuviera conocimiento o sospecha de la existencia de maltrato; y, 28
3. Todo profesional o funcionario que tuviera conocimiento o sospecha de la existencia de maltrato, no pudiendo alegar secreto

Ombudsman of their jurisdiction any violation, harm, threat, or denial of the rights of a child or an adolescent.²¹⁸

Decree 1302, Article 2, reinforces the duty of professionals that work at schools.²¹⁹

14 – Requires Internet Service Providers to report child pornography

The law does not require Internet Service Providers to report suspected child pornography located on their networks to law enforcement.

15 – Has a support telephone or online hotlines to enable the public to report children abuse

There is no hotline available in Bolivia to report sexual exploitation of children.

16 – Creates data retention and preservation policies or provisions

Data retention and preservation policies and provisions are not available.

Article 25 of the Bolivia Constitution regulates the right to the inviolability of communications. It prescribes that everyone has the right to secrecy of their private communications, sent by any means, except when there is a judicial order.²²⁰ It recognizes the inviolability of correspondence, private documents and private manifestations exchanged by any means, establishing that they can only be seized by written order of the competent authority, properly motivated, to help a criminal investigation. It states that public authorities cannot intercept private conversations or communications through a centralized place or agency.

profesional ni ampararse en órdenes superiores o dependencia funcionaria de cualquier naturaleza.

Los informantes y demandantes a que se refiere este artículo, están exentos de responsabilidad penal y civil con respecto a la información que proporcionen, salvo mala fe.

²¹⁷ Artículo 119°. (Obligación de los responsables de educación) Los responsables de establecimientos de educación comunicarán a los padres de familia o responsables, a la respectiva Junta Escolar o a la Defensoría de la Niñez y Adolescencia, los casos de:

Reiteradas inasistencias injustificadas y deserción escolar, agotando las instancias pedagógicas - administrativas;

Elevados niveles de reprobación;

Maltrato o violencia que se produzca dentro o fuera del establecimiento y que afecten a los alumnos.

²¹⁸ Artículo 202° (obligación de denunciar). Toda persona que tenga conocimiento del menoscabo, violación, amenaza o negación de los derechos del niño, niña o adolescente, deberá denunciar estos hechos ante la Defensoría de su respectiva jurisdicción o ante el Ministerio Público. Conc. (Art. 110°, 111° C.N.N.A.)

²¹⁹ Decreto 1302, agosto 2012, Artículo 2°. (Denuncia y seguimiento de la acción penal) Las y los Directores Departamentales de Educación y el Ministerio de Educación, tienen la obligación de denunciar y coadyuvar en la acción penal correspondiente hasta su conclusión, ante el Ministerio Público de su Jurisdicción o autoridad competente, en contra de directores, docentes o administrativos del Sistema Educativo Plurinacional, que hubiesen sido sindicados de la comisión de delitos que atenten contra la vida, la integridad física, psicológica y/o sexual de las niñas, niños y adolescentes estudiantes.

²²⁰ Artículo 25.

I. Toda persona tiene derecho a la inviolabilidad de su domicilio y al secreto de las comunicaciones privadas en todas sus formas, salvo autorización judicial.

II. Son inviolables la correspondencia, los papeles privados y las manifestaciones privadas contenidas en cualquier soporte, éstos no podrán ser incautados salvo en los casos determinados por la ley para la investigación penal, en virtud de orden escrita y motivada de autoridad judicial competente.

III. Ni la autoridad pública, ni persona u organismo alguno podrán interceptar conversaciones o comunicaciones privadas mediante instalación que las controle o centralice.

IV. La información y prueba obtenidas con violación de correspondencia y comunicaciones en cualquiera de sus formas no producirán efecto legal.

Article 190 of the Criminal Procedure Code allows the seizure of correspondence, documents and private papers, whenever necessary for the ascertaining of the truth, but it must be ordered by a Judge or a Court, in a motivated decision.²²¹

The Constitution and the Criminal Procedure Code do not specifically mention communications sent by electronic means, Internet, or any related term, but it is likely that the preservation provisions can also be applied to this kind of transmission because it includes the terms “transmitted by any means.”

Data retention is not addressed under the legislation.

Article 56 of Law 164 (Telecommunications Law) states that under the provisions of the Constitution, public network operators and providers of telecommunications services and information and communication technologies should ensure the inviolability and secrecy of communications, as well as the protection of personal data and privacy of users.²²²

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

There is no legislation regarding this requirement, but it is important to note that the ownership and use of computers is very low in Bolivia, and is one of the lowest in Latin America. According to the International Telecommunication Union, only 34.19% of the population uses the Internet, and only 9.4% access the Internet at home.²²³ Very few people own computers and access is mainly through cybercafés that do not have any kind of control or regulation about identification of users.

The year 1995 also saw the introduction of the Internet in Bolivia. Since that time, the number of Internet users has grown significantly, particularly in the country’s three major cities (Cochabamba, La Paz and Santa Cruz). Between 2002 and 2008 the number of Internet users grew by 55%, and there are now 111,860 Bolivians who subscribe to Internet service through various types of connections. Nevertheless, even though Bolivia has a total population of over nine million, the number of people with Internet access at home is rather small. Most of the population accesses the Internet either in the workplace or through public facilities such as cybercafés or telecentres. In rural areas and small and medium-sized cities, Internet access is still only available through a few public facilities with limited service offerings. (Arratia, Orlando).²²⁴

18 – Has a national plan to combat violence against children

There is a national plan to combat violence against children. It is the National Plan for Children – Plan Nacional de Niños, Niñas y Adolescentes para Vivir Bien – 2009/2013.

²²¹ Artículo 190º. (Incautación de correspondencia, documentos y papeles).

Siempre que se considere útil para la averiguación de la verdad, el juez o tribunal ordenará, por resolución fundamentada bajo pena de nulidad, la incautación de correspondencia, documentos y papeles privados o públicos.

Regirán las limitaciones del secuestro de documentos u objetos.

²²² Artículo 56. (INVOLABILIDAD Y SECRETO DE LAS COMUNICACIONES). En el marco de lo establecido en la Constitución Política del Estado, los operadores de redes públicas y proveedores de servicios de telecomunicaciones y tecnologías de información y comunicación, deben garantizar la inviolabilidad y secreto de la comunicaciones, al igual que la protección de los datos personales y la intimidad de usuarios o usuarios, salvo los contemplados en guías telefónicas, facturas y otros establecidos por norma.

²²³ Statistics, ITU, <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (last visited Oct. 13, 2014).

²²⁴ Orlando Arratia, *Bolivia: Universal Broadband Access*, ASSOC. FOR PROGRESSIVE COMMUNICATION, available at http://www.apc.org/en/system/files/CILACInvestigacionBolivia_EN_20090707.pdf.

19 – International treaties ratified

- Ratified the UN Convention on the Rights of the Child on June 26, 1990
- Ratified the UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on June 3, 2003
- Ratified the ILO Minimum Age Convention on June 11, 1997
 - Min. Age: 14 years old
- Ratified the ILO Worst Forms of Child Labour Convention on June 6, 2003

20 – Age of criminal liability

Article 223 of the Penal Code establishes that children under 12 years old do not have criminal liability, so they cannot be punished when they commit crimes.²²⁵ According to the Child and Adolescent Code, they can receive some protective measures, but cannot be deprived of their liberty.²²⁶

²²⁵ Artículo 223° (exención de responsabilidad). Las niñas y niños que no hubieren cumplido los doce años de edad, están exentos de responsabilidad social quedando a salvo la responsabilidad civil, la cual será demandada ante los tribunales competentes.

Sin embargo, al niño o niña que infrinja la Ley Penal, previa investigación, debe aplicarse las medidas de protección previstas en el presente Código. Por ningún motivo se dispondrá medida privativa de libertad.

²²⁶ Artículo 208. Las Defensorías de la Niñez y Adolescencia podrán aplicar las siguientes medidas:

1. Orientación, apoyo y acompañamiento temporales;
2. Derivación a programas de ayuda a la familia, al niño, niña o adolescente;
3. Inscripción y asistencia obligatoria del niño, niña o adolescente en establecimientos oficiales de enseñanza;
4. Derivación a la atención médica, psicológica o psiquiátrica en régimen hospitalario o ambulatorio;
5. Derivación a programas de ayuda, orientación o tratamiento para casos de dependencia al alcohol y/u otras drogas

La responsabilidad de la atención y los gastos serán imputados a los padres, tutores o guardadores, si no existieran o no tuvieran los recursos necesarios se responsabilizará de la atención a las unidades de gestión social de las prefecturas.

Artículo 210° (aplicación de medida por el juez de la Niñez Y Adolescencia). Además de las establecidas en los numerales 1 al 5 del Artículo 208°, el Juez de la Niñez y adolescencia de acuerdo con el caso y en los términos previstos por esta Ley puede aplicar las siguientes medidas:

Ordenar por tiempo determinado, la salida del agresor del domicilio familiar, pudiendo derivarlo a un centro de atención psicológica

Prohibir el tránsito del agresor por los lugares que transita la víctima;

Entrega del niño, niña o adolescente a los padres o responsables, previa suscripción de compromiso de asumir su responsabilidad y disponer la orientación técnica y seguimiento respectivo;

Colocación en hogar sustituto;

En caso en que el agresor fuera funcionario de una institución pública o privada, disponer que se envíen los antecedentes a la respectiva institución, para que se tomen las medidas administrativas correspondientes;

En caso de maltrato, las medidas dispuestas por la Ley 1674, en todo lo que no se oponga al presente Código. Si el maltrato fuera un acto reincidente o revistiera gravedad que ponga en riesgo la integridad física y mental del niño, niña o adolescente, se remitirá los obrados a la jurisdicción penal;

Acogimiento en centros de atención.

El acogimiento es una medida de carácter provisional y excepcional, viable únicamente en casos extremos y como transición a la colocación en un hogar sustituto u otra medida adecuada. Esta medida no implica privación de libertad.

Criminal liability begins at age 16. When adolescents between 12 and 16 years of age commit acts comparable to crimes, according to Article 221 of the Penal Code, they are subject to social-educational sanctions (Juvenile Justice System) that are intended to have a pedagogic nature.²²⁷

Adolescents older than 16 are subject to the punishments of the Penal Code²²⁸, but they are under the protection of the norms of the Child and Adolescent Code.²²⁹

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

Yes, the Penal Code specifically refers to crimes committed through computers (definition of child pornography in Article 323 Bis, that establishes that it can be committed by transmission of data files in public or private network telecommunications, computer systems or electronic).

22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism

These issues are not addressed in the legislation.

23 – Has specific legislation on online grooming considering it a standalone offense

There is no legislation specific to online grooming.

24 – Has a clear definition of online grooming

Does not apply.

25 – Age of potential victims of online grooming

Does not apply.

26 – Criminalizes grooming when the offender has specific intent to have online or offline sexual contact with a child; or grooming regardless of intent

Does not apply.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense or considers it an aspect of grooming

The act of showing pornography to a child is not criminalized as a standalone offense.

28 – Has specific legislation on cyberbullying

There is currently no legislation specific to cyberbullying.

29 – Has specific legislation concerning sexting

There is currently no legislation specific to sexting.

²²⁷ Artículo 221° (infracción y competencia). Se considera infracción a la conducta tipificada como delito en la Ley penal, en la que incurre como autor o participe un adolescente y de la cual emerge una responsabilidad social. El Juez de la Niñez y Adolescencia es el único competente para conocer estos casos en los términos previstos por el presente Código.

En caso de que el adolescente cumpla dieciocho años durante la ejecución de una sanción socio-educativa, continuará bajo la competencia del Juez de la Niñez y Adolescencia.

²²⁸ Artículo 5° (en cuanto a las personas). La ley penal no reconoce ningún fuero ni privilegio personal, pero sus disposiciones se aplicarán a las personas que en el momento del hecho fueren mayores de diez y seis años.

²²⁹ Artículo 225 (protección especial).- Los mayores de dieciséis años y menores de veintiún años, serán sometidos a la legislación ordinaria, pero contarán con la protección a que se refieren las normas del presente título.

30 – Existence of different levels of penalties for offenses related to the production, distribution or possession of child pornography

The Bolivian Penal Code establishes the same penalties for the production, distribution, and dissemination of child pornography. It does not criminalize possession.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

Bolivia’s legislation does not establish aggravated penalties for situations that involve personal relationships amongst the offender and the victim (member of the child’s family, person cohabiting with the child or a person who has abused a recognized position of trust or authority).

We could not find, either, legal provisions related to sexual exploitation of children that establish the increase of the penalty when the offense was committed by several persons acting together, or when it was committed within the framework of a criminal organization.

3. BRAZIL – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Articles 241-E, 240, 241, and 241-A of ECA
2 – Has a clear definition of child pornography	Articles 241-E, 240, 241, and 241-A of ECA
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, Article 241-B of ECA
6 – Criminalizes virtual images and sexually exploitative representations of children	Yes, Article 241-C of ECA
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No criminal liability, but sanctions can be imposed
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Partly, only for nationals. Article 7, II, b of the Penal Code
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, Paragraph e of Article 7 of the Penal Code
11 – Establishes forfeiture of assets used to commit or facilitate offenses	No, only when their possession is illicit, (Article 91, II, a of the Penal Code)
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Article 91 of the Penal Code
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Articles 56 and 245 of ECA
14 – Requires Internet Service Providers to report child pornography	Not nationally, but some States do require
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes, “Disque Denúncia Nacional de Abuso e Exploração Sexual contra Crianças e Adolescentes”
16 – Creates data retention or data preservation policies or provisions	Yes. Articles 13 and 15 of Law 12.965/14 – Brazilian Civil Rights Framework for the Internet
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	Not nationally, but some States and municipalities require it
18 – Has a national plan to combat violence against children	Yes, “Plano Nacional de Enfrentamento da Violência Sexual contra Crianças e Adolescentes”
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years. Adolescents between the ages of 12 and 18 are subjected to a juvenile justice system
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes, in the crimes of child pornography and online grooming
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Articles 231 and 231-A – International trafficking with the intent of sexual exploitation
23 – Has specific legislation on online grooming, considering it a standalone offense	Yes, Article 241-D of the ECA
24 – Has a clear definition of online grooming	Yes, Article 241-D of the ECA
25 – Considers everyone under 18 as a potential victim of online grooming	No, only children under 12 can be victims of the crime of online grooming
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Article 241-D – specific intent of having online or off-line sexual contact
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	Yes, Article 241-D; type of grooming
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	Yes, 3 different levels, as required
31 – Law establishes aggravating circumstances for child abuse offenses	Yes

BRAZIL – COUNTRY REPORT

Brazil is the fifth largest country in the world, and the largest country both in South America and in the Southern Hemisphere. In the last decade, it has experienced enormous economic development. It is part of BRICS, an association of emerging national economies that includes Brazil, Russia, India, China and South Africa, and is distinguished by their large and fast-growing economies, and significant influence in global affairs.

Though Brazil is very rich in natural resources, and is an agricultural and industrial power, it has millions of persons still living in poverty. Slums around the big cities are a clear indication of this reality, and the population in rural areas is a symbol of social exclusion and suffering from lack of access to education, health facilities, water supply, and sewage systems.

A research conducted in 2010 by the IBGE (Brazil's Government Statistics Bureau) revealed that 16.27 million people (8.5% of the population) still live on less than 70 reais (monthly income *per capita*) – the equivalent of around US\$1.30 per person per day – the limit set by President Rousseff as the extreme poverty line.²³⁰ One out of 10 Brazilians lives in hunger. Amongst those living in extreme poverty, 4.8 million survive on no income at all, and 11.4 million survive on between US\$0.5 and US\$35 per month. 15.6% of the population of Brazil lives in rural areas, and of those, 46.7% live in extreme poverty.²³¹

In recent years, both the federal and state governments have been implementing poverty reduction policies that are showing good results. The elimination of hunger is one of the highest priorities, as well as the improvement of education, and creation of jobs.

The socialist policies of the current and previous governments have been credited with lifting 28 million people out of extreme poverty and allowing 36 million to enter the middle class, in a country of 190.7 million. More than 48 million Brazilians (one quarter of the population) are registered for social programs that will cost 12 billion American dollars in 2013.²³²

One of the biggest challenges Brazil faces is to maintain sustainable economic growth while reducing poverty. It must overcome social injustice and inequality.

Since Brazil has a large and relatively young population, it is a very important country to consider when discussing the impacts of ICTs on children.

According to the Center of Studies on Information and Communication Technologies (CETIC), the number of people aged 10 and older who logged onto the Internet between 2006 and 2009 increased by more than 75% to 56 million users; access to technology among children aged 10 to 15 increased from

²³⁰ *Censo 2010*, IBGE, <http://censo2010.ibge.gov.br/en/resultados> (last visited Oct. 13, 2014).

²³¹ Carolina Pimentel, *Maioria dos miseráveis brasileiros é jovem, negra e nordestina*, May 3, 2011, available at <http://memoria.etc.com.br/agenciabrasil/noticia/2011-05-03/maioria-dos-miseraveis-brasileiros-e-jovem-negra-e-nordestina> (last visited Oct. 30, 2015).

²³² *Rousseff says end of poverty is close; 48 million Brazilians registered in social support programs*, MercoPress, Feb. 21, 2013, available at <http://en.mercopress.com/2013/02/21/rousseff-says-end-of-poverty-is-close-48-million-brazilians-registered-in-social-support-programs> (last visited Oct. 30, 2015).

53% to 63% between 2008 and 2009; access from Internet cafes (known in Brazil as Lan houses), both free and paid, among Internet users of the same age group increased from 33% in 2006 to 61% in 2009.²³³

Social networking has been found to be the favorite online activity for 80% of children and adolescents, followed by instant messaging.²³⁴

The total number of mobile phone subscriptions in Latin America reached 580 million, according to information from March 2011. The largest and most important mobile market in South America is Brazil, with 206 million subscriptions and reached 104% penetration by the end of December 2010.²³⁵

According to a national survey conducted by SaferNet Brazil, recent evidence indicates that 46% of Brazilian children and adolescents consider it normal to regularly publish photos online, 30% believe it is normal to publish their full family name, and 34% think it is common to share private information about their daily online and offline habits.²³⁶

Brazil is a very centralized, federal republic. The legislative power is bicameral (Senate and House of Representatives), and the Congress has the authority to legislate on Penal and Penal Procedure matters, amongst others.

The country is divided into 26 States and the Federal District of Brasília. The Supreme Court is the highest Court, and it mainly analyzes constitutional matters. The Superior Court of Justice is responsible for the harmonization of federal laws that are applied by all of the States.

There is a Federal Justice for lawsuits involving disputes in which one of the parties is the Union (Brazil), or for cases between a foreign State or International Organization and a person residing in Brazil. The Federal Justice, Labor Justice, and Military Justice are considered to be special justices, in opposition to the State Justice, responsible for sentencing cases that are not tried by the other justices.

Judges in Brazil are chosen exclusively by a highly competitive public contest, and have constitutional guarantees such as life tenure, inability to be removed, and irreducibility of payment, prerogatives inherent to the job that provide all conditions required for the fulfillment of judicial tasks.

There are public defenders responsible for assisting those who cannot pay a lawyer, in both civil and criminal matters, and if someone is financially disadvantaged, he/she does not have to expend personal funds to bring a lawsuit. This results in overloading the Judiciary Power, causing one of the highest ratios of cases to judge in the world.

²³³ CETIC.BR, SURVEY ON THE USE OF INFORMATION AND COMMUNICATION TECHNOLOGIES IN BRAZIL 2009, (2009) at 54, 133, 239, available at <http://www.cetic.br/media/docs/publicacoes/2/tic-2009.pdf>. Data are based on surveys of almost 20.000 interviewees.

²³⁴ Educadores, SAFERNET BRASIL, <http://new.netica.org.br/educadores/pesquisas/safernet/nacional> (last visited Oct. 30, 2015).

²³⁵ Press Release, Tinfora Telecoms and Media, Latin America reaches 100% mobile penetration says Informa Telecoms & Media, <http://informa.com/media/press-releases--news/latest-news/latin-america-reaches-100-mobile-penetration-says-telecoms--media/> (last visited Oct. 30, 2015).

²³⁶ Data provided by SaferNet Brasil based on the national survey with children from 2008, SAFERNET BRASIL, <http://new.netica.org.br/educadores/pesquisas/safernet/nacional> (last visited Oct. 30, 2015).

According to the National Council of Justice (CNJ), in 2012 there were 92.2 million active lawsuits; Judges sentence an average of 1,450 cases per year.²³⁷

Though Brazil is a civil law country, it has amended its Procedure Codes to enforce judgments with the same result for repetitive causes, in order to reduce the number of ongoing legal cases.

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

Brazil's long and detailed Constitution contains many programmatic norms that require the intervention of the branches of Government, especially the Legislative Power, to become reality.

According to Article 6 of the Brazilian Constitution, the protection of childhood is a social right, as well as education and health.²³⁸ The Union, the States, and the Federal District have the power to concurrently legislate on those subjects (Article 24).²³⁹ The Union usually legislates on general rules, and the States have supplementary competence to provide for their peculiarities.

Article 227 of the Federal Constitution establishes that it is the duty of the family, the society, and the State to ensure children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom, and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.²⁴⁰ Paragraph 4 of this Article determines that law shall severely punish abuse, violence, and sexual exploitation of children and adolescents.

²³⁷ Tatiane Freire, *Número de processos em trâmite no Judiciário cresce 10% em quatro anos*, Oct. 15, 2013, available at <http://www.cnj.jus.br/noticias/cnj/60895-numero-de-processos-em-tramite-no-judiciario-cresce-10-em-quatro-anos> (last visited Oct. 30, 2015).

²³⁸ Artigo 6. São direitos sociais a educação, a saúde, a alimentação, o trabalho, a moradia, o lazer, a segurança, a previdência social, a proteção à maternidade e à infância, a assistência aos desamparados, na forma desta Constituição.

²³⁹ Artigo 24. Compete à União, aos Estados e ao Distrito Federal legislar concorrentemente sobre:

IX - educação, cultura, ensino e desporto;

(...)

XII - previdência social, proteção e defesa da saúde;

(...)

XV - proteção à infância e à juventude;

(...)

§ 1. No âmbito da legislação concorrente, a competência da União limitar-se-á a estabelecer normas gerais.

§ 2. A competência da União para legislar sobre normas gerais não exclui a competência suplementar dos Estados.

§ 3. Inexistindo lei federal sobre normas gerais, os Estados exercerão a competência legislativa plena, para atender a suas peculiaridades.

§ 4. A superveniência de lei federal sobre normas gerais suspende a eficácia da lei estadual, no que lhe for contrário.

²⁴⁰ Artigo 227. É dever da família, da sociedade e do Estado assegurar à criança e ao adolescente, com absoluta prioridade, o direito à vida, à saúde, à alimentação, à educação, ao lazer, à profissionalização, à cultura, à dignidade, ao respeito, à liberdade e à convivência familiar e comunitária, além de colocá-los a salvo de toda forma de negligência, discriminação, exploração, violência, crueldade e opressão.

(...)

§ 4o A lei punirá severamente o abuso, a violência e a exploração sexual da criança e do adolescente

Criminal liability starts at 18 years old, and minors under 18 years of age are subject to the rules of special legislation of the Juvenile Justice System (Article 228 of the Constitution).²⁴¹

Paragraph 3 of Article 5 of the Constitution provides that international treaties and conventions related to human rights are equivalent to constitutional amendments, after being approved by three fifths of the members of both the Senate and House of Representatives.²⁴²

The Statute of the Child and Adolescent (Estatuto da Criança e do Adolescente – ECA) was enacted in 1990, guaranteeing integral protection to them. Article 2 of the ECA states that a person is considered a child if under 12 years of age, and an adolescent is a person between the ages of 12 and 18.²⁴³ It is a very detailed statute and is in alignment with the CRC.

Article 5 of the ECA establishes that no child or adolescent will suffer any kind of negligence, discrimination, exploitation, violence, cruelty or oppression, and that every violation of their fundamental rights shall be punished according to the law.²⁴⁴

In accordance with the Brazilian Constitution, the ECA establishes that the family, the community, society, and the government have the duty to guarantee, with absolute priority, the enforcement of the right to life, health, food, sports, leisure, professionalization, culture, dignity, respect, freedom, and close family and community association. Law 11.829 made a number of important amendments to the ECA, including criminalizing the simple possession of child abuse material, criminalizing grooming and enhancing several penalties.

The National Council on the Rights of Children (CONANDA) was created in 1991 by Federal Law 8.242. Through a shared management, the Brazilian Government and civil society establish the guidelines for the national policy of protection of the rights of children. The CONANDA also inspects the work of the Government regarding its attention to the juvenile population.

Extracts of legislation related to the template:

1, 2, and 3 – Existence of legislation specific to child pornography; clear definition of child pornography; and age of the victim

Article 241-E of the ECA defines child pornography as any explicit sexual scene or pornographic scene that involves a child or an adolescent in explicit or simulated sexual activity, or the exhibition of her/his genitals for sexual purposes.²⁴⁵

²⁴¹ Artigo 228. São penalmente inimputáveis os menores de dezoito anos, sujeitos às normas da legislação especial.

²⁴² Artigo 5. (...)

§ 3o Os tratados e convenções internacionais sobre direitos humanos que forem aprovados, em cada Casa do Congresso Nacional, em dois turnos, por três quintos dos votos dos respectivos membros, serão equivalentes às emendas constitucionais.

²⁴³ Artigo 2. Considera-se criança, para os efeitos desta Lei, a pessoa até doze anos de idade incompletos, e adolescente aquela entre doze e dezoito anos de idade.

²⁴⁴ Artigo 5. Nenhuma criança ou adolescente será objeto de qualquer forma de negligência, discriminação, exploração, violência, crueldade e opressão, punido na forma da lei qualquer atentado, por ação ou omissão, aos seus direitos fundamentais.

Article 240 of the ECA punishes crimes related to the production of child pornography with four to eight years of imprisonment:

- to produce, reproduce, direct, photograph, film or register, by any means, explicit sexual activity or pornographic scene involving a child or an adolescent;
- to facilitate, recruit, coerce or mediate the participation of a child or an adolescent in the scenes mentioned;
- to contrasene with a minor in the scenes mentioned above.²⁴⁶

The penalty is increased by one third if the crime is committed by a public officer (or someone pretending to be one), or by someone who takes advantage of a hospitality, cohabitation or kinship relation.

Article 241 of the ECA is related to the commercialization of the child abuse images, and punishes with the same penalties (four to eight years) those persons who sell or expose to sell photographs, videos or other records containing that type of material.²⁴⁷

Article 241A punishes the conduct of those who offer, exchange, make available, transmit, distribute, publish, or spread, by any means, photos, videos, or other records containing explicit sex scenes or pornography involving children or adolescents with three to six years of imprisonment (and a fine).²⁴⁸

²⁴⁵ Artigo 241-E. Para efeito dos crimes previstos nesta Lei, a expressão “cena de sexo explícito ou pornográfica” compreende qualquer situação que envolva criança ou adolescente em atividades sexuais explícitas, reais ou simuladas, ou exibição dos órgãos genitais de uma criança ou adolescente para fins primordialmente sexuais.

²⁴⁶ Artigo 240. Produzir, reproduzir, dirigir, fotografar, filmar ou registrar, por qualquer meio, cena de sexo explícito ou pornográfica, envolvendo criança ou adolescente:

Pena – reclusão, de 4 (quatro) a 8 (oito) anos, e multa.

§ 1º Incorre nas mesmas penas quem agencia, facilita, recruta, coage, ou de qualquer modo intermedeia a participação de criança ou adolescente nas cenas referidas no caput deste artigo, ou ainda quem com esses contracena.

§ 2º Aumenta-se a pena de 1/3 (um terço) se o agente comete o crime:

I – no exercício de cargo ou função pública ou a pretexto de exercê-la;

II – prevalecendo-se de relações domésticas, de coabitação ou de hospitalidade;

III – prevalecendo-se de relações de parentesco consanguíneo ou afim até o terceiro grau, ou por adoção, de tutor, curador, preceptor, empregador da vítima ou de quem, a qualquer outro título, tenha autoridade sobre ela, ou com seu consentimento.

²⁴⁷ Artigo 241. Vender ou expor à venda fotografia, vídeo ou outro registro que contenha cena de sexo explícito ou pornográfica envolvendo criança ou adolescente: [\[Redação dada pela Lei nº 11.829, de 2008\]](#)

Pena – reclusão, de 4 (quatro) a 8 (oito) anos, e multa.

²⁴⁸ Artigo 241-A. Oferecer, trocar, disponibilizar, transmitir, distribuir, publicar ou divulgar por qualquer meio, inclusive por meio de sistema de informática ou telemático, fotografia, vídeo ou outro registro que contenha cena de sexo explícito ou pornográfica envolvendo criança ou adolescente:

Pena – reclusão, de 3 (três) a 6 (seis) anos, e multa.

§ 1º Nas mesmas penas incorre quem:

I – assegura os meios ou serviços para o armazenamento das fotografias, cenas ou imagens de que trata o caput deste artigo;

II – assegura, por qualquer meio, o acesso por rede de computadores às fotografias, cenas ou imagens de que trata o caput deste artigo.

§ 2º As condutas tipificadas nos incisos I e II do § 1º deste artigo são puníveis quando o responsável legal pela prestação do serviço, oficialmente notificado, deixa de desabilitar o acesso ao conteúdo ilícito de que trata o caput deste artigo.

The same penalties apply to those who ensure the facilities or services for storing pictures, scenes or images of child abuse or secure, by any means, the access network computers to those kinds of photographs, scenes or images. In this case, the legal representative of the ISP has to be officially notified and fail to disable access to the illegal content indicated, in order to be considered liable for the crime.

The mere possession of child pornography is also punished by Article 241-B of the ECA with one to four years of imprisonment, and a fine.²⁴⁹ This penalty is diminished by one third to two thirds if the material found is small in quantity. The commission of the crime of distribution of child pornography (commercial or non-commercial distribution) usually absorbs the crime of possession.²⁵⁰

4 – Criminalizes accessing or downloading child pornography images

No, it is not criminalized.

5 – Criminalizes possession of child pornography

It is illegal to possess child pornography, regardless of the intent, according to Article 241-B of the ECA.

6 – Criminalizes virtual images or sexually exploitative representations of children

The production and distribution of virtual images or sexually exploitative representations of children is a crime based on Article 241-C of the ECA, and is punishable by one to three years of imprisonment.²⁵¹ It criminalizes the conduct of simulating the participation of a child or an adolescent in an explicit sex scene or pornography through the adulteration, installation or modification of photography, video or any other form of visual representation, as well as the selling, offering for sale, ownership or possession of such material.

7 – Addresses the criminal liability of children involved in pornography

No, the criminal liability of children involved in pornography is not addressed.

²⁴⁹ Artigo 241-B. Adquirir, possuir ou armazenar, por qualquer meio, fotografia, vídeo ou outra forma de registro que contenha cena de sexo explícito ou pornográfica envolvendo criança ou adolescente:

Pena – reclusão, de 1 (um) a 4 (quatro) anos, e multa.

§ 1º A pena é diminuída de 1 (um) a 2/3 (dois terços) se de pequena quantidade o material a que se refere o caput deste artigo.

§ 2º Não há crime se a posse ou o armazenamento tem a finalidade de comunicar às autoridades competentes a ocorrência das condutas descritas nos arts. 240, 241, 241-A e 241-C desta Lei, quando a comunicação for feita por:

I – agente público no exercício de suas funções;

II – membro de entidade, legalmente constituída, que inclua, entre suas finalidades institucionais, o recebimento, o processamento e o encaminhamento de notícia dos crimes referidos neste parágrafo;

III – representante legal e funcionários responsáveis de provedor de acesso ou serviço prestado por meio de rede de computadores, até o recebimento do material relativo à notícia feita à autoridade policial, ao Ministério Público ou ao Poder Judiciário.

§ 3º As pessoas referidas no § 2º deste artigo deverão manter sob sigilo o material ilícito referido.

²⁵⁰ Apelação Criminal 44922, TRF da 3 Região, Primeira Turma, Juíza Convocada Raquel Perrini, e-DJF3 Judicial 1, 01/10/2012)

²⁵¹ Artigo 241-C. Simular a participação de criança ou adolescente em cena de sexo explícito ou pornográfica por meio de adulteração, montagem ou modificação de fotografia, vídeo ou qualquer outra forma de representação visual:

Pena – reclusão, de 1 (um) a 3 (três) anos, e multa. [\(Incluído pela Lei nº 11.829, de 2008\)](#)

Parágrafo único. Incorre nas mesmas penas quem vende, expõe à venda, disponibiliza, distribui, publica ou divulga por qualquer meio, adquire, possui ou armazena o material produzido na forma do caput deste artigo.

8 – Establishes criminal liability of legal persons for child pornography offenses

No. The Brazilian Federal Constitution establishes the criminal, civil, and administrative liability of legal persons only for environmental crimes (Article 225, paragraph 3), which are regulated by Law 9.605/98. The Constitution also criminalizes crimes against economic and financial order (Article 175, paragraph 5). However, there is no such liability when talking about child pornography.

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

Brazil's legal frame only allows extraterritorial jurisdiction (based on the active personality principle) when the offender is a national. Article 7, II, b of the Brazilian Penal Code establishes Brazilian extraterritorial jurisdiction for crimes committed abroad by Brazilians, providing certain conditions are fulfilled: the offender is in the country, the conduct is punishable in the country where it was committed, the crime is included among those for which Brazilian law authorizes extradition; the offender was not acquitted abroad, has not served the sentence, has not been pardoned abroad or, for other reasons, the punishment was not extinct.²⁵²

Article 7, II, a of the Brazilian Penal Code also establishes extraterritorial jurisdiction for crimes that Brazil has agreed to punish according to International Instruments (universal jurisdiction), but the same conditions must be met. Since Brazil has ratified the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, there is likely legal basis for the prosecution of foreigners that are in the Brazilian territory, and have committed this kind of crime abroad.

There is a generic provision in the Penal Code that establishes the jurisdiction of Brazilian Courts to adjudicate crimes that Brazil has agreed to punish by treaty or convention.²⁵³

²⁵² Extraterritorialidade

Artículo 7o - Ficam sujeitos à lei brasileira, embora cometidos no estrangeiro:

II - os crimes:

- a) que, por tratado ou convenção, o Brasil se obrigou a reprimir;
- b) praticados por brasileiro;
- c) praticados em aeronaves ou embarcações brasileiras, mercantes ou de propriedade privada, quando em território estrangeiro e aí não sejam julgados.

§ 1o - Nos casos do inciso I, o agente é punido segundo a lei brasileira, ainda que absolvido ou condenado no estrangeiro.

§ 2o - Nos casos do inciso II, a aplicação da lei brasileira depende do concurso das seguintes condições:

- a) entrar o agente no território nacional;
- b) ser o fato punível também no país em que foi praticado;
- c) estar o crime incluído entre aqueles pelos quais a lei brasileira autoriza a extradição;
- d) não ter sido o agente absolvido no estrangeiro ou não ter aí cumprido a pena;
- e) não ter sido o agente perdoado no estrangeiro ou, por outro motivo, não estar extinta a punibilidade, segundo a lei mais favorável.

§ 3o - A lei brasileira aplica-se também ao crime cometido por estrangeiro contra brasileiro fora do Brasil, se, reunidas as condições previstas no parágrafo anterior:

- a) não foi pedida ou foi negada a extradição;
- b) houve requisição do Ministro da Justiça.

²⁵³ Artículo 7º - Ficam sujeitos à lei brasileira, embora cometidos no estrangeiro:

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

Yes. Article 7, paragraph 3 of the Brazilian Penal Code establishes that Brazilian law is applicable when the victim is Brazilian, providing that the same conditions of the Active Personality Principle are fulfilled (the offender has to be in the country, the conduct has to be also punishable in the country where it was committed, the crime has to be included among those for which Brazilian law authorizes extradition; the offender was not acquitted abroad, has not served the sentence, has not been pardoned abroad or, for other reasons, the punishment was not extinct).

11 – Establishes forfeiture of assets used to commit or facilitate offenses

Partly. The forfeiture of assets used to commit or facilitate offenses is an automatic consequence of a criminal conviction, but only when its possession is also illicit, according to Article 91, II, a of the Penal Code. The crime of trafficking in narcotics has a different treatment and is regulated by specific legislation.

12 – Establishes forfeiture of proceeds derived from such offenses

Article 91 of the Brazilian Penal Code generally establishes the forfeiture of proceeds derived from any crime, including the production and distribution of child pornography.²⁵⁴

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 56 of the ECA establishes that principals of elementary and middle schools must report any kind of abuse of children and adolescents.²⁵⁵ Article 245 establishes a fine for doctors, teachers or any professional who works with the health and education, who do not report the suspicion or confirmation of abuse.²⁵⁶

(...)

II - os crimes:

a) que, por tratado ou convenção, o Brasil se obrigou a reprimir;

(...)

²⁵⁴ Artículo 91. São efeitos da condenação:

I - tornar certa a obrigação de indenizar o dano causado pelo crime;

II - a perda em favor da União, ressalvado o direito do lesado ou de terceiro de boa-fé:

a) dos instrumentos do crime, desde que consistam em coisas cujo fabrico, alienação, uso, porte ou detenção constitua fato ilícito;

b) do produto do crime ou de qualquer bem ou valor que constitua proveito auferido pelo agente com a prática do fato criminoso.

§ 1º Poderá ser decretada a perda de bens ou valores equivalentes ao produto ou proveito do crime quando estes não forem encontrados ou quando se localizarem no exterior

§ 2º Na hipótese do § 1o, as medidas assecuratórias previstas na legislação processual poderão abranger bens ou valores equivalentes do investigado ou acusado para posterior decretação de perda.

²⁵⁵ Artículo 56. Os dirigentes de estabelecimentos de ensino fundamental comunicarão ao Conselho Tutelar os casos de:

I - maus-tratos envolvendo seus alunos;

II - reiteração de faltas injustificadas e de evasão escolar, esgotados os recursos escolares;

III - elevados níveis de repetência

²⁵⁶ Artículo 245. Deixar o médico, professor ou responsável por estabelecimento de atenção à saúde e de ensino fundamental, pré-escola ou creche, de comunicar à autoridade competente os casos de que tenha conhecimento, envolvendo suspeita ou confirmação de maus-tratos contra criança ou adolescente:

Pena - multa de três a vinte salários de referência, aplicando-se o dobro em caso de reincidência.

14 – Requires Internet Service Providers to report child pornography

Brazil's legislation does not require mandatory reporting of suspected child pornography for ISPs on a national level. However, Article 241A of the ECA proscribes that when an ISP is officially notified to interrupt the access to child abuse images and does not do so, they can be fined and their legal representatives can receive a penalty of imprisonment.

The State of Rio de Janeiro has legislation concerning the obligation to report. State Law 3.644 of September 13, 2003, establishes that the ISPs located in Rio de Janeiro must provide the list of home pages that they host to the CMDCA (Conselho Municipal dos Direitos da Criança e do Adolescente), as well as the name of the responsible party for its drafting in order for that institution to identify home pages that are displaying child pornography. They must also make a report to the authorities when they identify suspicious material related to pedophilia.²⁵⁷

It is important to note that there are “terms of adjustment of conduct” regulating the obligations of ISPs in Brazil. The National Office for the Federal Prosecutors for the Public Interest (Ministério Público Federal) created a task force to combat cybercrimes, and has filed a number of civil actions against ISPs that did not comply with judicial requests.

Google, for instance, signed an “adjustment of conduct”²⁵⁸ concerning ORKUT, a major social networking site at that time,²⁵⁹ in a “civil action” (Ação Civil Pública 2006.61.00.023065-3), ensuring:

- the retention and accessibility in the servers, for the minimum period of 180 days, of access login, IP address, access logs, date, time and GMT reference of connections made by users in Brazil (in a standardized and clear format), besides the content specifically requested by the

²⁵⁷ Artigo 1.º Os provedores de acesso à internet estabelecidos no Município do Rio de Janeiro, fornecerão a cada três meses, relação completa das páginas home pages que hospedam ao Conselho Municipal dos Direitos da Criança e do Adolescente–CMDCA, bem como a dos respectivos responsáveis por sua elaboração.

Parágrafo único. A elaboração, remessa e análise da relação a que se refere o art 1.º desta Lei, têm por objetivos precípuos:

I - identificar as home pages que estejam veiculando materiais sobre pedofilia;

II – coibir a prática da pedofilia na internet;

III - facilitar e viabilizar a punição dos responsáveis por sua elaboração.

Artículo 2.º Os provedores de acesso à internet estabelecidos no Município do Rio de Janeiro, farão incluir em suas home page espaço destinado à denúncia de casos de pedofilia com a seguinte advertência:

“PEDOFILIA É CRIME, DENUNCIE

Artículo 3.º O provedor de acesso ao identificar, por ocasião da elaboração da listagem home pages sobre as quais pese a suspeita de veiculação de materiais sobre pedofilia, comunicará o fato a autoridade policial competente, com prejuízo ao disposto no art. 1º desta Lei.

Art. 4.º O descumprimento às determinações desta Lei, importará na aplicação de multa, na seguinte forma:

I – R\$5.320,50 (cinco mil, trezentos e vinte Reais e cinquenta centavos), na primeira autuação;

II – R\$10.641,00 (dez mil, seiscentos e quarenta e um Reais), pela primeira reincidência;

III – R\$21.282,00 (vinte e um mil, duzentos e oitenta e dois Reais) e cassação do alvará, pela segunda reincidência.

²⁵⁸ Termo de Ajustamento De Conduta, available at www.safernet.org.br/site/sites/default/files/TACgoogleMPF_0.pdf (last visited Oct. 30, 2015).

²⁵⁹ According Comscore, Orkut was the social networking most accessed until dDecember 2011, when Facebook surpassed it in number of the users. *It's a Social World: Top 10 Need-to-Knows About Social Networking and Where It's Headed*, COMSCORE, http://www.comscore.com/Insights/Presentations_and_Whitepapers/2011/it_is_a_social_world_top_10_need-to-knows_about_social_networking (last visited Oct. 13, 2014).

competent authorities for the purpose of investigating the crime of child pornography (scraps, messages, topics, images and photos);

- the information, irrespective of a specific request, about any occurrences of child pornography reported to the National Center for Missing and Exploited Children (NCMEC), related to connections made in Brazil; or
- the commitment to preserve for 180 days and to inform, when requested by an authority, all the data related to connections made by users from Brazil (login, IP number etc.), and also the content of messages, images and photographs related to crimes; to include, even without any request, all the reports made to NCMEC, related to child pornography and connections made from Brazilian territory; report the existence of child pornography using their service; help law enforcement to combat child pornography.

15 – Has a support telephone or online hotlines to enable the public to report child abuse

The “Disque Denúncia Nacional de Abuso e Exploração Sexual Contra Crianças e Adolescentes” is available to the public (dial 100) to report violence against children and adolescents. Calls can be made from 8:00 AM until 8:00 PM everyday including weekends and holidays.

16 – Creates data retention and preservation policies or provisions

Brazil’s legislation does regulate data retention and preservation policies or provisions.

The Brazilian Civil Rights Framework for the Internet (*Marco Civil da Internet - MCI*) was approved into Law N^o 12.965 on April 23, 2014. It generally regulates the retention and preservation of data in Article 10.²⁶⁰

More specifically, it regulates the compulsory retention of connection data for one year²⁶¹, and the

²⁶⁰ Artigo 10. A guarda e a disponibilização dos registros de conexão e de acesso a aplicações de internet de que trata esta Lei, bem como de dados pessoais e do conteúdo de comunicações privadas, devem atender à preservação da intimidade, da vida privada, da honra e da imagem das partes direta ou indiretamente envolvidas.

§ 1^o O provedor responsável pela guarda somente será obrigado a disponibilizar os registros mencionados no **caput**, de forma autônoma ou associados a dados pessoais ou a outras informações que possam contribuir para a identificação do usuário ou do terminal, mediante ordem judicial, na forma do disposto na Seção IV deste Capítulo, respeitado o disposto no art. 7^o.

§ 2^o O conteúdo das comunicações privadas somente poderá ser disponibilizado mediante ordem judicial, nas hipóteses e na forma que a lei estabelecer, respeitado o disposto nos incisos II e III do art. 7^o.

§ 3^o O disposto no **caput** não impede o acesso aos dados cadastrais que informem qualificação pessoal, filiação e endereço, na forma da lei, pelas autoridades administrativas que detenham competência legal para a sua requisição.

§ 4^o As medidas e os procedimentos de segurança e de sigilo devem ser informados pelo responsável pela provisão de serviços de forma clara e atender a padrões definidos em regulamento, respeitado seu direito de confidencialidade quanto a segredos empresariais.

²⁶¹ Artigo 13. Na provisão de conexão à internet, cabe ao administrador de sistema autônomo respectivo o dever de manter os registros de conexão, sob sigilo, em ambiente controlado e de segurança, pelo prazo de 1 (um) ano, nos termos do regulamento.

§ 1^o A responsabilidade pela manutenção dos registros de conexão não poderá ser transferida a terceiros.

§ 2^o A autoridade policial ou administrativa ou o Ministério Público poderá requerer cautelarmente que os registros de conexão sejam guardados por prazo superior ao previsto no caput.

§ 3^o Na hipótese do § 2, a autoridade requerente terá o prazo de 60 (sessenta) dias, contados a partir do requerimento, para ingressar com o pedido de autorização judicial de acesso aos registros previstos no caput.

§ 4^o O provedor responsável pela guarda dos registros deverá manter sigilo em relação ao requerimento previsto no § 2, que perderá sua eficácia caso o pedido de autorização judicial seja indeferido ou não tenha sido protocolado no prazo previsto no § 3.

compulsory retention of the application access logs for 6 months²⁶², both under confidentiality. Article 5 provides a definition of connection records and application access logs.²⁶³

According to Articles 14 and §2 of Article 15, the administrative or police authority or the Public Prosecutor may require the precautionary keeping of connection records and access to applications logs for periods longer than one year. In any circumstance, the disclosure to the requesting party of the connection records and application logs must be preceded by a court order.

According to Article 12, the data retained may be requested by a judicial order when there is an investigation in course and the utility of the data is demonstrated.²⁶⁴

§ 5^o Em qualquer hipótese, a disponibilização ao requerente dos registros de que trata este artigo deverá ser precedida de autorização judicial, conforme disposto na Seção IV deste Capítulo.

§ 6^o Na aplicação de sanções pelo descumprimento ao disposto neste artigo, serão considerados a natureza e a gravidade da infração, os danos dela resultantes, eventual vantagem auferida pelo infrator, as circunstâncias agravantes, os antecedentes do infrator e a reincidência.

²⁶² Artigo 15. O provedor de aplicações de internet constituído na forma de pessoa jurídica e que exerça essa atividade de forma organizada, profissionalmente e com fins econômicos deverá manter os respectivos registros de acesso a aplicações de internet, sob sigilo, em ambiente controlado e de segurança, pelo prazo de 6 (seis) meses, nos termos do regulamento.

§ 1^o Ordem judicial poderá obrigar, por tempo certo, os provedores de aplicações de internet que não estão sujeitos ao disposto no caput a guardarem registros de acesso a aplicações de internet, desde que se trate de registros relativos a fatos específicos em período determinado.

§ 2^o A autoridade policial ou administrativa ou o Ministério Público poderão requerer cautelarmente a qualquer provedor de aplicações de internet que os registros de acesso a aplicações de internet sejam guardados, inclusive por prazo superior ao previsto no caput, observado o disposto nos §§ 3^o e 4^o do art. 13. § 3^o

Em qualquer hipótese, a disponibilização ao requerente dos registros de que trata este artigo deverá ser precedida de autorização judicial, conforme disposto na Seção IV deste Capítulo.

§ 4^o Na aplicação de sanções pelo descumprimento ao disposto neste artigo, serão considerados a natureza e a gravidade da infração, os danos dela resultantes, eventual vantagem auferida pelo infrator, as circunstâncias agravantes, os antecedentes do infrator e a reincidência.

²⁶³ Artigo 5^o Para os efeitos desta Lei, considera-se:

I - internet: o sistema constituído do conjunto de protocolos lógicos, estruturado em escala mundial para uso público e irrestrito, com a finalidade de possibilitar a comunicação de dados entre terminais por meio de diferentes redes;

II - terminal: o computador ou qualquer dispositivo que se conecte à internet;

III - endereço de protocolo de internet (endereço IP): o código atribuído a um terminal de uma rede para permitir sua identificação, definido segundo parâmetros internacionais;

IV - administrador de sistema autônomo: a pessoa física ou jurídica que administra blocos de endereço IP específicos e o respectivo sistema autônomo de roteamento, devidamente cadastrada no ente nacional responsável pelo registro e distribuição de endereços IP geograficamente referentes ao País;

V - conexão à internet: a habilitação de um terminal para envio e recebimento de pacotes de dados pela internet, mediante a atribuição ou autenticação de um endereço IP;

VI - registro de conexão: o conjunto de informações referentes à data e hora de início e término de uma conexão à internet, sua duração e o endereço IP utilizado pelo terminal para o envio e recebimento de pacotes de dados;

VII - aplicações de internet: o conjunto de funcionalidades que podem ser acessadas por meio de um terminal conectado à internet; e

VIII - registros de acesso a aplicações de internet: o conjunto de informações referentes à data e hora de uso de uma determinada aplicação de internet a partir de um determinado endereço IP.

²⁶⁴ Artigo 22. A parte interessada poderá, com o propósito de formar conjunto probatório em processo judicial cível ou penal, em caráter incidental ou autônomo, requerer ao juiz que ordene ao responsável pela guarda o fornecimento de registros de conexão ou de registros de acesso a aplicações de internet.

Preservation policies are also regulated by the MCI. Article 10 allows the disclosure of the connection records or application logs, and the content of communication, but only with a judicial order.

Brazilian legislation has provisions that regulate data retention, indicating the specific types of data to be retained or preserved. There is a set period of time for the retention and for the preservation of data. Content is disclosed only with a judicial order, but connection data does not require one. There is a legal duty to maintain the confidentiality of the judicial order.

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

Most Cyber cafes in Brazil work as non-registered enterprises, or informal services. They are known as “LAN Houses” – Local Area Network.

There is a bill currently under discussion in Congress about transforming LAN Houses in places of “public interest” because of their importance towards the universalization of Internet access.

States are regulating LAN Houses in Brazil. In Rio de Janeiro, Law 4.782/2006 prohibits LAN Houses being placed less than one kilometer from schools.

São Paulo (Law n. 12228/2006), Mato Grosso do Sul (Law 3103/2005), Rio de Janeiro (Law 3257/2006), Santa Catarina (Law 08/2005), Distrito Federal (Law 3.437/2004), and Rio Grande do Sul (12.698/2007) require LAN Houses or Cybercafés to identify the users of their computers, and to maintain for 60 months, information about the day and time of access and the equipment used.

Some municipalities are also legislating on this. Municipal law n. 3.087/2005, from the Municipality of Farroupilha, State of Rio Grande do Sul, requires every minor to register when using a computer. However, there is no national law requiring it.

18 – Has a national plan to combat violence against children

Brazil has the National Plan for combating sexual violence against children (Plano Nacional de Enfrentamento da Violência Sexual contra Crianças e Adolescentes) – 2013/2015.²⁶⁵

19 – International instruments ratified

- Ratified the Convention on the Rights of the Child on September 24, 1990
- Ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on January 27, 2004
- Ratified the ILO Minimum Age Convention on June 28, 2001
- Ratified the ILO Worst Forms of Child Labor Convention on February 2, 2000

Parágrafo único. Sem prejuízo dos demais requisitos legais, o requerimento deverá conter, sob pena de inadmissibilidade:

I - fundados indícios da ocorrência do ilícito;

II - justificativa motivada da utilidade dos registros solicitados para fins de investigação ou instrução probatória; e

III - período ao qual se referem os registros.

Artículo 23. Cabe ao juiz tomar as providências necessárias à garantia do sigilo das informações recebidas e à preservação da intimidade, da vida privada, da honra e da imagem do usuário, podendo determinar segredo de justiça, inclusive quanto aos pedidos de guarda de registro.

²⁶⁵ COMITÊ NACIONAL DE ENFRENTAMENTO DA VIOLÊNCIA SEXUAL CONTRA CRIANÇAS E ADOLESCENTES, <http://www.comitenacional.org.br> (last visited Oct. 13, 2014).

20 – Age of criminal liability

Article 27 of the Penal Code²⁶⁶ and Article 104 of the ECA²⁶⁷ determine that minors under 18 are not criminally liable. According to the ECA, adolescents between 12 and 18 years old are subjected to protective measures when they commit acts that are equivalent to crimes that can only be committed by adults. But those measures must be of a pedagogic nature, and must always be applied in the best interests of the child or adolescent (Article 100 of the ECA).

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

Article 241-D of the ECA specifically addresses the use of ICTs to commit crimes against children, especially when concerning the crime of online grooming. Article 240 of the ECA related to child pornography criminalizes the production “by any means” of explicit sexual activity or pornographic scenes involving a child or adolescent. The term “by any means” is considered adequate to address computer- and Internet-related crimes.

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of child sex tourism

The Brazilian Penal Code specifically punishes domestic and international trafficking with the intent of sexual exploitation of the victim (Article 231 and 231-A).²⁶⁸

²⁶⁶ Artigo 27. Os menores de 18 (dezoito) anos são penalmente inimputáveis, ficando sujeitos às normas estabelecidas na legislação especial.

²⁶⁷ Artigo 104. São penalmente inimputáveis os menores de dezoito anos, sujeitos às medidas previstas nesta Lei.

Parágrafo único. Para os efeitos desta Lei, deve ser considerada a idade do adolescente à data do fato.

²⁶⁸ Tráfico internacional de pessoa para fim de exploração sexual

Artículo 231. Promover ou facilitar a entrada, no território nacional, de alguém que nele venha a exercer a prostituição ou outra forma de exploração sexual, ou a saída de alguém que vá exercê-la no estrangeiro.

Pena - reclusão, de 3 (três) a 8 (oito) anos.

§ 1º Incorre na mesma pena aquele que agenciar, aliciar ou comprar a pessoa traficada, assim como, tendo conhecimento dessa condição, transportá-la, transferi-la ou alojá-la.

§ 2º A pena é aumentada da metade se:

I - a vítima é menor de 18 (dezoito) anos;

II - a vítima, por enfermidade ou deficiência mental, não tem o necessário discernimento para a prática do ato;

III - se o agente é ascendente, padrasto, madrasta, irmão, enteado, cônjuge, companheiro, tutor ou curador, preceptor ou empregador da vítima, ou se assumiu, por lei ou outra forma, obrigação de cuidado, proteção ou vigilância; ou

IV - há emprego de violência, grave ameaça ou fraude.

§ 3º Se o crime é cometido com o fim de obter vantagem econômica, aplica-se também multa.

Tráfico interno de pessoa para fim de exploração sexual

Artículo 231-A. Promover ou facilitar o deslocamento de alguém dentro do território nacional para o exercício da prostituição ou outra forma de exploração sexual:

Pena - reclusão, de 2 (dois) a 6 (seis) anos.

§ 1º Incorre na mesma pena aquele que agenciar, aliciar, vender ou comprar a pessoa traficada, assim como, tendo conhecimento dessa condição, transportá-la, transferi-la ou alojá-la.

§ 2º A pena é aumentada da metade se:

I - a vítima é menor de 18 (dezoito) anos;

II - a vítima, por enfermidade ou deficiência mental, não tem o necessário discernimento para a prática do ato;

23 – Has specific legislation on online grooming considering it a standalone offense

Article 241-D of the ECA refers to online grooming, prescribing a penalty of one to three years of imprisonment for those who entice, harass, embarrass or instigate, by any means of communication, a child, in order to practice with her lewd acts.²⁶⁹

24 – Has a clear definition of online grooming

The legislation adequately defines online grooming. Article 241-D of the ECA defines it as the acts of enticing, harassing, and embarrassing or instigating a child in order to practice lewd acts by any means of communication.

25 – Age of potential victims of online grooming

Article 241-D of the ECA only refers to children, so the victims can only be those who are under 12 years of age, according to its Article 2. Adolescents cannot be victims of this crime.²⁷⁰

26 – Criminalizes online grooming when the offender has the specific intent to have online or offline sexual contact with a child, or online grooming regardless of the intent

The ECA criminalizes grooming with a specific intent. Article 241-D of the ECA criminalizes it when the offender has a specific intent of having online or offline sexual contact with a child.²⁷¹ The offender does not have to have the intention of physically meeting the minor, because he can induce the child to take photographs or send him sexual images, conduct that is punished with the same penalties.

27 – Criminalizes showing pornography to a child as a standalone offense, or considers it an aspect of grooming

Article 241-D of the ECA criminalizes showing pornography to a child with the intent of having an offline sexual contact. This article defines “types” of grooming conduct, and that showing pornography to a child (in order to have an offline sexual contact) is one of them.

28 – Has specific legislation on cyberbullying

There is currently no legislation specific to cyberbullying.

III - se o agente é ascendente, padrasto, madrasta, irmão, enteado, cônjuge, companheiro, tutor ou curador, preceptor ou empregador da vítima, ou se assumiu, por lei ou outra forma, obrigação de cuidado, proteção ou vigilância; ou

IV - há emprego de violência, grave ameaça ou fraude.

§ 3º Se o crime é cometido com o fim de obter vantagem econômica, aplica-se também multa.

²⁶⁹ Artigo 241-D. Aliciar, assediar, instigar ou constranger, por qualquer meio de comunicação, criança, com o fim de com ela praticar ato libidinoso:

Pena – reclusão, de 1 (um) a 3 (três) anos, e multa.

Parágrafo único. Nas mesmas penas incorre quem:

I – facilita ou induz o acesso à criança de material contendo cena de sexo explícito ou pornográfica com o fim de com ela praticar ato libidinoso;

II – pratica as condutas descritas no caput deste artigo com o fim de induzir criança a se exhibir de forma pornográfica ou sexualmente explícita.

²⁷⁰ *Id.*

²⁷¹ *Id.*

29 – Has specific legislation concerning sexting

There is currently no legislation specific to sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

The Brazilian Penal Code establishes three levels of penalties, observing the order suggested by the Directive 2011/92/EU. It prescribes a higher penalty for offenses related to the production of child abuse material, followed by the ones related to the distribution, and a lower penalty for the possession of child abuse images.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

The Brazilian Penal Code establishes aggravated penalties for offenses committed by a member of the child’s family, by a person cohabiting with the child, or by a person who has abused a recognized position of trust or authority (Article 240, second paragraph, items I, II and III of the Statute for the Protection of Children and adolescents – ECA).²⁷²

In the Penal Code, Chapter II regulates sexual crimes against vulnerable people (Article 226, I, and enhances the sentence for crimes committed by two or more persons, but child pornography offenses are not amongst these crimes.²⁷³ Child pornography offenses are covered in the Statute of Children and Adolescents, so this specific article does not apply.

There is no provision related to child pornography offenses establishing the increase of the penalty when the offense was committed by several persons acting together, or when it was committed within the framework of a criminal organization.

²⁷² “Artículo 240.(...)”

§2°. Aumenta-se a pena de 1/3 (um terço) se o agente comete o crime:

I- no exercício de cargo ou função pública ou a pretexto de exercê-la;

II – prevalecendo-se de relações domésticas, de coabitação ou de hospitalidade; ou

III – prevalecendo-se de relações de parentesco consanguíneo ou afim até o terceiro grau, ou por adoção, de tutor, curador, preceptor, empregador da vítima ou de quem, a qualquer outro título, tenha autoridade sobre ela, ou com seu consentimento.”

²⁷³ Artículo 226. A pena é aumentada:

I - de quarta parte, se o crime é cometido com o concurso de 2 (duas) ou mais pessoas;

(...)

4. CHILE – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 374 bis of the Penal Code
2 – Has a clear definition of child pornography	Yes, Article 374 bis of the Penal Code
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 374 bis of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	No, only acquisition and storage
6 – Criminalizes virtual images and sexually exploitative representations of children	Yes
7 – Addresses the criminal liability of children involved in pornography	Partly, Article 4 of Law 20.526
8 – Establishes criminal liability of legal persons for child pornography offenses	No, but a commercial setting used can be closed by a judge’s order according to Article 368, III of the Penal Code
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Partly, Article 6 of the Código Orgánico de Tribunales
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, Article 6 of the Código Orgánico de Tribunales
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Article 673 Criminal Procedural Code
12 – Establishes forfeiture of proceeds derived from such offenses	No
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 175 Criminal Procedural Code
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes. Fono Ayuda Denuncia
16 – Creates data retention or data preservation policies or provisions	Yes, Article 222 Criminal Procedural Code
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No, bill considered unconstitutional
18 – Has a national plan to combat violence against children	Yes, Política Nacional Y Plan de Acción Integrado
19 – Has ratified international instruments	CRC, OPSC and others
20 – Age of criminal liability	18 years. Minors between 14 and 18 are subjected to a System of Juvenile Criminal Liability
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Partly. Article 374 bis of the Penal Code mentions “by any means”
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Yes, trafficking in persons with specific intent of producing child pornography
23 – Has specific legislation on online grooming, considering it a standalone offense	Yes, Article 366 IV of the Penal Code
24 – Has a clear definition of online grooming	No
25 – Considers everyone under 18 as a potential victim of online grooming	No, only under 14 years of age
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Specific intent of offline sexual contact
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	Criminalizes it as a standalone offense
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	Yes
31 – Law establishes aggravating circumstances for child abuse offenses	Yes

CHILE – COUNTRY REPORT

Chile is a stable democratic nation that has been experiencing steady growth and a reduction in poverty rates. It is a civil law country with judicial review by the Constitutional Court of all legislative acts.

Chile is divided into 15 regions. The Congress is bicameral and the highest Court is the Supreme Court (Corte Suprema).

In 1999, Chile held its First National Conference on Violence against and Commercial Sexual Exploitation of Children and Adolescents, establishing a National Plan of Action, based on the agreements reached in Stockholm at the World Congress against Commercial Sexual Exploitation of Children.

The SENAME (Servicio Nacional de Menores) developed a “Safe Surfin” program to prevent cyber-harassment and child pornography on the Internet, with the participation of public and private actors, most notably the criminal investigation police, the Public Prosecutor’s Office, Microsoft and the Internet Service Provider. The project is aimed at disseminating information and educational content to children, parents, guardians, and staff of schools in five communities with different socio-economic profiles in the Metropolitan region.

In 2009, Chile performed its first digital census of all educational establishments in the country. The second digital census was carried out in 2012. It sought to gather information about the state of infrastructure and IT management, in addition to the uses and competencies of ICTs by teachers and students.

Since the establishment of a national plan, a Cybercrime Squad (Brigada Investigadora del Ciber Crimen) was established with the support of the Interpol National Central Bureau, to monitor the Internet and identify websites containing child abuse images, or serving as contact points between virtual communities involved in the consumption and sale of child pornography. The Cybercrime Squad has incorporated the Child Exploitation Tracking System (CETS) software developed by Microsoft to support criminal investigations of child sexual exploitation.²⁷⁴ One of the Brigade’s stated missions²⁷⁵ is to investigate Internet crime targeted against children. The Head Deputy of Cybercrime, Nestor Gonzalez, addressed online grooming and cyberbullying specifically, labeling them a priority within La “Brigada Investigadora del Ciber Crimen”. Additionally, police give presentations in schools and neighborhoods, warning children and parents of online grooming risks.²⁷⁶

The private sector is also involved in the fight against online grooming. VTR, a Chilean telecommunications company, began a program in 2008 called “Internet Segura” or Safe Internet. Internet Segura educates Chilean children and their families about the various risks that the Internet poses and the tools that exist to defend against such risks. Every year, Internet Segura conducts new studies, learning about the new and different threats posed by the Internet to children. With this information, the group creates annual safety campaigns. The group’s 2008 campaign combated online

²⁷⁴ Written Replies submitted by the Government of Chile to the list of issues to be taken up in connection with the consideration of the initial report of Chile submitted under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, received on 5 December 2007 (forty-seventh session of the Committee on the Rights of the Child).

²⁷⁵ *Policía de Investigaciones de Chile*, PDI, <http://www.policia.cl> (last visited Oct. 13, 2014).

²⁷⁶ *Id.*

grooming, with the motto “Don’t chat with people you don’t know”.²⁷⁷ Internet Segura also distributes an anti-grooming manual to educate Chilean children and their parents about online grooming.²⁷⁸

The private and public sectors are also teaming up in the fight against online grooming. The Fundación País Digital (PDI), Servicio Nacional de Menores (Sename), Chile’s Public Ministry, VTR, and Microsoft collaborated to launch a website that teaches parents and teachers about online grooming, cyberbullying, and other Internet crimes. The website “Navega Protegido” also includes a section where adults and children may report directly to the police any suspicious activity they see or experience.²⁷⁹

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

In Chile, the existing legal framework shows reasonable compliance with international instruments. Article 3 of the Law 20.084 establishes that a child is anyone under 14 years of age, and adolescents are those who are between 14 and 18 years old. The law is also aligned with the CRC requirement that anyone under 18 years old can be a victim of child abuse images.

Chile presented a report in January 2008 to the UN Committee on the Rights of the Child on the implementation of the Optional Protocol on the sale of children, child prostitution and child pornography (OPSC). It showed some legislative progress, and it has continued to do so, demonstrating Chile’s commitment to implementing the provisions of the OPSC.

The Penal Code, enacted in 1874, has undergone significant amendments. For instance, Law n. 19.927, enacted in 2004, established sanctions for the distribution, disclosure, import and export of child pornography. Before 2004, Law 19.846 only punished the use of a child under 12 years old in the production of pornographic material (ancient article 366 IV of the Criminal Code). The old law is notable because it made the production, commercialization, distribution and display of pornographic material a separate offense, different from the abuse itself. Law 19.927 kept this same structure, maintaining the production and subsequent distribution as autonomous crimes, and created the crime of acquiring or storing child abuse images. Law 20526/2011 was later enacted, an important contribution because it complemented the definition of child pornography.

In June of 2012, Law 20594 was enacted, creating new types of punishment for crimes committed against children: temporary and permanent inability to work in the educational field or to work in contact with children. In a message sent to the Congress about the need to approve the Bill, the President of Chile informed that while there were no official statistics about the number of victims of sexual crimes in the country, according to the police (Carabineros de Chile), in the year of 2009 there were 3,900 reports on sexual crimes against children under 13 years old, and 2,200 reports of victims between the ages of 14 and 18 years old.

²⁷⁷ All citations in this paragraph are from the same source unless otherwise noted. See *¿Que Hacemos?*, VTR INTERNET SEGURA, <http://vtrinternetsegura.cl/que-hacemos/> (last visited Oct. 13, 2014); see also *Estudios*, VTR INTERNET SEGURA, <http://vtrinternetsegura.cl/estudios/> (last visited Oct. 13, 2014).

²⁷⁸ VTR INTERNET SEGURA, MANUAL ANTI GROOMING Y CYBERBULLYING, available at <http://vtrinternetsegura.cl/estudios/> (last visited Oct. 13, 2014).

²⁷⁹ All citations in this paragraph are from the same source. See Claudia Varas, *Navegando por la protección de los niños*, DETECTIVE, (Aug. 2009), at 7-11, available at <http://www.policia.cl/revistas/revista139/139.pdf>.

The temporary inability to work with minors already existed in the law and was extended to the crime of child pornography. This same law created a National Registry of those convicted of sexual crimes against children, which is available to the public.

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation and clear definition of child pornography; age of the victim

Child pornography is criminalized by Article 374 bis of the Penal Code and defined as “to commercialize, import, export, distribute disseminate or display pornographic material through any means or maliciously acquire or store,” which does not require the intent to commercialize.²⁸⁰

Article 366 V of the Penal Code created a specific and autonomous offense for anyone that participates in the production of child pornographic material, by way of any kind of help or support.²⁸¹ It defines child pornography, which is also applicable to article 374 bis, as the “representation of a person under eighteen engaged in explicit sexual activity, real or simulated, or any representation of the genitals of a minor for a sexual purpose, or any representation of such minors in which their voice or image is used, with the same purpose.”

It should be noted that this definition includes *representations* of a child in which his/her voice or image is used, making it possible to punish virtual images of child abuse.

4 – Criminalizes accessing or downloading child pornography images

Viewing, accessing, or downloading child pornography material is not a crime if the person does not show it to anyone else or does not store it. Acquiring child pornography, however, is a criminal offense. Acquiring refers to the act of purchasing child abuse images, not necessarily linked to the storage of the material.

5 – Criminalizes possession of child pornography

In order to guarantee observance of Article 3 of the Annex II of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, the Congress passed legislation criminalizing the conduct of *acquiring and storage* of child pornography. After analyzing Chile’s report, the

²⁸⁰ Artículo 374 bis.

El que comercialice, importe, exporte, distribuya, difunda o exhiba material pornográfico, cualquiera sea su soporte, en cuya elaboración hayan sido utilizados menores de dieciocho años, será sancionado con la pena de presidio menor en su grado medio a máximo.

El que maliciosamente adquiera o almacene material pornográfico, cualquiera sea su soporte, en cuya elaboración hayan sido utilizados menores de dieciocho años, será castigado con presidio menor en su grado medio.

²⁸¹ Artículo 366 quinquies.

El que participe en la producción de material pornográfico, cualquiera sea su soporte, en cuya elaboración hubieren sido utilizados menores de dieciocho años, será sancionado con presidio menor en su grado máximo.

Para los efectos de este artículo y del artículo 374 bis, se entenderá por material pornográfico en cuya elaboración hubieren sido utilizados menores de dieciocho años, toda representación de éstos dedicados a actividades sexuales explícitas, reales o simuladas, o toda representación de sus partes genitales con fines primordialmente sexuales o toda representación de dichos menores en que se emplee su voz o imagen, con los mismos fines.

understanding of the Committee on the Rights of the Child was that it did not prohibit possession, but only the storage of child abuse images.²⁸²

This is a very rigid position, as countries do have a margin of discretion to decide how to accomplish the objectives pursued based on the country's individual concerns. The storage of child pornography could be synonymous with possession with a slight difference in grade, which could be analyzed by judges in each individual case. Since the Committee is the organ responsible for interpreting the CRC, its position must be highlighted and followed, regardless of reservations about the subject.

6 – Criminalizes virtual images or sexually exploitative representations of children

The Chilean Penal Code does not give a definition of pornography that expressly includes terms related to virtual pornography, which would guarantee its punishment. The definition of Article 366 quinquies was modified by Law 20.546/2011, and includes “any representation of minors in which their voice or image is used.” However, this modification includes virtual child pornography in its title, “Law 20526, which penalizes online grooming, virtual child pornography and the possession of child pornography,” indicating legislative intent to criminalize it.

7 – Addresses the criminal liability of children involved in pornography

Article 4 of Law 20526 created a special rule for sexual crimes.²⁸³ It exempts adolescents between 14 and 18 years of age who commit a crime of child pornography against a child under 14 years of age, from any kind of punishment if the offender is not more than three years older than the victim, and there is no use of violence (force or intimidation), or abuse of superiority/helplessness of the victim (sense of deprivation, alienation, abandonment, sexual inexperience or ignorance).²⁸⁴

8 – Establishes the criminal responsibility of legal persons for child pornography offenses

There is no law establishing the criminal responsibility of legal persons, but article 368 III of the Penal Code establishes that a commercial setting used in the commission of the crimes of child pornography (374 bis) or production of child pornography (366 V) can be closed by a judge's order.²⁸⁵ During the criminal investigation the judge can also rule for the temporarily closure of the commercial business.

²⁸² Comm. On the Rights of the Child, Consideration of Reports Submitted by State Parties Under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 47th Session (Feb. 1, 2008), available at <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-OPSC-CHL-CO-1.pdf>.

²⁸³ Artículo 4^o. Regla especial para delitos sexuales.

No podrá procederse penalmente respecto de los delitos previstos en los artículos 362, 365, 366 bis, 366 quáter y 366 quinquies del Código Penal, cuando la conducta se hubiere realizado con una persona menor de 14 años y no concurra ninguna de las circunstancias enumeradas en los artículos 361 ó 363 de dicho Código, según sea el caso, a menos que exista entre aquélla y el imputado una diferencia de, a lo menos, dos años de edad, tratándose de la conducta descrita en el artículo 362, o de tres años en los demás casos.

²⁸⁴ Delitos contra la libertad sexual. El artículo 4 de la LRPA recoge una regla especial para los delitos sexuales, excluyendo la responsabilidad penal por los supuestos de protección de la indemnidad sexual (artículos 362, 365, 366 bis, 366 quáter y 366 quinquies CP) cuando la diferencia etaria entre autor y víctima no supere los 2 ó 3 años de edad. De este modo, excepto por lo que se refiere a la promoción o favorecimiento de la corrupción de menores (artículos 367 y 367 ter CP), la responsabilidad penal del menor se fundamenta en el uso de la violencia (fuerza o intimidación) o en el abuso de superioridad / desvalimiento de la víctima (privación de sentido, enajenación, desamparo, inexperience o ignorancia sexual). Beatriz Cruz Márquez, *La culpabilidad por el hecho del adolescente: Referencias y diferencias respecto del Derecho Penal de adultos*, available at <http://www.biblio.dpp.cl/biblio/DataBank/7525.pdf>.

²⁸⁵ Artículo 368 Ter. Cuando, en la comisión de los delitos señalados en los artículos 366 quáter, 366 quinquies, 367, 367 ter o 374 bis se utilizaren establecimientos o locales, a sabiendas de su propietario o encargado, o no pudiendo éste menos que saberlo, podrá decretarse en la sentencia su clausura definitiva.

Asimismo, durante el proceso judicial respectivo, podrá decretarse, como medida cautelar, la clausura temporal de dichos establecimientos o locales.

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory; and

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

According to Article 6 of the Penal Code, crimes committed abroad are subject to Chilean legislation only if determined by law.

The Court's Organic Code (Código Orgánico de Tribunales) establishes hypotheses of extraterritorial application of the Chilean law. It was amended by Law 19.927/2004, changing Article 6 and creating paragraph 10.²⁸⁶ The first part of this paragraph empowers National Courts to try persons for the crimes of production of child pornography (art. 366 V), trafficking and facilitation of child prostitution (art. 367) committed abroad when the integrity or sexual freedom of a Chilean is affected, or when those crimes are committed by a Chilean or by someone that has residence in Chile.

The crime of production of child pornography committed abroad allows the jurisdiction of Chilean Courts in two situations: (a) when committed against Chileans; (b) when committed by a national or a foreigner has residence in the country.

Paragraph 10 also proscribes that offenders who commit the crimes of acquisition, possession, distribution, dissemination, import, and export of child pornography (Article 374 bis – commercialization, possession and other acts), are subject to Chilean law, but only when Chilean children are depicted.

During its 47th session, the Committee on the Rights of Child understood that the Chilean legislation only punishes the crime of child pornography if the child is a Chilean national, which contradicts the Optional Protocol.²⁸⁷

However, an analysis of the law can lead to alternative conclusions than that of the Committee, *data*

²⁸⁶ Artículo 6° Quedan sometidos a la jurisdicción chilena los crímenes y simples delitos perpetrados fuera del territorio de la República que a continuación se indican:

(...)

6. Los cometidos por chilenos contra chilenos si el culpable regresa a Chile sin haber sido juzgado por la autoridad del país en que delinquiró;

(...)

10. Los sancionados en los artículos 366 quinquies, 367 y 367 bis N° 1, del Código Penal, cuando pusieren en peligro o lesionaren la indemnidad o la libertad sexual de algún chileno o fueren cometidos por un chileno o por una persona que tuviere residencia habitual en Chile; y el contemplado en el artículo 374 bis, inciso primero, del mismo cuerpo legal, cuando el material pornográfico objeto de la conducta hubiere sido elaborado utilizando chilenos menores de dieciocho años.

²⁸⁷ UN COMM. ON THE RIGHTS OF THE CHILD, *supra* note 83.

Existing criminal or penal laws and regulations

(...)

27. The Committee, while welcoming that the State party may exercise extra-territorial jurisdiction in some of the cases listed in article 4 of the Protocol, is concerned at the information that the exercise of this jurisdiction is actually limited to only some of the offences covered by it and when the author or the victim of the offence is Chilean.

28. The Committee recommends that the State party take all necessary measures to establish its jurisdiction over all the offences referred to in the Protocol in conformity with article 4.

(...)

venia. The analysis of the first part of paragraph 10 of Article 6 of the Court's Organic Code confirms that, for the crime of production of child pornography, Chilean legislation establishes the jurisdiction of Chilean Courts, regardless of the victim's nationality, when the crime is committed by a Chilean or a foreigner that has residence in Chile. The second part of paragraph 10, related to the crimes of trading, importing, exporting, distributing, disseminating or exhibiting child pornography, establishes that Chilean Courts will only have jurisdiction over them when the victim is Chilean.

It should be noted that item 8 of Article 6 of the Court's Organic Code, establishes that Chilean Courts have jurisdiction over crimes indicated in international treaties.²⁸⁸ Thus, if indicated in an international treaty ratified by Chile, nationals and foreigners can be tried for the crimes of distribution, dissemination of child pornography and similar conduct.

11 – Establishes forfeiture of assets used to commit or facilitate offenses

Article 348 and Article 412 of the Criminal Procedure Code establish that the judge should decide on the forfeiture of assets used to commit the crime, and the proceeds derived from the offense where there is a conviction. The forfeiture of assets is thus not a requirement as it is dependent on the judge's discretion.^{289, 290}

Article 673 of the Criminal Procedural Code (Código de Procedimiento Penal) proscribes the forfeiture of computers and all kinds of ICTs used in the production and commercialization of child pornography, establishing that the assets must be sent to the SENAME or to a specialized department committed to similar work with children.²⁹¹

If the crime of facilitating child prostitution is committed by an offender who works in an organization dedicated to that crime, Article 367 V of the Penal Code enhances the penalty and establishes the

²⁸⁸ Artículo 6°. Quedan sometidos a la jurisdicción chilena los crímenes y simples delitos perpetrados fuera del territorio de la República que a continuación se indican:

(...)

8° Los comprendidos en los tratados celebrados con otras potencias;

(...)

²⁸⁹ Artículo 348. Sentencia condenatoria. La sentencia condenatoria fijará las penas y se pronunciará sobre la eventual aplicación de alguna de las medidas:

(...)

La sentencia condenatoria dispondrá también el comiso de los instrumentos o efectos del delito o su restitución, cuando fuere procedente.

²⁹⁰ Artículo 412. Fallo en el procedimiento abreviado.

Terminado el debate, el juez dictará sentencia. En caso de ser condenatoria, no podrá imponer una pena superior ni más desfavorable a la requerida por el fiscal o el querellante, en su caso.

(...) La sentencia condenatoria dispondrá también el comiso de los instrumentos o efectos del delito o su restitución, cuando fuere procedente.

²⁹¹ Artículo 673. (...)

En los casos de los artículos 366 quinquies, 374 bis, inciso primero y 374 ter del Código Penal, el tribunal destinará los instrumentos tecnológicos decomisados, tales como computadores, reproductores de imágenes o sonidos y otros similares, al Servicio Nacional de Menores o a los departamentos especializados en la materia de los organismos policiales que correspondan. Las producciones incautadas como pruebas de dichos delitos podrán destinarse al registro reservado a que se refiere el inciso segundo del artículo 369 ter del Código Penal. En este caso, la vulneración de la reserva se sancionará de conformidad con lo dispuesto en el párrafo 8 del Título V, del Libro II del Código Penal.

forfeiture of every asset (real state, movables, money etc.) used or intended to be used in the commission of the crime. There is no such norm related to child pornography, but Articles 348 and 412 of the Criminal Procedure Code can be used to provide for such punishment.²⁹²

12 – Establishes forfeiture of proceeds derived from such offenses

The forfeiture of proceeds derived from the offense of child pornography is not addressed.

13 – Establishes mandatory reporting requirements for professionals who work with children

According to Article 175 of the Criminal Procedural Code, every professional who works in the health field or in schools is required to report violence against children with whom they have contact.²⁹³

14 – Requires Internet Service Providers to report child pornography

The law does not require ISPs to report suspected child pornography found on their networks to law enforcement.

15 – Has a support telephone or online hotlines to enable the public to report child abuse

FONO AYUDA DENUNCIA – 800.730.800 is a hotline, but it cannot receive calls from cell phones. It is available from 9:00 AM to 6:00 AM (from Monday to Thursday) and from 9:00 AM to 5:00 AM (Fridays). Phone calls made after hours are transferred to the Brigada de Delitos Sexuales of the Police. In addition, anyone can report a situation of violence against children on the webpage of SENAME.

16 – Creates data retention and preservation policies or provisions

According to Article 222, Part V of the Code of Criminal Procedure (Código de Proceso Penal), Internet Service Providers must maintain confidential records and make them available to the Attorney General.²⁹⁴ This can include an updated list of their authorized ranges of IP addresses and a record,

²⁹² Artículo 367 quinquies. En los delitos previstos en los artículos 367 ter y 367 quater se impondrá la pena superior en grado cuando el culpable perteneciere a una organización o asociación, incluso de carácter transitorio, que se dedicare a la realización de las actividades allí señaladas.

Sin perjuicio de las reglas generales, caerán especialmente en comiso los bienes inmuebles, muebles, dinero y todo instrumento que haya servido o hubiere estado destinado a la comisión de cualquiera de los delitos penados en los artículos 367 ter y 367 quater, los efectos que de ellos provinieren y las utilidades que hubieran originado, cualquiera sea su naturaleza jurídica o las transformaciones que hubieren experimentado.

²⁹³ Artículo 175. Denuncia obligatoria. Estarán obligados a denunciar:

a) (...)

b) (...)

c) (...)

d) Los jefes de establecimientos hospitalarios o de clínicas particulares y, en general, los profesionales en medicina, odontología, química, farmacia y de otras ramas relacionadas con la conservación o el restablecimiento de la salud, y los que ejercieren prestaciones auxiliares de ellas, que notaren en una persona o en un cadáver señales de envenenamiento o de otro delito, y

e) Los directores, inspectores y profesores de establecimientos educacionales de todo nivel, los delitos que afectaren a los alumnos o que hubieren tenido lugar en el establecimiento.

La denuncia realizada por alguno de los obligados en este artículo eximirá al resto.

²⁹⁴ Artículo 222. (...)

Interceptación de comunicaciones telefónicas. Cuando existieren fundadas sospechas, basadas en hechos determinados, de que una persona hubiere cometido o participado en la preparación o comisión, o que ella preparare actualmente la comisión o participación en un hecho punible que mereciere pena de crimen, y la investigación lo hiciere imprescindible, el juez de garantía, a petición del ministerio público, podrá ordenar la interceptación y grabación de sus comunicaciones telefónicas o de otras formas de telecomunicación.

Las empresas telefónicas y de comunicaciones deberán dar cumplimiento a esta medida, proporcionando a los funcionarios encargados

maintained for no less than one year, of IP addresses related to the connections made by subscribers. This same article regulates preservation of data, which can be required by a judge when there are founded suspicions that someone is committing a crime, or is preparing to commit a crime. Article 222 is regulated by Decree 142 of “Ministerio de las Telecomunicaciones”.^{295, 296}

The Code of Criminal Proceeding (Codigo de Procedimiento Penal) also regulates retention of data and preservation policies through article 113 III.²⁹⁷ It is specifically related to child pornography offenses, and also refers to organized crime.

Law 20526 modified the Procedural Penal Code, and increased the time for data retention policies from six months up to one year.

There are provisions that regulate the retention and preservation of data in Chile, but they do not specify the types of data to be preserved. The legislation establishes the period of time for retention at one year, and the period of time for the preservation of data at 60 days. A judicial order is necessary in order to authorize these measures. Decree 142 indirectly establishes the need to maintain the confidentiality of the preservation order, and that ISPs shall adopt measures to guarantee that service will not be altered in such a way as to alert persons under investigation.²⁹⁸

de la diligencia las facilidades necesarias para que se lleve a cabo con la oportunidad con que se requiera.

Con este objetivo los proveedores de tales servicios deberán mantener, en carácter reservado, a disposición del Ministerio Público, un listado actualizado de sus rangos autorizados de direcciones IP y un registro, no inferior a un año, de los números IP de las conexiones que realicen sus abonados. La negativa o entorpecimiento a la práctica de la medida de interceptación y grabación será constitutiva del delito de desacato. Asimismo, los encargados de realizar la diligencia y los empleados de las empresas mencionadas en este inciso deberán guardar secreto acerca de la misma, salvo que se les citare como testigos al procedimiento.

²⁹⁵ Artículo 222.

Interceptación de comunicaciones telefónicas. Cuando existieren fundadas sospechas, basadas en hechos determinados, de que una persona hubiere cometido o participado en la preparación o comisión, o que ella prepare actualmente la comisión o participación en un hecho punible que mereciere pena de crimen, y la investigación lo hiciere imprescindible, el juez de garantía, a petición del ministerio público, podrá ordenar la interceptación y grabación de sus comunicaciones telefónicas o de otras formas de telecomunicación.

Las empresas telefónicas y de comunicaciones deberán dar cumplimiento a esta medida, proporcionando a los funcionarios encargados de la diligencia las facilidades necesarias para que se lleve a cabo con la oportunidad con que se requiera.

Con este objetivo los proveedores de tales servicios deberán mantener, en carácter reservado, a disposición del Ministerio Público, un listado actualizado de sus rangos autorizados de direcciones IP y un registro, no inferior a un año, de los números IP de las conexiones que realicen sus abonados. La negativa o entorpecimiento a la práctica de la medida de interceptación y grabación será constitutiva del delito de desacato. Asimismo, los encargados de realizar la diligencia y los empleados de las empresas mencionadas en este inciso deberán guardar secreto acerca de la misma, salvo que se les citare como testigos al procedimiento.

²⁹⁶ Decreto 142 Reglamento Sobre Interceptación y Grabación de Comunicaciones Telefónicas y de Otras Formas de Telecomunicación (Sep. 22, 2005), at <http://www.leychile.cl/Navegar?idNorma=242261&idVersion=2005-09-22>.

²⁹⁷ Artículo 113 ter. Cuando existieren sospechas fundadas de que una persona o una organización delictiva hubiere cometido o preparado la comisión de alguno de los delitos previstos en los artículos 366 quinquies, 367, 367 bis, 367 ter, 374 bis, inciso primero, y 374 ter del Código Penal, y la investigación lo hiciere imprescindible, el juez podrá ordenar la interceptación o grabación de las telecomunicaciones de esa persona o de quienes integren dicha organización y la grabación de comunicaciones.

La orden que dispusiere la interceptación o grabación deberá indicar el nombre o los datos que permitan la adecuada identificación del afectado por la medida y señalar la forma en que se aplicará y su duración, la que no podrá exceder de sesenta días. (...) Las empresas o establecimientos que presten los servicios de comunicación a que se refiere el inciso primero deberán, en el menor plazo posible, poner a disposición de los funcionarios encargados de la diligencia todos los recursos necesarios para llevarla a cabo. Con este objetivo los proveedores de tales servicios deberán mantener, en carácter reservado, a disposición del tribunal, un listado actualizado de sus rangos autorizados de direcciones IP y un registro, no inferior a seis meses, de los números IP de las conexiones que realicen sus abonados. La negativa o el entorpecimiento en la práctica de la medida decretada será constitutiva del delito de desacato, conforme al artículo 240 del Código de Procedimiento Civil.

²⁹⁸ Decreto 142:

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

In November 2005, a bill was presented to Congress to force Internet Cafés to keep records of the personal information of their clients (Bill n. 4438), including ID card numbers, computer used, date, time and length of time of the service hired. It was approved in the House of Representatives, but was archived in the Senate in 2009. There was an attempt to include this kind of provision in Article 4 of Law 20526/2011, but it was considered unconstitutional by the Constitutional Court of Chile.

18 – Has a National Plan to combat violence against children

Yes, the Política Nacional y Plan de Acción Integrado a favor de la Infancia y la Adolescencia 2002-2010.

19 – International instruments ratified

- Ratified the Convention on the Rights of the Child on August 13, 1990
- Ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on February 3, 2003
- Ratified the ILO Minimum Age Convention on February 1, 1999
 - Minimum age: 15 years old
- Ratified the ILO Worst Forms of Child Labor Convention on July 17, 2000

20 – Age of criminal liability

Criminal liability begins at 18 years of age.²⁹⁹ Minors older than 14 and under 18 who commit infractions are subject to the System of Juvenile Criminal Responsibility, which establishes another kind of liability for adolescents, subject to different penalties that must be in the best interests of the minor, and in observance of the international instruments ratified by Chile.³⁰⁰

Apruébese el siguiente Reglamento sobre Interceptación y Grabación de Comunicaciones Telefónicas y de otras Formas de Telecomunicación.

(...)

4.- Asimismo, los prestadores requeridos deberán cuidar que las intervenciones se ejecuten de manera tal que se proteja la privacidad y la seguridad de las comunicaciones cuya interceptación y grabación no fue autorizada, debiendo evitar cualquier tipo de intromisión en ellas. Además, deberán adoptar las medidas de resguardo necesarias para que no se produzcan alteraciones en el servicio, que pudieran alertar a las personas cuyas comunicaciones se ha ordenado interceptar y grabar.

(...)

²⁹⁹ Artículo 10. Están exentos de responsabilidad criminal:

(...)

2º El menor de dieciocho años. La responsabilidad de los menores de dieciocho años y mayores de catorce se regulará por lo dispuesto en la ley de responsabilidad penal juvenil.

(...)

³⁰⁰ Artículo 3º. Límites de edad a la responsabilidad. La presente ley se aplicará a quienes al momento en que se hubiere dado principio de ejecución del delito sean mayores de catorce y menores de dieciocho años, los que, para los efectos de esta ley, se consideran adolescentes.

En el caso que el delito tenga su inicio entre los catorce y los dieciocho años del imputado y su consumación se prolongue en el tiempo más allá de los dieciocho años de edad, la legislación aplicable será la que rija para los imputados mayores de edad.

La edad del imputado deberá ser determinada por el juez competente en cualquiera de las formas establecidas en el Título XVII del Libro I del Código Civil

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

There is no specific legislation, but the Penal Code punishes the distribution, commercialization or storage of child pornography by any means (Article 374 bis).

22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism

Trafficking in person is criminalized by Article 411 quarter of the Chilean Penal Code, which specifically requires child pornography as one of the objectives of the offender.³⁰¹ Article 366 quinquies of the Penal Code punishes any kind of participation in the production of child abuse images.

23 – Has specific legislation on online grooming, considering it a standalone offense

Article 366 IV of the Penal Code, modified by Law 20.526/2011, punishes the acts of showing pornographic material to minors and performing sexual acts or acts with sexual connotation in front of minors, which is an element of grooming.³⁰² It also punishes the act of grooming, defining it as making a child under 14 years of age send images or recordings where he/she performs acts of sexual significance. It specifically states that this crime can be committed through electronic means, without physical presence of the perpetrator.

24 – Has a clear definition on online grooming

The legislation has a clear definition, though it is not wholly objective.

25 – Age of potential victims of online grooming

Only children under 14 years old are considered potential victims of online grooming. Children between 14 and 18 years old can be victims of this crime if there is use of force or intimidation, or when there is an abuse of a dependency relationship (i.e. when the perpetrator is responsible for the custody, care or

³⁰¹ Artículo 411 quáter. El que mediante violencia, intimidación, coacción, engaño, abuso de poder, aprovechamiento de una situación de vulnerabilidad o de dependencia de la víctima, o la concesión o recepción de pagos u otros beneficios para obtener el consentimiento de una persona que tenga autoridad sobre otra capte, traslade, acoja o reciba personas para que sean objeto de alguna forma de explotación sexual, incluyendo la pornografía, trabajos o servicios forzados, servidumbre o esclavitud o prácticas análogas a ésta, o extracción de órganos, será castigado con la pena de reclusión mayor en sus grados mínimo a medio y multa de cincuenta a cien unidades tributarias mensuales.

Si la víctima fuere menor de edad, aun cuando no concurriere violencia, intimidación, coacción, engaño, abuso de poder, aprovechamiento de una situación de vulnerabilidad o de dependencia de la víctima, o la concesión o recepción de pagos u otros beneficios para obtener el consentimiento de una persona que tenga autoridad sobre otra, se impondrán las penas de reclusión mayor en su grado medio y multa de cincuenta a cien unidades tributarias mensuales. El que promueva, facilite o financie la ejecución de las conductas descritas en este artículo será sancionado como autor del delito.

³⁰² Artículo 366 quáter. El que, sin realizar una acción sexual en los términos anteriores, para procurar su excitación sexual o la excitación sexual de otro, realizare acciones de significación sexual ante una persona menor de catorce años, la hiciere ver o escuchar material pornográfico o presenciar espectáculos del mismo carácter, será castigado con presidio menor en su grado medio a máximo.

Si, para el mismo fin de procurar su excitación sexual o la excitación sexual de otro, determinare a una persona menor de catorce años a realizar acciones de significación sexual delante suyo o de otro o a enviar, entregar o exhibir imágenes o grabaciones de su persona o de otro menor de 14 años de edad, con significación sexual, la pena será presidio menor en su grado máximo.

Quien realice alguna de las conductas descritas en los incisos anteriores con una persona menor de edad pero mayor de catorce años, concurriendo cualquiera de las circunstancias del numerando 1º del artículo 361 o de las enumeradas en el artículo 363 o mediante amenazas en los términos de los artículos 296 y 297, tendrá las mismas penas señaladas en los incisos anteriores

Las penas señaladas en el presente artículo se aplicarán también cuando los delitos descritos en él sean cometidos a distancia, mediante cualquier medio electrónico

Si en la comisión de cualquiera de los delitos descritos en este artículo, el autor falseare su identidad o edad, se aumentará la pena aplicable en un grado.

education of, or has an employment relationship with the adolescent) when the offender takes advantage of a situation of severe neglect, the victim is deceived because of his/her sexual inexperience or ignorance, or the offender takes advantage of the child's temporary or permanent mental abnormality or mental disturbance.

26 – Criminalizes grooming when the offender has specific intent to have online or offline sexual contact with a child; grooming regardless of the intent

It criminalizes grooming when the offender has the specific intent of having sexual contact.

27 – Criminalizes showing pornography to a child as a standalone offense, or considers it an aspect of grooming

Article 366 of the Penal Code criminalizes showing pornography to a child. It is criminalized regardless of intent when the victim is less than 14 years old, and when the victim is between 14 and 18 years old, it is a crime only if the use of force or intimidation is present. The latter is punished by the same Article that criminalizes online or offline grooming, with the same penalties.

28 – Has specific legislation concerning cyberbullying

There is no specific legislation concerning cyberbullying, but the Chilean Police dedicated an entire branch of their force to fighting cybercrimes, giving special attention to cyberbullying, and labeling this and online grooming as a priority within la Brigada Investigadora del Ciber Crimen.

29 – Has specific legislation concerning sexting

There is currently no legislation specific to sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

Chile does not criminalize the possession of child abuse material. The Chilean Penal Code establishes two levels of penalties, observing the order suggested by the Directive 2011/92/EU. It proscribes a higher penalty for offenses related to the production of child abuse material, and a lower one to offenses related to the distribution of child abuse images.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child's family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

The Chilean Penal Code establishes aggravating circumstances for offenses committed by a member of the family, or a person who has abused a recognized position of trust or authority (Article 368 of the Penal Code).³⁰³ It gives the same treatment when a person cohabiting with the child commits the crime.

³⁰³ Artículo 368. Si los delitos previstos en los dos párrafos anteriores hubieren sido cometidos por autoridad pública, ministro de un culto religioso, guardador, maestro, empleado o encargado por cualquier título o causa de la educación, guarda, curación o cuidado del ofendido, se impondrá al responsable la pena señalada al delito con exclusión de su grado mínimo, si ella consta de dos o más grados, o de su mitad inferior, si la pena es un grado de una divisible. La misma regla se aplicará a quien hubiere cometido los mencionados delitos en contra de un menor de edad con ocasión de las funciones que desarrolle, aun en forma esporádica, en recintos educacionales, y al que los cometa con ocasión del servicio de transporte escolar que preste a cualquier título.

Exceptúan se los casos en que el delito sea de aquellos que la ley describe y pena expresando las circunstancias de usarse fuerza o intimidación, abusarse de una relación de dependencia de la víctima o abusarse de autoridad o confianza.

Article 368 bis, item 2, of the Penal Code establishes aggravating circumstances for crimes committed by several persons acting together, but the commission of a crime within the framework of a criminal organization is not proscribed as an aggravating circumstance.³⁰⁴

³⁰⁴ “Artículo 368 bis. Sin perjuicio de lo dispuesto en el artículo 63, en los delitos señalados en los párrafos 5 y 6 de este Título, serán circunstancias agravantes las siguientes:

(..)

2. Ser dos o más los autores del delito.”

5. COLOMBIA – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 218 of the Penal Code and Law 679/2001
2 – Has a clear definition of child pornography	Yes, Article 218 of the Penal Code
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 218 of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No.
5 – Criminalizes possession of child abuse material	Yes, Article 218 of the Penal Code – regardless of the intent
6 – Criminalizes virtual images and sexually exploitative representations of children	No
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Yes, Article 16, items IV and 6 of the Penal Code
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, Article 16, V of the Penal Code
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Articles 2 and 3 of Law 793/2002
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Articles 2 and 3 of Law 793/2002
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 219A of the Penal Code and Article 11 of Law 679/2001
14 – Requires Internet Service Providers to report child pornography	Yes, Articles 7 and 8 of Law 679/2001
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes
16 – Creates data retention or data preservation policies or provisions	Yes, Articles 235 and 236 of the Penal Code and Article 244 of Criminal Procedure Code
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	Yes, Article 4 of Law 1336/2009 that requires Codes of Conduct
18 – Has a national plan to combat violence against children	Yes
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years. From 14-18 years – juvenile justice
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes, Articles 218 and 219A of the Penal Code
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Yes, advertising on Article 219A of the Penal Code and sex tourism on Article 219 of Law 599/2000
23 – Has specific legislation on online grooming, considering it a standalone offense	No
24 – Has a clear definition of online grooming	Does not apply
25 – Considers everyone under 18 as a potential victim of online grooming	Does not apply
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Does not apply
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	No
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	No
31 – Law establishes aggravating circumstances for child abuse offenses	Yes, member of the family

COLOMBIA – COUNTRY REPORT

Colombia is a democratic republic with a civil law system. According to Article 1 of the Constitution, Colombia is a decentralized, unified republic, decentralized. The legislature is bicameral (Senate and House of Representatives).³⁰⁵

According to World Factbook, the executive branch dominates the government structure.³⁰⁶ Despite decades of internal conflict and drug related security challenges, Colombia maintains relatively strong democratic institutions characterized by peaceful, transparent elections and the protection of civil liberties. Income inequality is among the worst in the world, and more than a third of the population lives below the poverty line.

Colombia's highest courts are the Supreme Court of Justice (Corte Suprema de Justicia), the Constitutional Court, and the Council of State.

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

In the last decades, Colombia has strengthened legislation on the sexual exploitation of children in order to provide greater protection and guarantees for victims of child abuse.

The Code of Children and Adolescents (Código de la Infancia y la Adolescencia) brings Colombian legislation in line with the principles enshrined in the Convention on the Rights of the Child (CRC). Article 6 establishes that the provisions of International Human Rights Treaties or Conventions that have been ratified by Colombia, in particular the CRC, shall be an integral part of the Code of Children and Adolescents, and shall guide the interpretation and application of it.

The Colombian Penal Code (Law 599/2000) is relatively new and it has been amended several times, particularly regarding violence against children. The Penal Code was modified by Law 679/2001 and Law 1329/2009, which designed and articulated an integrated policy that involves preventive, educational, regulatory, administrative, punitive, policing measures, and criminal law measures in order to prevent and combat child exploitation.

There are many programmatic norms, especially in the Law 679/2001, which promote and encourage the creation of systems of auto-regulation and codes of conduct for the Internet, by a group consisting of representatives of ISPs, and of the users. According to Article 12, the government must implement public awareness about the problem of child pornography, among others, clarifying its causes, physical and psychological effects, and the responsibility of prevention.³⁰⁷ Article 23 of this law creates a tax to

³⁰⁵ Article 1. Colombia es un Estado social de derecho, organizado en forma de República unitaria, descentralizada, con autonomía de sus entidades territoriales, democrática, participativa y pluralista, fundada en el respeto de la dignidad humana, en el trabajo y la solidaridad de las personas que la integran y en la prevalencia del interés general.

³⁰⁶ Colombia, *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html> (last visited Oct. 13, 2014).

³⁰⁷ Artículo 12. Medidas de sensibilización. Las autoridades de los distintos niveles territoriales y el Instituto Colombiano de Bienestar Familiar, implementarán acciones de sensibilización pública sobre el problema de la prostitución, la pornografía y el abuso sexual de menores de edad. El Gobierno Nacional, por intermedio del Ministerio de Educación, supervisará las medidas que a este respecto sean dictadas por las autoridades departamentales, distritales y municipales.

be paid by tourists that are leaving the country (one American dollar), which goes to a fund dedicated to the prevention of child sexual exploitation and child pornography.³⁰⁸

The judicial power, in particular the Supreme Court (Corte Suprema de Justicia), analyzes domestic legislation according to the Constitution, which protects children against any kind of abandonment, moral or physical violence, trafficking, sexual abuse, and economic exploitation.³⁰⁹ The *Corte Suprema de Justicia* also analyzes domestic legislation according to the International Treaties ratified by Colombia, that are related to the prevention and combatting of violence against children.³¹⁰

The Child and Adolescent Code established that a child is anyone under 12 years of age, and adolescents are between 12 and 18 years old. There is a presumption that one is a minor in cases where there is doubt about the person's minor status.³¹¹ Article 20 establishes that children and adolescents have the right to be protected against sexual exploitation, pornography, and any other kind of conduct that is against their integrity, liberty, or sexual development.³¹²

Families must promote the responsible exercise of sexual and reproductive rights of their children, and the duty to collaborate with the schools in educating on that subject.³¹³

Parágrafo 1o. Por medidas de sensibilización pública se entiende todo programa, campaña o plan tendiente a informar por cualquier medio sobre el problema de la prostitución, la pornografía con menores de edad y el abuso sexual de menores de edad; sobre sus causas y efectos físicos y psicológicos y sobre la responsabilidad del Estado y de la sociedad en su prevención.

³⁰⁸ Artículo 23. Impuesto de salida. El extranjero, al momento de salida del territorio colombiano, cubrirá el valor correspondiente a un dólar de los Estados Unidos de América, o su equivalente en pesos colombianos, con destino a la financiación de los planes y programas de prevención y lucha contra la explotación sexual y la pornografía con menores de edad.

³⁰⁹ Article 44 of the Colombian Constitution.

³¹⁰ Casación 32554, Ralph Paladino, Casación 39160, Lucy Edilma Suárez Sanches, decisions available on the webpage of the Corte Suprema de Justicia.

³¹¹ Artículo 3°. Sujetos titulares de derechos. Para todos los efectos de esta ley son sujetos titulares de derechos todas las personas menores de 18 años. Sin perjuicio de lo establecido en el artículo 34 del Código Civil, se entiende por niño o niña las personas entre los 0 y los 12 años, y por adolescente las personas entre 12 y 18 años de edad.

Parágrafo 1°. En caso de duda sobre la mayoría o minoría de edad, se presumirá esta. En caso de duda sobre la edad del niño, niña o adolescente se presumirá la edad inferior. Las autoridades judiciales y administrativas, ordenarán la práctica de las pruebas para la determinación de la edad, y una vez establecida, confirmarán o revocarán las medidas y ordenarán los correctivos necesarios para la ley.

³¹² Artículo 20. Derechos de protección. Los niños, las niñas y los adolescentes serán protegidos contra:

(...)

4. La violación, la inducción, el estímulo y el constreñimiento a la prostitución; la explotación sexual, la pornografía y cualquier otra conducta que atente contra la libertad, integridad y formación sexuales de la persona menor de edad. (...)

³¹³ Artículo 39. Obligaciones de la familia. La familia tendrá la obligación de promover la igualdad de derechos, el afecto, la solidaridad y el respeto recíproco entre todos sus integrantes. Cualquier forma de violencia en la familia se considera destructiva de su armonía y unidad y debe ser sancionada. Son obligaciones de la familia para garantizar los derechos de los niños, las niñas y los adolescentes:

(...)

6. Promover el ejercicio responsable de los derechos sexuales y reproductivos y colaborar con la escuela en la educación sobre este tema.

(...)

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation and clear definition of child pornography; age of the victim

The definition of child pornography is in Article 218 of the Criminal Code, modified by Law 1336/2009, and defines it as to “take pictures, videotape, produce, disseminate, offer, sell, buy, possess, carry, store, transmit or display by any means, for personal use or exchange, real representations of sexual activity involving a person under 18 years of age.³¹⁴ The uploading of child abuse images is punished equally.

Colombian legislation has some interesting norms about the use of the Internet to commit crimes against children. In fact, the Law 679/2001 creates a crime related to the offer of the exploitation of children through the Internet on its Article 34, adding Article 219A in the Penal Code, and determines that the punishment is higher when the victim is under 12 years old.³¹⁵ This law also created the crime of failure to act (Article 219B), committed by those who are aware that crimes are being committed against children and do not report it to the authorities.

Colombia has a clear definition of child pornography, but is not complete (according to the requirement in the OPSC) because it does not consider simulated sexual activity with children or adolescents. Potential victims are children under 18 years of age.

4 – Criminalizes accessing or downloading child pornography images

Viewing (accessing or downloading) child pornography material is not a crime. Conduct like exhibiting or displaying by any means are criminalized. It is a crime under Article 218 of the Penal Code to upload child abuse images (feeding Internet databases), with or without profit.³¹⁶

5 – Criminalizes possession of child pornography

The possession of child pornography material is a crime, according to Article 218 of the Penal Code, regardless of the intent.

³¹⁴ Artículo 218. Pornografía con menores. El que fotografíe, filme, grabe, produzca, divulgue, ofrezca, venda, compre, posea, porte, almacene, transmita o exhiba, por cualquier medio, para uso personal o intercambio, representaciones reales de actividad sexual que involucre persona menor de 18 años de edad, incurrirá en prisión de 10 a 20 años y multa de 150 a 1.500 salarios mínimos legales mensuales vigentes.

Igual pena se aplicará a quien alimente con pornografía infantil bases de datos de Internet, con o sin fines de lucro.

La pena se aumentará de una tercera parte a la mitad cuando el responsable sea integrante de la familia de la víctima.

³¹⁵ Artículo 219A. Utilización o facilitación de medios de comunicación para ofrecer servicios sexuales de menores. El que utilice o facilite el correo tradicional, las redes globales de información, o cualquier otro medio de comunicación para obtener contacto sexual con menores de dieciocho (18) años, o para ofrecer servicios sexuales con éstos, incurrirá en pena de prisión de diez (10) a catorce (14) años, y multa de sesenta y siete (67) a (750) salarios mínimos legales mensuales vigentes.

Las penas señaladas en el inciso anterior se aumentarán hasta en la mitad (1/2) cuando las conductas se realizaren con menores de doce (12) años.

³¹⁶ Artículo 218. El que fotografíe, filme, grabe, produzca, divulgue, ofrezca, venda, compre, posea, porte, almacene, transmita o exhiba, por cualquier medio, para uso personal o intercambio, representaciones reales de actividad sexual que involucre persona menor de 18 años de edad, incurrirá en prisión de 10 a 20 años y multa de 150 a 1.500 salarios mínimos legales mensuales vigentes.

Igual pena se aplicará a quien alimente con pornografía infantil bases de datos de Internet, con o sin fines de lucro.

La pena se aumentará de una tercera parte a la mitad cuando el responsable sea integrante de la familia de la víctima.

6 – Criminalizes virtual images or sexually exploitative representations of children

An interpretation of Article 218 indicates that the production and distribution of virtual images or sexually exploitative representations of children is not a crime, and that it requires actual sexual activity of minors.

7 – Addresses the criminal liability of children involved in pornography

The legislation does not address criminal liability of children involved in pornography.

8 – Establishes the criminal liability of legal persons for child pornography offenses

Legal entities are not criminally liable under Colombian law.

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

According to Article 16, IV of the Penal Code, modified by Article 22 of Law 1121/2006, Colombian law is applied to a Colombian citizen who commits a crime in a foreign country and returns to Colombia, if the Colombian law establishes a punishment of deprivation of liberty for a minimum two years.³¹⁷ The crime of child pornography (Article 218 of the Penal Code), trafficking (Articles 188 and 188 A of the Penal Code), and the crime of using the Internet to commit violence against a child (Article 219 A of the Penal Code) have minimum penalties superior to that limit, so the principle of extraterritoriality of the penal legislation is applicable.

According to Article 16, VI of the Penal Code, Colombian law is applied to foreigners within its territory, if the crime is punished with no less than three years of imprisonment, among other requirements. The country recognizes extraterritorial jurisdiction when the offender is a person who has habitual residence in its territory.

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

According to Article 16, V of the Penal Code, Colombian law is applied to a foreigner who is in Colombia after having committed a crime against a Colombian in a foreign country, if the relevant Colombian law establishes a punishment of deprivation of liberty for a minimum of two years.³¹⁸ The crimes of child

³¹⁷ Artículo 16. Extraterritorialidad. La ley penal colombiana se aplicará:

(...)

4.- Al nacional que fuera de los casos previstos en los numerales anteriores, se encuentre en Colombia después de haber cometido un delito en territorio extranjero, cuando la ley penal colombiana lo reprima con pena privativa de la libertad cuyo mínimo no sea inferior a dos (2) años y no hubiere sido juzgado en el exterior.

Si se trata de pena inferior, no se procederá sino por querrela de parte o petición del Procurador General de la Nación.

³¹⁸ Artículo 16. Extraterritorialidad. La ley penal colombiana se aplicará:

(...)

5.- Al extranjero que fuera de los casos previstos en los numerales 1º, 2º y 3º, se encuentre en Colombia después de haber cometido en el exterior un delito en perjuicio del Estado o de un nacional colombiano, que la ley colombiana reprima con pena privativa de la libertad cuyo mínimo no sea inferior a dos años (2) y no hubiere sido juzgado en el exterior.

En este caso sólo se procederá por querrela de parte o petición del Procurador General de la Nación.

6.- Al extranjero que haya cometido en el exterior un delito en perjuicio de extranjero, siempre que se reúnan estas condiciones:

- a.- Que se halle en territorio colombiano;
- b.- Que el delito tenga señalada en Colombia pena privativa de la libertad cuyo mínimo no sea inferior a tres (3) años;
- c.- Que no se trate de delito político, y

pornography (Article 218 of the Penal Code), trafficking (Article 188 and 188 A of the Penal Code), and the crime of using the Internet to commit violence against a child (Article 219 A of the Penal Code) all have minimum penalties superior to that limit, so the principle of extraterritoriality of the penal legislation is applicable. When the extradition of a foreigner is denied, he can also be prosecuted in Colombia under some conditions (item 6 of Article 16 of the Penal Code).

11 – Establishes forfeiture of assets used to commit or facilitate offenses

Articles 348³¹⁹ and 412³²⁰ of the Criminal Procedure Code establish that the judge should decide on forfeiture of assets used to commit the crime, and proceeds derived from the offense, when there is a conviction. Forfeiture is not required as it depends on the discretion of the judge.

Article 673 of the Criminal Procedural Code (Código de Procedimiento Penal) proscribes the forfeiture of computers and all kinds of ICTs used in the production and commercialization of child pornography, establishing that the assets must be sent to the SENAME or to a specialized department doing similar work with children.³²¹

Regarding the facilitation of child prostitution, if the offender works in an organization dedicated to that purpose, Article 367 V of the Penal Code enhances the penalty and establishes the forfeiture of every asset (real state, movables, money etc.) used or intended to be used in the commission of the crime.³²²

d.- Que solicitada la extradición no hubiere sido concedida por el gobierno colombiano. Cuando la extradición no fuere aceptada habrá lugar a proceso penal.

En el caso a que se refiere el presente numeral no se procederá sino mediante querrela o petición del Procurador General de la Nación y siempre que no hubiere sido juzgado en el exterior.

³¹⁹ Artículo 348. Sentencia condenatoria. La sentencia condenatoria fijará las penas y se pronunciará sobre la eventual aplicación de alguna de las medidas:

(...)

La sentencia condenatoria dispondrá también el comiso de los instrumentos o efectos del delito o su restitución, cuando fuere procedente.

³²⁰ Artículo 412. Fallo en el procedimiento abreviado.

Terminado el debate, el juez dictará sentencia. En caso de ser condenatoria, no podrá imponer una pena superior ni más desfavorable a la requerida por el fiscal o el querellante, en su caso.

(...) La sentencia condenatoria dispondrá también el comiso de los instrumentos o efectos del delito o su restitución, cuando fuere procedente.

³²¹ Artículo 673. (...)

En los casos de los artículos 366 quinquies, 374 bis, inciso primero y 374 ter del Código Penal, el tribunal destinará los instrumentos tecnológicos decomisados, tales como computadores, reproductores de imágenes o sonidos y otros similares, al Servicio Nacional de Menores o a los departamentos especializados en la materia de los organismos policiales que correspondan. Las producciones incautadas como pruebas de dichos delitos podrán destinarse al registro reservado a que se refiere el inciso segundo del artículo 369 ter del Código Penal. En este caso, la vulneración de la reserva se sancionará de conformidad con lo dispuesto en el párrafo 8 del Título V, del Libro II del Código Penal.

³²² Artículo 367 quinquies. En los delitos previstos en los artículos 367 ter y 367 quater se impondrá la pena superior en grado cuando el culpable perteneciere a una organización o asociación, incluso de carácter transitorio, que se dedicare a la realización de las actividades allí señaladas.

Sin perjuicio de las reglas generales, caerán especialmente en comiso los bienes inmuebles, muebles, dinero y todo instrumento que haya servido o hubiere estado destinado a la comisión de cualquiera de los delitos penados en los artículos 367 ter y 367 quater, los efectos que de ellos provinieren y las utilidades que hubieran originado, cualquiera sea su naturaleza jurídica o las transformaciones que hubieren experimentado.

Colombian legislation also regulates the forfeiture of assets in Law 793/2002. Article 2 enumerates specific crimes for which this is possible: embezzlement, acts committed to the detriment of the Treasury, and conduct which reveals a serious deterioration of social morality.³²³ The production and distribution of child pornography could be read into the last category, but the legislator has specified the crimes that could cause impairment to social morality: those that represent threats to public health, or economic and social order, that harm natural resources and the environment, public safety, public administration, the constitutional and legal regime, and the crimes of kidnapping, kidnapping for extortion, extortion, pimping, trafficking in persons and smuggling of migrants. Trafficking in persons is the only crime included above that can be associated with child pornography, and thus is the only child pornography offense that can attract the forfeiture of assets under law 793/2002.

Subsection 3 of Article 2 of Law 793/2002 also defines the kinds of assets that can be confiscated, including all the goods used as means or instrument to commit illegal activities, and all assets aimed at or related to the subject of crime.³²⁴ Subsection 4 establishes that even if those goods are sold or permutated, any new assets traded or received can be also confiscated.

Article 3 of Law 793/2002 proscribes that all goods that can have economic assessment, are movable or immovable, tangible or intangible, or those which can be placed on property rights, as well as fruits and yields can be confiscated.³²⁵ It also states that if they were sold, destroyed, hidden or exchanged, the prosecutor can identify goods of equivalent value to be confiscated in its place.

³²³ Artículo 2. (...).

Parágrafo 2o. Las actividades ilícitas a las que se refiere el presente artículo son:

1. (...)

2. (...)

3. Las que impliquen grave deterioro de la moral social. Para los fines de esta norma, se entiende que son actividades que causan deterioro a la moral social, las que atenten contra la salud pública, el orden económico y social, los recursos naturales y el medio ambiente, la seguridad pública, la administración pública, el régimen constitucional y legal, el secuestro, el secuestro extorsivo, la extorsión, el proxenetismo, la trata de personas y el tráfico de inmigrantes.

³²⁴ Artículo 2o. CAUSALES Se declarará extinguido el dominio mediante sentencia judicial, cuando ocurriere cualquiera de los siguientes casos:

3. Cuando los bienes de que se trate hayan sido utilizados como medio o instrumento para la comisión de actividades ilícitas, sean destinadas a estas o correspondan al objeto del delito.

4. Cuando los bienes o recursos de que se trate provengan de la enajenación o permute de otros que tengan su origen, directa o indirectamente, en actividades ilícitas, o que hayan sido destinados a actividades ilícitas o sean producto, efecto, instrumento u objeto del ilícito.

5. Cuando los bienes de que se trate tengan origen lícito, pero hayan sido mezclados, integrados o confundidos con recursos de origen ilícito. Se exceptúan los títulos depositados en los Depósitos Descentralizados de Valores, siempre y cuando los tenedores de esos títulos cumplan satisfactoriamente las normas en materia de prevención del lavado de activos y financiación del terrorismo que le sean exigibles.

PARÁGRAFO 1o. El afectado deberá probar a través de los medios idóneos, los fundamentos de su oposición y el origen lícito de los bienes.

³²⁵ Artículo 3o. DE LOS BIENES. Para los efectos de la presente ley se entenderá por bienes sujetos a extinción del dominio, todos los que sean susceptibles de valoración económica, muebles o inmuebles, tangibles o intangibles, o aquellos sobre los cuales pueda recaer derecho de propiedad. Igualmente, se entenderá por tales todos los frutos y rendimientos de los mismos.

Cuando no resultare posible ubicar o extinguir el dominio de los bienes determinados sobre los cuales verse la extinción del dominio, porque estos hayan sido enajenados, destruidos, ocultados o permutados, el Fiscal deberá identificar bienes lícitos de propiedad del accionado y presentarlos al Juez, para que declare extinguido el dominio, sobre bienes y valores equivalentes. Lo anterior no podrá interpretarse en perjuicio de los terceros de buena fe exentos de culpa.

Article 9 of the Law 1336/2009 provides for the forfeiture of assets such as hotels, hostels, pensions, residences, apartments, and other establishments that provide hosting service, when such properties have been used to commit sexual activities using children and adolescents. This would be most applicable to the production of child pornography when committed in this type of establishment. In such cases, the assets shall be used for the financing of the Fund Against Sexual Exploitation of Children.

12 – Establishes forfeiture of proceeds derived from such offenses

Subsection 2 Article 2 of Law 793 includes any proceeds derived from crimes in the list of assets that can be confiscated.³²⁶ Subsections 4 and 5 of Article 2, and Article 3 are also applicable.

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 219-A of the Penal Code (introduced by Article 35 of Law 679/2001: penalties enhanced by Article 14 of Law 890/2004) is related to the crime of failure of act (omission), committed by those who, by reason of office, function or activity, becomes aware of child pornography or any other violence against children and do not report it to the authorities.³²⁷ Individuals and corporations are required to report any violation of Law 679/2001, which created the Statute for the Prevention and of Exploitation, Pornography and Sex tourism with children.³²⁸

14 – Requires Internet Service Providers to report child pornography

Law 679/2001 “Act of prevention and combat of exploitation, pornography and sex tourism with children” establishes through Articles 7 and 8, the prohibitions and duties for ISPs and users of the Internet. Internet Service Providers must both make mandatory reports about child pornography, and combat the distribution of this kind of material by creating technical blocks and filters. Decree 1524/2002 regulates Law 679/2001, and its Articles define these obligations.³²⁹

³²⁶ Artículo 2o. Causales. Se declarará extinguido el dominio mediante sentencia judicial, cuando ocurriere cualquiera de los siguientes casos:

1. (...)
2. Cuando el bien o los bienes de que se trate provengan directa o indirectamente de una actividad ilícita.
3. (...)

³²⁷ Artículo 219A. Omisión de denuncia. El que, por razón de su oficio, cargo, o actividad, tuviere conocimiento de la utilización de menores para la realización de cualquiera de las conductas previstas en el presente capítulo y omitiere informar a las autoridades administrativas o judiciales competentes sobre tales hechos, teniendo el deber legal de hacerlo, incurrirá en multa de trece punto treinta y tres (13.33) a setenta y cinco (75) salarios mínimos legales mensuales vigentes.

Si la conducta se realizare por servidor público, se impondrá, además, la pérdida del empleo.

³²⁸ Artículo 11. Personería procesal. Toda persona natural o jurídica tendrá la obligación de denunciar ante las autoridades competentes cualquier hecho violatorio de las disposiciones de la presente ley. Las asociaciones de padres de familia y demás organizaciones no gubernamentales cuyo objeto sea la protección de la niñez y de los derechos de los menores de edad, tendrán personería procesal para denunciar y actuar como parte en los procedimientos administrativos y judiciales encaminados a la represión del abuso sexual de menores de edad.

La Defensoría del Pueblo y las personerías municipales brindarán toda la asesoría jurídica que las asociaciones de padres de familia requieran para ejercer los derechos procesales a que se refiere este artículo. La omisión en el cumplimiento de esta obligación constituye falta disciplinaria gravísima

³²⁹ Artículo 4°. Prohibiciones. Los proveedores o servidores, administradores y usuarios de redes globales de información no podrán:

1. Alojar en su propio sitio imágenes, textos, documentos o archivos audiovisuales que impliquen directa o indirectamente actividades sexuales con menores de edad.
2. Alojar en su propio sitio material pornográfico, en especial en modo de imágenes o videos, cuando existan indicios de que las personas fotografiadas o filmadas son menores de edad.
3. Alojar en su propio sitio vínculos o "links", sobre sitios telemáticos que contengan o distribuyan material pornográfico relativo a menores de edad.

15 – Has a support telephone or online hotlines to enable the public to report child abuse

The public can report sexual exploitation of children through the hotline Línea Nacional de Bienestar (01800091880). 24 hours a day, or through the website of the Instituto Colombiano de Bienestar Familiar (ICBF), a public institution whose mission is to prevent vulnerabilities of or threats against children, and protect them. According to El Tiempo, in 2010 ICBF received 2,827 reports related to

Artículo 5°. Deberes. Sin perjuicio de la obligación de denuncia consagrada en la ley para todos los residentes en Colombia, los proveedores, administradores y usuarios de redes globales de información deberán:

1. Denunciar ante las autoridades competentes cualquier acto criminal contra menores de edad de que tengan conocimiento, incluso de la difusión de material pornográfico asociado a menores.
2. Combatir con todos los medios técnicos a su alcance la difusión de material pornográfico con menores de edad.
3. Abstenerse de usar las redes globales de información para divulgación de material ilegal con menores de edad.
4. Establecer mecanismos técnicos de bloqueo por medio de los cuales los usuarios se puedan proteger a sí mismos o a sus hijos de material ilegal, ofensivo o indeseable en relación con menores de edad.

Artículo 6°. Medidas Técnicas.

1. Los ISP, proveedores de servicio de alojamiento o usuarios corporativos deberán implementar sistemas internos de seguridad para su red, encaminados a evitar el acceso no autorizado a su red, la realización de spamming, o que desde sistemas públicos se tenga acceso a su red, con el fin de difundir en ella contenido relacionado con pornografía infantil.

2. Los ISP deben implementar en su propia infraestructura, técnicas de control, basadas en la clasificación de contenidos que tengan como objetivo fundamental evitar el acceso a sitios con contenidos de pornografía infantil.

La clasificación de estos contenidos se sujetará a la que efectúen las diferentes entidades especializadas en la materia. Dichas entidades serán avaladas de manera concertada por el Ministerio de Comunicaciones y el Instituto Colombiano de Bienestar Familiar-ICBF.

3. Los prestadores de servicios de alojamiento podrán utilizar herramientas tecnológicas de monitoreo y control sobre contenidos alojados en sitios con acceso al público en general que se encuentran en su propia infraestructura.

4. Los ISP y proveedores de servicios de alojamiento deberán ofrecer o informar a sus usuarios, sobre la existencia de mecanismos de filtrado que puedan ser instalados en los equipos de estos, con el fin de prevenir y contrarrestar el acceso de menores de edad a la pornografía.

Así mismo los ISP deberán facilitar al usuario el acceso a la información de criterios de clasificación, los valores y principios que los sustentan, la configuración de los sistemas de selección de contenido y la forma como estos se activan en los equipos del usuario.

5. Cuando una dirección es bloqueada por el ISP, se debe indicar que esta no es accesible debido a un bloqueo efectuado por una herramienta de selección de contenido.

6. Los ISP y proveedores de servicios de alojamiento deberán incluir en sus sitios, información expresa sobre la existencia y los alcances de la Ley 679 de 2001, y sus decretos reglamentarios.

7. Los ISP y proveedores de servicios de alojamiento deberán implementar vínculos o "links" claramente visibles en su propio sitio, con el fin de que el usuario pueda denunciar ante las autoridades competentes sitios en la red con presencia de contenidos de pornografía infantil.

Parágrafo. Para todos los efectos la información recolectada o conocida en desarrollo de los controles aquí descritos, será utilizada únicamente para los fines de la Ley 679 de 2001, y en ningún caso podrá ser suministrada a terceros o con detrimento de los derechos de que trata el artículo 15 de la Constitución Política.

Artículo 7°. Medidas Administrativas. En los diferentes contratos de servicio entre los ISP y sus suscriptores, deberán incluirse las prohibiciones y deberes de que trata este decreto, advirtiendo a estos que su incumplimiento acarreará las sanciones administrativas y penales contempladas en la Ley 679 de 2001 y en este decreto.

En los contratos de prestación de servicios de alojamiento se deben estipular cláusulas donde se prohíba expresamente el alojamiento de contenidos de pornografía infantil. En caso que el prestador de servicio de alojamiento tenga conocimiento de la existencia de este tipo de contenidos en su propia infraestructura, deberá denunciarlos ante la autoridad competente, y una vez surtido el trámite y comprobada la responsabilidad por parte de esta se procederá a retirarlos y a terminar los contratos unilateralmente.

Parágrafo. La autoridad competente podrá como medida precautelativa, ordenar la suspensión del correspondiente sitio en el evento que la misma así lo considere, con el fin de hacer el control efectivo en los términos del presente decreto.

abuse, 1,637 related to child prostitution, 184 related to child abuse images and nine related to sex tourism.³³⁰

16 – Creates data retention and preservation policies or provisions

Colombia does not have legislation concerning data retention and preservation policies or provisions. Under Article 15 of the Colombian Constitution, any form of communication requires judicial order to be intercepted.³³¹ The Constitution was enacted in 1991, and in 2003 there was an attempt to modify this article, by including the authorization for some authorities (to be later identified by law) to intercept and register any kind of communication, without prior judicial order, to prevent terrorist acts. The competent judge would need to be informed within 36 hours. This amendment was declared unenforceable due to a procedural irregularity.³³²

Article 250 of the Colombian Constitution was amended at the same time in 2003), and allows Prosecutors to intercept communications with posterior judicial review within the following 36 hours.³³³

In 2011, the Criminal Procedure Code was modified. Article 235³³⁴ and Article 236³³⁵ allow Prosecutors to issue a warrant to intercept and record private communications, and to retain any kind of information

³³⁰ Línea para denunciar casos de abuso infantil, funcionara durante las 24 horas (Jun. 18, 2010), at <http://www.eltiempo.com/archivo/documento/CMS-7762238> (last visited Oct. 14, 2015).

³³¹ Artículo 15. Todas las personas tienen derecho a su intimidad personal y familiar y a su buen nombre, y el Estado debe respetarlos y hacerlos respetar. De igual modo, tienen derecho a conocer, actualizar y rectificar las informaciones que se hayan recogido sobre ellas en bancos de datos y en archivos de entidades públicas y privadas.

En la recolección, tratamiento y circulación de datos se respetarán la libertad y demás garantías consagradas en la Constitución.

La correspondencia y demás formas de comunicación privada son inviolables. Sólo pueden ser interceptadas o registradas mediante orden judicial, en los casos y con las formalidades que establezca la ley. (...)

³³² Sentencia C-816/2004, available at <http://www.corteconstitucional.gov.co/relatoria/2004/c-816-04.htm> (last visited Nov. 5, 2015).

³³³ Artículo 250. (Modificado. Acto Legislativo 3 de 2002. Artículo 2°)

La Fiscalía General de la Nación está obligada a adelantar el ejercicio de la acción penal y realizar la investigación de los hechos que revistan las características de un delito que lleguen a su conocimiento por medio de denuncia, petición especial, querrela o de oficio, siempre y cuando medien suficientes motivos y circunstancias fácticas que indiquen la posible existencia del mismo. No podrá, en consecuencia, suspender, interrumpir, ni renunciar a la persecución penal, salvo en los casos que establezca la ley para la aplicación del principio de oportunidad regulado dentro del marco de la política criminal del Estado, el cual estará sometido al control de legalidad por parte del juez que ejerza las funciones de control de garantías. Se exceptúan los delitos cometidos por Miembros de la Fuerza Pública en servicio activo y en relación con el mismo servicio.

En ejercicio de sus funciones la Fiscalía General de la Nación, deberá:

1. Solicitar al juez que ejerza las funciones de control de garantías las medidas necesarias que aseguren la comparecencia de los imputados al proceso penal, la conservación de la prueba y la protección de la comunidad, en especial, de las víctimas.

El juez que ejerza las funciones de control de garantías, no podrá ser, en ningún caso, el juez de conocimiento, en aquellos asuntos en que haya ejercido esta función.

La ley podrá facultar a la Fiscalía General de la Nación para realizar excepcionalmente capturas; igualmente, la ley fijará los límites y eventos en que proceda la captura. En estos casos el juez que cumpla la función de control de garantías lo realizará a más tardar dentro de las treinta y seis (36) horas siguientes.

2. Adelantar registros, allanamientos, incautaciones e interceptaciones de comunicaciones. En estos eventos el juez que ejerza las funciones de control de garantías efectuará el control posterior respectivo, a más tardar dentro de las treinta y seis (36) horas siguientes.

(...)

³³⁴ Artículo 235. Interceptación de comunicaciones telefónicas y similares. El fiscal podrá ordenar, con el único objeto de buscar elementos materiales probatorios y evidencia física, que se intercepten mediante grabación magnetofónica o similares las comunicaciones telefónicas, radiotelefónicas y similares que utilicen el espectro electromagnético, cuya información tengan interés para los fines de la actuación. En este sentido, las entidades encargadas de la operación técnica de la respectiva interceptación tienen la obligación de realizarla inmediatamente después de la notificación de la orden.

transmitted through any communications network, for the purpose of gathering evidence for a criminal prosecution. The must be submitted for judicial review within 24 hours.³³⁶ It requires a written warrant, and is limited to the months, renewable only with prior judicial review. The persons who take part in these operations shall guarantee the confidentiality of the information and communications.

The Ministries of Justice and ICTs issued Decree 1704, on Communications Interceptions and Data Retention on August 15, 2012. Article 4 of this decree proscribes that ISPs must maintain information from its subscribers for five years.³³⁷

Article 244 of the Criminal Procedure Code allows the real time collection of traffic data and content by Prosecutors, subject to subsequent judicial review.³³⁸

Colombia does have provisions regulating retention and preservation of data, as ISPs have to retain information from its subscribers for five years and the legislation specifies the types of data than can be

En todo caso, deberá fundamentarse por escrito. Las personas que participen en estas diligencias se obligan a guardar la debida reserva.

Por ningún motivo se podrán interceptar las comunicaciones del defensor.

³³⁵ Artículo 236. Recuperación de información dejada al navegar por internet u otros medios tecnológicos que produzcan efectos equivalentes. Cuando el fiscal tenga motivos razonablemente fundados, de acuerdo con los medios cognoscitivos os previstos en este código, para inferir que el indiciado o el imputado ha estado transmitiendo información útil para la investigación que se adelanta, durante su navegación por internet u otros medios tecnológicos que produzcan efectos equivalentes, ordenará la aprehensión del computador, computadores y servidores que pueda haber utilizado, disquetes y demás medios de almacenamiento físico, para que expertos en informática forense descubran, ecojan, analicen y custodien la información que recuperen.

En estos casos serán aplicables analógicamente, según la naturaleza de este acto, los criterios establecidos para los registros y allanamientos.

La aprehensión de que trata este artículo se limitará exclusivamente al tiempo necesario para la captura de la información en él contenida. Inmediatamente se devolverán los equipos incautados.

³³⁶ Artículo 237. Audiencia de control de legalidad posterior. Dentro de las veinticuatro (24) horas siguientes al recibimiento del informe de Policía Judicial sobre las diligencias de las órdenes de registro y allanamiento, retención de correspondencia, interceptación de comunicaciones o recuperación de información producto de la transmisión de datos a través de las redes de comunicaciones, el fiscal comparecerá ante el Juez de Control de Garantías, para que realice la audiencia de revisión de legalidad sobre lo actuado.

Durante el trámite de la audiencia podrán asistir, además del fiscal, los funcionarios de la Policía Judicial y los testigos o peritos que prestaron declaraciones juradas con el fin de obtener la orden respectiva, o que intervinieron en la diligencia.

El juez podrá, si lo estima conveniente, interrogar directamente a los comparecientes y, después de escuchar los argumentos del fiscal, decidirá de plano sobre la validez del procedimiento.

Parágrafo. Si el cumplimiento de la orden ocurrió luego de formulada la imputación, se deberá citar a la audiencia de control de legalidad al imputado y a su defensor para que, si lo desean, puedan realizar el contradictorio. En este último evento, se aplicarán analógicamente, de acuerdo con la naturaleza del acto, las reglas previstas para la audiencia preliminar.

³³⁷ Artículo 4. Información de los subscriptores

Los proveedores de redes y servicios de telecomunicaciones, una vez cumplidos los requisitos legales a que haya lugar, deberán suministrar a la Fiscalía General de la Nación o demás autoridades competentes, a través del grupo de Policía Judicial designado para la investigación del caso, los datos del suscriptor, tales como identidad, dirección de facturación y tipo de conexión. Esta información debe entregarse en forma inmediata.

Los proveedores de redes y servicios de telecomunicaciones deberán mantener actualizada la información de sus suscriptores y conservarla por el término de cinco años.

³³⁸ Artículo 244. *Búsqueda selectiva en bases de datos.* La policía judicial, en desarrollo de su actividad investigativa, podrá realizar las comparaciones de datos registradas en bases mecánicas, magnéticas u otras similares, siempre y cuando se trate del simple cotejo de informaciones de acceso público.

Cuando se requiera adelantar búsqueda selectiva en las bases de datos, que implique el acceso a información confidencial, referida al indiciado o imputado o, inclusive a la obtención de datos derivados del análisis cruzado de las mismas, deberá mediar autorización previa del fiscal que dirija la investigación y (se aplicarán, en lo pertinente, las disposiciones relativas a los registros y allanamientos).

retained. Preservation can last six months, which is a period much longer than recommended. There is no need for a prior judicial order, but the requests are subject to a judicial review within 24 hours. ISP employees must guarantee the confidentiality of the preservation order.

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

Article 4 of Law 1336/2009 establishes a system of auto-regulation of cybercafés, stating that these establishments must adopt measures to prevent children from being exploited, and from having access to any form of pornography. It suggests that cybercafés must adopt codes of conduct to prevent the distribution of child pornography through the Internet. This is exactly aligned with the Pact of Rio de Janeiro.

18 – Has a national plan to combat violence against children

Colombia has the National Action Plan for the Prevention and Eradication of the Commercial Sexual Exploitation of Children, designed for 2006-2011. This plan created the National Committee for the Prevention and Eradication of the Commercial Sexual Exploitation of Children in 2007, in accordance with Law 679.

There is also a committee called the Inter-Institutional Advisory Committee for the Prevention of Sexual Violence and the Comprehensive Care of Children who are Victims of Sexual Abuse, which has been operating since 2007 and is responsible for issuing regulations for the prevention of sexual violence.

19 – International instruments ratified

- Ratified the Convention on the Rights of the Child on January 28, 1991. Declarations or Reservation: against the minimum age of 15 for taking part in armed conflicts, arguing that it should be 18. Ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on November 11, 2003
 - Declarations or Reservations: the same made at the CRC
- Colombia is a party to the ILO Minimum Age Convention, ratified on February 2, 2001
 - Minimum age: 15
- Ratified the ILO Worst Forms of Child Labor Convention on January 28, 2005
- Ratified the Hague Convention on the Civil Aspects of International Child Abduction; Acceded on July 13, 1995 and entry into force on March 1, 1996
- Colombia signed the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption on April 1, 1993, acceded on August 13, 1998 and entry into force on June 1, 1998; Made declarations concerning Articles 17, 21, 22, and 28

20 – Age of criminal liability

Criminal liability starts at 18 years old, and minors between 14 and 18 years old who commit infractions are subjected to the System of Juvenile Criminal Responsibility, which establishes different liability and penalties for adolescents, and have a pedagogic nature, guaranteeing the application of the integral protection principle.³³⁹

³³⁹ Artículo 33. Inimputabilidad. (...) Los menores de dieciocho (18) años estarán sometidos al Sistema de Responsabilidad Penal Juvenil.

Child and Adolescent Code, Law 1098/2006, Artículo 139. Sistema de responsabilidad penal para adolescentes. El sistema de responsabilidad penal para adolescentes es el conjunto de principios, normas, procedimientos, autoridades judiciales especializadas y entes administrativos que rigen o intervienen en la investigación y juzgamiento de delitos cometidos por personas que tengan entre catorce (14) y dieciocho (18) años al momento de cometer el hecho punible.

Artículo 140. Finalidad del sistema de responsabilidad penal para adolescentes. En materia de responsabilidad penal para adolescentes

Children under 14 years old are excluded from any kind of criminal liability. In accordance with the Code on Children and Adolescents, all adolescents who are over 14 years old are criminally liable for offenses they commit, but the measures of enforcement taken must be educational and bear in mind the need for comprehensive protection and the best interests of the child. The Supreme Court (Corte Suprema de Justicia), has emphasized that:

Actualmente, la opinión dominante en el derecho contemporáneo considera que, a partir de cierta edad (que en nuestro país es a los catorce años), los menores no sólo son titulares de derechos con capacidad para ejercerlos por sí mismos, sino que a la vez deben responder ante el incumplimiento de sus deberes y obligaciones, por lo que podrían estar sometidos al poder punitivo del Estado en los eventos en que cometan violaciones a la ley penal, pero siempre bajo el criterio de imputabilidad diferenciada, es decir, de aquella en la que se tiene en cuenta tanto sus condiciones personales como el grado de evolución de sus facultades, en aras de imponerles una medida, no asimilable al tradicional concepto de pena, que pretenderá reintegrarlos a la sociedad.

De esta forma, el modelo adoptado por el sistema penal para adolescentes de Colombia es uno de los que en la doctrina se han denominado de responsabilidad, es decir, que corresponde a un procedimiento independiente, especializado y autónomo, revestido con la garantías básicas del debido proceso, a la vez que reforzado con otras de índole especial, en el que el adolescente es susceptible de ser declarado responsable por la realización de una conducta punible de graves connotaciones, pero con la particularidad de que la consecuencia jurídica adoptada por el funcionario no puede ser catalogada como pena en un sentido tradicional del término, sino como una medida que tan sólo pretende ser educativa y busca su reintegro a la sociedad.³⁴⁰

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

This legislation is located in some Articles of the Penal Code. Article 218 of the Penal Code defines child pornography, mentioning that it can manifest by any means. It includes the upload of data (alimento con pornografía infantil bases de datos de Internet) in its definition, specifically mentioning the Internet as a vehicle for this crime. Article 219 A criminalizes the use of the Internet to obtain sexual contact with minors, and to offer sexual activities with them.³⁴¹

tanto el proceso como las medidas que se tomen son de carácter pedagógico, específico y diferenciado respecto del sistema de adultos, conforme a la protección integral. El proceso deberá garantizar la justicia restaurativa, la verdad y la reparación del daño

³⁴⁰ Corte Suprema de Justicia, proceso 35681, available at http://www.google.com.br/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.procuraduria.gov.co%2Frelatoria%2Fmedia%2Ffile%2Ffla_juridico%2F129_CSJ-SP-35681.doc&ei=RkvvVK2pjoHBgwTPiYL4Dw&usg=AFQjCNGNWBCmX8JerozMWHBJgiePHeF8Kw&bvm=bv.86956481,d.eXY

³⁴¹ Artículo 219A. Utilización o facilitación de medios de comunicación para ofrecer servicios sexuales de menores. El que utilice o facilite el correo tradicional, las redes globales de información, o cualquier otro medio de comunicación para obtener contacto sexual con menores de dieciocho (18) años, o para ofrecer servicios sexuales con éstos, incurrirá en pena de prisión de cinco (5) a diez (10) años, y multa de cincuenta (50) a cien (100) salarios mínimos legales mensuales vigentes.

Las penas señaladas en el inciso anterior se aumentarán hasta en la mitad (1/2) cuando las conductas se realizaren con menores de doce (12) años.

22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism

Trafficking in persons for sexual exploitation of the victim is criminalized in Article 188-A of the Colombian Penal Code, modified by Law 679-2001.³⁴²

The use of ICTs to offer sexual activities with minors is punished in Article 219-A. The online advertising of sex tourism with children is therefore specifically punished by the Penal Code.

Sex tourism is punished by Article 219 of Law 599/2000 (modified by Article 23 of law) which establishes that it is a crime to organize or promote tourist activities that include sexual activities with minors (four to eight years of imprisonment), enhancing the penalty by half when the victim is under 12.

Law 679 establishes administrative penalties for tour companies that suggest, in their folders, child sex tourism or indicates places where minors can be exploited.³⁴³

23 – Has specific legislation on online grooming considering it a standalone offense

Colombia does not have specific legislation for online grooming. However, Article 219 A criminalizes the use of the Internet to obtain sexual contact with minors, or to offer sexual activities with them. The intent of the Legislator was to combat sex tourism with children.³⁴⁴ A more restricted interpretation of this norm infers that this crime is committed among adults, where one is offering sexual services of children to the other, and not by contact between adults and children, without intermediates. Seemingly, this provision cannot be used to combat online grooming.

24 – Has a clear definition of online grooming

Does not apply.

25 – Age of potential victims of online grooming

Does not apply.

³⁴² Artículo 188 A. Trata de personas. El que promueva, induzca constraña facilite financie, colabore o participe en el traslado de una persona dentro del territorio nacional o al exterior recurriendo a cualquier forma de violencia, amenaza, o engaño, con fines de explotación, para que ejerza prostitución, pornografía, servidumbre por deudas, mendicidad, trabajo forzado. Matrimonio servil, esclavitud con el propósito de obtener provecho económico o cualquier otro beneficio, para si o para otra persona incurrirá en prisión de diez (10) a quince (15) años y una multa de seiscientos (600) a mil (1000) salarios mínimos legales vigentes mensuales al momento de la sentencia condenatoria

³⁴³ Colombia – Article 19 of Law 679 (Exploitation of Child Pornography and Sex Tourism)

Artículo 19. Infracciones.

Además de las infracciones previstas en el artículo 71 de la Ley 300, de 1996, los prestadores de servicios turísticos podrán ser objeto de sanciones administrativas, sin perjuicio de las penales, cuando incurran en alguna de las siguientes conductas:

1. Utilizar publicidad que sugiera expresa o subrepticamente la prestación de servicios turísticos sexuales con menores de edad.
2. Dar información a los turistas, directamente o por intermedio de sus empleados acerca de lugares desde donde se coordinen o donde se presten servicios sexuales con menores de edad.
3. Conducir a los turistas a establecimientos o lugares donde se practique la prostitución de menores de edad.
4. Conducir a los menores de edad, directamente o por intermedio de sus empleados, a los sitios donde se encuentran hospedados los turistas, incluso si se trata de lugares localizados en altamar, con fines de prostitución de menores de edad.
5. Arrendar o utilizar vehículos en rutas turísticas con fines de prostitución o de abuso sexual con menores de edad.
6. Permitir el ingreso de menores a los hoteles o lugares de alojamiento y hospedaje, bares, negocios similares y demás establecimientos turísticos con fines de prostitución o de abuso sexual de menores de edad.

³⁴⁴ *Id.*

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child, or criminalizes grooming regardless of the intent

Does not apply.

27 – Criminalization of the conduct of showing pornography to a child

The legislation does not criminalize showing pornography to a child.

28 – Has specific legislation concerning cyberbullying

The country does not have specific legislation concerning cyberbullying.

29 – Has specific legislation concerning sexting

The country does not have specific legislation concerning sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

The Colombian legislation only proscribes one level of penalty for all offenses related to child pornography. However, the law provides for a high penalty for possession, equivalent to the one established for the production, which is a more harmful offense.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

Colombia only recognizes penalty enhancement when the perpetrator is a member of the family (Article 218 of the Penal Code), and does not include cohabitation, or relationships of trust or authority as circumstances requiring heightened penalties.³⁴⁵

There is no provision related to sexual exploitation of children establishing increased penalties when the offense is committed by several persons acting together, or when it is committed within the framework of a criminal organization.

³⁴⁵ Artículo 218. Pornografía con menores

(...)

La pena se aumentará de una tercera parte a la mitad cuando el responsable sea integrante de la familia de la víctima. Para efectos de determinar los miembros o integrantes de la familia habrá de aplicarse lo dispuesto por el artículo 35 y siguientes del Código Civil, relacionados con el parentesco y los diferentes grados de consanguinidad, afinidad y civil.

6. COSTA RICA – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Articles 173 and 174 of the Penal Code
2 – Has a clear definition of child pornography	Yes
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Articles 173 and 174 of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, regardless of the intent
6 – Criminalizes virtual images and sexually exploitative representations of children	Yes
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Yes, Article 7 of the Penal Code
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, Article 6 of the Penal Code
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Article 110 of the Penal Code
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Article 110 of the Penal Code
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 49 of the CAM and Article 281 of the Criminal Procedure Code
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes, but not an official one
16 – Creates data retention or data preservation policies or provisions	Yes, Article 201 Criminal Procedure Code; Article 1 of Law 7425
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No
18 – Has a national plan to combat violence against children	Yes
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years, according to Article 17 of the Penal Code. There is a System of Juvenile Criminal Justice.
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes, Articles 167, 173, and 174 of the Penal Code
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	These acts are not criminalized
23 – Has specific legislation on online grooming, considering it a standalone offense	Article 167 of the Penal Code – online grooming is considered a part of the corruption of minors process
24 – Has a clear definition of online grooming	No
25 – Considers everyone under 18 as a potential victim of online grooming	Yes
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	With a specific intent of having offline sexual contact with the minor
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	No
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	Yes, but only two levels
31 – Law establishes aggravating circumstances for child abuse offenses	No

COSTA RICA – COUNTRY REPORT

Costa Rica is located in the Central American isthmus, and is 51,100 km². Its Greater Metropolitan Area (GMA), including San José, Cartago, Heredia and Alajuela, concentrates 57% of the population. It was a Spanish colony and declared its sovereignty in 1838.

A good background on the country can be extracted from “Costa Rica and Child Online Protection: National Case Study” written by the International Telecommunication Union (ITU) in 2013.³⁴⁶ The structure of the government is divided into three branches: executive, legislative and judicial. The legislative branch is a unicameral Legislative Assembly whose 57 deputies serve four-year terms (as determined by Articles 106 and 107 of the Constitution). Judicial power is exercised by the Supreme Court of Justice and other courts established by law (Article 152 of the Constitution), and in 1989 a Constitutional Chamber of the Supreme Court was created to review the constitutionality of legislation. The members of the Supreme Court of Justice are elected for eight years, and are considered as reelected for equal terms unless otherwise decided by the Legislative Assembly (Article 158 of the Constitution).

Costa Rica is the world leader in *per capita* exports to the U.S., and was the first high-tech exporter in Latin America, according to the World Bank’s World Development Indicators. It also has a strong tourism industry. The latest data from the National Institute for Statistics and Census (INEC) shows that 21.3% of households live below the poverty line, and 6% in conditions of extreme poverty.³⁴⁷

The main governmental agency for cyber security is the Computer Security Incident Response Team Costa Rica (CSIRT-CR), formally created in April 2012, and is responsible for mitigating risks and cyber threats, and enhancing ICT security for citizens.³⁴⁸

In Costa Rica 69% of mobile phone users use pre-paid services. The responsible agency, SUTEL, compels Costa Rican operators to keep an updated temporary record of clients who purchase pre-paid phones, but this obligation is not always respected.³⁴⁹

The Computer Crimes Section of the Costa Rican Organization of Judicial Investigation (OIJ) was created in 1996-1997, and has 14 full-time permanent civil servants and eight temporary staff, which makes it the largest department of this kind in Central America. Microsoft Costa Rica has financially supported training activities of OIJ agents in the field of cybercrime, delivered by the International Centre for Missing and Exploited Children (ICMEC).

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

Costa Rica employs a broad legal framework in responding to international standards on human rights of children and adolescents. During the 90s, there was a strong movement for the harmonization of laws

³⁴⁶ INT’L TELECOMM. UNION, COSTA RICA AND CHILD ONLINE PROTECTION: NATIONAL CASE STUDY, 2013, available at <https://www.itu.int/en/cop/Documents/CostaRica.pdf> (last visited Nov. 9, 2015).

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

and accommodation for the human rights approach proposed by the CRC. However, the changes to legislation were not necessarily followed by the institutional and cultural changes needed to recognize children and adolescents as holders of rights.³⁵⁰

The government has tried to combat the sexual exploitation of children through the legislative branch, and while it has properly legislated, there is a lack of training of the police and public servants to implement the changes. There is also a lack of public awareness and knowledge amongst the population that is most affected by this problem.³⁵¹

Article 7 of the Costa Rican Constitution establishes that upon enactment, public treaties and international agreements duly approved by the Legislative Assembly shall have a higher authority than the domestic laws. Under Article 55, the autonomous institution, National Infancy Foundation (Patronato Nacional de la Infancia), in collaboration with other State institutions, provides for the special protection of minors.

Article 168 of the Code of Childhood and Adolescence creates the System of Integral Protection for the Rights of the Children (Sistema de Protección Integral de los Derechos de la Niñez), and indicates its organs.³⁵²

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation and clear definition of child pornography; age of the victim

Article 173 of the Penal Code, reformed by Article 1 of Law 9117, was enacted on November 1, 2013, and punishes the manufacture, production or reproduction of pornographic material with minors, with imprisonment of four to eight years.³⁵³ It also punishes by imprisonment of three to six years the

³⁵⁰ Alternative Report of the Implementation of the Convention of the Rights of Children and Adolescents in Costa Rica, made by the Federation of NGO's for the *Defense* of the Rights of Children and Adolescents.

³⁵¹ Alternative report on the compliance of the CTC in Costa Rica – 2005-2011, presented by IIMA - Istituto Internazionale Maria Ausiliatrice VIDES International - International Volunteerism Organization for Women, Education, Development

³⁵² Artículo 169. Sistema de Protección Integral de los Derechos de la Niñez

El Sistema de Protección Integral de los Derechos de la Niñez y la Adolescencia estará conformado por las siguientes organizaciones:

- a) El Consejo Nacional de la Niñez y la Adolescencia
- b) Las instituciones gubernamentales y organizaciones de la sociedad civil representadas ante el Consejo de la Niñez.
- c) Las Juntas de Protección de la Infancia.
- d) Los Comités tutelares de los derechos de la niñez y la adolescencia.

³⁵³ Artículo 173. (*) Fabricación, producción o reproducción de pornografía

Será sancionado con pena de prisión de cuatro a ocho años, quien fabrique, produzca o reproduzca, por cualquier medio, material pornográfico infantil.

Será sancionado con pena de prisión de tres a seis años, quien transporte o ingrese en el país este tipo de material.

Para los efectos de este Código, se entenderá por material pornográfico infantil toda representación escrita, visual o auditiva producida por cualquier medio, de una persona menor de edad, su imagen o su voz, alteradas o modificadas, dedicada a actividades sexuales explícitas, reales o simuladas, o toda representación de las partes genitales de una persona menor de edad con fines sexuales.

(*) Reformado el artículo 173 por el artículo 1 de la Ley N° 9177 de 1 de noviembre de 2013, publicada en La Gaceta N° 231 de 29 de

transport and entering the country with this kind of material, which can be understood as a synonym for import. The first paragraph of Article 173 gives a proper definition of child pornography, describing it as any written, visual or auditory representation, produced by any means, of a minor, his image or voice, altered or modified, dedicated to explicit sexual activities, real or simulated, or any representation of the genital parts of a minor for sexual purposes.

Law 9117 enhances the penalties of Article 173, but altered the definition of child pornography, adding the potentially restrictive expression “by any means, including written and virtual.”

Dissemination of pornography is in the second part of Article 174 of the Penal Code, which punishes those who sell, disseminate or exhibit, by any means and any title, pornographic material to minors, where their image is used, or possess it with the intent of disseminate, distribute or trade.³⁵⁴ The already mentioned “Expediente n. 18.139” is a tentative enhancing of the penalty from one to four years of imprisonment, to five to 10 years of imprisonment, and would also include the distribution pornography.³⁵⁵

Article 173 mentions that the victim must be a minor, so it can be concluded that victims are those under 18, regardless the age of sexual consent, because Article 2 of the Code of Childhood and Adolescence states that children are persons under 12, and adolescents are persons between 12 and 18.

4 – Criminalizes accessing or downloading child pornography images

It is not a crime to access or download child pornography in Costa Rica.

5 – Criminalizes possession of child pornography

The possession of child pornography is a crime, according to Article 173 bis of the Penal Code.³⁵⁶ Law 9177 enhanced its penalty, but made it more limited in reach by removing “in which there are images or voice of minors being used.”

6 – Criminalizes virtual images or sexually exploitative representations of children

This is punished under Article 174 bis of the Penal Code and included by Law 9117.³⁵⁷ This article specifically punishes the possession, production, sale, distribution, exhibition or facilitation, by any

noviembre de 2013.

³⁵⁴ Artículo 174. Difusión de pornografía

Quien entregue, comercie, difunda distribuya o exhiba material pornográfico a personas menores de edad o incapaces, será sancionado con pena de prisión de tres a siete años.

Se impondrá pena de cuatro a ocho años a quien exhiba, difunda, distribuya financie o comercialice, por cualquier medio y cualquier título, material pornográfico en el que aparezcan personas menores de edad o lo posea para estos. (Así reformado por el artículo 1º de la Ley n.7899/1999, y posteriormente adicionado el párrafo segundo por Ley n° 8143/2001, y posteriormente reformado por el artículo 1 de la Ley n. 9177 de 1 de noviembre de 2013)

³⁵⁵ *Id.*

³⁵⁶ Artículo 173 bis. Tenencia de material pornográfico

Será sancionado con pena de prisión de uno a cuatro años, quien posea material pornográfico infantil.

(Así adicionado mediante el artículo 1º de la ley N° 8590 del 18 de julio del 2007).

³⁵⁷ Artículo 174 bis. Pornografía virtual y pseudo pornografía.-

Se impondrá pena de prisión de seis meses a dos años al que posea, produzca, venda, distribuya, exhiba o facilite por cualquier medio material pornográfico en el que no habiendo utilizado personas menores de edad:

means, of pornographic material produced without minors, when adults pretend to be minors in explicit sexual activities or when there is the use of an image, cartoon drawing or representation of any kind that looks like or simulates a minor engaged in sexual activity.

Before the modification to the legislation, there were some judicial decisions, such as Voto.2005-00958 of Sala Tercera, suggesting that it is sufficient to have the effective participation of a minor in the production of the pornographic material in order for it to be a crime.³⁵⁸ Thus, the amendment of the Penal Code by Law 9117 was an important contribution.

7 – Addresses criminal liability of children involved in pornography

The legislation does not address the criminal liability of children involved in pornography. However, there is a special statute, Law 8460-2005 (Law on Execution of Juvenile Criminal Sanctions), which determines the supervision of the sentences imposed by judges when a minor commits a sexual crime.

8 – Establishes the criminal liability of legal persons for child pornography offenses

Legal persons do not have criminal liability for production or commercialization of child pornography.

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

Costa Rica's Penal Code establishes the jurisdiction of its courts for crimes committed by nationals abroad.³⁵⁹

a) Emplee una persona adulta que simule ser una persona menor de edad realizando actividades sexuales.

b) Emplee imagen, caricatura, dibujo o representación de cualquier clase que aparente o simule a una persona menor de edad realizando actividades sexuales

(Adicionado el artículo 174 bis por el artículo 3 de la Ley n. 9177 de 1 de noviembre de 2013, publicada en La Gaceta n. 231 de 29 de noviembre de 2013.

³⁵⁸ Voto.2005-00958, Sala. Tercera.

“Es por ello que como una primera aproximación debe entenderse que, conforme a la redacción del artículo 173 del Código Penal ya citado (que se ubica dentro del título III, de los delitos sexuales), para que determinado material pudiera recibir el calificativo de “pornográfico”, es necesario que en el mismo se incluyan imágenes de personas menores de edad en relación a las cuales no pueda dejarse de lado su vinculación clara y explícita con fines sexuales, extremos que se deducirá de la imagen misma o incluso del contexto en el que se produzca.

En este sentido el autor Fernando Da Rosa, al definir el concepto de pornografía infantil refirió lo siguiente: “...El congreso de Yokohama hace referencia a la definición de pornografía del New Oxford Dictionary: “material que contiene la descripción o exhibición explícitas de órganos o actividades sexuales, concebido para estimular sentimientos no tanto estéticos o emotivos como eróticos...”.(Artículo que aparece en internet, en la siguiente dirección: www.d-sur.net/fedaro/index.php?p=4). El mismo autor nos amplía su análisis, al hacer alusión a tres definiciones de pornografía infantil utilizadas en Europa, en todas las cuales siempre se advierte un denominador común, esto es, que las imágenes incluyan a menor en una actividad sexual explícita, y que lleven como fin la satisfacción sexual o erótica del usuario:”

“Conforme a lo hasta aquí expuesto, es claro que cualquier material relativo a una persona menor de edad, donde se describan o expongan sus órganos genitales, o una actividad de naturaleza sexual, en todo lo cual se persiga un fin erótico o la satisfacción del usuario lo que a su vez implicaría una explotación sexual), deberá calificarse como pornografía.

³⁵⁹ Penal Code. Artículo 6. Posibilidad de incoar proceso por hechos punibles cometidos en el extranjero.

Podrá incoarse proceso por hechos punibles cometidos en el extranjero y en ese caso aplicarse la ley costarricense, cuando:

(..)

4. Hayan sido cometidos por algún costarricense.

Article 7 of the Penal Code establishes that Costa Rican law will be applied to crimes committed abroad if they are related to trafficking women and children, obscene publications, or other offenses against human rights under the treaties signed by Costa Rica.³⁶⁰ This norm is a clear support for the punishment of production and distribution of child pornography. However, Article 8 requires the offender to be in Costa Rica, and Article 10 requires that he/she should not be acquitted abroad. Costa Rica applies the universal jurisdiction principle, which has broader reach than the active personality principle regarding the nationality or residence of the offender.³⁶¹ The universal jurisdiction principle requires no specific nexus between the crime and the forum state. It is usually applied to heinous crimes that affect the international community as a whole, such as genocide, war crimes or crimes against humanity.

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

Costa Rica recognizes its extraterritorial jurisdiction when the victim is a national of the State, according to Article 6 of the Penal Code.³⁶²

11 – Establishes forfeiture of assets used to commit or facilitate offenses; and

12 – Establishes forfeiture of proceeds derived from such offenses

Article 110 of the Penal Code establishes the forfeiture of the instruments used to commit the crime, and the forfeiture of objects or proceeds derived from the illicit conduct.³⁶³ Article 367 of the Criminal Procedural Code specifies that the judge, according to the law, must determine the forfeiture of assets.³⁶⁴

³⁶⁰ Artículo 7. Delitos internacionales. Independientemente de las disposiciones vigentes en el lugar de la comisión del hecho punible y de la nacionalidad del autor, se penará conforme a la ley costarricense a quienes cometan actos de piratería, genocidio, falsifiquen monedas, títulos de crédito, billetes de banco y otros efectos al portador; tomen parte en la trata de esclavos, mujeres o niños; se ocupen del tráfico de estupefacientes o publicaciones obscenas y a quienes cometan otros hechos punibles contra los derechos humanos previstos en los tratados suscritos por Costa Rica, o en este Código.

³⁶¹ Artículo 7. Independientemente de las disposiciones vigentes en el lugar de la comisión del hecho punible y la nacionalidad del autor, se penará, conforme a la ley costarricense, a quienes cometan actos de piratería, terrorismo o su financiamiento, o actos de genocidio; falsifiquen monedas, títulos de crédito, billetes de banco y otros efectos al portador; trafiquen, ilícitamente, armas, municiones, explosivos o materiales relacionados; tomen parte en la trata de esclavos, mujeres o niños; cometan delitos sexuales contra personas menores de edad, o se ocupen del tráfico de estupefacientes o de publicaciones obscenas; asimismo, se penará a quienes cometan otros hechos punibles contra los derechos humanos y el Derecho internacional humanitario, previstos en los tratados suscritos por Costa Rica o en este Código.

(Así reformado por el artículo único de la ley N° 8961 del 5 de julio del 2011)

³⁶² Posibilidad de incoar proceso por hechos punibles cometidos en el extranjero

Artículo 6. Podrá incoarse proceso por hechos punibles cometidos en el extranjero y en ese caso aplicarse la ley costarricense, cuando:

1) (...)

2) (...)

3) Se perpetraren contra algún costarricense o sus derechos.

³⁶³ Artículo 110. Comiso. del delito produce la pérdida en favor del Estado de los instrumentos con que se cometió y de las cosas o valores provenientes de su realización, o que constituyan para el agente un provecho derivado del mismo delito salvo el derecho que sobre ellos tengan el ofendido o terceros.

³⁶⁴ Artículo 367. Condenatoria

La sentencia condenatoria fijará, con precisión, las penas que correspondan y, en su caso, determinará la suspensión condicional de la pena y las obligaciones que deberá cumplir el condenado.

Se unificarán las condenas o las penas cuando corresponda.

La sentencia decidirá también sobre las costas y sobre la entrega de los objetos secuestrados a quien tenga mejor derecho para poseerlos, sin perjuicio de los reclamos que correspondan ante los tribunales civiles. Decidirá sobre el comiso y la destrucción, previstos en la ley.

Because the domestic legislation was considered weak by the Patronato Nacional de la Infancia, a reform was proposed to specifically allow the seizure of all goods, vehicles, instruments, equipment, value, money and objects used in the commission of child pornography, but the provisions related to this issue were not approved by Congress.³⁶⁵

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 49 of the Code of Childhood and Adolescence establishes that any professional who works in the health and education fields must report any suspicion of abuse against children and adolescents.³⁶⁶ But this article does not establish any kind of penalty for noncompliance. Article 66 establishes that principals from public or private schools must report to the Executive any suspicion of sexual abuse that involves children or adolescents, as victims or perpetrators.³⁶⁷

Article 281 of the Criminal Procedural Code also establishes that some health field professionals and public servants have the duty to report crimes only of the most serious nature that normally do not require any request to be filed by the victim.³⁶⁸ On the decision 2010-011894 of the Constitutional Court, the Justices reinforced this obligation, concerning a late report done by a principal of a school, who was a public servant.³⁶⁹

³⁶⁵ Marie-Laure Lemineur Retana, *El combate contra la pornografía infantil en Internet – El caso de Costa Rica*, at 83, available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCKQFiAA&url=http%3A%2F%2Fwhite.oit.org.pe%2Fipec%2Fdocumentos%2Fpornografia.pdf&ei=GfZBUoj-NYzl4APd2oHQAQ&usg=AFQjCNGB-nbH6Qd6rJJQyPEIsX9kbWInfw&bvm=bv.52434380,d.dmg>.

³⁶⁶ Artículo 49. Denuncia de maltrato o abuso.

Los directores y el personal encargado de los centros de salud, públicos o privados, adonde se lleven personas menores de edad para atenderlas, estarán obligados a denunciar ante el Ministerio Público cualquier sospecha razonable de maltrato o abuso cometido contra ellas. Igual obligación tendrán las autoridades y el personal de centros educativos, guarderías o cualquier otro sitio en donde permanezcan, se atiendan o se preste algún servicio a estas personas.

³⁶⁷ Artículo 66. Denuncias ante el Ministerio de Educación Pública

Sin perjuicio de otras obligaciones en el ámbito del Derecho Penal, las autoridades competentes de los establecimientos públicos o privados de enseñanza preescolar, general, básica y diversificada, además de lo que por su competencia les corresponde, para aplicar las medidas necesarias, estarán obligadas a comunicar al Ministerio de Educación Pública lo siguiente:

a) los casos de maltrato físico, emocional, abuso sexual o trato corruptor, que involucren al alumnado como víctima o victimario, o los cometidos en perjuicio del grupo de docentes o administrativos.

(...)

³⁶⁸ Artículo 281. Obligación de Denunciar

Tendrán obligación de denunciar los delitos perseguibles de oficio:

1. Los funcionarios o empleado públicos que los conozcan en el ejercicio de sus funciones

2. Los médicos, parteras, farmacéuticos y demás personas que ejerzan cualquier ramo del arte de curar, que conozcan esos hechos al prestar los auxilios de su profesión, salve que el conocimiento adquirido por ellos esté protegido por la ley bajo el amparo del secreto profesional.

3. (...)

En todos estos casos la denuncia no será obligatoria si razonablemente arriesga la persecución penal propia del cónyuge o de parientes hasta tener grado por consanguinidad o afinidad, o de una persona que conviva con el denunciante ligada a él por lazos especiales de afecto.

³⁶⁹ Voto. 2010-011894, Sala. Constitucional

Es clara la Sala Constitucional al señalar en este voto la obligación de los funcionarios públicos de denunciar con la mayor prontitud y diligencia las situaciones de sospecha de abuso sexual o físico de personas menores de edad. En este voto se declara con lugar el recurso de amparo interpuesto debido a la actuación tardía del director del Centro Educativo.

14 – Requires Internet Service Providers to report child pornography

Costa Rican legislation does not require mandatory reporting for ISPs.

15 – Has a support telephone or online hotlines to enable the public to report child abuse

No support telephone or online hotlines administrated by the government could be found, but there are several ones from NGOs including:

- Ricky Martin Foundation;
- The NGO Defensa de los Niños Internacional (DNI)³⁷⁰ has an online hotline to enable the public to report child pornography, through an agreement with a Spanish organization known as Protégeles³⁷¹; and
- The NGO Alianza Por Tu Derechos also has a website where people can report the address of webpages that have child pornography.

16 – Creates data retention and preservation policies or provisions

The legislation does not address data retention.

Article 201 of the Criminal Procedure Code establishes that a special law must regulate the interception of communications. Law 7425 is the special law providing for this and was enacted in 1994.

Article 1 of Law 7425 specifies that private documents are those that are produced by any means, such as telematic means.³⁷² Article 9 states that judges can authorize the interception of communications of any kind when certain offenses are committed, including the production of pornography and trafficking in persons.³⁷³ The request for intercepting or recording communications must be adequately substantiated. According to Article 12, the measure can last three months, a period that can be renewed twice.³⁷⁴ Article 22 stipulates that all persons involved must maintain confidentiality about the measure.³⁷⁵

³⁷⁰ Defensa de los Niños Internacional, at www.dnicostarica.org (last visited Oct. 13, 2014).

³⁷¹ Protegeles, at <http://www.protegeles.com/> (last visited Oct. 14, 2015).

³⁷² Artículo 1. Competencia.

Los Tribunales de Justicia podrán autorizar el registro, el secuestro o el examen de cualquier documento privado, cuando sea absolutamente indispensable para esclarecer asuntos penales sometidos a su conocimiento.

Para los efectos de esta Ley, se consideran documentos privados: la correspondencia epistolar, por fax, télex, telemática o cualquier otro medio; los videos, los casetes, las cintas magnetofónicas, los discos, los disquetes, los escritos, los libros, los memoriales, los registros, los planos, los dibujos, los cuadros, las radiografías, las fotografías y cualquier otra forma de registrar información de carácter privado, utilizados con carácter representativo o declarativo, para ilustrar o comprobar algo.

³⁷³ Artículo 9. Autorización de intervenciones. Dentro de los procedimientos de una investigación policial o jurisdiccional, los tribunales de justicia podrán autorizar la intervención de comunicaciones orales, escritas o de otro tipo, incluso las telecomunicaciones fijas, móviles, inalámbricas y digitales, cuando involucre el esclarecimiento de los siguientes delitos: secuestro extorsivo, corrupción agravada, proxenetismo agravado, fabricación o producción de pornografía, tráfico de personas y tráfico de personas para comercializar sus órganos; homicidio calificado; genocidio, terrorismo y los delitos previstos en la Ley sobre estupefacientes, sustancias psicotrópicas, drogas de uso no autorizado, legitimación de capitales y actividades conexas, N° 8204, del 26 de diciembre del 2001.

En los mismos casos, dichos tribunales podrán autorizar la intervención de las comunicaciones entre los presentes, excepto lo dispuesto en el segundo párrafo del artículo 26 de la presente Ley; cuando se produzcan dentro de domicilios y recintos privados, la intervención solo podrá autorizarse si existen indicios suficientes de que se lleva a cabo una actividad delictiva.

³⁷⁴ Artículo 12. Plazos y prórrogas de la intervención.

La intervención ordenada se autorizará por un lapso máximo hasta de tres meses, salvo en los casos de extrema gravedad o de difícil investigación, en los que el Juez, mediante resolución fundada, disponga una prórroga. Excepcionalmente, se podrán ordenar, por igual plazo, hasta dos prórrogas como máximo.

³⁷⁵ Artículo 22. Prohibiciones a los encargados de intervenir.

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

The law requires that all Internet cafés be registered with SUTEL, an independent regulatory authority. The ITU notes that not all Internet cafés are registered as required, and the official number of registered Internet cafés is 452.³⁷⁶ The Law on the Protection of Children and Adolescents requires the installation of filters in computers used by minors to block access to harmful content such as child pornography. They are also required to display a visible sign warning minors of the dangers of revealing private information on social networks, chat rooms and forums that could have a negative impact on their moral and physical integrity. SUTEL issues certifications on compliance with regulations. It is obligated to send inspectors to visit Internet cafés to verify their compliance with the terms of the Law on the Protection of Children and Adolescents.

Decree 31.763 from 2004 (Decreto Ejecutivo 31.763/2004) was enacted to prevent and control children's access to pornographic material through Internet Cafes or similar enterprises, and it identifies the establishments that are in compliance with law, that provide services free from pornography.³⁷⁷

18 – Existence of a national plan to combat violence against children

There is a national plan to combat violence against children. The first National Plan Against Commercial Sexual Exploitation 2002-2006 was implemented with the support of the work of the National Commission against Sexual Exploitation (CONACOES). It incorporated the guidelines of the first World Congress in Stockholm.

19 – International instruments ratified

- Ratified the Convention on the Rights of the Child on August 21, 1990
- Ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on April 9, 2002
- Ratified the ILO Minimum Age Convention on January 23, 1996
- Ratified the ILO Worst Forms of Child Labor Convention on June 11, 1976
- Costa Rica was invited to accede the Cybercrime Convention of the Council of Europe

20 – Age of criminal liability

The age of criminal liability is 18 years, according to Article 17 of the Penal Code.³⁷⁸ Juvenile Justice deals

A los funcionarios y empleados participantes en la intervención de las comunicaciones, el registro, el secuestro o el examen de documentos o a quienes tengan la potestad de solicitar estas medidas, se les prohíbe lo siguiente:

- 1.- Utilizar los resultados de la intervención para propósitos distintos de los que la motivaron.
- 2.- Ayudar, directa o indirectamente, a alguien para que eluda las investigaciones de la autoridad o se sustraiga de su acción.
- 3.- Violar la confidencialidad y el secreto de todas las medidas e informaciones autorizadas en esta Ley, salvo para los efectos que originaron el acto.
- 4.- Inducir al Juez a disponer una intervención de comunicaciones, el registro, el secuestro o el examen de documentos privados, por medio de la simulación, la alteración, el ocultamiento, la suposición de hechos o documentos falsos o la deformación de los verdaderos

³⁷⁶ INT'L TELECOMM. UNION, *supra* note 347, at 33.

³⁷⁷ Decreto Ejecutivo 31.763 del 26 de abril de 2004. Reglamento de Control y Regulación de Locales que Ofrecen Servicio Público de Internet: su objetivo es prevenir el acceso a pornografía y material no conveniente para personas menores de dieciocho años, en cibercafés, cafés-internet o similares. En el marco de este reglamento se prevé distinguir mediante signos externos a los locales que toman las medidas necesarias y ofrecen un servicio libre de acceso a pornografía.

³⁷⁸ Artículo 17. Este Código se aplicará a las personas de dieciocho años cumplidos.

with illicit conduct perpetrated by adolescents between 12 and 18 years of age.³⁷⁹

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

The legislation addresses this both directly and indirectly. Article 167 of the Penal Code specifically mentions the use of social media or any computing or telematic means as a way of committing crimes, by searching or arranging sexual meetings with minors or by corrupting minors.³⁸⁰ Article 174 related to child pornography uses the expression “by any means,” which includes the use of ICTs.

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of child sex tourism

There is not a specific crime related to online advertising of sex tourism with children, but Article 168bis of Law 8811 determines that anyone in charge of a travel agency can lose permission to work in this field if they promote or facilitate the exploitation of children and adolescents.³⁸¹

Trafficking in persons for sexual exploitation of the victim is criminalized in Article 172 of the Penal Code.³⁸²

³⁷⁹ Artículo 1. Ámbito de aplicación según los sujetos

Serán sujetos de esta ley todas las personas que tengan una edad comprendida entre los doce años y menos de dieciocho años al momento de la comisión de un hecho tipificado como delito o contravención en el Código Penal o leyes especiales.

³⁸⁰ Artículo 167. Corrupción

Será sancionado con pena de prisión de tres a ocho años quien mantenga o promueva la corrupción de una persona menor de edad o incapaz, con fines eróticos, pornográficos u obscenos, en exhibiciones o espectáculos públicos o privados, aunque la persona menor de edad o incapaz lo consienta.

La pena será de cuatro a diez años de prisión, si el actor, utilizando las redes sociales o cualquier otro medio informático o telemático, u otro medio de comunicación, busca encuentros de carácter sexual para sí, para otro o para grupos, con una persona menor de edad o incapaz; utiliza a estas personas para promover la corrupción o las obliga a realizar actos sexuales perversos, prematuros o excesivos, aunque la víctima consienta participar en ellos o verlos ejecutar.

³⁸¹ Ley 8811. Artículo 168. Incentivo de la Responsabilidad Social Corporativa Turística.

Se impondrá la inhabilitación para el ejercicio del comercio de 3 a 10 años al dueño, gerente o encargado de una agencia de viajes, de un establecimiento de hospedaje, aerolínea, tour operador y de un transporte terrestre que promueva o facilite la explotación sexual comercial de personas menores de 18 años.

³⁸² Artículo 172.- Delito de trata de personas

Será sancionado con pena de prisión de seis a diez años, quien promueva, facilite o favorezca la entrada o salida del país, o el desplazamiento dentro del territorio nacional, de personas de cualquier sexo para realizar uno o varios actos de prostitución o someterlas a explotación, servidumbre sexual o laboral, esclavitud o prácticas análogas a la esclavitud, trabajos o servicios forzados, matrimonio servil, mendicidad, extracción ilícita de órganos o adopción irregular.

La pena de prisión será de ocho a dieciséis años, si media, además, alguna de las siguientes circunstancias:

- a) La víctima sea menor de dieciocho años de edad o se encuentre en una situación de vulnerabilidad o discapacidad.
- b) Engaño, violencia o cualquier medio de intimidación o coacción.
- c) El autor sea cónyuge, conviviente o pariente de la víctima hasta tercer grado de consanguinidad o afinidad.
- d) El autor se prevalezca de su relación de autoridad o confianza con la víctima o su familia, medie o no relación de parentesco.
- e) El autor se aproveche del ejercicio de su profesión o de la función que desempeña.
- f) La víctima sufra grave daño en su salud.
- g) El hecho punible fuere cometido por un grupo delictivo integrado por dos o más miembros.

23 – Has specific legislation on online grooming considering it a standalone offense

The law has established a sufficient basis for the punishment of online grooming, although it is not standalone as it is grouped with other crimes in the same article of the Penal Code. Article 167 of the Penal Code, which is related to the crime of corruption of minors, criminalizes broadly in its second part, the use of Internet to arrange sexual meetings with minors.³⁸³ A second part of this same Article criminalizes the use of Internet to corrupt minors, or to make them perform premature or excessive sexual acts. Read together, these two provisions demonstrate sufficient punishment of online grooming, even though it is not clearly defined.

24 – Has a clear definition of online grooming

Costa Rica has a clear definition of online grooming on the legislation, though it is not very objective.

25 – Age of potential victim of online grooming

The legislation considers everyone under the age of 18 as a potential victim of online grooming.

26 – Criminalizes online grooming when the offender has the specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

The law criminalizes online grooming with the specific intent of having offline sexual contact with a child or adolescent.

27 – Criminalizes showing pornography to a child as a standalone offense, or considers it an aspect of grooming

Showing pornography to a child is not a crime.

28 – Has specific legislation on cyberbullying

There is currently no legislation specific to cyberbullying.

29 – Has specific legislation concerning sexting

There is currently no legislation specific to sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

Costa Rica's legislation only establishes two levels of penalties: one for production and distribution (and related conduct), and another one for possession of child pornography.

³⁸³ Artículo 167. Corrupción

Será sancionado con pena de prisión de tres a ocho años quien mantenga o promueva la corrupción de una persona menor de edad o incapaz, con fines eróticos, pornográficos u obscenos, en exhibiciones o espectáculos públicos o privados, aunque la persona menor de edad o incapaz lo consienta.

La pena será de cuatro a diez años de prisión, si el actor, utilizando las redes sociales o cualquier otro medio informático o telemático, u otro medio de comunicación, busca encuentros de carácter sexual para sí, para otro o para grupos, con una persona menor de edad o incapaz; utiliza a estas personas para promover la corrupción o las obliga a realizar actos sexuales perversos, prematuros o excesivos, aunque la víctima consienta participar en ellos o verlos ejecutar.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

Costa Rica’s legislation does not establish aggravated penalties for situations involving personal relationships amongst the offender and the victim (i.e., member of the child’s family, person cohabiting with the child, or a person who has abused a recognized position of trust or authority).

No legal provisions could be found related to sexual exploitation of children that would establish a heightened penalty when the offense was committed by several persons acting together, or within the framework of a criminal organization.

7. DOMINICAN REPUBLIC – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 194 of the new Penal Code, not yet in force
2 – Has a clear definition of child pornography	Yes, Article 194 of the new Penal Code
3 Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 194 of the new Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, Article 24 of Law 53-07
6 – Criminalizes virtual images and sexually exploitative representations of children	Yes, Article 24 of Law 53-07; not in the new Penal Code
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	Yes, general rule on Article 60 of Law 53-07, specific rule in the new Penal Code
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	No
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	No
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Article 11 of the Penal Code; Articles 31, 36, 41, and 44 of the new Penal Code
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Article 22 of the Penal Code; Articles 31, 36, 41, and 44 of the new Penal Code
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 14 of the CSPNA
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes, Línea 700
16 – Creates data retention or data preservation policies or provisions	Yes, Article 56 of Law 53-07 and Article 192 of Criminal Procedure Code
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	Yes
18 – Has a national plan to combat violence against children	Yes, National Plan for Guaranteeing the Rights of Children and Adolescents 2003-2013
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years old; there is a Juvenile Justice
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes, Law 53-07
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Yes, Article 194 of the new Penal Code, not yet in force
23 – Has specific legislation on online grooming, considering it a standalone offense	Yes, Article 23 of Law 53-07
24 – Has a clear definition of online grooming	Yes, Article 23 of Law 53-07
25 – Considers everyone under 18 as a potential victim of online grooming	Yes, Article 23 of Law 53-07
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Requires specific intent of sexual assault
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	No. But there is a bill being analyzed by the Senate that criminalizes it
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	Yes, but only 2 levels
31 – Law establishes aggravating circumstances for child abuse offenses	Yes

DOMINICAN REPUBLIC – COUNTRY REPORT

Dominican Republic is a democratic republic that became independent from Haiti in 1844. It has a civil law system based on the French Civil Code. The president is both the Chief of State and head of Government, and is elected for four-year terms. The Legislative branch is bicameral. The highest court is the Supreme Court of Justice (Suprema Corte de Justicia).³⁸⁴

Its economy is centered on the exportation of sugar, coffee and tobacco, and is highly dependent upon the U.S., as that is the destination for more than half of exports. The country suffers from marked income inequality, high unemployment, and underemployment.³⁸⁵

The Instituto Dominicano de las Telecomunicaciones, Indotel, and the Comisión Nacional para la Sociedad de la Información y el Conocimiento (CNSIC), publicly lamented on February 5, 2013 – Day of the Safe Internet (Día de la Internet Segura) – that the Dominican Republic has few cases of child pornography reported, an average of two cases per year, whereas other countries in Latin America average 20 reports per day. The Cybercrime Division (Departamento de Investigación de Crímenes y Delitos de Alta Tecnología) received only 14 reports between 2008-2012 that have resulted in ten cases.³⁸⁶ This is not because the Dominican Republic does not have problems related to this issue but because there is not enough awareness and not enough collaboration in civil society to solve or reduce it.

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

The Dominican Constitution guarantees that the family, the society, and the State shall prioritize the interests of children and adolescents, protecting them to ensure their full and harmonious development. It declares that it is a highest national interest to eradicate any type of abuse or violence against minors, who must be protected against all forms of abandonment, abduction, vulnerability, abuse or physical violence, or psychological, moral or sexual commercial exploitation (Article 56).³⁸⁷

Item 11 of Article 63 of the Constitution establishes that the State must guarantee universal access to information through computers, and that schools must adapt to new technologies and innovations.³⁸⁸

³⁸⁴ Dominican Republic, *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/dr.html> (last visited Oct. 13, 2014).

³⁸⁵ *Id.*

³⁸⁶ Deploran bajo índice de denuncias sobre pornografía infantil en RD, Feb. 5, 2013, *available at* <http://www.indotel.gob.do/index.php/cgblog/1849/Deploran-bajo-indice-de-denuncias-sobre-pornografia-infantil-en-RD> (last visited Nov. 5, 2015).

³⁸⁷ Artículo 56.- Protección de las personas menores de edad. La familia, la sociedad y el Estado, harán primar el interés superior del niño, niña y adolescente; tendrán la obligación de asistirles y protegerles para garantizar su desarrollo armónico e integral y el ejercicio pleno de sus derechos fundamentales, conforme a esta Constitución y las leyes. En consecuencia:

Se declara del más alto interés Nacional la erradicación del trabajo infantil y todo tipo de maltrato o violencia contra las personas menores de edad. Los niños, niñas y adolescentes serán protegidos por el Estado contra toda forma de abandono, secuestro, estado de vulnerabilidad, abuso o violencia física, psicológica, moral o sexual, explotación comercial, laboral, económica y trabajos riesgosos;

Se promoverá la participación activa y progresiva de los niños, niñas y adolescentes en la vida familiar, comunitaria y social;

Los adolescentes son sujetos activos del proceso de desarrollo. El Estado, con la participación solidaria de las familias y la sociedad, creará oportunidades para estimular su tránsito productivo hacia la vida adulta.

³⁸⁸ Artículo 63.

(...)

The Dominican Republic was invited to accede to the Convention on Cybercrime, and ratified it in February 2013, entering into force after June 2013. The Dominican Constitution states that the Constitutional Court is responsible for making a prior determination of the constitutionality of international treaties before their ratification by the Congress, after which they cannot be submitted for judicial review (Article 185, 2). The Supreme Court of Justice (Suprema Corte de Justicia) recognized in August 2010 that the Council of Europe's Cybercrime Treaty is accordance with the Dominican Constitution.³⁸⁹

The Code for the Protection System and Fundamental Rights of Children and Adolescents (CSPNA) (Código para el Sistema de Protección y Los Derechos Fundamentales de Niños, Niñas y Adolescentes) defines children as those under 12 years of age, and adolescents between 13 and 18 years of age. In case of doubt, the person shall be considered a child or an adolescent (principles II and III of the CSPNA).³⁹⁰

The superior interest of a child or an adolescent shall always be considered when interpreting the law; and the State and society shall give absolute priority to the fundamental rights of children and adolescents (Principles V and VI of the CSPNA).³⁹¹

11. Los medios de comunicación social, públicos y privados, deben contribuir a la formación ciudadana. El Estado garantiza servicios públicos de radio, televisión y redes de bibliotecas y de informática, con el fin de permitir el acceso universal a la información. Los centros educativos incorporarán el conocimiento y aplicación de las nuevas tecnologías y de sus innovaciones, según los requisitos que establezca la ley;

³⁸⁹ *Boletín Judicial (Disponibles a partir del año 1994)*, PODER JUDICIAL DE LA REPÚBLICA DOMINICANA, http://www.suprema.gov.do/consultas/consultas_sentencias/detalle_info_sentencias.aspx?ID=120910001 (last visited Oct. 13, 2014).

³⁹⁰ Principio II - Definición de niño, niña y adolescente. Se considera niño o niña a toda persona desde su nacimiento hasta los doce años, inclusive; y adolescente, a toda persona desde los trece años hasta alcanzar la mayoría de edad.

Principio III- Presunción de minoridad. Si existieren dudas acerca de si una persona es niño, niña o adolescente, se le presumirá niño, niña o adolescente, hasta prueba en contrario, en los términos que establece este Código.

³⁹¹ Principio V – Interés superior de niño, niña y adolescente.

El principio del interés superior del niño, niña o adolescente debe tomarse en cuenta siempre en la interpretación y aplicación de este Código y es de obligatorio cumplimiento en todas las decisiones que les sean concernientes. Busca contribuir con su desarrollo integral y asegurar el disfrute pleno y efectivo de sus derechos fundamentales.

Para determinar el interés superior del niño, niña y adolescente, en una situación concreta, se debe apreciar:

La opinión del niño, niña y adolescente;

La necesidad de equilibrio entre los derechos y garantías del niño, niña y adolescente y las exigencias del bien común;

La condición específica de los niños, niñas y adolescentes como personas en desarrollo;

La indivisibilidad de los derechos humanos y, por tanto, la necesidad de que exista equilibrio entre los distintos grupos de derechos de los niños, niñas y adolescentes y los principios en los que están basados, de acuerdo a lo establecido por la Convención Internacional sobre los Derechos del Niño;

Código para el Sistema de Protección y los Derechos Fundamentales 15 de Niños, Niñas y Adolescentes

La necesidad de priorizar los derechos del niño, niña y adolescente frente a los derechos de las personas adultas.

Principio de prioridad absoluta. El Estado y la sociedad deben asegurar, con prioridad absoluta, todos los derechos fundamentales de los niños, niñas y adolescentes.

La prioridad absoluta es imperativa para todos y comprende:

Primacía en la formulación de las políticas públicas;

Primacía en recibir protección especial en cualquier circunstancia;

Preferencia en la atención de los servicios públicos y privados;

Prevalencia de sus derechos ante una situación de conflicto con otros derechos e intereses legítimamente protegidos.

According to Article 12 of the CSPNA, children and adolescents have the right to personal integrity, which includes inviolability of the physical, psychological, moral, and sexual integrity.³⁹² Article 13 of the CSPNA establishes that the State must protect children and adolescents from any kind of abuse or exploitation, including commission through the Internet or any ICT.³⁹³

A definition of physical, psychological, and sexual abuse is in Article 396 of the CSPNA, the last of which occurs when an adult or someone five years older, for his own sexual gratification, engages in a sexual activity with a child or an adolescent, regardless of his/her psychosexual development, even without physical contact.³⁹⁴ This last part of the definition is very important, because it opens space for the recognition that sexual abuses can and do occur through the Internet without any physical contact.

The House of Representatives recently approved a new Penal Code after more than 13 years of discussion. It was sent to President Danilo Medina for sanction, but he has partly vetoed it, specifically the articles related to the decriminalization of abortion when the pregnancy is a result of a sexual assault (Articles 107, 108, 109, and 110).³⁹⁵ It was sent back to Congress, which has already analyzed the presidential restrictions; the House of Representatives accepted the veto, and the new text is now waiting for the approval of the Senate.³⁹⁶ The new Penal Code will come into force in 12 months, thus

³⁹² Artículo 12. Derecho a la integridad personal.

Todos los niños, niñas y adolescentes tienen derecho a la integridad personal. Este derecho comprende el respeto a la dignidad, la inviolabilidad de la integridad física, síquica, moral y sexual, incluyendo la preservación de su imagen, identidad, autonomía de valores, ideas, creencias, espacio y objetos personales.

Párrafo. Es responsabilidad de la familia, el Estado y la sociedad protegerlos, contra cualquier forma de explotación, maltrato, torturas, abusos o negligencias que afecten su integridad personal.

³⁹³ Artículo 13. Derecho a la restitución de derechos.

El Estado Dominicano tiene la responsabilidad de proteger a todos los niños, niñas y adolescentes contra toda forma de abuso, maltrato y explotación, sin importar el medio que se utilice, incluyendo el uso de internet o cualquier vía electrónica.

Párrafo. Para estos casos, se procederá a la restitución de los derechos violados o amenazados por medio de la ejecución de medidas de protección previstas en el presente Código. La familia y la sociedad, en su conjunto, deben participar y exigir este derecho

³⁹⁴ Artículo 396. Sanción al abuso contra niños, niñas y adolescentes. Se considera:

a) Abuso físico: Cualquier daño físico que reciba el niño, niña o adolescente, de forma no accidental y en que la persona que le ocasione esta lesión se encuentre en condiciones de superioridad o poder;

b) Abuso psicológico: Cuando un adulto ataca de manera sistemática el desarrollo personal del niño, niña o adolescente y su competencia social;

c) Abuso sexual: Es la práctica sexual con un niño, niña o adolescente por un adulto, o persona cinco (5) años mayor, para su propia gratificación sexual, sin consideración del desarrollo sicosexual del niño, niña o adolescente y que puede ocurrir aún sin contacto físico.

Será castigado con penas de dos (2) a cinco (5) años de prisión y multa de tres (3) a diez (10) salarios mínimos establecido oficialmente, vigente al momento de cometer la infracción, si el autor o autora del hecho mantiene una relación de autoridad, guarda o vigilancia (maestro, guardianes, funcionarios, policías, etc.) sobre el niño, niña o adolescente y se producen lesiones severas, comprobadas por especialistas en el área, se aplicará el máximo de la pena indicada anteriormente.

³⁹⁵ *Presidente Danilo Medina observa Código Penal para devolverlo al Congreso*, Nov. 28, 2014, <http://acento.com.do/2014/actualidad/8199630-presidente-danilo-medina-veta-codigo-penal-para-devolverlo-al-congreso/>; See R. Dominicana Aborta, *Personalidades apoyan a Medina y las excepciones de penalización del aborto en República Dominicana*, Dec. 13, 2014, <http://www.diariolasamericas.com/5051-america-latina/2841084-personalidades-apoyan-a-medina-y-las-excepciones-de-penalizacion-del-aborto-en-republica-dominicana.html>; See also *Presidente observa Código Penal por artículos penalizan el aborto*, Nov. 28, 2014, <http://www.elcaribe.com.do/2014/11/28/presidente-observa-codigo-penal> (last visited Nov. 5, 2015).

³⁹⁶ *Código Penal deroga 48 leyes*, Feb. 19, 2015, available at <http://www.elcaribe.com.do/2015/02/19/codigo-penal-deroga-48-leyes>; See also *Cámara de Diputados acogió las observaciones hechas por el Poder Ejecutivo al nuevo Código Penal*, Dec. 18, 2014, available at http://www.camaradediputados.gob.do/app/app_2011/article.aspx?id=4890 (last visited Nov. 5, 2015).

the following analysis will take into consideration both current Penal Code and the new Penal Code. The new Penal Code does not have yet have an identification number as a statute, and the numbering of the articles may change, so reference to each one is by title.

The Dominican Penal Code does not generally punish attempted crime as a rule, but only those specifically identified (Article 3 of the Penal Code), a different approach from all other Latin American countries.³⁹⁷ This rule will be changed by the new Code, which will punish all attempted crimes that are considered grave.

Article 1 of the Penal Procedural Code of Dominican Republic establishes that Courts must apply international treaties in cases under their jurisdiction.³⁹⁸

In 2007, Law 53-07, known as the Cybercrime Law, was enacted. It regulates the prevention and punishment of crimes committed with the use of ICTs, and created the Cybercrime Unit inside of the National Police.³⁹⁹

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation; a clear definition of child pornography; and age of the victim

Article 25 of the CSPNA prohibits the use of minors in pornography, defining it as any representation of children and adolescents, by any means, in explicit sexual activities, real or simulated, or any representation of their genitals with sexual purposes.⁴⁰⁰ This definition of child pornography was

³⁹⁷ Artículo 3. Las tentativas de delito no se reputan delitos, sino en los casos en que una disposición especial de la ley así lo determine.

³⁹⁸ Artículo 1. Primacía de la Constitución y los tratados. Los tribunales, al aplicar la ley, garantizan la vigencia efectiva de la Constitución de la República y de los tratados internacionales y sus interpretaciones por los órganos jurisdiccionales creados por éstos, cuyas normas y principios son de aplicación directa e inmediata en los casos sometidos a su jurisdicción y prevalecen siempre sobre la ley.

La inobservancia de una norma de garantía judicial establecida en favor del imputado no puede ser invocada en su perjuicio.

³⁹⁹ Ley No. 53-07, del 23 de abril de 2007, contra Crímenes y Delitos de Alta Tecnología.

Artículo I. Objeto de la Ley. La presente ley tiene por objeto la protección integral de los sistemas que utilicen tecnologías de información y comunicación y su contenido, así como la prevención y sanción de los delitos cometidos contra éstos o cualquiera de sus componentes o los cometidos mediante el uso de dichas tecnologías en perjuicio de personas física o morales, en los términos previstos en esta ley. La integridad de los sistemas de información y sus componentes, la información o los datos, que se almacenan o transmiten a través de éstos, las transacciones y acuerdos comerciales o de cualquiera otra índole que se llevan a cabo por su medio y la confidencialidad de éstos, son todos bienes jurídicos protegidos.

Artículo 36. Creación del Departamento de Investigación de Crímenes y Delitos de Alta Tecnología (DICAT). Se crea el Departamento de Investigación de Crímenes y Delitos de Alta Tecnología (DICAT), como entidad subordinada a la Dirección Central de Investigaciones Criminales de la Policía Nacional.

⁴⁰⁰ Artículo 25. Prohibición de la comercialización, prostitución y pornografía. Se prohíbe la comercialización, la prostitución y la utilización en pornografía de niños, niñas y adolescentes.

Párrafo I. Se entiende por comercialización de niños, niñas y adolescentes todo acto o transacción en virtud del cual un niño, niña y adolescente es transferido por una persona o grupo de personas a otra, a cambio de remuneración o cualquier otra retribución. A estos fines, se sancionará ofrecer, entregar o aceptar por cualquier medio un niño, niña o adolescente, con el objeto de explotación sexual, venta y/o uso de sus órganos, trabajo forzoso o cualquier otro destino que denigre a la persona del niño, niña o adolescente.

Párrafo II. Se entiende por prostitución de niños, niñas y adolescentes la utilización de cualquiera de éstos o éstas en actividades sexuales a cambio de remuneración o de cualquier otra retribución.

Párrafo III. Se entiende por utilización de niños, niñas y adolescentes en pornografía, toda representación, por cualquier medio, de niños,

repeated in Article 4 of Law 53-07, and both are aligned with the CRC.⁴⁰¹ Victims are children and adolescents, understood as persons under 18 years old (according to the second paragraph of the CNPSA).⁴⁰²

Article 411 of the CNPSA punishes by two to four years of imprisonment and a fine (three to 10 minimum wage salaries), individuals or companies whose representatives or employees photograph, film or publish pornographic or sex scenes in which children or adolescents are involved.⁴⁰³ Article 24 of Law 53-07 punishes by two to four years of imprisonment and a fine (10 to 15 minimum wage salaries), whoever produces, distributes, sells or promotes any kind of trade of pornographic images or representations of children or adolescents, as defined by Article 4.⁴⁰⁴ The first paragraph of Article 24 also punishes the acquisition and possession of child pornography.

It does not seem that Article 411 of the Penal Code was revoked by Article 24 of Law 53-07, because they are not contradictory nor in conflict. If they were, Law 53-07 would prevail because of the principle of specialty. It is important to point out that Article 67 states that any contradictory rule or provision regulated by another statute is automatically revoked.⁴⁰⁵ The first norm punishes those who photograph, film or publish, as individuals or representative/employees of enterprises, pornographic material, and the second norm punishes the production and distribution of this kind of material. Employees that are photographing or filming child pornography could allege that they are not producing the material and that it is an activity of the enterprise. No judicial decisions could be found relating to this issue.

Articles 351-2 in the Penal Code punishes parents who allow, intentionally or by omission, others to commit sexual abuse against their children, or let them be used in child pornography.⁴⁰⁶

niñas y adolescentes, dedicados a actividades sexuales explícitas, reales o simuladas o toda representación de las partes genitales de niños, niñas y adolescentes con fines primordialmente sexuales.

⁴⁰¹ Ley 53-07. Artículo 4. Definiciones. Para los fines de esta ley, se entenderá por:

(...)

Pornografía Infantil: Toda representación, por cualquier medio, de niños, niñas y adolescentes, dedicados a actividades sexuales explícitas, reales o simuladas o toda representación de las partes genitales de niños, niñas y adolescentes con fines primordialmente sexuales. Se considera niño o niña, a toda persona desde su nacimiento hasta los doce años, inclusive, y adolescente, a toda persona desde los trece años hasta alcanzar la mayoría de edad.

⁴⁰² Definición de niño, niña y adolescente. Se considera niño o niña a toda persona desde su nacimiento hasta los doce años, inclusive; y adolescente, a toda persona desde los trece años hasta alcanzar la mayoría de edad.

⁴⁰³ Artículo 411. Sanción por fotografiar, filmar o publicar. Las personas o empresas cuyos delegados o empleados fotografíen, filmen o publiquen escenas de sexo o pornográficas, en las que intervengan niños, niñas o adolescentes, serán castigados con penas de reclusión de dos (2) a cuatro (4) años y multa de tres (3) a diez (10) salarios mínimos establecido oficialmente, vigente al momento de cometer la infracción

⁴⁰⁴ Artículo 24. Pornografía Infantil. La producción, difusión, venta y cualquier tipo de comercialización de imágenes y representaciones de un niño, niña o adolescente con carácter pornográfico en los términos definidos en la presente ley, se sancionará con penas de dos a cuatro años de prisión y multa de diez a quinientas veces el salario mínimo.

Párrafo. Adquisición y Posesión de Pornografía Infantil. La adquisición de pornografía infantil por medio de un sistema de información para uno mismo u otra persona, y la posesión intencional de pornografía infantil en un sistema de información o cualquiera de sus componentes, se sancionará con la pena de tres meses a un año de prisión y multa de dos a doscientas veces el salario mínimo.

⁴⁰⁵ Artículo 67. Derogaciones. Con la promulgación de la presente ley, queda derogada cualquier norma o disposición que le sea contraria a la misma en esta materia.

⁴⁰⁶ Artículo 351-2. (Agregado por la Ley 24-97 de fecha 28 de enero de 1997 G.O. 9945).

Se considerarán culpables de abandono y maltrato a niños, niñas y adolescentes, y sancionados con las penas de prisión de uno a cinco

The new Penal Code defines sexual exploitation of children in Article 194 (Tipificación de la explotación sexual de niños, niñas e adolescentes), identifying the conduct related to the production, distribution and possession of child pornography as one kind of sexual exploitation, amongst others. Item 4 of the mentioned Article 194 gives a new definition of child pornography as “images of children or adolescents in sexual or erotic activities – explicit or not – real or simulated – or the voice of a child or adolescent, directly or through electronic media or any other means, to perform or simulate such activities.”⁴⁰⁷

The final provisions of the new Penal Code proscribe that all definitions of crimes regulated by other statutes, that are different from the ones the new Code has regulated, are automatically derogated. The Code for the Protection System and Fundamental Rights of Children and Adolescents – CNPSA and the Cybercrime Statute – are special statutes, specifically related to the rights of children, and to crimes committed in the Cyberspace, respectively. Considering that the new Penal Code has a new definition of child pornography though, it is understood as derogated from the definition in the CNPSA.

This is an unfortunate setback because the definition of Article 194, 3 of the new Penal Code is incomplete and not aligned with the OPSC. It requires the presence of real children or adolescents, does not criminalize virtual pornography or pseudo pornography, and does not mention the representation of minors’ genitals with sexual purposes as a kind of child pornography.

It is important to note that the new Penal Code enhances the penalties for child pornography (Article 193), establishing 10 to 20 years of imprisonment for all kinds of sexual exploitation.⁴⁰⁸ The Cybercrime Statute (Law 53-07), which will be revoked by the new Penal Code, proscribes in Article 24, a penalty of two to four years of imprisonment for the production, dissemination, sale, and commercialization of

años y multa de quinientos a cinco mil pesos, el padre o la madre o las personas que tienen a su cargo a cualquier niño, niña o adolescente que no le presten atención, afecto, vigilancia o corrección suficientes, o permitan o inciten a éstos a la ejecución de actos perjudiciales para su salud síquica o moral.

El padre, la madre o las personas que tienen a su cargo cualquier niño, niña o adolescente que, por acción u omisión y de manera intencional, causen a niños, niñas, o adolescentes daño físico, mental o emocional; cuando se cometa o se permita que otros cometan abuso sexual; cuando se utilice o se permita que se utilicen niños, niñas o adolescentes en la práctica de mendicidad, de la pornografía o de la prostitución; cuando se emplean niños, niñas y adolescentes en trabajos prohibidos o contrarios a la moral o que ponga en peligro su vida, su salud o su integridad física; cuando no se les suministre alimentos, ropas, habitación, educación o cuidados en su salud; cuando existan medios económicos para hacerlo o cuando por negligencia no se disponga de los medios adecuados.

⁴⁰⁷ Artículo 194. Tipificación de la explotación sexual de niños, niñas y adolescentes. La explotación sexual de niños, niñas y adolescentes quedará tipificada por una cualquiera de las actuaciones punibles siguientes:

- 1) Si de cualquier forma se promueve, facilita, instiga, recluta u organiza la utilización de niños, niñas y adolescentes en publicaciones o actividades pornográficas, espectáculos sexuales, turismo sexual, o en la práctica de relaciones sexuales remuneradas.
- 2) Si se paga o se promete pagar, con dinero u otra ventaja de cualquier naturaleza, a un niño, niña o adolescente para que realice actos o sostenga relaciones sexuales.
- 3) Si se promueve, ofrece o vende la República Dominicana como destino sexual de niños, niñas y adolescentes, a través de medios electrónicos, revistas, periódicos, folletos o por cualquier otra vía.
- 4) Si de cualquier forma se financia, produce, reproduce, publica, posee, distribuye, importa, exporta, exhibe, ofrece, vende o comercia imágenes de niños, niñas y adolescentes en actividades sexuales o eróticas— sean estas explícitas o no, reales o simuladas—, o se utiliza la voz de un niño, niña y adolescente, en forma directa y a través de medios electrónicos o por cualquier otro medio, para realizar o simular realizar dichas actividades.
- 5) Si se utiliza a niños, niñas y adolescentes con fines sexuales en actos de exhibicionismo o en espectáculos públicos o privados, o se les facilita a éstos el acceso a estos espectáculos.
- 6) Si se suministra pornografía a niños, niñas y adolescentes.

⁴⁰⁸ Artículo 193. Sanción por explotación sexual de niños, niñas y adolescentes. La explotación sexual comercial de niños, niñas y adolescentes será sancionada con diez a veinte años de prisión mayor y multa de diez a veinte salarios mínimos del sector público.

child pornography, and a penalty of three months to one year of imprisonment for the acquisition and possession of this kind of material.⁴⁰⁹ The dissemination is not specifically criminalized by the new Penal Code.

4 – Criminalizes accessing or downloading child pornography images

Accessing or downloading child pornography is not a crime, but the acquisition and possession of it are criminalized by the new Penal Code.

5 – Criminalizes simple possession of child pornography

Simple possession is criminalized according to Article 24 of Law 53-07, transcribed above; and according to Article 194, item 3, of the new Penal Code transcribed above.

6 – Criminalizes virtual images or sexually exploitative representations of children

This is criminalized according to Article 24 of Law 53-07, but case law must be checked. However, the new Penal Code will not allow for this conclusion.

7 – Addresses the criminal liability of children involved in pornography

The legislation does not address the criminal liability of children involved in pornography.

8 – Establishes the criminal liability of legal persons for child pornography offenses

The legislation establishes criminal liability of legal persons. However, according to a general rule in Article 60 of Law 53-07, it establishes liability when any crime is committed, and creates penalties for them such as fines, forfeiture of assets and closure.⁴¹⁰

⁴⁰⁹ Artículo 24. Pornografía Infantil. La producción, difusión, venta y cualquier tipo de comercialización de imágenes y representaciones de un niño, niña o adolescente con carácter pornográfico en los términos definidos en la presente ley, se sancionará con penas de dos a cuatro años de prisión y multa de diez a quinientas veces el salario mínimo.

Párrafo. Adquisición y Posesión de Pornografía Infantil. La adquisición de pornografía infantil por medio de un sistema de información para uno mismo u otra persona, y la posesión intencional de pornografía infantil en un sistema de información o cualquiera de sus componentes, se sancionará con la pena de tres meses a un año de prisión y multa de dos a doscientas veces el salario mínimo.

⁴¹⁰ Artículo 60. Responsabilidad Civil y Penal de las Personas Morales. Además de las sanciones que se indican más adelante, las personas morales son responsables civilmente de las infracciones cometidas por sus órganos o representantes. La responsabilidad penal por los hechos e infracciones contenidas en esta ley, se extiende a quienes ordenen o dispongan de su realización y a los representantes legales de las personas morales que conociendo de la ilicitud del hecho y teniendo la potestad para impedirlo, lo permitan, tomen parte en él, lo faciliten o lo encubran. La responsabilidad penal de las personas morales no excluye la de cualquiera persona física, autor o cómplice de los mismos hechos. Cuando las personas morales sean utilizadas como medios o cubierta para la comisión de un crimen o un delito, o se incurra a través de ella en una omisión punible, las mismas se sancionarán con una, varias o todas de las penas siguientes:

- a) Una multa igual o hasta el doble de la contemplada para la persona física para el hecho ilícito contemplado en la presente ley;
- b) La disolución, cuando se trate de un crimen o un delito sancionado en cuanto a las personas físicas se refiere con una pena privativa de libertad superior a cinco años;
- c) La prohibición, a título definitivo o por un período no mayor de cinco años, de ejercer directa o indirectamente una o varias actividades profesionales o sociales;
- d) La sujeción a la vigilancia judicial por un período no mayor de cinco años;
- e) La clausura definitiva o por un período no mayor de cinco años, de uno o varios de los establecimientos de la empresa, que han servido para cometer los hechos incriminados;
- f) La exclusión de participar en los concursos públicos, a título definitivo o por un período no mayor de cinco años;
- g) La prohibición, a perpetuidad o por un período no mayor de cinco años, de participar en actividades destinadas a la captación de valores provenientes del ahorro público;
- h) La confiscación de la cosa que ha servido o estaba destinada a cometer la infracción, o de la cosa que es su producto;

The new Penal Code proscribes in Article 197, the criminal liability of legal persons for any kind of exploitation of children or adolescents, and establishes the penalties in Articles 42⁴¹¹, 43⁴¹², 44⁴¹³, and 45⁴¹⁴, which include:

- Penalty of fine;
- Legal dissolution;
- Forfeiture of proceeds, property, objects and assets derived directly or indirectly from the offense;
- Permanent closure or temporary closure for no more than three years of one or more commercial establishments operated by the company or of its commercial exploitation (all or part of it); and
- Temporary revocation of concessions, licenses, permits or authorizations given by the government.

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory; and

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

No, but the Dominican Republic has a legal framework prepared to receive improvements in order to specifically allow it.

Article 26 of the 2010 Constitution establishes that the Dominican Republic is a member State of the international community, open to cooperation and bound to adhere to the provisions of international law.⁴¹⁵ It also determines that the provisions of ratified international conventions shall be applicable.

i) La publicación por carteles de la sentencia pronunciada o la difusión de ésta, sea por la prensa escrita o por otro medio de comunicación.

⁴¹¹ Artículo 42. Penas por infracciones graves y menos graves. Las penas aplicables a las personas jurídicas responsables de infracciones graves o menos graves son las siguientes:

- 1) La multa.
- 2) Las penas complementarias.
- 3) La disolución legal de la persona jurídica.

⁴¹² Artículo 43. Procedimiento de imposición de multas por infracciones graves o menos graves. Para la aplicación de la pena de multa ante la comisión de infracciones graves o menos graves, se procederá a multiplicar por dos la cuantía que de ordinario se dispone para las personas físicas imputables ante igual infracción.

⁴¹³ Artículo 44. Penas complementarias a infracciones graves o menos graves. Las penas complementarias aplicables a las personas jurídicas responsables de infracciones graves o menos graves son las siguientes:

- 1) La confiscación o decomiso del producto, los bienes, objetos y los haberes procedentes directa o indirectamente de la infracción, sin perjuicio de los derechos de los terceros de buena fe.
- 2) El cierre definitivo, o el cierre temporal por un período no mayor de tres años, de uno o varios de los establecimientos comerciales operados por la sociedad, o de toda su explotación comercial o parte de ella.
- 3) La revocación temporal, por un período no mayor de cinco años, de cualquier habilitación legal que le haya concedido a la persona jurídica una institución pública para la prestación de la actividad comercial o el servicio público de que se trate, sin importar la naturaleza del título habilitante, que podrá ser una concesión, licencia, permiso, autorización o cualquier otro.
- 4) La inhabilitación definitiva, o temporal por un período no mayor de cinco años, de hacer llamado público al ahorro en los sectores financieros, bursátiles o comerciales, con el fin de colocar títulos o valores de cualquier clase.

⁴¹⁴ Artículo 45. Medidas complementarias para infracciones grave, menos graves o leves. La imposición de una pena de multa no excluye la facultad del tribunal de ordenar al mismo tiempo una o varias penas complementarias para sancionar las infracciones graves, menos graves o leves, conforme lo dispone este código.

⁴¹⁵ Artículo 26.- Relaciones internacionales y derecho internacional. La República Dominicana es un Estado miembro de la comunidad

However, the CRC determines that States must adapt their legislation in order to allow extraterritorial jurisdiction, and the Dominican Republic has not done that yet. Although the country is prepared to apply extraterritorial jurisdiction, it cannot yet do so in regards to child pornography.

Article 56 of the Code of Criminal Procedure grants Dominican courts the competence to exercise universal jurisdiction over certain crimes, and national courts have the authority to prosecute cases involving genocide, war crimes or crimes against humanity, wherever committed, provided that the offender is a resident in the country, or that the acts caused harm to Dominicans.⁴¹⁶ Article 62 of that Code even identifies the competent tribunal for the application of the universal jurisdiction principle, the Santo Domingo court of First Instance.⁴¹⁷ Those provisions would have to be reformed in order to specifically allow competency of the Court when a crime of child pornography is committed because child pornography is not currently included among the specified crimes subject to the Court's jurisdiction.

The new Penal Code will not bring any changes to the subject.

11 – Establishes forfeiture of assets used to commit or facilitate offenses; and 12 – Establishes forfeiture of proceeds derived from such offenses

Article 11 of the Penal Code provides for the forfeiture of assets used to commit or facilitate offenses, and also of the proceeds derived from offenses, penalties which are applied to every crime, not only the ones related to CAM.⁴¹⁸

internacional, abierto a la cooperación y apegado a las normas del derecho internacional, en consecuencia:

- 1) Reconoce y aplica las normas del derecho internacional, general y americano, en la medida en que sus poderes públicos las hayan adoptado;
- 2) Las normas vigentes de convenios internacionales ratificados regirán en el ámbito interno, una vez publicados de manera oficial;
- 3) Las relaciones internacionales de la República Dominicana se fundamentan y rigen por la afirmación y promoción de sus valores e intereses nacionales, el respeto a los derechos humanos y al derecho internacional;
- 4) En igualdad de condiciones con otros Estados, la República Dominicana acepta un ordenamiento jurídico internacional que garantice el respeto de los derechos fundamentales, la paz, la justicia, y el desarrollo político, social, económico y cultural de las naciones. Se compromete a actuar en el plano internacional, regional y nacional de modo compatible con los intereses nacionales, la convivencia pacífica entre los pueblos y los deberes de solidaridad con todas las naciones;
- 5) La República Dominicana promoverá y favorecerá la integración con las naciones de América, a fin de fortalecer una comunidad de naciones que defienda los intereses de la región. El Estado podrá suscribir tratados internacionales para promover el desarrollo común de las naciones, que aseguren el bienestar de los pueblos y la seguridad colectiva de sus habitantes, y para atribuir a organizaciones supranacionales las competencias requeridas para participar en procesos de integración;
- 6) Se pronuncia en favor de la solidaridad económica entre los países de América y apoya toda iniciativa en defensa de sus productos básicos, materias primas y biodiversidad.

⁴¹⁶ Artículo 56. Jurisdicción. La jurisdicción penal es ejercida por los jueces y tribunales que establece este código, y se extiende sobre los dominicanos y sobre los extranjeros para los efectos de conocer y juzgar los hechos punibles cometidos total o parcialmente en el territorio nacional, o cuyos efectos se produzcan en él, salvo los casos exceptuados en tratados o convenciones internacionales adoptados por los órganos públicos o en los principios reconocidos por el derecho internacional general y americano.

Es competencia de los tribunales nacionales, independientemente del lugar de su comisión, juzgar de los casos que constituyan genocidio, crímenes de guerra o crímenes contra la humanidad, siempre que el imputado resida, aún temporalmente, en el país o los hechos se hayan cometido en perjuicio de nacionales.

⁴¹⁷ Artículo 62. Competencia universal.

En los casos en que los tribunales nacionales conocen de hechos punibles cometidos fuera del territorio nacional, es competente, Tribunal de Primera Instancia del Distrito Nacional.

⁴¹⁸ Artículo 11. Son penas comunes a las materias criminales y correccionales: la sujeción del condenado a la vigilancia de la alta policía, la multa y la confiscación especial del cuerpo del delito, cuando sea propiedad del condenado, la de las cosas producidas por el delito, y por último, la de aquellas que sirvieron para su comisión o que se destinaron a ese fin.

Articles 31, 36, 41, and 44 of the new Penal Code recognizes different degrees of punishment, and determines the confiscation or forfeiture of proceeds, property, objects, and assets directly or indirectly derived from the offense.⁴¹⁹

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 14 of the CSPNA determines that all professionals that work with children and adolescents must report any suspicion of abuse or violation of the rights of a child or an adolescent. Failure to do so subjects the professional to a fine of one to three minimum wage salaries).⁴²⁰

14 – Requires Internet Service Providers to report child pornography

The law does not require Internet Service Providers to report to law enforcement suspected child pornography located on their networks.

15 – Has a support telephone or online hotline to enable the public to report child abuse

In the 2008 report to the CRC Committee, the Dominican Republic informed that they established the Línea de apoyo niños/as y adolescents de Indesui in 1996, and the Línea 700 in 2007, and that there is planned expansion to the former to create a 24 hour toll free helpline. In its conclusions, the Committee recommended that the State party should provide core funding to maintain and expand these services,

⁴¹⁹ Artículo 31. Penas complementarias a infracciones graves. Las penas complementarias aplicables a las personas físicas imputables de infracciones graves son las siguientes:

1) La confiscación o decomiso del producto y de los bienes, objetos y haberes procedentes directa o indirectamente de la infracción, sin perjuicio de los derechos que tengan los terceros de buena fe;

(...)

Artículo 36. Penas complementarias a infracciones menos graves. Las penas complementarias aplicables a las personas físicas imputables de una infracción menos grave son las siguientes:

1) La confiscación o decomiso del producto, los bienes, objetos y los haberes procedentes directa o indirectamente de la infracción, sin perjuicio de los derechos de los terceros de buena fe.

(...)

Artículo 41. Penas complementarias a infracciones leves. Las penas complementarias aplicables a las personas físicas imputables de una infracción leve son las siguientes:

1) La confiscación o decomiso del producto, los bienes, objetos y los haberes procedentes directa o indirectamente de la infracción, sin perjuicio de los derechos de los terceros de buena fe.

(...)

Artículo 44. Penas complementarias a infracciones graves o menos graves. Las penas complementarias aplicables a las personas jurídicas responsables de infracciones graves o menos graves son las siguientes:

1) La confiscación o decomiso del producto, los bienes, objetos y los haberes procedentes directa o indirectamente de la infracción, sin perjuicio de los derechos de los terceros de buena fe.

(...)

⁴²⁰ Artículo 14. Derecho a que sea denunciado el abuso en su contra.

Los profesionales y funcionarios de las áreas de la salud, pedagogía, sicología, trabajo social y agentes del orden público, directores y funcionarios, tanto públicos como privados, y cualquier otra persona que en el desempeño o no de sus funciones tuviere conocimiento o sospecha de una situación de abuso o de violación de los derechos de los niños, niñas y adolescentes, están obligados a denunciarla ante las autoridades competentes, estando exentos de responsabilidad penal y civil, con respecto a la información que proporcionen.

Código para el Sistema de Protección y los Derechos Fundamentales 23 de Niños, Niñas y Adolescentes

Párrafo. El incumplimiento de esta obligación conlleva una sanción penal de uno (1) a tres (3) salarios mínimos establecidos oficialmente. La sala penal del Tribunal de Niños, Niñas y Adolescentes es competente para conocer de esta infracción.

including by establishing a toll free three digit 24-hour helpline, and make possible that these services reach children in marginalized and rural communities as well. The Committee also recommended that Dominican Republic should integrate these two helplines.

16 – Creates data retention and preservation policies or provisions

The legislation does address data retention and preservation policies.

Article 56 of Law 53-07 determines that ISPs must retain data and all information that can be useful in an investigation, and preserve it for at least 90 days.⁴²¹ Following a determination of this law, INDOTEL regulated data retention and preservation provisions in the Reglamento para la Obtención y Preservación de Datos e Informaciones por parte de los Proveedores de Servicios, en Aplicación de las Disposiciones de la Ley n. 53-07, sobre Crímenes y Delitos de Alta Tecnología, which indicates all the elements that should be observed by ISPs.⁴²² The type of data to be retained is identified in Article 4.⁴²³

⁴²¹ Artículo 56. Proveedores de Servicios.

Sin perjuicio de lo establecido en el literal b) del Artículo 47 de la presente ley, los proveedores de servicio deberán conservar los datos de tráfico, conexión, acceso o cualquier otra información que pueda ser de utilidad a la investigación, por un período mínimo de noventa (90) días. El Instituto Dominicano de las Telecomunicaciones (INDOTEL) creará un reglamento para el procedimiento de obtención y preservación de datos e informaciones por parte de los proveedores de servicios, en un plazo de 6 meses a partir de la promulgación de la presente ley. Dicha normativa deberá tomar en cuenta la importancia de preservación de la prueba, no obstante la cantidad de proveedores envueltos en la transmisión o comunicación.

⁴²² INDOTEL – Dominican Republic Agency for Telecommunication, <http://www.indotel.gob.do/> (last visited Nov. 9, 2015).

⁴²³ Artículo 4.- Datos que deben conservarse.

1) Los Proveedores de Servicios tienen la obligación de conservar los siguientes datos:

a) Datos necesarios para rastrear e identificar el origen de una comunicación:

(...)

2) Con respecto al acceso a Internet, correo electrónico por Internet y telefonía por Internet:

i) La identificación de usuario y/o facilidad asignada;

ii) La identificación de usuario y/o facilidad y el número de teléfono asignados a toda comunicación que acceda a la red pública de telefonía; y

iii) El nombre y la dirección del usuario del servicio y/o facilidad al que se le ha asignado en el momento de la comunicación una dirección de Protocolo Internet (IP), una identificación de usuario o un número de teléfono.

b) Datos necesarios para identificar el destino de una comunicación:

(...)

2) Con respecto al correo electrónico por Internet y a la telefonía por Internet:

i) La identificación de usuario o el número de teléfono del destinatario o de los destinatarios de una llamada telefónica por Internet; y

ii) Los nombres y direcciones de los usuarios de los servicios y la identificación de usuario del destinatario de la comunicación.

c) Datos necesarios para identificar la fecha, hora y duración de una comunicación:

(...)

2) Con respecto al acceso a Internet, correo electrónico por Internet y telefonía por Internet:

i) La fecha y hora de la conexión y desconexión del servicio de acceso a Internet, basadas en un determinado huso horario, así como la dirección del Protocolo Internet (IP), ya sea dinámica o estática, asignada por el Proveedor de Servicios, así como la identificación del usuario registrado; y

ii) La fecha y hora de la conexión y desconexión del servicio de correo electrónico por Internet o del servicio de telefonía por Internet, basadas en un determinado huso horario.

It is important to note that Article 53 of Law 53-07 requires authorities to act quickly in order to guarantee that data does not vanish, especially when the data is vulnerable.⁴²⁴ Article 54 gives special attributions to the Prosecutors, who can, *inter alia*, determine that any person or entity shall provide them documents or data which are stored in any information system, and can determine that any person or entity shall maintain the integrity of a system for a period of 90 days (extendable), or can have access to any information system.⁴²⁵

d) Datos necesarios para identificar el tipo de comunicación:

(...)

2) Con respecto al correo electrónico por Internet y a la telefonía por Internet: el servicio de Internet utilizado.

e) Datos necesarios para identificar el equipo de comunicación de los usuarios o lo que se considera ser el equipo de comunicación:

(...)

(...)

3) Con respecto al acceso a Internet, correo electrónico por Internet y telefonía por Internet:

i) El número de teléfono de origen en caso de acceso mediante marcado de números; y

ii) La línea digital de abonado (DSL) u otro punto terminal identificador del autor de la comunicación.

f) Datos necesarios para identificar la localización del equipo de comunicación móvil:

1) La etiqueta de localización (identificador de celda) al comienzo de la comunicación; y

2) Los datos que permiten fijar la localización geográfica de la celda, mediante referencia a la etiqueta de localización, durante el período en el que se conservan los datos de las comunicaciones.

2) De conformidad con el presente Reglamento, no podrá conservarse ningún dato que revele el contenido de la comunicación, salvo aquellos casos que cuenten con la orden de una autoridad judicial competente para tal fin.

⁴²⁴ Artículo 53. Conservación de los Datos.

Las autoridades competentes actuarán con la celeridad requerida para conservar los datos contenidos en un sistema de información o sus componentes, o los datos de tráfico del sistema, principalmente cuando éstos sean vulnerables a su pérdida o modificación.

⁴²⁵ Artículo 54. Facultades del Ministerio Público.

Previo cumplimiento de las formalidades dispuestas en el Código Procesal Penal, el Ministerio Público, quien podrá auxiliarse de una o más de las siguientes personas: organismos de investigación del Estado, tales como el Departamento de Investigación de Crímenes y Delitos de Alta Tecnología (DICAT) de la Policía Nacional; la División de Investigación de Delitos Informáticos (DIDI) del Departamento Nacional de Investigaciones; peritos; instituciones públicas o privadas, u otra autoridad competente, tendrá la facultad de:

a) Ordenar a una persona física o moral la entrega de la información que se encuentre en un sistema de información o en cualquiera de sus componentes;

b) Ordenar a una persona física o moral preservar y mantener la integridad de un sistema de información o de cualquiera de sus componentes, por un período de hasta noventa (90) días, pudiendo esta orden ser renovada por períodos sucesivos;

c) Acceder u ordenar el acceso a dicho sistema de información o a cualquiera de sus componentes;

d) Ordenar a un proveedor de servicios, incluyendo los proveedores de servicios de Internet, a suministrar información de los datos relativos a un usuario que pueda tener en su posesión o control;

e) Tomar en secuestro o asegurar un sistema de información o cualquiera de sus componentes, en todo o en parte;

f) Realizar y retener copia del contenido del sistema de información o de cualquiera de sus componentes;

g) Ordenar el mantenimiento de la integridad del contenido de un sistema de información o de cualquiera de sus componentes;

h) Hacer inaccesible o remover el contenido de un sistema de información o de cualquiera de sus componentes, que haya sido acezado para la investigación;

i) Ordenar a la persona que tenga conocimiento acerca del funcionamiento de un sistema de información o de cualquiera de sus componentes o de las medidas de protección de los datos en dicho sistema a proveer la información necesaria para realizar las investigaciones de lugar;

j) Recolectar o grabar los datos de un sistema de información o de cualquiera de sus componentes, a través de la aplicación de medidas tecnológicas;

Thus, the automatic retention of data is established for ISPs, which have to keep it for not less than 90 days and not more than two years, a reasonable period of time, according to Directive 2006/24 of the European Parliament and of the Council.⁴²⁶

Article 192 of the Criminal Procedural Code is related to interception and preservation of communication content, which requires prior judicial order.⁴²⁷ The authorization for those measures has to be renewed monthly, but the legislation does not establish a maximum period of time for the preservation of data.

Thus, the Dominican Republic does have retention and preservation provisions; the period of time legally stipulated for the retention is reasonable (90 days to two years); there are provisions that require the identification of specific types of data to be preserved; preservation measures require prior judicial order; and the need to maintain the confidentiality of the preservation order is determined by law.

Only the investigation of offenses punished with a maximum penalty higher than 10 years of imprisonment can authorize preservation of the content of communication.

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

The legislation does establish mandatory identification of the users of public computers.

Article 16 of the Regulation of Law 53-07 specifically requires the identification of the users of public computers.⁴²⁸ Article 17 of this same regulation establishes some obligations for owners of cybercafés or

k) Solicitar al proveedor de servicios recolectar, extraer o grabar los datos relativos a un usuario, así como el tráfico de datos en tiempo real, a través de la aplicación de medidas tecnológicas;

l) Realizar la intervención o interceptación de las telecomunicaciones en tiempo real, según el procedimiento establecido en el Artículo 192 del Código Procesal Penal para la investigación de todos los hechos punibles en la presente ley; y,

m) Ordenar cualquier otra medida aplicable a un sistema de información o sus componentes para obtener los datos necesarios y asegurar la preservación de los mismos.

⁴²⁶ Artículo 6. Periodos de conservación

Los Proveedores de Servicios garantizarán que los datos mencionados en el artículo 4 sean conservados por un período de tiempo que no será inferior a noventa (90) días, ni superior a dos (2) años a partir de la fecha de su generación y conservación.

⁴²⁷ Artículo 192. Interceptación de telecomunicaciones. Se requiere autorización judicial para la interceptación, captación y grabación de las comunicaciones, mensajes, datos, imágenes o sonidos transmitidos a través de redes públicas o privadas de telecomunicaciones por el imputado o cualquier otra persona que pueda facilitar razonablemente información relevante para la determinación de un hecho punible, cualquiera sea el medio técnico utilizado para conocerlas. Se procede conforme a las reglas del allanamiento o registro.

La medida de interceptación de comunicaciones tiene carácter excepcional y debe renovarse cada treinta días, expresando los motivos que justifican la extensión del plazo.

La resolución judicial que autoriza la interceptación o captación de comunicaciones debe indicar todos los elementos de identificación de los medios a interceptar y el hecho que motiva la medida.

El funcionario encargado debe levantar acta detallada de la transcripción de las comunicaciones útiles y relevantes para la investigación con exclusión de cualquier otra comunicación de carácter personal o familiar. Bajo esas formalidades la grabación pueden ser reproducida en el juicio o su transcripción puede ser incorporada por su lectura, sin perjuicio de que las partes puedan solicitar su reproducción íntegra.

Los registros y transcripciones son destruidos a la expiración del plazo de prescripción de la acción pública.

La interceptación de comunicaciones sólo se aplica a la investigación de hechos punibles cuya sanción máxima prevista supere los diez años de privación de libertad y a los casos que se tramitan conforme el procedimiento especial para asuntos complejos.

⁴²⁸ Artículo 16. Obligaciones de los propietarios de los Centros de Acceso Público

LAN houses, which are very useful for criminal investigations and include:

- Creating a compulsory user's registration, indicating their names, date of birth, nationality, ID;
- Not allowing the Internet access of unidentified persons;
- Keeping a list of web pages visited and time spent on each one, as well as the IP address used and time of connection; and
- Forbidding the access to any web page, chats or programs with child abuse material.⁴²⁹

18 – Has a national plan to combat violence against children

In the conclusions of the CRC Committee report on the OPSC, information can be found indicating that there were various action plans for the promotion of the rights of children, including the National Plan for Guaranteeing the Rights of Children and Adolescents 2003-2013, the National Plan against Worst Forms of Child Labour, and the Action Plan against Sexual Exploitation against Children and Adolescents. But the Committee was concerned that there was not one consolidated plan of action, which would ensure a coordinated approach to the implementation of children's rights.

According to Articles 51 and 52 of the CSPNA, the National System for Protection of the Rights of Children and Adolescents, formed by governmental and non-governmental entities, is responsible for the formulation, coordination, and execution of the public policies, programs, and actions concerning

1. Los propietarios de los Centros de Acceso Público tendrán las siguientes obligaciones:

- a) Mantener un registro de los usuarios, no inferior a noventa (90) días, con el nombre, Cédula de Identidad y Electoral u otro documento de identidad como el pasaporte, en el caso de extranjeros, o en su defecto fecha de nacimiento y nacionalidad del usuario, fecha, hora y duración del servicio e individualización del equipo utilizado;
- b) Prohibir el acceso a páginas de Internet, chats, portales o cualquier programa de contenido de material de abuso infantil;
- c) Implementar mecanismos de seguridad como programas y aplicaciones que impidan el acceso a páginas y similares con contenido de material de abuso infantil;
- d) Supervisar a los niños, niñas y adolescentes mientras se encuentren en los Centros de Acceso Público; y

En caso de los Centros de Acceso Público que poseen "Salas privadas", las cuales no pueden ser supervisadas por los propietarios de los Centros de Acceso Público, prohibir el acceso a niños, niñas y adolescentes a dichas salas.

2. Los propietarios de los Centros de Acceso Público tendrán un plazo de un (1) año a partir de la entrada en vigencia del presente Reglamento, para adecuar e implementar las medidas y mecanismos de seguridad necesarios para el cumplimiento de las obligaciones establecidas en este Reglamento.

⁴²⁹ Artículo 17. Obligaciones de los propietarios de los Puntos de Acceso Público

Los propietarios de los Puntos de Acceso Público tendrán las siguientes obligaciones:

- a) Crear un registro inicial, en el cual los usuarios de sus servicios deban registrar sus datos, tales como nombre, Cédula de Identidad y Electoral o en su defecto fecha de nacimiento y nacionalidad;
- b) No permitir el acceso de usuarios "anónimos". Aun cuando el servicio sea gratuito los usuarios deberán registrarse creando cuentas de usuario en las que se deberá almacenar la dirección MAC (MAC Address) de la tarjeta inalámbrica del equipo del usuario;
- c) Mantener un registro de los usuarios de sus servicios, no inferior a noventa (90) días, de páginas de Internet que fueron visitadas, así como cuánto tiempo permanecieron en ellas. Este registro debe incluir la dirección MAC, la dirección de Protocolo de Internet (IP) pública asignada por el enrutador inalámbrico al momento de la conexión, la fecha y la hora de las mismas;
- d) Prohibir el acceso a páginas Web, chats, portales o cualquier programa de contenido de material de abuso infantil;
- e) Implementar mecanismos de seguridad como programas y aplicaciones que impidan el acceso a páginas y similares con contenido de material de abuso infantil.

Los propietarios de los Puntos de Acceso Público tendrán un plazo de un (1) año, a partir de la entrada en vigencia del presente Reglamento, para adecuar e implementar las medidas y mecanismos de seguridad necesarios para el cumplimiento de las obligaciones establecidas en este Reglamento.

the integral protection of minors.⁴³⁰

19 – International treaties ratified

- Ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography on December 6, 2006
- A party to the ILO Minimum Age Convention, ratified on June 15, 1999
- Ratified the ILO Worst Forms of Child Labour Convention on November 15, 2000
- Has not ratified the Hague Convention on the Civil Aspects of International Child Abduction
- Accession to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption on November 22, 2006
- Has ratified the Convention on Cybercrime on February 2013 to enter into force after June 2013

20 – Age of criminal liability

The age of criminal liability is 18 years old. Persons older than 13 who commit illicit acts (similar to crimes), are subject to Juvenile Justice, which has special rules and is more concerned with the reeducation of the minor.⁴³¹

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

Law 53-07 is specifically related to crimes committed with the use of ICTs. Article 13 of the CSPNA specifically determines that the State has to protect children and adolescents from any kind of abuse or

⁴³⁰ Artículo 51. Definición. El Sistema Nacional de Protección de los Derechos de los Niños, Niñas y Adolescentes es el conjunto de instituciones, organismos y entidades, tanto gubernamentales como no gubernamentales, que formulan, coordinan, integran, supervisan, ejecutan y evalúan las políticas públicas, programas y acciones a nivel nacional, regional y municipal para la protección integral de los derechos de los niños, niñas y adolescentes.

Artículo 52. Finalidad. El Sistema Nacional de Protección de los Derechos de los Niños, Niñas y Adolescentes tiene por finalidad garantizar los derechos de la niñez y la adolescencia y la promoción de su desarrollo integral mediante la coordinación de políticas y acciones intersectoriales e interinstitucionales.

⁴³¹ CPP - Artículo 57. (...)

Los actos infraccionales y procedimientos en los casos de niños, niñas y adolescentes se rigen por su ley especial.

Artículo 222. Objetivo. La justicia penal de la persona adolescente, una vez establecida la responsabilidad penal tiene por objetivo aplicar la medida socioeducativa o la sanción correspondiente y promover la educación, atención integral e inserción de la persona adolescente en la familia y en la sociedad.

Artículo 223. Principio de grupos etarios.

Para los efectos de la aplicación de medidas cautelares y sanciones, la justicia penal de la persona adolescente diferenciará la siguiente escala de edades:

De 13 a 15 años, inclusive;

De 16 años hasta alcanzar la mayoría de edad.

Párrafo. Los niños y niñas menores de trece (13) años, en ningún caso, son responsables penalmente, por tanto no pueden ser detenidos, ni privados de su libertad, ni sancionados por autoridad alguna.

Artículo 278. Acto infraccional.

Se considerará acto infraccional cometido por una persona adolescente, la conducta tipificada como crimen, delito o contravención por las leyes penales.

Artículo 326. Finalidad de la sanción.

La finalidad de la sanción es la educación, rehabilitación e inserción social de las personas adolescentes en conflicto con la ley penal, y es deber del juez encargado de la ejecución de la sanción velar porque el cumplimiento de toda sanción satisfaga dicha finalidad.

exploitation, including abuses perpetrated through the Internet or any ICT.⁴³²

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of child sex tourism

Article 20 of Law 53-07 specifically punishes the illicit marketing of goods and services through the Internet by three months to five years of imprisonment, and this can be used to punish the online advertising of sex tourism with children.⁴³³

Article 194 of the new Penal Code for Dominican Republic, transcribed above, specifically criminalizes sex tourism with children, through electronic means, magazines, newspapers or any other means, as well as the advertisement of it through electronic means (Article 158, 3).

23 – Has specific legislation on online grooming considering it a standalone offense

No crime could be found in the Dominican Legislation that would correspond exactly to the definition of online grooming, as given by the Cybercrime Convention. But it is important to note that Article 23 of Law 53-07 establishes a penalty of three to 10 years of imprisonment for sexual assaults against children or adolescents with the use of ICTs.⁴³⁴ It seems that sexual assaults against minors with the use of ICTs could be defined as online grooming with a specific intent of getting an offline sexual contact. The new Penal Code does not regulate it.

24 – Has a clear definition of online grooming

The legislation does not have a clear definition of online grooming.

25 – Age of potential victims of online grooming

The legislation criminalizes sexual assault against children or adolescents, so everyone under 18 years of age is a potential victim.

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

The legislation criminalizes online grooming when there is intent of sexual assault.

⁴³² Artículo 13. Derecho a la restitución de derechos.

El Estado Dominicano tiene la responsabilidad de proteger a todos los niños, niñas y adolescentes contra toda forma de abuso, maltrato y explotación, sin importar el medio que se utilice, incluyendo el uso de internet o cualquier vía electrónica.

Párrafo. Para estos casos, se procederá a la restitución de los derechos violados o amenazados por medio de la ejecución de medidas de protección previstas en el presente Código. La familia y la sociedad, en su conjunto, deben participar y exigir este derecho

⁴³³ Artículo 20. Comercio Ilícito de Bienes y Servicios.

La comercialización no autorizada o ilícita de bienes y servicios, a través del Internet o de cualquiera de los componentes de un sistema de información, se castigará con la pena de tres meses a cinco años de prisión y multa de cinco a quinientas veces el salario mínimo.

Párrafo. El hecho de traficar ilícitamente humanos o migrantes, de cometer el delito tipificado como trata de personas o la venta de drogas o sustancias controladas, utilizando como soporte sistema electrónicos, informáticos, telemáticos o de telecomunicaciones, se castigará con las penas establecidas en las legislaciones especiales sobre estas materias.

⁴³⁴ Artículo 23. Atentado Sexual.

El hecho de ejercer un atentado sexual contra un niño, niña, adolescente, incapacitado o enajenado mental, mediante la utilización de un sistema de información o cualquiera de sus componentes, se sancionará con las penas de tres a diez años de prisión y multa desde cinco a doscientas veces el salario mínimo.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense, or considers it an aspect of grooming

The Penal Code does not criminalize showing pornography to minors, but the new Penal Code for Dominican Republic does note in Article 157 item 5 that using children or adolescents in sexual activities and acts of exhibitionism or public or private shows is considered commercial sexual exploitation of minors.⁴³⁵

28 – Has specific legislation on cyberbullying

The Dominican Republic does not have specific legislation on cyberbullying. However, Article 26 of the CSPNA prohibits the display, by any means, of the image and data of minors, especially when it can affect their physical, moral, psychological, and intellectual development, their honor or reputation, or if it can represent arbitrary or illegal interference in their private life or family intimacy, or if it can stigmatize their conduct or behavior.⁴³⁶

Article 21 of Law 53-07 punishes defamation committed through electronic, informatics or telematics means.⁴³⁷ Article 22 punishes the harm caused through those means.⁴³⁸

Cyberbullying only occurs when there is the use of ICTs to support deliberate, repeated, and hostile behavior by an individual or group, intended to harm others, and the mentioned articles do not require a repeated and hostile behavior of the offender. Thus, cyberbullying is not specifically criminalized in the Dominican Republic, but the provisions related to the offense of the dignity of a person through the Internet are good legislative initiatives.

29 – Has specific legislation concerning sexting

There is currently no legislation specific to sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

There are only two levels of penalties for offenses related to the exploitation of children in Dominican Republic. The Penal Code punishes offenses related to production, with the same penalties established

⁴³⁵ Artículo 157. Constituye explotación sexual comercial de menores de edad la utilización de niños, niñas o adolescentes en actividades sexuales, por una o varias personas, empresas o instituciones, a cambio de dinero, favores en especie o de cualquier otra forma de remuneración.

(...)

5. Cuando se utilice a niños, niñas o adolescentes con fines sexuales en actos de exhibicionismo o en espectáculos públicos o privados, o se facilite el acceso a estos espectáculos o se suministre pornografía a niños, niñas o adolescentes.

⁴³⁶ Artículo 26. Derecho a la protección de la imagen.

Se prohíbe disponer o divulgar, a través de cualquier medio, la imagen y datos de los niños, niñas y adolescentes en forma que puedan afectar su desarrollo físico, moral, psicológico e intelectual, su honor y su reputación, o que constituyan injerencias arbitrarias o ilegales en su vida privada e intimidad familiar o que puedan estigmatizar su conducta o comportamiento.

Párrafo. La violación de las prohibiciones indicadas en los artículos anteriores se sancionará de la manera dispuesta por el artículo 411 de este Código.

⁴³⁷ Artículo 21. Difamación. La difamación cometida a través de medios electrónicos, informáticos, telemáticos, de telecomunicaciones o audiovisuales, se sancionará con la pena de tres meses a un año de prisión y multa de cinco a quinientas veces el salario mínimo.

⁴³⁸ Artículo 22. Injuria Pública. La injuria pública cometida a través de medios electrónicos, informáticos, telemáticos, de telecomunicaciones, o audiovisuales, se sancionará con la pena de tres meses a un año de prisión y multa de cinco a quinientas veces el salario mínimo.

for offenses related to distribution of child abuse images, establishing a lower penalty only for the possession of this kind of material.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

The Dominican Republic only enhances the penalty when the perpetrator is a member of the family and does not consider the cohabitation or a relationship of trust or authority as causes necessary for raising penalties. The new Penal Code, which will enter into force in December 2015, maintains this position (Article 195, item 1, of the Penal Code).⁴³⁹

Article 195 in the Penal Code establishes aggravating circumstances for crimes committed by several persons acting together, but the commission of a crime within the framework of a criminal organization does not have the same legal treatment.⁴⁴⁰

⁴³⁹ Artículo 195. Circunstancias agravantes de la explotación de niños, niñas y adolescentes.

La explotación sexual comercial de niños, niñas y adolescentes será sancionada con veinte a treinta años de prisión mayor y multa de veinte a treinta salarios mínimos del sector público en los casos siguientes:

- 1) Si la persona responsable tiene algún grado de parentesco o filiación en cualquier grado con la víctima, u ostenta alguna autoridad pública o privada, jurídica o de hecho, asalariada o no, respecto de ella.
- 2) Si la infracción es perpetrada por varias personas actuando como autor o cómplice, sin importar que formen o no una asociación de malhechores.

(...)

⁴⁴⁰ Artículo 195. Circunstancias agravantes de la explotación de niños, niñas y adolescentes.

La explotación sexual comercial de niños, niñas y adolescentes será sancionada con veinte a treinta años de prisión mayor y multa de veinte a treinta salarios mínimos del sector público en los casos siguientes:

- 1) Si la persona responsable tiene algún grado de parentesco o filiación en cualquier grado con la víctima, u ostenta alguna autoridad pública o privada, jurídica o de hecho, asalariada o no, respecto de ella.
- 2) Si la infracción es perpetrada por varias personas actuando como autor o cómplice, sin importar que formen o no una asociación de malhechores.

(...)

8. ECUADOR – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Articles 103 and 104 COIP
2 – Has a clear definition of child pornography	Yes, Article 103 of the COIP
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 103 of the COIP
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, Article 104 of the COIP
6 – Criminalizes virtual images and sexually exploitative representations of children	Yes, Article 103 of the COIP combined with Article 69 of the CNA
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	Yes, Article 109 of the COIP
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Yes, Article 14 of the COIP
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, Article 14 of the COIP
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Article 69 of the COIP
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Article 69 of the COIP
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 17, 30, and 73 of the CAN and Article 142 of COIP
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes
16 – Creates data retention or data preservation policies or provisions	Only preservation, Article 476 of the Organic Penal Code
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No
18 – Has a national plan to combat violence against children	Yes
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years of age
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes, specifically (Articles 103, 104, 173, and 174 of the COIP)
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Yes, Articles 91 and 174 of the COIP
23 – Has specific legislation on online grooming, considering it a standalone offense	Yes, Article 174 of the COIP
24 – Has a clear definition of online grooming	Yes, Article 174 of the COIP
25 – Considers everyone under 18 as a potential victim of online grooming	Yes, Article 174 of the COIP
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Article 174 – with specific intent
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	Yes, Article 168 of the COIP
28 – Has specific legislation on cyberbullying	Partly, Article 180 of the COIP
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	2 levels – possession not criminalized
31 – Law establishes aggravating circumstances for child abuse offenses	Yes

ECUADOR – COUNTRY REPORT

Ecuador was part of the northern Inca Empire, and gained its independence in 1830. It is bordered by Colombia, Peru, and the Pacific Ocean, and includes the Galapagos Islands. Ecuador's population is ethnically diverse, composed of mestizos, Indians, and descendants of Spaniards.

It is a small and sparsely populated country that has a GINI index of 47.7, which indicates a high inequality of wealth.⁴⁴¹ It ranks 27 out of 136 countries for highest inequality of wealth in the world.⁴⁴² It has an illiteracy rate of 7%, which reaches above 20% amongst the indigenous population.⁴⁴³ The public education system is free and attendance is mandatory until the age of 14.

According to CIA World Factbook, Ecuador's high poverty and income inequality most affect indigenous, mixed race, and rural populations; the government is trying to increase its social spending to ameliorate these problems, and has implemented a conditional cash transfer program that requires children to attend school and have medical check-ups.⁴⁴⁴ Its economy is dependent on petroleum resources.

Ecuador was the first Latin American country to ratify the UN Convention on the Rights of the Child in 1990.

The judicial branch in Ecuador is formed by a Constitutional Court (Corte Constitucional - Article 429 of the Constitution⁴⁴⁵), a National Court of Justice (Corte Nacional de Justicia), Provincial Courts, and local Courts (Article 178 of the Constitution⁴⁴⁶). The Constitutional Court consists of nine judges, appointed by other branches.⁴⁴⁷ The National Court of Justice consists of 21 judges, including the Chief Justice, and is organized into five specialized chambers.⁴⁴⁸

⁴⁴¹ *Distribution of Family Income - GINI Index, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2172.html> (last visited Oct. 13, 2014).

⁴⁴² Considering that the "number one country" is the country with the highest inequality of wealth.

⁴⁴³ Instituto Nacional de Estadística y Censos, <http://www.ecuadorencifras.gob.ec/?s=analfabetismo> (last visited Oct. 30, 2015).

⁴⁴⁴ *Ecuador, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ec.html> (last visited Oct. 13, 2014).

⁴⁴⁵ Artículo 429. La Corte Constitucional es el máximo órgano de control, interpretación constitucional y de administración de justicia en esta materia. Ejerce jurisdicción nacional y su sede es la ciudad de Quito. Las decisiones relacionadas con las atribuciones previstas en la Constitución serán adoptadas por el pleno de la Corte.

⁴⁴⁶ Artículo 178. Los órganos jurisdiccionales, sin perjuicio de otros órganos con iguales potestades reconocidos en la Constitución, son los encargados de administrar justicia, y serán los siguientes:

1. La Corte Nacional de Justicia.
2. Las cortes provinciales de justicia.
3. Los tribunales y juzgados que establezca la ley.
4. Los juzgados de paz.

⁴⁴⁷ Artículo 432. La Corte Constitucional estará integrada por nueve miembros que ejercerán sus funciones en plenario y en salas de acuerdo con la ley. Desempeñarán sus cargos por un periodo de nueve años, sin reelección inmediata y serán renovados por tercios cada tres años. La ley determinará el mecanismo de reemplazo en caso de ausencia del titular.

⁴⁴⁸ Artículo 182. La Corte Nacional de Justicia estará integrada por juezas y jueces en el número de veinte y uno, quienes se organizarán en salas especializadas, y serán designados para un periodo de nueve años; no podrán ser reelectos y se renovarán por tercios cada tres años. Cesarán en sus cargos conforme a la ley. Las juezas y jueces de la Corte Nacional de Justicia elegirán de entre sus miembros a la Presidenta o Presidente, que representará a la Función Judicial y durará en sus funciones tres años. En cada sala se elegirá un presidente para el período de un año. Existirán conjuezas y conjueces que formarán parte de la Función Judicial, quienes serán seleccionados con los mismos procesos y tendrán las mismas responsabilidades y el mismo régimen de incompatibilidades que sus titulares. La Corte Nacional de Justicia tendrá jurisdicción en todo el territorio nacional y su sede estará en Quito.

Ecuador's National Institute of Statistics and Census (Instituto Nacional de Estadística y Censos) has recently published a research on ICTs based on data collected in December 2013 from 21,768 houses, and shows that:

- 58.3% of children between 5-15 years of age and 67.8% of adolescents and young adults between 16-24 years of age use computers, while only 35% of adults between 35-44 years of age and 19% of adults between 55-64 years of age use computers;
- At a national level, 29.8% of the population accesses the Internet on public computers; in rural areas, the number rises to 42.5%; and
- At a national level, 20% of the population can be considered digitally illiterate (considered as the group of persons that have not used a computer, a mobile phone, or accessed the Internet in the last 12 months), and in rural areas, 30% of the population fits this category.⁴⁴⁹

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

The current Constitution of Ecuador was enacted in 2008, the 20th Constitution after its independence. Article 84 proscribes that Congress has the obligation of adapting domestic law to align with international treaties related to human dignity.⁴⁵⁰ Through Article 46 item 4, it guarantees that children have special protection against all kinds of violence, especially against sexual exploitation, and any acts of neglect acts leading to those ends.⁴⁵¹ It also states that the country must adopt measures to protect children against any kind of economic exploitation.

The Code of Children and Adolescents (Código de la Niñez y Adolescencia) (CNA) was enacted in 2003 before the new Constitution, but was maintained by the new constitutional order. It guarantees integral protection for children and adolescents and creates a National Council, the Consejo Nacional de la Niñez y Adolescencia (CNNA), as the governing body responsible for coordinating the National System of

⁴⁴⁹ Instituto Nacional de Estadística y Censos, Tecnologías de La Información y Comunicación (TIC) – 2013, <http://www.ecuadorencifras.gob.ec/tecnologias-de-la-informacion-y-comunicacion-tic/> (last visited Oct. 30, 2015).

⁴⁵⁰ Artículo 84. La todo órgano con potestad normativa tendrá la obligación de adecuar, formal y materialmente, las leyes y demás normas jurídicas a los derechos previstos en la Constitución y los tratados internacionales, y los que sean necesarios para garantizar la dignidad del ser humano o de las comunidades, pueblos y nacionalidades. En ningún caso, la reforma de la Constitución, las leyes, otras normas jurídicas ni los actos del poder público atentarán contra los derechos que reconoce la Constitución.

⁴⁵¹ Artículo 46. El Estado adoptará, entre otras, las siguientes medidas que aseguren a las niñas, niños y adolescentes:

1. (..)
2. Protección especial contra cualquier tipo de explotación laboral o económica. Se prohíbe el trabajo de menores de quince años, y se implementarán políticas de erradicación progresiva del trabajo infantil. El trabajo de las adolescentes y los adolescentes será excepcional, y no podrá conculcar su derecho a la educación ni realizarse en situaciones nocivas o peligrosas para su salud o su desarrollo personal. Se respetará, reconocerá y respaldará su trabajo y las demás actividades siempre que no atenten a su formación y a su desarrollo integral.
3. (...)
4. Protección y atención contra todo tipo de violencia, maltrato, explotación sexual o de cualquier otra índole, o contra la negligencia que provoque tales situaciones.
5. (...)
6. (...)
7. (...)
8. (...)
9. (...)

Protection of Children and Adolescents. Its norms are applicable to all persons under 18 years of age⁴⁵², although children are considered to be those under 12 years of age, and adolescents are between 12 and 18 years of age.⁴⁵³

According to Article 45 of CNA, children and adolescents have the right to seek information by the means they choose.⁴⁵⁴ The State, civil society, and the family must assure that they receive adequate information, and give them a critical education, which allows them to exercise their rights.

The CNA defines many important terms related to child abuse and child sexual exploitation, but it does not define crimes that are in the Penal Code. These two instruments must be combined when analyzing child exploitation.

According to Article 68 of CNA⁴⁵⁵, sexual abuse is any physical contact with a child of sexual nature, even with her/his permission, through menace, seduction, intimidation or any other means.⁴⁵⁶ Sexual exploitation, is divided in child prostitution and child pornography, and is defined similarly to the one provided by the OPSC.

Ecuador recently enacted a new Penal Code. According to its explanatory introduction, Ecuador has had five Penal Codes since it became a Republic – 1837, 1872, 1889, 1906, and 1938; the last of which was considered outdated, incomplete, and had more than 46 amendments since 1971.⁴⁵⁷ Considering that the country has undergone profound economic, social and political transformations in recent decades, a new Penal Code was enacted in December 2013, and entered into force in August 2014. It criminalizes conduct not criminalized earlier, and classifies some as crimes against humanity and human rights violations, giving them a special status.

Under the chapter related to human rights violations, there is a section that regulates diverse forms of exploitation of persons, including child pornography. Online grooming and possession of child pornography were finally criminalized. Penalties for the production and distribution of child

⁴⁵² Artículo 2. Sujetos protegidos.- Las normas del presente Código son aplicables a todo ser humano, desde su concepción hasta que cumpla dieciocho años de edad. Por excepción, protege a personas que han cumplido dicha edad, en los casos expresamente contemplados en este Código

⁴⁵³ Artículo 4. Definición de niño, niña y adolescente.- Niño o niña es la persona que no ha cumplido doce años de edad. Adolescente es la persona de ambos sexos entre doce y dieciocho años de edad

⁴⁵⁴ Artículo 45. Derecho a la información.- Los niños, niñas y adolescentes tienen derecho a buscar y escoger información; y a utilizar los diferentes medios y fuentes de comunicación, con las limitaciones establecidas en la ley y aquellas que se derivan del ejercicio de la patria potestad.

Es deber del Estado, la sociedad y la familia, asegurar que la niñez y adolescencia reciban una información adecuada, veraz y pluralista; y proporcionarles orientación y una educación crítica que les permita ejercitar apropiadamente los derechos señalados en el inciso anterior.

⁴⁵⁵ Artículo 68. Concepto de abuso sexual.- Sin perjuicio de lo que dispone el Código Penal sobre la materia, para los efectos del presente Código constituye abuso sexual todo contacto físico, sugerencia de naturaleza sexual, a los que se somete un niño, niña o adolescente, aun con su aparente consentimiento, mediante seducción, chantaje, intimidación, engaños, amenazas, o cualquier otro medio.

Cualquier forma de acoso o abuso sexual será puesto a conocimiento del Agente Fiscal competente para los efectos de la ley, sin perjuicio de las investigaciones y sanciones de orden administrativo que correspondan.

⁴⁵⁶ In the opinion of the other, it is not adequate to require menace, seduction, intimidation, or any other means to characterize sexual abuse, especially for children under 12, as any kind of sexual contact at that age is abuse, regardless of the means.

⁴⁵⁷ Exposición de motivos del Código Orgánico Integral Penal de Ecuador, available at Código Orgánico Integral Penal, DERECHO ECUADOR, http://www.justicia.gob.ec/wp-content/uploads/2014/05/c%C3%B3digo_org%C3%A1nico_integral_penal_-_coip_ed._sdn-midhc.pdf (last visited Nov. 6, 2015).

pornography were enhanced.

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

The earlier Penal Code, after its amendment in 2005, used to punish the conduct of producing, publishing, commercializing or distributing child pornography with six to nine years of imprisonment.

The current Penal Code (COIP) that just entered in force regulates the crime of production of child pornography and related conduct in Article 103, separating them from the conduct related to possession and commercialization of such material, which are now regulated by Article 104 and establishes a different penalty than Article 103.

Article 103 of the COIP deals only with the production of child pornography, stating that the person who photographs, films, records, produces, transmits or edits, through visual, audiovisual, computer, electronic or any other medium or format, material that depicts naked or semi-naked children or adolescents, real or simulated, with sexual connotation, shall be punished with imprisonment from 13 to 16 years.⁴⁵⁸

The commercialization of child pornography is now regulated by Article 104 of the COIP, which criminalizes the buying, selling, possession, transmission, import, export and storage of child pornography, for personal use or trade, establishing a penalty of 10 to 13 years of imprisonment.⁴⁵⁹

The provisions of the COIP related to child pornography still need to be interpreted together with Article 69 of the CNA, which defines child pornography as the representation, by whatever means, of a child or an adolescent in explicit sexual activity, real or simulated, or his/her genitals, with the intent to promote, suggest or evoke sexual activities.⁴⁶⁰

Persons under 18 years of age are deemed children and adolescents, and are the potential victims of child pornography. The punishment is harsher if the victim is a child under 12 years of age, and if the perpetrator is one of the parents, a caretaker, teacher, or a professional that work with children.

⁴⁵⁸ Artículo 103. Pornografía con utilización de niñas, niños o adolescentes.- La persona que fotografíe, filme, grabe, produzca, transmita o edite materiales visuales, audiovisuales, informáticos, electrónicos o de cualquier otro soporte físico o formato que contenga la representación visual de desnudos o semidesnudos reales o simulados de niñas, niños o adolescentes en actitud sexual; será sancionada con pena privativa de libertad de trece a dieciséis años.

Si la víctima, además, sufre algún tipo de discapacidad o enfermedad grave o incurable, se sancionará con pena privativa de libertad de dieciséis a diecinueve años.

Cuando la persona infractora sea el padre, la madre, pariente hasta el cuarto grado de consanguinidad o segundo de afinidad, tutor, representante legal, curador o pertenezca al entorno íntimo de la familia; ministro de culto, profesor, maestro, o persona que por su profesión o actividad haya abusado de la víctima, será sancionada con pena privativa de libertad de veintidós a veintiséis años.

⁴⁵⁹ Artículo 104. Comercialización de pornografía con utilización de niñas, niños o adolescentes.- La persona que publicite, compre, posea, porte, transmita, descargue, almacene, importe, exporte o venda, por cualquier medio, para uso personal o para intercambio pornografía de niños, niñas y adolescentes, será sancionada con pena privativa de libertad de diez a trece años.

⁴⁶⁰ Artículo 69. Concepto de explotación sexual.- Constituyen explotación sexual la prostitución y la pornografía infantil. Prostitución infantil es la utilización de un niño, niña e adolescente en actividades sexuales a cambio de remuneración o de cualquier otra retribución. Pornografía infantil es toda representación, por cualquier medio, de un niño, niña y adolescente en actividades sexuales explícitas, reales e simuladas; o de sus órganos genitales, con la finalidad de promover, sugerir o evocar la actividad sexual.

The consent of the victim was considered irrelevant, according to the forth Article added to Chapter III, c of Title VIII of the revoked Penal Code.⁴⁶¹ The new Penal Code, COIP, maintained this rule, and regulates it in item 5 of Article 110, which states that the consent does not diminish the penalty.⁴⁶²

4 – Criminalizes accessing or downloading child pornography images

Viewing (accessing or downloading) child pornography material is not a crime.

5 – Criminalizes simple possession of child pornography

Possession of child pornography is a crime, according to Article 104 of the current Penal Code.

6 – Criminalizes virtual images or sexually exploitative representations of children

The production or exhibition of virtual images or sexually exploitative representations of children can be considered a crime under Article 103 of the COIP when read together with 69 of the CNA, which defines this term as any representation, by any means, of a child or an adolescent in explicit sexual activity, real or simulated; or any representation of their genitals (items 1, 2, and 3, *retro*). The legislation leaves room for this conclusion because the related provision refers to “any representation of a child.” It does not punish it in a specific and clear provision and decisions in case law would need to be analyzed in order to determine how judges are dealing with this subject.

7 – Addresses the criminal liability of children involved in pornography

The criminal liability of children involved in pornography is not addressed under the law.

8 – Establishes the criminal liability of legal persons for child pornography offenses

Legal persons involved with the production or distribution of child pornography have criminal liability, and can be punished with extinction and a fine under Article 109 of the Penal Code.⁴⁶³

⁴⁶¹ Artículo... (4). (Agregado por el Art. 18 de la Ley 2005-2, R.O. 45, 23-VI-2005).- En los delitos sexuales, el consentimiento dado por la víctima menor de dieciocho años de edad, será irrelevante. En los delitos de trata de personas, el consentimiento será irrelevante.

⁴⁶² Artículo 110. Disposiciones comunes.

Para los delitos previstos en las Secciones segunda y tercera de este capítulo se observarán las siguientes disposiciones comunes:

1. En estos delitos, la o el juzgador, adicional a la pena privativa de libertad podrá imponer una o varias pena no privativas de libertad.
2. En los casos en los que la o el presunto agresor sea ascendiente o descendiente, colateral hasta el cuarto grado de consanguinidad o segundo de afinidad, cónyuge, ex cónyuge, conviviente, ex conviviente, pareja o ex pareja en unión de hecho, tutora o tutor, representante legal, curadora o curador o cualquier persona a cargo del cuidado o custodia de la víctima, la o el juez de Garantías Penales como medida cautelar suspenderá la patria potestad, tutoría, curatela y cualquier otra modalidad de cuidado sobre la víctima a fin de proteger sus derechos.
3. Para estos delitos no cabe la atenuante prevista en el número 2 del artículo 45 de este Código.
4. *El comportamiento público o privado de la víctima, anterior a la comisión de la infracción, no es considerado dentro del proceso.*
5. *En estos delitos el consentimiento dado por la víctima no excluye la responsabilidad penal ni disminuye la pena correspondiente.*
6. *Las víctimas en estos delitos podrán ingresar al programa de víctimas y testigos.*

⁴⁶³ Artículo 109. Sanción a la persona jurídica.-

Cuando se determine la responsabilidad penal de una persona jurídica en la comisión de los delitos previstos en esta Sección, será sancionada con la extinción y multa de diez a mil salarios básicos unificados del trabajador en general.

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory; and

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

The Código Orgánico Integral Penal (COIP) proscribes in Article 14 that Ecuadorian law is applicable to crimes related to those human rights protected by international instruments ratified by Ecuador, when the prosecution is not initiated abroad.⁴⁶⁴ It also states that Ecuador has jurisdiction to prosecute serious offenses to human rights. Since Ecuador has committed to combatting child pornography (which is a human rights violation) by ratifying the OPSC, extraterritorial jurisdiction applies. The COIP has amplified the spectrum of the extraterritorial jurisdiction, and now is aligned with the OPSC.

11 – Establishes forfeiture of assets used to commit or facilitate offenses; and

12 – Establishes forfeiture of proceeds derived from such offenses

The legislation generally addresses this matter. Article 69 of the COIP establishes the penalty of forfeiture of every object used to commit a crime, and of proceeds derived from criminal offenses, and it is applicable to all crimes.⁴⁶⁵

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 17 of the CNA determines that every person has the legal duty to report any violation of the right of a child or adolescent to the authorities within a maximum of 48 hours. Article 73 establishes the duty that everyone has to protect children or adolescents against sexual abuse, trafficking, sexual

⁴⁶⁴ Artículo 14. *Ámbito espacial de aplicación.- Las normas de este Código se aplicarán a:*

1. *Toda infracción cometida dentro del territorio nacional.*

2. *Las infracciones cometidas fuera del territorio ecuatoriano, en los siguientes casos:*

a) *(...)*

b) *Cuando la infracción penal es cometida en el extranjero, contra una o varias personas ecuatorianas y no ha sido juzgada en el país donde se la cometió.*

c) *(...)*

d) *Cuando la infracción penal afecta bienes jurídicos protegidos por el Derecho Internacional, a través de instrumentos internacionales ratificados por el Ecuador, siempre que no se haya iniciado su juzgamiento en otra jurisdicción.*

e) *Cuando las infracciones constituyen graves violaciones a los derechos humanos, de acuerdo con las reglas procesales establecidas en este Código.*

⁴⁶⁵ Artículo 69. *Penas restrictivas de los derechos de propiedad.-*

Son penas restrictivas de los derechos de propiedad:

1. *Multa, cuyo valor se determina en salarios básicos unificados del trabajador en general. (...)*

2. *Comiso penal, procede en todos los casos de delitos dolosos y recae sobre los bienes, cuando estos son instrumentos, productos o réditos en la comisión del delito. No habrá comiso en los tipos penales culposos. En la sentencia condenatoria, la o el juzgador competente dispondrá el comiso de:*

a) *Los bienes, fondos o activos, o instrumentos equipos y dispositivos informáticos utilizados para financiar o cometer la infracción penal o la actividad preparatoria punible;*

b) *Los bienes, fondos o activos, contenido digital y productos que procedan de la infracción penal;*

c) *Los bienes, fondos o activos y productos en los que se transforman o convierten los bienes provenientes de la infracción penal;*

d) *El producto del delito que se mezcle con bienes adquiridos de fuentes lícitas; puede ser objeto de comiso hasta el valor estimado del producto entremezclado;*

e) *Los ingresos u otros beneficios derivados de los bienes y productos provenientes de la infracción penal.*

exploitation, and other violations of their rights.⁴⁶⁶

People that work in health establishments, public or private, in all levels of responsibility, must report suspects of child sexual abuse, and they must collect and preserve the elements of the crime (Article 30, subsection 11 and subsection 12 of the CNA).⁴⁶⁷

Article 72 of the CNA determines that every professional who sees a situation that suggests child abuse, child sexual exploitation, or trafficking in children must report it to authorities within 24 hours.⁴⁶⁸

The COIP also determines, in Article 422, that professionals that work in hospitals have the legal duty to report crimes, as well as professionals that work with education.⁴⁶⁹

14 – Requires Internet Service Providers to report child pornography

There is no such requirement for ISPs.

15 – Has a support telephone or online hotline to enable the public to report child abuse

The NGO Teléfono de La Esperanza works to provide a regular number that can be called in case of child sexual abuse (6000 477 or 292 3327). No government operated hotline could be found. There is an emergency number, 101, managed by the National Police, but it is not specifically for violence against children. There is a system of personalized help, INFORMA-T/AYUDA-T, which helps people identify all of the organizations that can help them to solve a problem. It indicates one link for child pornography.⁴⁷⁰

16 – Creates data retention and preservation policies or provisions

Article 476 of the Organic Penal Code establishes rules about preservation of data.⁴⁷¹ It requires prior judicial order and has a time limit of 90 days, renewable if there is sufficient reason for it. If the

⁴⁶⁶ Artículo 73. Deber de protección en los casos de maltrato.- Es deber de todas las personas intervenir en el acto para proteger a un niño, niña o adolescente en casos flagrantes de maltrato, abuso sexual, tráfico y explotación sexual y otras violaciones a sus derechos; y requerir la intervención inmediata de la autoridad administrativa, comunitaria o judicial.

⁴⁶⁷ Artículo 30. Obligaciones de los establecimientos de salud.-Los establecimientos de salud, públicos y privados, cualquiera sea su nivel, están obligados a:

(...)

11. Informar inmediatamente a las autoridades y organismos competentes los casos de niños o niñas y adolescentes con indicios de maltrato o abuso sexual; y aquellos en los que se desconozca la identidad o el domicilio de los progenitores;

12. Recoger y conservar los elementos de prueba de maltrato o abuso sexual; y

(...)

⁴⁶⁸ Artículo 72. Personas obligadas a denunciar.- Las personas que por su profesión u oficio tengan conocimiento de un hecho que presente características propias de maltrato, abuso y explotación sexual, tráfico o pérdida de que hubiere sido víctima un niño, niña o adolescente, deberán denunciarlo dentro de las veinticuatro horas siguientes de dicho conocimiento ante cualquiera de los fiscales, autoridades judiciales o administrativas competentes, incluida la Defensoría del Pueblo, como entidad garante de los derechos fundamentales.

⁴⁶⁹ Artículo 422. Deber de denunciar.- Deberán denunciar quienes están obligados a hacerlo por expreso mandato de la Ley, en especial:

1. La o el servidor público que, en el ejercicio de sus funciones, conozca de la comisión de un presunto delito contra la eficiencia de la administración pública.

2. Las o los profesionales de la salud de establecimientos públicos o privados, que conozcan de la comisión de un presunto delito.

3. Las o los directores, educadores u otras personas responsables de instituciones educativas, por presuntos delitos cometidos en dichos centros.

⁴⁷⁰ Fundación Nuestros Jóvenes, <http://www.fnj.org.ec/index.php/for-items/item/81-servicios-t> (last visited Nov. 6, 2015).

⁴⁷¹ Artículo 476. Interceptación de las comunicaciones o datos informáticos.-

preservation of data is related to the organized crime, a longer period of six months is provided for, which can be equally renewed, but only once.

There was an attempt to regulate the retention of data in the COIP, but the Congress did not approve the respective article.⁴⁷²

Thus, the Ecuadorian legislation does not regulate retention of data; the preservation of data can be established only by prior judicial order, for not more than 90 days with a one-time renewal dependent upon demonstration of need. There is not a provision concerning the confidentiality of the preservation order.

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

The legislation does not require the identification of the users of public computers.

18 – Has a national plan to combat violence against children

Ecuador has a National Plan to combat human trafficking, illegal trafficking of migrants, sexual exploitation, labor exploitation and prosecution of women, children and adolescents, child pornography and corruption of minors (2006); an Action Plan for Prevention and Eradication of Commercial Sexual

La o el juzgador ordenará la interceptación de las comunicaciones o datos informáticos previa solicitud fundamentada de la o el fiscal cuando existan indicios que resulten relevantes a los fines de la investigación, de conformidad con las siguientes reglas:

1. La o el juzgador determinará la comunicación interceptada y el tiempo de intercepción, que no podrá ser mayor a un plazo de noventa días. Transcurrido el tiempo autorizados podrá solicitar motivadamente por una sola vez una prórroga hasta por un plazo de noventa días.

Cuando sean investigaciones de delincuencia organizada y sus delitos relacionados, la interceptación podrá realizarse hasta por un plazo de seis meses. Transcurrido el tiempo autorizado se podrá solicitar motivadamente por una sola vez una prórroga hasta por un plazo de seis meses.

2. La información relacionada con la infracción que se obtenga de las comunicaciones que se intercepten durante la investigación serán utilizadas en el proceso para el cual se las autoriza y con la obligación de guardar secreto de los asuntos ajenos al hecho que motive su examen.

3. Cuando, en el transcurso de una interceptación se conozca del cometimiento de otra infracción, se comunicará inmediatamente a la o al fiscal para el inicio de la investigación correspondiente. En el caso de delitos flagrantes, se procederá conforme con lo establecido en este Código.

4. Previa autorización de la o el juzgador, la o el fiscal, realizará la interceptación y registro de los datos informáticos en transmisión a través de los servicios de telecomunicaciones como: telefonía fija, satelital, móvil e inalámbrica, con sus servicios de llamadas de voz, mensajes SMS, mensajes MMS, transmisión de datos y voz sobre IP, correo electrónico, redes sociales, videoconferencias, multimedia, entre otros, cuando la o el fiscal lo considere indispensable para comprobar la existencia de una infracción o la responsabilidad de los partícipes.

5. Está prohibida la interceptación de cualquier comunicación protegida por el derecho a preservar el secreto profesional y religioso. Las actuaciones procesales que violenten esta garantía carecen de eficacia probatoria, sin perjuicio de las respectivas sanciones.

6. Al proceso solo se introducirá de manera textual la transcripción de aquellas conversaciones o parte de ellas que se estimen útiles o relevantes para los fines de la investigación. No obstante, la persona procesada podrá solicitar la audición de todas sus grabaciones, cuando lo considere apropiado para su defensa.

7. El personal de las prestadoras de servicios de telecomunicaciones, así como las personas encargadas de interceptar, grabar y transcribir las comunicaciones o datos informáticos tendrán la obligación de guardar reserva sobre su contenido, salvo cuando se las llame a declarar en juicio.

8. El medio de almacenamiento de la información obtenida durante la interceptación deberá ser conservado por la o el fiscal en un centro de acopio especializado para el efecto, hasta que sea presentado en juicio.

9. Quedan prohibidas la interceptación, grabación y transcripción de comunicaciones que vulneren los derechos de los niños, niñas y adolescentes, especialmente en aquellos casos que generen la re victimización en infracciones de violencia contra la mujer o miembros del núcleo familiar, sexual, física, sicológica y otros.

⁴⁷² Article 474 of the Bill presented to Congress.

Exploitation of Children and Adolescents associates with Travel and Tourism Plan (2007); a National Plan for the Eradication of Sexual Offenses in the Educational Setting; a National 10-year Plan of Comprehensive Protection for Children and Adolescents (2004-2014)⁴⁷³; and Plan Nacional para el Buen Vivir (2009-2013).⁴⁷⁴

19 – International instruments ratified

- Ecuador ratified the Convention on the Rights of the Child on March 23, 1990
- Ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on January 30, 2004
- Ratified the ILO Minimum Age Convention on September 19, 2000
 - Minimum age: 14
- Ratified the ILO Worst Forms of Child Labor Convention on September 19, 2000

20 – Age of criminal liability

The Ecuador Constitution establishes in Article 175 that children and adolescents are subjected to a special legislation and a different system of justice, which must apply the integral protection doctrine.⁴⁷⁵ Article 38 of the COIP establishes that those who are under 18 years of age are not subjected to the general Penal Code, but instead to the Code of Childhood and Adolescence.⁴⁷⁶

The CNA proscribes in Article 66 that children under 12 years of age do not have liability.⁴⁷⁷ Article 307 determines further that they are not subjected to educational measures.⁴⁷⁸

Under Articles 305⁴⁷⁹ and 306⁴⁸⁰, adolescents do not have criminal liability, but are subjected to educational measures proscribed by the can.⁴⁸¹

⁴⁷³ According to Ecuador's initial periodic report on the OPSC, presented to the Committee on the Rights of the Child on January 2010.

⁴⁷⁴ *Plan Nacional para el Buen Vivir*, SECRETARIA NACIONAL DE PLANIFICACIÓN Y DESARROLLO, available at <http://buenvivir.gob.ec/versiones-plan-nacional#tabs2> (last visited Nov. 8, 2015).

⁴⁷⁵ Artículo 175. Las niñas, niños y adolescentes estarán sujetos a una legislación y a una administración de justicia especializada, así como a operadores de justicia debidamente capacitados, que aplicarán los principios de la doctrina de protección integral. La administración de justicia especializada dividirá la competencia en protección de derechos y en responsabilidad de adolescentes infractores

⁴⁷⁶ Artículo 38. Personas menores de dieciocho años.- Las personas menores de dieciocho años en conflicto con la ley penal, estarán sometidas al Código Orgánico de la Niñez y Adolescencia.

⁴⁷⁷ Artículo 66. Responsabilidad de los niños, niñas y adolescentes.- Los niños y niñas están exentos de responsabilidad jurídica. Por sus hechos y actos dañosos, responderán civilmente sus progenitores o guardadores en los casos y formas previstos en el Código Civil.

⁴⁷⁸ Artículo 307. Inimputabilidad y exención de responsabilidad de niños y niñas.-

Los niños y niñas son absolutamente inimputables y tampoco son responsables; por tanto, no están sujetos ni al juzgamiento ni a las medidas socio-educativas contempladas en este Código.

Si un niño o niña es sorprendido en casos que puedan ser considerados de flagrancia según el artículo 326, será entregado a sus representantes legales y, de no tenerlos, a una entidad de atención. Se prohíbe su detención e internación preventiva.

Cuando de las circunstancias del caso se derive la necesidad de tomar medidas de protección, éstas se tomarán respetando las condiciones y requisitos del presente Código.

⁴⁷⁹ Artículo 305. Inimputabilidad de los adolescentes.- Los adolescentes son penalmente inimputables y, por tanto, no serán juzgados por jueces penales ordinarios ni se les aplicarán las sanciones previstas en las leyes penales.

⁴⁸⁰ Artículo 306. Responsabilidad de los adolescentes.- Los adolescentes que cometan infracciones tipificadas en la ley penal estarán sujetos a medidas socio-educativas por su responsabilidad de acuerdo con los preceptos del presente Código.

⁴⁸¹ Artículo 306. Responsabilidad de los adolescentes.- Los adolescentes que cometan infracciones tipificadas en la ley penal estarán sujetos a medidas socio-educativas por su responsabilidad de acuerdo con los preceptos del presente Código.

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

Legislation specifically addresses the use of ICTs in Articles 103, 173, and 174, related to child pornography, advertising of child exploitation, and online grooming.

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of sex tourism with children

The trafficking in person with the specific intent of sexual exploitation, including the production of child pornography, is criminalized in Article 91 of the COIP.⁴⁸² The punishment for this is independent from the punishment of the exploitation, according to Article 92. It specifically identifies child pornography as a kind of sexual exploitation.⁴⁸³

The advertising or offering of sexual contact with minors, through electronic means, is criminalized by Article 174 of the COIP.⁴⁸⁴ Sex tourism is also a crime as proscribed in Article 102 of the COIP.⁴⁸⁵

⁴⁸² Artículo 91. Trata de personas.- La captación, transportación, traslado, entrega, acogida o recepción para sí o para un tercero, de una o más personas, ya sea dentro del país o desde o hacia otros países con fines de explotación, constituye delito de trata de personas.

Constituye explotación, toda actividad de la que resulte un provecho material o económico, una ventaja inmaterial o cualquier otro beneficio, para sí o para un tercero, mediante el sometimiento de una persona o la imposición de condiciones de vida o de trabajo, obtenidos de:

1. La extracción o comercialización ilegal de órganos, tejidos, fluidos o material genético de personas vivas, incluido el turismo para la donación o trasplante de órganos.
2. La explotación sexual de personas incluida la prostitución forzada, el turismo sexual y la pornografía infantil.
3. La explotación laboral, incluido el trabajo forzoso, la servidumbre por deudas y el trabajo infantil.
4. Promesa de matrimonio o unión de hecho servil, incluida la unión de hecho precoz, arreglada, como indemnización o transacción, temporal o para fines de procreación.
5. La adopción ilegal de niñas, niños y adolescentes.
6. La mendicidad.
7. Reclutamiento forzoso para conflictos armados o para el cometimiento de actos penados por la ley.
8. Cualquier otra modalidad de explotación.

⁴⁸³ Artículo 92. Sanción para el delito de trata de personas.- La trata de personas será sancionada:

1. Con pena privativa de libertad de trece a dieciséis años.
2. Con pena privativa de libertad de dieciséis a diecinueve años, si la infracción recae en personas de uno de los grupos de atención prioritaria o en situación de doble vulnerabilidad o si entre la víctima y el agresor ha existido relación afectiva, consensual de pareja, conyugal, convivencia, de familia o de dependencia económica o exista vínculo de autoridad civil, militar, educativa, religiosa o laboral.
3. Con pena privativa de libertad de diecinueve a veintidós años, si con ocasión de la trata de personas, la víctima ha sufrido enfermedades o daños psicológicos o físicos graves o de carácter irreversible.
4. Con pena privativa de libertad de veintidós a veintiséis años, si por motivo de la trata de personas se produce la muerte de la víctima.
La trata se persigue y sanciona con independencia de otros delitos que se hayan cometido en su ejecución o como su consecuencia.

⁴⁸⁴ Artículo 174. Oferta de servicios sexuales con menores de dieciocho años por medios electrónicos.- La persona, que utilice o facilite el correo electrónico, chat, mensajería instantánea, redes sociales, blogs, foto blogs, juegos en red o cualquier otro medio electrónico o telemático para ofrecer servicios sexuales con menores de dieciocho años de edad, será sancionada con pena privativa de libertad de siete a diez años.

⁴⁸⁵ Artículo 102. Turismo sexual.- La persona que organice, promueva, ofrezca, brinde, traslade, reclute, adquiera o contrate actividades turísticas que impliquen servicios de naturaleza sexual, será sancionada con pena privativa de libertad de siete a diez años.

Si las víctimas se encuentran en alguno de los siguiente casos, la pena privativa de libertad será de diez a trece:

1. Si son niñas, niños o adolescentes o personas en situación de vulnerabilidad, aun cuando hayan prestado su consentimiento.

23 – Has specific legislation on online grooming considering it a standalone offense

The definition adopted by this Regional Study determines online grooming as the online enticement of a child for sexual acts, which can include personal meetings or just the exchange of pornographic material to or from the child. Online grooming is criminalized by Article 173 of the COIP, which defines it as the contact with minors, through electronic means, with sexual purposes.⁴⁸⁶

24 – Has a clear definition of online grooming

Ecuadorian legislation has a clear definition of online grooming.

25 – Age of potential victim of online grooming

Potential victims are children and adolescents, under 18 years of age, as determined by Article 173 of COIP.

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

Article 173 of the COIP punishes grooming with specific intent to arrange a meeting with a person under 18 years of age.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense, or considers it an aspect of grooming

Article 168 of the COIP criminalizes the distribution of pornographic material to children and adolescents.⁴⁸⁷

28 – Has specific legislation on cyberbullying

There is currently no legislation specific to cyberbullying, but Article 180 of the COIP can be used to prevent the dissemination of information of a child that is in violation of his/her rights, as described in the CNA.⁴⁸⁸

2. Cuando se utilice violencia, amenaza o intimidación.

3. La persona no tenga capacidad para comprender el significado del hecho.

⁴⁸⁶ Artículo 173. Contacto con finalidad sexual con menores de dieciocho años por medios electrónicos.- La persona que a través de un medio electrónico o telemático proponga concertar un encuentro con una persona menor de dieciocho años, siempre que tal propuesta se acompañe de actos materiales encaminados al acercamiento con finalidad sexual o erótica, será sancionada con pena privativa de libertad de uno a tres años.

Cuando el acercamiento se obtenga mediante coacción o intimidación, será sancionada con pena privativa de libertad de tres a cinco años.

La persona que suplantando la identidad de un tercero o mediante el uso de una identidad falsa por medios electrónicos o telemáticos, establezca comunicaciones de contenido sexual o erótico con una persona menor de dieciocho años o con discapacidad, será sancionada con pena privativa de libertad de tres a cinco años.

⁴⁸⁷ Artículo 168. Distribución de material pornográfico a niñas, niños y adolescentes.- La persona que difunda, venda o entregue a niñas, niños o adolescentes, material pornográfico, será sancionada con pena privativa de libertad de uno a tres años.

⁴⁸⁸ Artículo 180. Difusión de información de circulación restringida.- La persona que difunda información de circulación restringida será sancionada con pena privativa de libertad de uno a tres años.

Es información de circulación restringida:

1. La información que está protegida expresamente con una cláusula de reserva previamente prevista en la ley.
2. La información producida por la Fiscalía en el marco de una investigación previa.
3. La información acerca de las niñas, niños y adolescentes que viole sus derechos según lo previsto en el Código Orgánico de la Niñez y Adolescencia.

29 – Has specific legislation concerning sexting

There is currently no legislation specific to sexting.

30 – Has different levels of penalties for offenses related to the production, distribution or possession of child pornography

There are two levels of penalties, but possession is not criminalized.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

Article 103 of the Organic Penal Code establishes aggravated penalties for offenses committed by a member of the child’s family, by a person cohabiting with the child, and by a person who has abused a recognized position of trust of authority.⁴⁸⁹

There is an article in the Penal Code that establishes aggravating circumstances for crimes committed by several persons acting together (Article 47, item 5 of the Organic Penal Code).⁴⁹⁰ However, the commission of a crime within the framework of a criminal organization does not receive the same legal treatment.

⁴⁸⁹ Artículo 103 (...)

Cuando la persona infractora sea el padre, la madre, pariente hasta el cuarto grado de consanguinidad o segundo de afinidad, tutor, representante legal, curador o pertenezca al entorno íntimo de la familia: ministro de culto, profesor, maestro, o persona que por suya profesión o actividad haya abusado de la víctima, será sancionada con pena privativa de libertad de veintidós a veintiséis años.

⁴⁹⁰ Artículo 47. Circunstancias agravantes de la infracción.

Son circunstancias agravantes de la infracción penal:

(...)

5. Cometer la infracción con participación de dos o más personas.

(...)

9. EL SALVADOR – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 173 of the Penal Code
2 – Has a clear definition of child pornography	Yes, Article 173 of the Penal Code
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 173 of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, Article 173 A of the Penal Code
6 – Criminalizes virtual images and sexually exploitative representations of children	Yes
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No, but sanctions can be imposed
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Yes, Article 10 of the Penal Code
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, Article 10 of the Penal Code
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Article 127 of the Penal Code – for every crime
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Article 126 of the Penal Code – for every crime
13 – Establishes mandatory reporting requirements for professionals who work with children	Partly. Article 126 of the Law on Family Violence and Article 24 of the Law that regulates the activity of the Defense Attorney on Human Rights
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes, line 911
16 – Creates data retention or data preservation policies or provisions	Yes, Decree 285
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No
18 – Has a national plan to combat violence against children	
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years of age
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes, Article 173 of the Penal Code
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Trafficking in Persons – enhanced penalties when the victim is a child
23 – Has specific legislation on online grooming, considering it a standalone offense	No
24 – Has a clear definition of online grooming	Does not apply
25 – Considers everyone under 18 as a potential victim of online grooming	Does not apply
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Does not apply
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	Article 172 of the Penal Code
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	Only 2 levels of penalties
31 – Law establishes aggravating circumstances for child abuse offenses	Yes

EL SALVADOR – COUNTRY REPORT

According to the CIA World Factbook, El Salvador is the smallest and most densely populated country in Central America.⁴⁹¹ The delineation of its borders with Honduras was achieved through a decision from the International Court of Justice, with final agreement by the parties in 2006. El Salvador is a presidential representative democratic republic. The president is the head of the government and of the state.

El Salvador achieved independence from Spain in 1821 and from the Central American Federation in 1839. A 12-year civil war, which cost about 75,000 lives, was brought to a close in 1992 when the government and leftist rebels signed a treaty that provided for military and political reforms. El Salvador has a high index of emigration as a result of deteriorating economic conditions, natural disasters and wars. At least 20% of El Salvador's population lives abroad, and the remittances sent home account for close to 20% of GDP, which has helped reduce poverty.⁴⁹²

El Salvador has a civil law system with minor common law influence. The Supreme Court of Justice (Corte Suprema de Justicia) is responsible for the judicial review of legislation. El Salvador has a unicameral legislative assembly (Article 121 of the Constitution).⁴⁹³

International treaties have the same hierarchy as domestic legislation, and cannot be modified by domestic laws (Article 144 of the Constitution).⁴⁹⁴ In case of a conflict between a treaty and a domestic law, the treaty prevails, unless it was ratified with reservations (Articles 144 and 145 of the Constitution).⁴⁹⁵

The Supreme Court of Justice is responsible for the judicial review of laws and decrees under Article 174 of the Constitution.⁴⁹⁶ The Constitution does not have many norms regarding children or childhood, but it does statues that minors have special protection from the State, which must legislate in order to provide for their development as human beings.⁴⁹⁷

⁴⁹¹ *El Salvador, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/es.html> (last visited Oct. 13, 2014).

⁴⁹² *Id.*

⁴⁹³ Artículo 121. La Asamblea Legislativa es un cuerpo colegiado compuesto por Diputados, elegidos en la forma prescrita por esta Constitución, y a ella compete fundamentalmente la atribución de legislar.

⁴⁹⁴ Artículo 144. Los tratados internacionales celebrados por El Salvador con otros estados o con organismos internacionales, constituyen leyes de la República al entrar en vigencia, conforme a las disposiciones del mismo tratado y de esta Constitución.

La ley no podrá modificar o derogar lo acordado en un tratado vigente para El Salvador. En caso de conflicto entre el tratado y la ley, prevalecerá el tratado.

⁴⁹⁵ Artículo 145. No se podrán ratificar los tratados en que se restrinjan o afecten de alguna manera las disposiciones constitucionales, a menos que la ratificación se haga con las reservas correspondientes. Las disposiciones del tratado sobre las cuales se hagan las reservas no son ley de la República.

⁴⁹⁶ Artículo 174. La Corte Suprema de Justicia tendrá una Sala de lo Constitucional, a la cual corresponderá conocer y resolver las demandas de inconstitucionalidad de las leyes, decretos y reglamentos, los procesos de amparo, el habeas corpus, las controversias entre el Órgano Legislativo y el Órgano Ejecutivo a que se refiere el Art. 138 y las causas mencionadas en la atribución 7ª del Art. 182 de esta Constitución.

La Sala de lo Constitucional estará integrada por cinco Magistrados designados por la Asamblea Legislativa. Su Presidente será elegido por la misma en cada ocasión en que le corresponda elegir Magistrados de la Corte Suprema de Justicia; el cual será Presidente de la Corte Suprema de Justicia y del Órgano Judicial.

⁴⁹⁷ Artículo 34. Todo menor tiene derecho a vivir en condiciones familiares y ambientales que le permitan su desarrollo integral, para lo cual tendrá la protección del Estado.

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

Article 173 of the Salvadorian Penal Code punishes those who produce, reproduce, distribute, publish, imports, export, offer, finance, sell, trade, or disseminate, in any form, pictures of a person under 18 or a person with a mental disability, or uses their voice in sexual activities, erotic or with an unequivocally sexual nature, explicit or not, real or simulated, through computer, audiovisual, virtual or in any other way.⁴⁹⁸

This Article has a clear definition of child pornography, although it is limited to pictures, and voice recording or audio systems. Perpetrators are subject to a penalty of 6 to 12 years of imprisonment.

These acts are punished if committed directly or through a computer, an audiovisual system, or virtually.

4 – Criminalizes accessing or downloading child pornography images

Viewing (accessing or downloading) child pornography material is not a crime.

5 – Criminalizes simple possession of child pornography

The possession of child pornography is considered a crime, regardless of the intent of the offender, according to article 173-A of the Penal Code.⁴⁹⁹

6 – Criminalizes virtual images or sexually exploitative representations of children

The definition of child pornography in the Penal Code is not very clear, but it allows for an interpretation that includes virtual pornography. Article 173 of the Penal Code criminalizes conduct related to the production and distribution of *images and voices* of minors, directly or through *computing, audiovisual or virtual* means, which exhibits sexual or erotic activities, explicit or not, real or simulated.

An important study conducted by researchers of the Technologic University of El Salvador and the University of Zaragoza, related to child pornography offenses and its commission through ICTs, analyzes the legislation related to child pornography in El Salvador, Spain, and other countries in Europe.⁵⁰⁰ The

La ley determinará los deberes del Estado y creará las instituciones para la protección de la maternidad y de la infancia.

Artículo 35.- El Estado protegerá la salud física, mental y moral de los menores, y garantizará el derecho de éstos a la educación y a la asistencia.

La conducta antisocial de los menores que constituya delito o falta estará sujeta a un régimen jurídico especial.

⁴⁹⁸ Utilización de personas menores de dieciocho años e incapaces o deficientes mentales en pornografía.

Artículo 173.- El que produzca, reproduzca, distribuya, publique, importe, exporte, ofrezca, financie, venda, comercie o difunda de cualquier forma, imágenes, utilice la voz de una persona menor de dieciocho años, incapaz o deficiente mental, sea en forma directa, informática, audiovisual, virtual o por cualquier otro medio en el que exhiban, en actividades sexuales, eróticas o inequívocas de naturaleza sexual, explícitas o no, reales o simuladas, será sancionado con prisión de seis a doce años.

Igual sanción se impondrá a quien organizare o participare en espectáculos, públicos o privados, en los que se hace participar a las personas señaladas en el inciso anterior, en acciones pornográficas o eróticas.

⁴⁹⁹ Artículo 173-A.- El que posea material pornográfico en el que se utilice la imagen de personas menores de dieciocho años, incapaces o deficientes mentales, en actividades pornográficas o eróticas, será sancionado con pena de dos a cuatro años.

⁵⁰⁰ Miguel Pasamar, Carlos Iglesias, and Hazel Vásques, *Delitos Relacionados con la Pornografía de Personas Menores de 18 años. Especial Referencia a las Tecnologías de la Información y la Comunicación como Medio Comisivo*, UNIVERSIDAD TECNOLÓGICA DE EL SALVADOR, available at <http://www.google.com.br/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&ved=0CGAQFjAI&url=http%3A%2F%2Fwww.utec.edu.sv%2Fm>

authors, in spite of disagreeing with the criminalization of virtual pornography, recognize that it was at the Legislator's discretion to do so in El Salvador.

7 – Addresses the criminal liability of children involved in pornography

The criminal liability of children involved in pornography is not addressed under the law.

8 – Establishes the criminal liability of legal persons for child pornography offenses

The criminal liability of legal persons for production or commercialization of child pornography is not addressed under the law. However, Article 126 of the Penal Code establishes the forfeiture of proceeds derived from offenses, when they benefit a legal person.⁵⁰¹

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory; and

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

El Salvador recognizes its extraterritorial jurisdiction for both situations. Article 9, item 2 of the Penal Code establishes that the Salvadoran Penal Law is applicable to crimes committed by Salvadorans abroad, or to crimes committed against Salvadorians.⁵⁰² It also allows the universal jurisdiction principle (Article 10) when the crime is committed in a place not subject to Salvadoran jurisdiction, provided that they affect property, rights protected by international law, or that seriously undermines universally recognized human rights.⁵⁰³ This is a very vague norm, but it allows vanguard decisions concerning the extraterritorial jurisdiction of Salvadoran laws.

According to Article 11 of the Penal Code, the judge must apply the law that is in force at the place of the commission of offense, regardless of whether its provisions are more favorable to the accused than

[edia%2Finvestigaciones%2Ffiles%2FNo%252034%2520LIBRO%2520PORNOGRAFIA%2520INFANTIL.pdf&ei=28zIVvFMMSmggSQm4OQDA&usq=AFQICNEAhABTCCOE5LIMPuo_4BqayEk9g&bvm=bv.85970519.d.eXY](#) (last visited Nov. 8, 2015).

⁵⁰¹ Artículo 126. Sin perjuicio de las devoluciones y reparaciones debidas por los daños y perjuicios derivados del hecho, el juez o tribunal ordenará la pérdida del producto, de las ganancias y de las ventajas obtenidas por el condenado con motivo del hecho, en favor del Estado.

Esta pérdida comprenderá los valores, derechos y cosas obtenidos por cualquier título, con motivo o como resultado del hecho, por el condenado o por otra persona, natural o jurídica, para la cual hubiese actuado el condenado. También sufrirán la pérdida de los valores, derechos o cosas, los terceros que los hubiesen adquirido incluso a título gratuito, a sabiendas que los mismos proceden de una actividad delictiva, con el propósito de encubrir el origen ilícito de dichos valores, derechos o cosas o de ayudar a quien esté implicado en dicha actividad.

⁵⁰² Principio personal o de nacionalidad.

Artículo 9. También se aplicará la ley penal salvadoreña:

- 1) A los delitos cometidos en el extranjero por persona al servicio del Estado, cuando no hubiere sido procesada en el lugar de la comisión del delito, en razón de los privilegios inherentes a su cargo;
- 2) A los delitos cometidos por un salvadoreño en el extranjero o en lugar no sometido a la jurisdicción particular de un Estado; y, contra los bienes jurídicos de otro salvadoreño; y,
- 3) A los delitos cometidos en el extranjero por salvadoreños cuando se deniegue la extradición solicitada en razón de su nacionalidad, o por extranjeros contra bienes jurídicos de salvadoreños.

⁵⁰³ Principio de universalidad.

Artículo 10. También se aplicará la ley penal salvadoreña a los delitos cometidos por cualquier persona en un lugar no sometido a la jurisdicción salvadoreña, siempre que ellos afectaren bienes protegidos internacionalmente por pactos específicos o normas del derecho internacional o impliquen una grave afectación a los derechos humanos reconocidos universalmente.

those contained in the Salvadoran criminal law.⁵⁰⁴ However, preference is given to the State where the crime was committed, if it claims the criminal case before the start of the case in El Salvador.

11 – Establishes forfeiture of assets used to commit or facilitate offenses

Article 127 of the Penal Code determines generally the forfeiture of assets used to commit or facilitate offenses, but it is applicable to all crimes and is not specific to child pornography.⁵⁰⁵

12 – Establishes forfeiture of proceeds derived from such offenses

Article 126 of the Penal Code, applicable to all crimes, proscribes the forfeiture of proceeds derived from illicit activities, understood as any value, right, or properties obtained by any title, during or as a result of the illicit conduct, obtained by the offender or another person, natural or legal, to which the offender had acted.⁵⁰⁶ It also proscribes that the forfeiture will be applied to values, rights, and properties obtained by third parties that have been acquired, even for free, knowing that they come from criminal activity, for the purpose of disguising their illicit origin to help those who are involved in such activity.

13 – Establishes mandatory reporting requirements for professionals who work with children

There is no specific legal obligation for professionals who work with children to report child abuse. The legislation on family violence establishes that health professionals and persons who work in the education field must report any suspect of violence within the family.⁵⁰⁷

Article 24 of the Law for the Defense Attorney of Human Rights stipulates that anyone can report violations of human rights.⁵⁰⁸ The General Education Law establishes that students have the right to be

⁵⁰⁴ Favorabilidad extraterritorial.

Artículo 11. En los casos a que se refieren los dos artículos anteriores, se aplicará la ley vigente en el lugar de la comisión del hecho punible, si sus disposiciones son más favorables al imputado que las contenidas en la ley penal salvadoreña; sin embargo, se dará preferencia a la pretensión del Estado en cuyo territorio se hubiere cometido el delito, si reclamare el juzgamiento antes de que se inicie el ejercicio de la acción penal.

⁵⁰⁵ Comiso. Artículo 127. Sin perjuicio de los derechos de adquirentes de buena fe a título oneroso y de las mejoras que hayan introducido o de las erogaciones que hayan hecho los adquirentes a título gratuito, el juez o tribunal ordenará el comiso o pérdida en favor del Estado, de los objetos o instrumentos de que se valió el condenado para preparar o facilitar el hecho. El comiso no será procedente en caso de hechos culposos.

El comiso sólo procederá cuando los objetivos o instrumentos sean de propiedad del condenado o estén en su poder sin que medie reclamo de terceros. Cuando la pérdida resulte desproporcionada con la gravedad del hecho que motive la condena, el juez o tribunal podrá dejarla sin efecto, restringirla a una parte de la cosa u ordenar un pago sustitutivo razonable al Estado.

⁵⁰⁶ Artículo 126. Sin perjuicio de las devoluciones y reparaciones debidas por los daños y perjuicios derivados del hecho, el juez o tribunal ordenará la pérdida del producto, de las ganancias y de las ventajas obtenidas por el condenado con motivo del hecho, en favor del Estado.

Esta pérdida comprenderá los valores, derechos y cosas obtenidos por cualquier título, con motivo o como resultado del hecho, por el condenado o por otra persona, natural o jurídica, para la cual hubiese actuado el condenado. También sufrirán la pérdida de los valores, derechos o cosas, los terceros que los hubiesen adquirido incluso a título gratuito, a sabiendas que los mismos proceden de una actividad delictiva, con el propósito de encubrir el origen ilícito de dichos valores, derechos o cosas o de ayudar a quien esté implicado en dicha actividad.

⁵⁰⁷ Artículo 14. Tendrán obligación de dar aviso de los hechos constitutivos de violencia intrafamiliar:

- a) Los funcionarios que los conozcan en el ejercicio de sus funciones; y,
- b) Las o los médicos, farmacéuticos, enfermeros, maestros y demás personas que ejerzan profesiones relacionadas con la salud, la educación y la asistencia social, que conozcan tales hechos a prestar sus servicios dentro de su profesión. (1)

⁵⁰⁸ Artículo 24. Toda persona puede interponer denuncias sobre presuntas violaciones a los derechos humanos.

Las denuncias serán presentadas en la Secretaría General de la Procuraduría o en las oficinas de las delegaciones departamentales o locales. También podrán ser recibidas por funcionarios, delegados del Procurador u otro personal designado para tal fin.

treated with respect, and not to suffer humiliation, physical, or mental abuse or sexual exploitation.⁵⁰⁹

14 – Requires Internet Service Providers to report child pornography

The law does not require Internet Service Providers to report to law enforcement suspected child pornography located on their networks.

15 – Has a support telephone or online hotline to enable the public to report child abuse

According to a list provided by the United States Department of State, El Salvador has a support telephone line, 911, that can be used to report violence against children and has the support of the Ricky Martin Foundation Call and Live Campaign.⁵¹⁰

16 – Creates data retention and preservation policies or provisions

El Salvador regulates the retention and preservation of data.

The Constitution used to prohibit the interception of communication. But it was reformed in 2009, and in Article 24 allows for the interception of communications, with prior judicial order, to investigate offenses that would be indicated in a special law.⁵¹¹

Decree 285 was enacted in 2010, authorizing the intervention of communications when necessary to help with a criminal investigation. It allowed this exceptional measure only for the crimes indicated, amongst which the production and possession of child pornography are included.⁵¹² A prosecutor must

⁵⁰⁹ Artículo 90. Son derechos de los educandos:

(...)

c) Ser tratado con justicia, y respeto y no ser objeto de castigos corporales, humillaciones, abusos físicos o mentales, descuido o trato negligente, malos tratos o explotación incluido el abuso sexual;

(...)

⁵¹⁰ *Global Hotlines List*, U.S. DEP'T OF STATE, <http://www.state.gov/j/tip/rls/other/2009/121161.htm> (last visited Oct. 13, 2014).

⁵¹¹ Artículo 24. La correspondencia de toda clase es inviolable, interceptada no hará fe ni podrá figurar en ninguna actuación, salvo en los casos de concurso y quiebra.

Se prohíbe la interferencia y la intervención de las telecomunicaciones. De manera excepcional podrá autorizarse judicialmente, de forma escrita y motivada, la intervención temporal de cualquier tipo de telecomunicaciones, preservándose en todo caso el secreto de lo privado que no guarde relación con el proceso

La información proveniente de una intervención ilegal carecerá de valor.

La violación comprobada a lo dispuesto en este artículo por parte de cualquier funcionario, será causa justa para la destitución inmediata de su cargo y dará lugar a la indemnización por los daños y perjuicios ocasionados.

Una ley especial determinará los delitos en cuya investigación podrá concederse esta autorización. Asimismo señalará los controles, los informes periódicos a la Asamblea Legislativa, y la responsabilidad y sanciones administrativas, civiles y penales en que incurrirán los funcionarios que apliquen ilegalmente esta medida excepcional.

La aprobación y reforma de esta ley especial requerirá el voto favorable de por lo menos las dos terceras partes de los diputados electos.

⁵¹² Artículo 5. Únicamente podrá hacerse uso de la facultad de intervención prevista en esta Ley en la investigación y el procesamiento de los siguientes delitos:

1) Homicidio y su forma agravada.

2) Privación de libertad, Secuestro y Atentados contra la Libertad Agravados.

3) Pornografía, Utilización de personas menores de dieciocho años e incapaces o deficientes mentales en pornografía, y Posesión de pornografía.

4) Extorsión.

make a request, and is then responsible for identifying the kind of data that should be recorded and preserved, as well as the period of time for the interception.⁵¹³ The request must be analyzed and authorized by a judge, for a period no longer than three months, and can be renewed three times.⁵¹⁴

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- 5) Concusión.
 - 6) Negociaciones Ilícitas.
 - 7) Cohecho Propio, Impropio y Activo.
 - 8) Agrupaciones Ilícitas.
 - 9) Comercio de Personas, Tráfico Ilegal de Personas, Trata de Personas y su forma agravada.
 - 10) Organizaciones Internacionales delictivas.
 - 11) Los delitos previstos en la Ley Reguladora de las Actividades Relativas a las Drogas.
 - 12) Los delitos previstos en la Ley Especial contra Actos de Terrorismo.
 - 13) Los delitos previstos en la Ley contra el Lavado de Dinero y de Activos.
 - 14) Los delitos cometidos bajo la modalidad de crimen organizado en los términos establecidos en la ley de la materia.
 - 15) Los delitos previstos en la presente Ley.
 - 16) Los delitos conexos con cualquiera de los anteriores. A los efectos de este numeral se entiende como conexo aquel delito cometido para perpetrar o facilitar la comisión de otro de los previstos anteriormente o para procurar al culpable o a otros el provecho o la impunidad.

En ningún caso la intervención procederá cuando el delito investigado sea menos grave, salvo en caso de conexidad.

⁵¹³ Contenido de la Solicitud

Artículo 9. La solicitud para la intervención de las telecomunicaciones contendrá:

- a) La indicación detallada de las personas cuyas telecomunicaciones serán objeto de intervención, en caso que se conozcan los nombres. Cuando se desconozca la identidad de la persona deberá explicarse esta circunstancia, y en cuanto sea posible aportarse elementos mínimos para su individualización.
- b) La descripción del hecho, actividades que se investigan y diligencias en que se funda, las que deberán ser presentadas, con indicación de la calificación legal del delito o delitos por los que se solicita la intervención.
- c) Los datos que identifican el servicio de telecomunicación a ser intervenido, tales como números de teléfonos, frecuencias o direcciones electrónicas, incluyendo la información referente a los aparatos y dispositivos empleados para brindar el servicio, o cualesquiera otros datos que sean útiles para determinar la clase de telecomunicación que se pretende intervenir.
- d) Los datos y la colaboración que sean necesarios para la intervención.
- e) El plazo de duración de la intervención.
- f) La designación del fiscal responsable de la intervención, o del caso y el facultado para recibir.

⁵¹⁴ Artículo 10. El juez mediante resolución motivada decidirá sobre la autorización de la intervención de las telecomunicaciones en el plazo más breve posible atendidas las circunstancias, el cual no excederá de veinticuatro horas.

En caso de autorizar la intervención, el juez fijará las condiciones y plazo en que debe realizarse, indicando las personas afectadas, los datos del servicio de telecomunicación a ser intervenido y su fecha de finalización; así como los períodos en los cuales será informado por el fiscal del desarrollo de la investigación.

En el curso de la investigación podrá ampliarse la solicitud y la autorización de la intervención a otras personas, delitos o servicios de telecomunicación. La petición respectiva se resolverá en el plazo y forma indicados para la solicitud original de intervención.

Artículo 12 La intervención de las telecomunicaciones se autorizará por plazos no superiores a tres meses, que podrán prorrogarse hasta por tres períodos más.

Sólo podrán autorizarse nuevos plazos si se presenta una nueva solicitud fiscal con todos los requisitos previstos por esta Ley y con justificación suficiente de la necesidad de la prórroga. Dicha petición será resuelta en el tiempo previsto para la solicitud original.

La solicitud de prórroga deberá presentarse cinco días antes de que venza el plazo autorizado. La autorización de la prórroga se hará mediante una nueva resolución motivada.

La denegación de la prórroga o sus condiciones admitirá apelación en los términos establecidos en esta Ley.

Decree 285 determined the creation of a center to monitor the interception of communications.⁵¹⁵ Decree 285 determines that ISPs have to retain all data related to the identification of the user, and time and place of the exchange of communication for 10 years.⁵¹⁶

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

The legislation does not require the identification of the users of public computers.

18 – Has a national plan to combat violence against children

The National Action Plan expired in 2009.

19 – International treaties ratified

- The Convention on the Rights of the Child, ratified on July 10, 1990
- The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, ratified on May 17, 2004 with the following declaration:
 - “ The Government of the Republic of El Salvador recognizes the extradition of nationals on the basis of the second and third clauses of article 28 of the Constitution, which stipulate that "Extradition will be regulated under international treaties; in cases involving Salvadorans, extradition will proceed only if the treaty in question expressly allows it and the treaty has been approved by the respective legislatures of the signatory countries. In any case, the terms of the treaty must include the principle of reciprocity and give Salvadorans all the guarantees with respect to trials and penalties that this Constitution provides. The accused will be extradited if the offense was committed in the territory of the requesting country, unless the offense is international

⁵¹⁵ Creación del Centro

Artículo 29. Créase el Centro de Intervención de las Telecomunicaciones como un ente adscrito a la Fiscalía General de la República, el cual se denominará el “Centro” o “Centro de Intervención”.

Este Centro será el encargado de ejecutar las intervenciones de las telecomunicaciones autorizadas por los jueces, en estricta aplicación de lo prescrito en la presente Ley.

El Centro contará con un presupuesto especial que será agregado al de la Fiscalía General de la República.

El Estado por medio del Ministerio de Hacienda deberá otorgar los fondos para la fundación, funcionamiento y desarrollo permanente del Centro.

⁵¹⁶ Artículo 47. Los fiscales en el desarrollo de una investigación penal podrán, previa resolución motivada, requerir de los operadores los informes relativos a los datos de registro de la línea o líneas telefónicas investigadas y los registros de llamadas, correos electrónicos y otros medios de telecomunicaciones, durante un período determinado así como los datos sobre el origen de las comunicaciones.

La información requerida deberá ser entregada por los operadores conforme a los siguientes plazos:

a) Para los registros de línea se dispondrá de un plazo máximo de veinticuatro horas.

b) Para los registros de llamadas y datos de origen de las comunicaciones, así como de correos electrónicos y otros medios de telecomunicaciones, se dispondrá de un plazo máximo de tres días hábiles, si la información se refiere a comunicaciones efectuadas en un período inferior a un año contado a partir de la fecha de la solicitud; de un plazo máximo de cinco días hábiles, cuando la información se refiera a comunicaciones realizadas en un período mayor de un año y menor de tres años contados a partir de la fecha de la solicitud; y de un plazo máximo de diez días hábiles si la información se refiere a comunicaciones efectuadas en un período mayor a tres años contados a partir de la fecha de la solicitud.

La Fiscalía deberá establecer las políticas y procedimientos necesarios para tramitar ante los operadores las solicitudes de información.

El incumplimiento de la entrega de la información será considerada falta grave de conformidad con la Ley de Telecomunicaciones, y estará sujeta al régimen de infracciones y sanciones así como a los procedimientos establecidos en la misma.

Los operadores estarán obligados a conservar todos los registros correspondientes por un plazo no menor de diez años.

in scope, and in no case for political offenses, even though common criminal offenses may have occurred as a result."

- The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, ratified on April 18, 2002 with the following declaration:
 - "...pursuant to article 3, paragraph 2 of the above-mentioned Protocol, the Government of the Republic of El Salvador declares that the minimum age for Salvadorans who wish to enlist voluntarily for military service is 16 years, in accordance with articles 2 and 6 of the Act on Military Service and Reserves of the Armed Forces of El Salvador. The following is a description of the safeguards that the relevant Salvadoran authorities have adopted to ensure that the military service provided is legally voluntary:
 - The 16-year-old minor must submit a written request to the Recruitment and Reserves Office or its subsidiary offices, unequivocally stating a desire to provide military service;
 - Submission of the original birth certificate or minor's card;
 - Document certifying knowledge of and consent to the request to provide military service from the minor's parents, guardian or legal representative, all in accordance with the provisions of title II on parental authority, article 206 et seq. of the Family Code;
 - Acceptance of the request shall be subject to the needs for military service."
- The ILO Minimum Age Convention, ratified on January 23, 1996
 - Obligatory Declarations
 - Minimum Age: 14
- The ILO Worst Forms of Child Labour Convention, ratified on October 12, 2000
- Accession to the Hague Convention on the Civil Aspects of International Child Abduction on February 5, 2001
 - Declarations Reservations: Articles 3, 26 -- (Translation)
 - 1. The Government of the Republic of El Salvador shall not be bound to assume the costs referred to in Article 26, paragraph 3, except insofar as those costs may be covered by its system of legal aid and advice;
 - 2. The Government of the Republic of El Salvador interprets Article 3 with the domestic legislation of the Republic whereby the age of majority is eighteen years;
 - 3. (...)
 - 4. The Government of the Republic of El Salvador declares that all documentation sent to El Salvador in application of the said Convention must be accompanied by an official translation into Spanish.
- The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, ratified on December 17, 1998
 - Declarations: Articles: 2, 17, 21, 22, 28, 34 -- (Translation)
 - 1. (...)
 - 2. In accordance with Articles 17, 21, and 28, the Salvadorian Government declares that a minor subject to adoption proceedings cannot leave national territory until an adoption order has been handed down by the competent court.
 - 3. In accordance with Article 22 (4), the Salvadorian Government declares that adoptions of minors habitually resident in El Salvador may take place only if the functions of the Central Authorities are performed in accordance with Article 22 (1) of the Convention.

- 4. (...)
- 5. In accordance with Article 34, the Salvadorian Government declares that all documentation transmitted to El Salvador must be accompanied by an official translation into Spanish.
- 6. In accordance with Article 2 of the Convention, the Salvadorian Government declares that adoptions of minors habitually resident in El Salvador may take place only in accordance with the internal laws of the State of origin.

20 – Age of criminal liability

Age of criminal liability is 18 years of age under Article 17 of the Penal Code.⁵¹⁷

Article 2 of the El Salvador Juvenile Criminal law determines that it is applicable to persons between 12 and 18 years old.⁵¹⁸ This law establishes the measures to which minors are subjected when they commit conduct that corresponds to crimes.

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

Article 173, which criminalizes the production and distribution of child pornography, specifically refers to computers.

22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism

New legislation was enacted in El Salvador recently concerning trafficking in persons. Legislative Decree 824-2014, Article 54 criminalizes trafficking in persons with intent of sexual exploitation, specifically including child pornography amongst the conduct that characterizes it (Article 5).⁵¹⁹ The penalty is

⁵¹⁷ Artículo 17.- La ley penal se aplicará con igualdad a todas las personas que en el momento del hecho tuvieren más de dieciocho años. Los menores de esta edad estarán sujetos a un régimen especial.

No obstante lo dispuesto en el inciso anterior no se aplicará la ley penal salvadoreña cuando la persona goce de privilegios según la Constitución de la República y el Derecho Internacional y cuando goce de inviolabilidades en determinadas materias, de conformidad con lo dispuesto en la Constitución de la República.

⁵¹⁸ Artículo 2.- Esta Ley se aplicará a las personas mayores de doce años de edad y menores de dieciocho.

Los menores cuyas edades se encontraren comprendidas entre los dieciséis y dieciocho años de edad, a quienes se les atribuyere o comprobare responsabilidad, como autores o partícipes de una infracción penal se le aplicarán las medidas establecidas en la presente Ley.

La conducta antisocial de los menores cuyas edades se encontraren comprendidas entre los doce y dieciséis años de edad que constituya delito o falta se establecerá mediante el procedimiento regulado en esta Ley. Comprobados los hechos constitutivos de la conducta antisocial, el Juez de Menores resolverá aplicarle al menor cualesquiera de las medidas establecidas en la Ley del Instituto Salvadoreño de Protección al Menor o de las medidas contempladas en esta Ley siempre que sean en beneficio para el menor.

Los menores que no hubieren cumplido doce años de edad y presenten una conducta antisocial no estarán sujetos a este régimen jurídico especial, ni al común; están exentos de responsabilidad y, en su caso, deberá darse aviso inmediatamente al Instituto Salvadoreño de Protección al Menor para su protección integral.

⁵¹⁹ Artículo 54.- El que entregue, capte, transporte, traslade, reciba o acoja personas, dentro o fuera del territorio nacional o facilite, promueva o favorezca, para ejecutar o permitir que otros realicen cualquier actividad de explotación humana, definidas en el artículo 3 de la presente Ley, será sancionado con pena de diez a catorce años de prisión.

Artículo 3.- Para los efectos de la presente Ley, se entenderá por:

- a) Explotación Humana: cuando una persona dispusiere de la integridad física de otra para realizar actividades de explotación sexual en sus distintas modalidades; explotación sexual comercial en el sector del turismo; esclavitud; servidumbre; trabajo forzado; explotación de la mendicidad; embarazo forzado; matrimonio o unión forzada; adopción fraudulenta; así como para extraer, traficar, fecundar u obtener ilícitamente órganos, tejidos, fluidos, células, embriones humanos o para la utilización de personas en la experimentación clínica o farmacológica; así como la utilización de niñas, niños o adolescentes en actividades criminales;

enhanced when the victim is a child, according to Article 55 of Legislative Decree 824-2014.⁵²⁰ The conduct of requesting, paying or promising any type of benefit to a person, in order for her to perpetrate the crime of trafficking in person is also criminalized in Article 56 of Legislative Decree 824-2014.⁵²¹

Article 370 of the Penal Code punishes those who belong to international organizations dedicated to infringing on treaties related to human rights.⁵²² As the Convention on the Rights of Children is an international instrument related to the protection of human rights, it can be concluded that those who belong to international organizations dedicated to child pornography can be punished.

23 – Has specific legislation on online grooming considering it a standalone offense

There is no legislation specific to online grooming.

24 – Has a clear definition of online grooming

Does not apply.

25 – Age of potential victim of online grooming

Does not apply.

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

Does not apply.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense, or considers it an aspect of grooming

The act of showing pornography to a child is criminalized as a standalone offense.

Article 172 of the Penal Code proscribes that those who transfer, disseminate, distribute, rent, sell, offer, produce, implement, exhibit or show movies, magazines or any other pornographic material to children under 18 (or a person with mental disability), shall be punished with imprisonment of three to five years.⁵²³ The same penalty can be applied to those that do not make a clear warning that the

⁵²⁰ Agravantes del Delito de Trata de Personas

Artículo 55. El Delito de Trata de Personas será sancionado con la pena de dieciséis a veinte años de prisión e inhabilitación especial en el ejercicio de la profesión, cargo o empleo público o privado, durante el tiempo que dure la condena, en los siguientes casos:

a) Cuando la víctima sea niña, niño, adolescente, persona adulta mayor o persona con discapacidad;

(...)

⁵²¹ Remuneración en el Delito de Trata de Personas

Artículo 56. El que solicite, prometa, pague o retribuya con cualquier tipo de beneficio a terceras personas, para ejecutar actos que involucren a víctimas del Delito de Trata de Personas, indistintamente de las modalidades contempladas en la presente Ley, será sancionado con prisión de cuatro a diez años.

Cuando la víctima fuere niña, niño, adolescente, persona adulta mayor o persona con discapacidad, la pena de prisión se incrementará en una tercera parte del máximo.

⁵²² ORGANIZACIONES INTERNACIONALES DELICTIVAS - Art. 370.- Los que dirigieren o formaren parte de organizaciones de carácter internacional, dedicadas a traficar con esclavos, al comercio de personas o realizaren actos de piratería aérea o infringieren disposiciones de los tratados aprobados por El Salvador para proteger los derechos humanos, serán sancionados con prisión de cinco a quince años.

⁵²³ Artículo 172. El que por cualquier medio directo, inclusive a través de medios electrónicos, fabricare, transfiriere, difundiere, distribuyere, alquilar, vendiere, ofreciere, produjere, ejecutare, exhibiere o mostrare, películas, revistas, pasquines o cualquier otro material pornográfico entre menores de dieciocho años de edad o deficientes mentales, será sancionado con prisión de tres a cinco años.

material they are offering or commercializing is unsuitable for children, including material that can be transmitted through electronic means.

28 – Has specific legislation on cyberbullying

There is currently no legislation specific to cyberbullying.

29 – Has specific legislation concerning sexting

There is currently no legislation specific to sexting.

30 – Has different levels of penalties for offenses related to the production, distribution or possession of child pornography

There are two levels of penalties for offenses related to the exploitation of children in El Salvador. The Penal Code punishes offenses related to production with the same penalties established for offenses related to distribution of child abuse images, establishing a lower penalty only for the possession of this kind of material.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

The Penal Code of El Salvador establishes aggravated penalties for offenses committed by a member of the child’s family, by a person cohabiting with the child, and by a person who has abused a recognized position of trust or authority (Article 173-B of the Penal Code).⁵²⁴

There is no provision related to sexual exploitation of children that establishes an increase of the penalty when several persons acting together commit the offense.

El Salvador’s legislation establishes an aggravating circumstance, offenses committed within the framework of a criminal organization (Article 47 of the Penal Code).⁵²⁵

En la misma sanción incurrirá el que no advirtiere, de forma visible, sobre el contenido de las películas, revistas, pasquines o cualquier otro material, inclusive el que se pueda transmitir a través de medios electrónicos, cuando éste fuere inadecuado para menores de dieciocho años de edad o deficientes mentales.

⁵²⁴ Artículo 173-B. Los delitos a que se refieren los Arts. 169 y 173 del presente Código, serán sancionados con la pena máxima correspondiente aumentada hasta en una tercera parte del máximo establecido de la pena y la inhabilitación del ejercicio de su profesión durante el tiempo que dure la condena, si cualquiera de las acciones descritas fuera realizada por:

- a) Ascendientes, descendientes, hermanos, adoptantes, adoptados, cónyuges, conviviente y familiares hasta el cuarto grado de consanguinidad y segundo de afinidad;
- b) Todas las personas contempladas en el Art. 39 de este Código;
- c) La persona encargada de la tutela, protección o vigilancia de la víctima; y,
- d) Toda persona que prevaleciendo de la superioridad originada por relaciones de confianza, doméstica, educativa, de trabajo o cualquier otra relación.

⁵²⁵ Artículo 30 - Son circunstancias que agravan la responsabilidad penal.

(...)

19. Cuando el delito se ejecutare mediante el concurso de los integrantes de una agrupación ilícita o de crimen organizado.

10. GUATEMALA – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 193 III, 195 II of the Penal Code
2 – Has a clear definition of child pornography	Yes, Article 193 of the Penal Code
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 193 of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, Article 195, III of the Penal Code
6 – Criminalizes virtual images and sexually exploitative representations of children	Yes, Article 195, II of the Penal Code
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No, but penalties can be imposed - Articles 38 and 198 of the Penal Code
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Partly, only to nationals, according to Article 5 of the Penal Code
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, Article 5 of the Penal Code
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Articles 42 and 60 of the Penal Code – for all crimes
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Articles 42 and 60 of the Penal Code – for all crimes
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Articles 54 and 55 of the Law on Protection of Child and Adolescents
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes - 502.2230.1279; 502.2221.3275; www.vicepresidencia.gob.gt/svet/
16 – Creates data retention or data preservation policies or provisions	No
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No
18 – Has a national plan to combat violence against children	Yes, Plan of Action 2004-2015
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years of age
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Not specifically - “through any means”
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Yes, Article 202 III of the Penal Code – trafficking with the intent of producing child pornography
23 – Has specific legislation on online grooming, considering it a standalone offense	No
24 – Has a clear definition of online grooming	Does not apply
25 – Considers everyone under 18 as a potential victim of online grooming	Does not apply
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Does not apply
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	Yes, Article 189 d of the Criminal Code
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	Yes
31 – Law establishes aggravating circumstances for child abuse offenses	Yes

GUATEMALA – COUNTRY REPORT

Guatemala is a constitutional democratic republic divided into 22 departments, and became independent from Spain in 1821. It has a civil law system, with judicial review of legislative acts. The President is both Head of State and Head of Government. Guatemala has a unicameral congress, and its highest Court is the Supreme Court of Justice (Corte Suprema de Justicia).

During the second half of the 20th century, Guatemala experienced a variety of military and civilian governments, as well as a 36-year guerrilla war that ended in 1996 when the government signed a peace agreement. It is a predominantly poor country that struggles in several areas of health and development. It is the most populous country in Central America, with the highest population growth rate, the highest fertility rate in Latin America, and the youngest population (almost half is under age 19).⁵²⁶

Due to a lack of economic opportunity, political instability, natural disasters, and guerrilla, many Guatemalans emigrate to Mexico, the U.S., and Canada. It has a high inequality of wealth, more than half of the population is below the national poverty line, and 13% are considered living in extreme poverty. It is worse for indigenous groups where the poverty level averages 73%, and extreme poverty at 28%). According to the OACDH (UN Office of the High Commissioner for Human Rights in Guatemala), the country enjoys a rising economy that could guarantee the well-being of all its citizens, however it maintains one of the most unequal distributions of wealth in the world.⁵²⁷

The former Special Rapporteur on the Sale of Children, Child Prostitution and Child for the UN, Najat Maalla M'jid, made an official visit to Guatemala for ten days in August 2012, at the invitation of the Government. One objective of the visit was to explore the incidence of, trends in, and root causes of child pornography, and to examine the initiatives and measures taken by the Government and civil society to combat and prevent these phenomena.⁵²⁸

She reported that 524 child pornography-related complaints were received by the Public Prosecutor's Office between 2009 and 2012, 61 judicial proceedings were opened, and 10 convictions were made. She noted particular concern about the lack of systematic denunciations regarding the exploitation of children, which makes it very difficult to determine the extent of the problem. She noted a "lack of access to mechanisms that guarantee rapid protection and security for victims outside the capital, Guatemala City, pointing out that there is a transnational dimension to the issue which translates into using minors for sex tourism, online pornography and organized crime".⁵²⁹ She recognized that there have been numerous legal reforms and measures to combat the problem, but considered that child protection measures are still fragmented due to the overlapping competencies of multiple institutions,

⁵²⁶ *Guatemala, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/gt.html> (last visited Oct. 13, 2014).

⁵²⁷ *Guatemala*, NACIONES UNIDAS DERECHOS HUMANOS, www.ohchr.org/SP/Countries/LACRegion/Pages/GTIndex.aspx (last visited Oct. 13, 2014).

⁵²⁸ Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Special Rapporteur on the sale of children, child prostitution and child pornography—Mission to Guatemala*, Human Rights Council, U.N. Doc. A/HRC/22/54/Add.1 (Jan. 21, 2013) (by Najat M'jid Maalla), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-54-Add1_en.pdf (last visited Nov. 9, 2015).

⁵²⁹ *Id.*

the lack of coordination among sectors, as well as the absence of adequate and permanent resources. According to her analysis, the slow judicial investigations and the current impunity enjoyed by perpetrators impede the rapid and efficient protection of victims and witnesses.⁵³⁰

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

The Constitution describes the family as the bedrock of society (Article 4) and guarantees special protection to minors and the elderly (Article 51).⁵³¹

The Code of Children and Youth, Decree n. 78-1996, was revoked by the Law on the Comprehensive Protection of Children and Adolescents (PINA Act - Decree n. 27- 2003), which adapted its norms to the Convention on the Rights of Children. Article 2 proscribes that children are persons under 13 years of age, and adolescents are those between 13 and 18 years of age.⁵³² According to its programmatic norms, children and adolescents have the right to be protected against all kinds of negligence, discrimination, exploitation or violence, that shall be punished according to the law, and the State must adopt legal, administrative, social, and educative measures to protect them against sexual abuse, which is defined as the abuse perpetrated by someone in a relationship of power or trust with a child or adolescent, and engages him/her in a sexual content activity that promotes his/her victimization, and the sexual satisfaction of the offender, including any form of sexual harassment (Articles 53 and 54 of the PINA Act).⁵³³

Article 56 of the PINA Act proscribes that children and adolescents have the right to be protected against all forms of sexual abuse, including inducement to engage in any sexual activity, and their use in pornography.⁵³⁴

⁵³⁰ *Id.*

⁵³¹ Artículo 51. Protección a menores y ancianos. El Estado protegerá la salud física, mental y moral de los menores de edad y de los ancianos. Les garantizará su derecho a la alimentación, salud, educación y seguridad y previsión social.

⁵³² Artículo 2. Definición de niñez y Adolescencia. Para los efectos de esta Ley se considera niño o niña a toda persona desde su concepción hasta que cumple trece años de edad y adolescente toda aquella desde los trece hasta que cumple dieciocho años de edad.

⁵³³ SECCIÓN VII DERECHO A LA PROTECCIÓN POR EL MALTRATO

Artículo 53. Maltrato y agravios. Todo niño, niña o adolescente tiene el derecho de no ser objeto de cualquier forma de negligencia, discriminación, marginación, explotación, violencia, crueldad y opresión, punibles por la ley, ya sea por acción u omisión a sus derechos fundamentales.

Asimismo tienen derecho a ser protegidos contra toda forma de maltrato. El Estado estimulará la creación de instituciones y programas preventivos o psico-sociales necesarios, para dar apoyo y orientación a la familia y a la comunidad. Deberá proporcionar la asistencia necesaria, tratamiento y rehabilitación a las víctimas, a quienes cuidan de ellas y al victimario.

Artículo 54. Obligación estatal. El Estado deberá adoptar las medidas legislativas, administrativas, sociales y educativas apropiadas para proteger a los niños, niñas y adolescentes contra toda forma de:

(...)

Abuso sexual: Que ocurre cuando una persona en una relación de poder o confianza involucra a un niño, niña o adolescente en una actividad de contenido sexual que propicie su victimización y de la que el ofensor obtiene satisfacción incluyéndose dentro del mismo cualquier forma de acoso sexual;

(...)

Cualquier persona que tenga conocimiento sobre un hecho de los descritos anteriormente deberá comunicarlo de inmediato a la autoridad competente más cercana, quien a su vez deberá realizar las diligencias pertinentes a efecto de que se sancione drásticamente a los que resultaren responsables de los mismos.

⁵³⁴ Sección VIII Derecho a la Protección por la Explotación y Abusos

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

The Penal Code was modified by Decree 9-2009, and included the crime of production of pornography with minors in Article 193 III.⁵³⁵ It punishes with imprisonment of six to 10 years, whoever in any form or by any means produces, manufactures, or makes pornographic material that contains images or voices of one or more minors engaged in pornographic or erotic activities. It is important to note that the Guatemalan Penal Code does not have a clear definition of child pornography, simply referring to it as “pornographic material.” This would need to be amended in order to be compliant with the OPSC.

Since the Law on Protection of Children and Adolescents defines minors as persons under 18 years of age, victims of child pornography are children and adolescents under 18 years old. This same article establishes that people with mental disabilities can be victims of this crime.

Decree 9-2009 also included in the Penal Code the crimes of commercialization of child pornography, possession of child pornography and sex tourism (articles 195 II, 195 III, and 195 IV).

Article 195 II of the Penal Code criminalizes the publication, reproduction, import, export, distribution, transportation, exhibition, trade, and dissemination of child abuse images, and the advertising of pornographic material of minors, through the use of their image or voice, real or simulated.⁵³⁶

Article 195 III proscribes the possession of pornographic material involving minors as punishable by imprisonment for two to four years.

Article 195 V of the Penal Code enhances the penalties for the production (Article 194), the commercialization (Article 195 bis), and the possession of child pornography (Article 195 ter), by one third if the victim is between 14 and 18 years of age, by three quarters if the victim is between 10 and 14, and is doubled if the victim is under 10 years of age.⁵³⁷

Artículo 56. Explotación o abuso sexual. Los niños, niñas y adolescentes tienen derecho a ser protegidos contra toda forma de explotación o abuso sexual, incluyendo:

- a) La incitación o la coacción para que se dedique a cualquier actividad sexual;
- b) Su utilización en la prostitución, espectáculos o material pornográfico;
- c) Promiscuidad sexual;
- d) El acoso sexual de docentes, tutores y responsables.

⁵³⁵ Artículo 193 ter. Quien de cualquier forma y a través de cualquier medio produzca, fabrique o elabore material pornográfico que contenga imagen o voz real o simulada de una o varias personas menores de edad o con incapacidad volitiva o cognitiva, en acciones pornográficas o eróticas, será sancionado con prisión de seis a diez años y multa de cincuenta mil a quinientos mil quetzales

⁵³⁶ Artículo 195 bis. Quien publique, reproduzca, importe, exporte, distribuya, transporte, exhiba, elabore propaganda, difunda o comercie de cualquier forma y a través de cualquier medio, material pornográfico de personas menores de edad o con incapacidad volitiva o cognitiva en donde se utilice su imagen o voz real o simulada, será sancionado con prisión de seis a ocho años y multa de cincuenta mil a quinientos mil Quetzales.

⁵³⁷ Artículo 195 quinquies. Circunstancias especiales de agravación.

Las penas para los delitos contemplados en los artículos 173, 188, 189, 194, 195, 195 Bis, 195 Ter, se aumentarán dos terceras partes si la víctima fuera menor de dieciocho y mayor de catorce años de edad; en tres cuartas partes si la víctima fuera persona menor de catorce años, y con el doble de la pena si la víctima fuera persona menor de diez años.

4 – Criminalizes accessing or downloading child pornography images

Viewing (accessing or downloading) child pornography material is not a crime.

5 – Criminalizes simple possession of child pornography

The possession of child pornography is a crime, regardless of the intent of the offender, according to Article 195 ter, but it requires the knowledge of the offender of its content (that he possesses or had bought it knowingly).⁵³⁸

6 – Criminalizes virtual images or sexually exploitative representations of children

Article 195 II of the Penal Code forbids the publishing, reproduction, import, export, distribution, transportation, exhibition, developing, advertising, distribution or trade of pornographic material of minors, through the use of their image or voice, real or simulated. It can be concluded that the Penal Code punishes the production and commercialization of virtual images or sexually exploitative representations of children, because it refers to the use of simulated images or voices of minors.

7 – Addresses the criminal liability of children involved in pornography

The criminal liability of children involved in pornography is not addressed under the law.

8 – Establishes the criminal liability of legal persons for child pornography offenses

Article 38 of the Penal Code is related to the criminal liability of legal persons, but it proscribes that the managers or representatives are responsible for the crimes the company commits, based on their participation in it. Thus, it does not really proscribe penalties for legal persons, nor establish criminal liability of legal persons.⁵³⁹

Article 198 of the Penal Code, modified by Decree 9-2009, introduced a new kind of accessory penalty for legal persons regarding crimes committed against the liberty and sexual integrity of persons, among which include the production, commercialization, and possession of child pornography.⁵⁴⁰ It establishes that legal persons can lose the authorization to function, or can be prevented from exercising commercial activities for a period corresponding to double the imprisonment received by directors or legal representatives.

⁵³⁸ Artículo 195.Ter. Posesión de material pornográfico de personas menores de edad.

Quien a sabiendas posea y adquiera material pornográfico, de una o varias personas menores de edad o con incapacidad volitiva o cognitiva, en acciones pornográficas o eróticas, será sancionado con prisión de dos a cuatro años.

⁵³⁹ Responsabilidad Penal de Personas Jurídicas

Artículo 38. En lo relativo a personas jurídicas se tendrá como responsables de los delitos respectivos a directores, gerentes, ejecutivos, representantes, administradores, funcionarios o empleados de ellas, que hubieren intervenido en el hecho y sin cuya participación no se hubiere realizado éste y serán sancionados con las mismas penas señaladas en este Código para las personas individuales.

⁵⁴⁰ Artículo 198. Penas accesorias

A los responsables de los delitos a que se refiere el Título III del Libro II del Código Penal se les impondrá además de las penas previstas en cada delito, las siguientes:

1. (...)

2. Si el delito es cometido por una persona jurídica, además de las sanciones aplicables a los autores y cómplices, se ordenará la cancelación de la patente de comercio, así como la prohibición para ejercer actividades comerciales por un período equivalente al doble de la pena de prisión impuesta.

3. (...)

4. (...)

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

Article 5 of the Penal Code recognizes Guatemala’s extraterritorial jurisdiction when the offender is a national, and is applicable to all offenses (not only to child pornography).⁵⁴¹ However, the legal framework requires a request of extradition from the country where the crime was committed, which must then have been declined by Guatemala.

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

Guatemala does recognize its extraterritorial jurisdiction when the victim is a national of the State, under Article 5 of the Penal Code, and is applicable to all offenses (not only to child pornography).⁵⁴² It requires that the offender be located in Guatemalan territory.

11 – Establishes forfeiture of assets used to commit or facilitate offenses; and

12 – Establishes forfeiture of proceeds derived from such offenses

Articles 42 and 60 of the Penal Code regulate the accessory penalties, indicating the forfeiture of proceeds and loss of the objects or instruments of crime as one of them.⁵⁴³ Article 42 indicates these, and Article 60 clarifies its scope. These Articles are applicable to all crimes, not only those related to children.

13 – Establishes mandatory reporting requirements for professionals who work with children

There are many programmatic norms regarding the protection of children and adolescents, and the obligation of reporting any violence against them. Article 54 of the Law on Protection of Children and Adolescents determines that the State must adopt all measures to avoid abuses against minors, defining sexual abuse, and determining that any person made aware of its occurrence must report it to the authorities.⁵⁴⁴ Article 55 of this same law establishes that every professional who works with children

⁵⁴¹ Extraterritorialidad de la Ley Penal

Artículo 5. Este Código también se aplicará:

1o. (...)

2o. (...)

3o. Por delito cometido por guatemalteco, en el extranjero, cuando se hubiere denegado su extradición.

4o. Por delito cometido en el extranjero contra guatemalteco, cuando no hubiere sido juzgado en el país de su perpetración, siempre que hubiere acusación de parte o del Ministerio Público y el imputado se hallare en Guatemala.

5o. Por delito que, por tratado o convención, deba sancionarse en Guatemala, aun cuando no hubiere sido cometido en su territorio.

⁵⁴² *Id.*

⁵⁴³ PENAS ACCESORIAS ARTICULO 42. Son penas accesorias: Inhabilitación absoluta; inhabilitación especial; comiso y pérdida de los objetos o instrumentos del delito; expulsión de extranjeros del territorio nacional; pago de costas y gastos procesales; publicación de la sentencia y todas aquéllas que otras leyes señalen.

COMISO ARTICULO 60. El comiso consiste en la pérdida, a favor del Estado, de los objetos que provengan de un delito o falta, y de los instrumentos con que se hubieren cometido, a no ser que pertenezcan a un tercero no responsable del hecho. Cuando los objetos referidos fueren de uso prohibido o no sean de lícito comercio, se acordará el comiso, aunque no llegue a declararse la existencia del delito o la culpabilidad del imputado. Los objetos decomisados de lícito comercio, se venderán y el producto de la venta incrementará los fondos privativos del Organismo Judicial.

⁵⁴⁴ Artículo 54. Obligación estatal. El Estado deberá adoptar las medidas legislativas, administrativas, sociales y educativas apropiadas para proteger a los niños, niñas y adolescentes contra toda forma de:

(...)

Abuso sexual: Que ocurre cuando una persona en una relación de poder o confianza involucra a un niño, niña o adolescente en una

and adolescents must report any general ill treatment. None of these articles establishes penalties for a lack of compliance with this obligation.⁵⁴⁵

14 – Requires Internet Service Providers to report child pornography

There is no legal provision establishing mandatory reporting of suspected child pornography by Internet Service Providers. It was a recommendation of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, in the report she made on her last mission to Guatemala in 2012, that the Government should establish legal obligations for ISPs to report violations on their networks, block access to offending sites, and retain material for the purposes of investigations and legal proceedings.⁵⁴⁶

15 – Has a support telephone or online hotline to enable the public to report child abuse

Hotlines 502.2230.1279 and 2221.3275 and website <http://www.vicepresidencia.gob.gt/svet/> both belong to the Secretaria contra la Violencia Sexual, Explotación y Trata de Personas, and enable the public to report any kind of sexual abuse.

ECPAT International, a global network dedicated to protecting children, has a branch in Guatemala that uses the line 501.2254.8698 to receive reports of sexual exploitation, sex tourism, prostitution, child pornography, and sexual trafficking of minors.

16 – Creates data retention and preservation policies or provisions

There are currently no data retention and preservation policies and provisions. The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, in her 2012 report on Guatemala, recommended that the Government establish legal obligations to ISPs to report violations on their networks, block access to offending sites, and retain material for the purposes of investigations and legal proceedings.⁵⁴⁷

It is important to note that there is a Regulation Act on Interception of Electronic Data, but it is related to crimes regulated by Law 21-2006, the Law on Organized Crime.⁵⁴⁸ Article 48 determines that ISPs must collaborate in police investigations by recording and releasing the communication exchanges of their customers, but only when crimes enumerated in that law are being committed.⁵⁴⁹ There must be a

actividad de contenido sexual que propicie su victimización y de la que el ofensor obtiene satisfacción incluyéndose dentro del mismo cualquier forma de acoso sexual;

(...)

Cualquier persona que tenga conocimiento sobre un hecho de los descritos anteriormente deberá comunicarlo de inmediato a la autoridad competente más cercana, quien a su vez deberá realizar las diligencias pertinentes a efecto de que se sancione drásticamente a los que resultaren responsables de los mismos.

⁵⁴⁵ Artículo 55. Obligación de denuncia. El personal de las instituciones públicas y privadas, centros educativos, servicios de salud y otros de atención a los niños, niñas y adolescentes, tienen la obligación de denunciar los casos de maltrato que se detecten o atiendan en sus instituciones.

⁵⁴⁶ Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 531.

⁵⁴⁷ *Id.*

⁵⁴⁸ *Reglamento para la aplicación de los métodos especiales de investigación* 80, DIARIO DE CENTRO AMERICA, June 24, 2009, available at <http://transdoc.com.gt/articulos/archivos-leyes/Reglamento-para-la-aplicacion-de-los-metodos-/9980> (last visited Nov. 8, 2015).

⁵⁴⁹ Artículo 48. Interceptaciones.

Cuando sea necesario evitar, interrumpir o investigar la comisión de los delitos regulados en los artículos 2, 3, 4, 5, 6, 7, 8, 9, 10 y 11 de la presente ley, podrá interceptarse, grabarse y reproducirse, con autorización judicial, comunicaciones orales, escritas, telefónicas,

prior written request from a prosecutor, submitted to a judge, who must authorize it. ISPs must adopt the necessary measures to avoid changes in service that could alert the users that their communication is being recorded. Offenses related to child pornography are not included in the list of crimes that authorize this kind of intervention.

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

The legislation does not require identification of users of public computers. This was also a problem identified by the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Najat Maalla M'jid, on the report she made on her last mission to Guatemala in 2012, and pointed to the “weakness of control mechanisms for high-risk areas such as cybercafés.”⁵⁵⁰ She recommended that the National Civil Police should have legal jurisdiction to monitor cybercafés.

18 – Has a national plan to combat violence against children

The Guatemalan Government is trying to address the protection of children through various national plans and policies: the National Policy on the Prevention of Youth Violence. The Public Policy on Comprehensive Protection – Plan of Action (2004-2015), and the National Plan to Prevent and Eradicate Domestic Violence and Violence against Women (2004-2014). However, the Special Rapporteur noticed that there is a “lack of complementarity and synergy among them, and an absence of an integral strategy on child protection, a lack of sustainability due to the short-term nature of the policies and a limited budget and human resources.”⁵⁵¹

The PINA Act created the Nacional Committee of Childhood and Adolescence (Comisión Nacional de la Niñez y de La Adolescencia), giving it the responsibility to formulate policies on the protection of children and adolescents.⁵⁵²

19 – International treaties ratified

- Convention on the Rights of the Child, ratified on June 6, 1990 with the following declarations:
 - "The State of Guatemala is signing this Convention out of a humanitarian desire to strengthen the ideals on which the Convention is based, and because it is an instrument which seeks to institutionalize, at the global level, specific norms for the protection of children, who, not being legally of age, must be under the guardianship of the family, society and the State.

radiotelefónicas, informáticas y similares que utilicen el espectro electromagnético, así como cualesquiera de otra naturaleza que en el futuro existan.

Crimes regulated by the mentioned articles are: drug trafficking, white collar crimes, money laundry, trafficking in persons, terrorism, embezzlement, fraud and others.

⁵⁵⁰ Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography *supra* note 531.

⁵⁵¹ *Id.*

⁵⁵² CAPITULO II COMISIÓN NACIONAL DE LA NIÑEZ Y DE LA ADOLESCENCIA

Artículo 85. Comisión Nacional de la Niñez y de la Adolescencia. La Comisión Nacional de la Niñez y de la Adolescencia será responsable de la formulación de las políticas de protección integral de la niñez y la adolescencia; conforme a las disposiciones del artículo 81 de esta Ley; así como de trasladarlas al sistema de consejos de desarrollo urbano y rural y a los ministerios y dependencias del Estado para su incorporación a sus políticas de desarrollo; velar por su cumplimiento y adoptar las acciones pertinentes que lleven a la mayor eficiencia dicha protección. Contará con un reglamento interno y recursos provenientes de:

- a) Aportes de La Secretaria de Bienestar Social, para cubrir los gastos de funcionamiento que sean necesarios.
- b) Aportes o subvenciones ordinarias o extraordinarias que reciba del Estado y otros organismos nacionales e internacionales.
- c) Donaciones de personas individuales o jurídicas.

- "With reference to article 1 of the Convention, and with the aim of giving legal definition to its signing of the Convention, the Government of Guatemala declares that article 3 of its Political Constitution establishes that: "The State guarantees and protects human life from the time of its conception, as well as the integrity and security of the individual".
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, ratified on May 9, 2002
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, ratified on May 9, 2002 with the following declaration:
 - "In conformity with article 3, paragraph 2 of the aforementioned Protocol, the Government of Guatemala makes the following declaration: 'Guatemala shall not permit the compulsory recruitment of persons under 18 years of age into its armed forces, and, in keeping with article 3, paragraph 4, of the Convention on the Rights of the Child on the involvement of children in armed conflict, the description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced shall be submitted at a later date.'
- Party to the ILO Minimum Age Convention on April 27, 1990
 - Obligatory Declarations
 - Minimum Age: 14
- ILO Worst Forms of Child Labour Convention, ratified on October 11, 2001
- Hague Convention on the Civil Aspects of International Child Abduction, acceded to on February 6, 2002 with the following reservations
 - Reservations: Articles: 24, 26
 - 1. The Republic of Guatemala oppose itself to the use of French in all the requests, communication and other documents to be sent to the Central Authority, based in the second paragraph of Article 24 of the Convention (if applicable).
 - 2. The Republic of Guatemala is not obligated to assume any kind of expenses mentioned in the second paragraph of Article 26 of the Convention, derived from the participation of a lawyer, legal advisors or the judiciary procedure, except insofar as those costs may be covered by its system of legal aid and advice.
- Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, acceded to on November 26, 2002

20 – Age of criminal liability

Under Article 20 of the Constitution, minors do not have criminal liability, and must receive integral education and rehabilitation.⁵⁵³ Article 23 of the Penal Code repeats this norm.⁵⁵⁴

⁵⁵³ Artículo 20. Menores de edad. Los menores de edad que transgredan la ley son inimputables. Su tratamiento debe estar orientado hacia una educación integral propia para la niñez y la juventud.

Los menores, cuya conducta viole la ley penal, serán atendidos por instituciones y personal especializado. Por ningún motivo pueden ser recluidos en centros penales o de detención destinados para adultos. Una ley específica regulará esta materia.

⁵⁵⁴ Artículo 23. No es imputable:

1o. El menor de edad.

2o. Quien en el momento de la acción u omisión, no posea, a causa de enfermedad mental, de desarrollo psíquico incompleto o retardo o de trastorno mental transitorio, la capacidad de comprender el carácter ilícito del hecho o de determinarse de acuerdo con esa comprensión, salvo que el trastorno mental transitorio, haya sido buscado de propósito por el agente.

The PINA Act has different dispositions regarding adolescents in conflict with the law, and its norms can be applied to those between 13 and 18 years of age. The measures to be applied vary according to the age of the perpetrator (Articles 133, 136, and 138).⁵⁵⁵

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

The domestic legislation does not specifically address the use of ICTs to commit crimes against children. However, it does so generally using the phrase “through any means.”

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of sex tourism with children

The Penal Code criminalizes the organization, facilitation or permission of sex tourism with minors by imprisonment for six to 10 years (Article 195 quarter).⁵⁵⁶

Trafficking with the intent of producing child pornography is specifically criminalized in Article 202 ter of the Penal Code.⁵⁵⁷

Guatemala Law Against Sexual Exploitation and Trafficking Decree 9-2009 added article 150bis to the Penal Code, and criminalized the causing of any kind of physical or psychological damage to a minor, punishing it with imprisonment from two to five years, applicable together with the penalties established for other crimes.⁵⁵⁸

⁵⁵⁵ Artículo 133. Ámbito de aplicación según los sujetos.

Serán sujetos de esta Ley todas las personas que tengan una edad comprendida entre los trece y menos de dieciocho años al momento de incurrir en una acción en conflicto con la ley penal o leyes especiales.

Artículo 136. Grupos etarios. Para su aplicación, esta Ley diferenciará en cuanto al proceso, las medidas y su ejecución entre dos grupos, a partir de los trece y hasta los quince años de edad, y a partir de los quince hasta tanto no se hayan cumplido los dieciocho años de edad.

Artículo 138. Menor de trece años. Los actos cometidos por un menor de trece años de edad, que constituyan delito o falta no serán objeto de este título, la responsabilidad civil quedará a salvo y se ejercerá ante los tribunales jurisdiccionales competentes. Dichos niños y niñas serán objeto de atenciones médicas, psicológicas y pedagógicas que fueren necesarias bajo el cuidado y custodia de los padres o encargados y deberán ser atendidos por los Juzgados de la Niñez y la Adolescencia.

⁵⁵⁶ Artículo 195 quáter. Utilización de actividades turísticas para la explotación sexual comercial de personas menores de edad.

Quien facilite, organice, promueva o permita de cualquier forma la realización de los delitos contemplados en este capítulo, a través de actividades relacionadas con el turismo, será sancionado con prisión de seis a diez años y multa de cien mil a quinientos mil Quetzales.

⁵⁵⁷ Artículo 202. Ter. Trata de personas

Constituye delito de trata de personas la captación, el transporte, bastado, retención, acogida o recepción de una o más personas con fines de explotación. Quien cometa este delito será sancionado con prisión de ocho a dieciocho años y multa de trescientos mil a quinientos mil Quetzales. En ningún caso se tendrá en cuenta el consentimiento prestado por la víctima de trata de personas o por su representante legal.

Para los fines del delito de trata de personas, se entenderá como fin de explotación: La prostitución ajena, cualquier obra forma de explotación sexual, los trabajos o servicios forzados, cualquier tipo de explotación laboral, la mendicidad, cualquier forma de esclavitud, la servidumbre, la venta de personas, la extracción y el tráfico de órganos y tejidos humanos, el reclutamiento de personas menores de edad para grupos delictivos organizados, adopción irregular, trámite irregular de adopción, pornografía, embarazo forzado o matrimonio forzado o servil

⁵⁵⁸ Artículo 150 bis. Maltrato contra personas menores de edad.

Quien mediante cualquier acción y omisión provoque a una persona menor de edad o con incapacidad volitiva o cognitiva, daño físico, psicológico, enfermedad o coloque al niños en grave riesgo de padeceros, será sancionado con prisión de dos a cinco años, sin perjuicio de las sanciones aplicables por otros delitos.

A provision in Decree n.8 – 2013⁵⁵⁹ criminalizes the use of mobile terminal devices and other means of electronic communications to plan the commission of offenses.

23 – Has specific legislation on online grooming considering it a standalone offense

There is no legislation specific to online grooming.

24 – Has a clear definition of online grooming

Does not apply.

25 – Age of potential victim of online grooming

Does not apply.

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

Does not apply.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense, or considers it an aspect of grooming

Article 189 item d specifically criminalizes the act of distributing or facilitating in the distribution of pornography to children, but does not specify if it is related to adult or child pornography.⁵⁶⁰

28 – Has specific legislation on cyberbullying

There is currently no legislation specific to cyberbullying.

29 – Existence of a specific legislation concerning sexting

There is currently no legislation specific to sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

The Penal Code of Guatemala establishes three levels of penalties, observing the order suggested by the Directive 2011/93/EU. It proscribes a higher penalty for offenses related to the production of child abuse material, followed by those related to distribution, and a lower penalty for the possession of child abuse images.

⁵⁵⁹ Artículo 31. Conspiración mediante equipos terminales móviles.

Comete el delito de conspiración mediante equipos terminales móviles u otros medios de comunicación electrónicas, quien se concierte con otra y otras personas para cometer hechos delictivos establecidos en el ordenamiento legal guatemalteco utilizando equipos terminales móviles y otros medios de comunicación electrónica. El autor del mismo será sancionado con la pena correspondiente al delito que se conspira, independientemente de las penas asignadas a los delitos cometidos. Si el delito conspirado no se hubiera consumado, el autor del delito de conspiración será sancionado en la forma que prevé el artículo 63 del código Penal.

⁵⁶⁰ Artículo 189. Ingreso a espectáculos y distribución de material pornográfico a personas menores de edad.

Será sancionado con prisión de tres a cinco años quien:

- a. Permita presenciar espectáculos de naturaleza sexual reservados para adultos, a personas menores de edad o con incapacidad volitiva o cognitiva.
- b. Permita a menores de edad el ingreso a espectáculos públicos de naturaleza sexual, reservados para adultos.
- c. De cualquier forma distribuya a personas menores de edad material pornográfico.
- d. De cualquier forma permita adquirir material pornográfico a personas menores de edad.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

The Penal Code of Guatemala establishes aggravated penalties for offenses committed by a member of the child’s family, by a person cohabiting with the child, and by a person who has abused a recognized position of trust or authority (Article 27, item 12 and Article 31 of the Penal Code).⁵⁶¹ The provisions are not specifically related to child pornography; they are generic and applicable to all offenses, which is considered sufficient for the purposes of this Regional Study.

There is no provision related to the sexual exploitation of children that establishes an enhanced penalty when the offense is committed by several persons acting together, or when it was committed within the framework of a criminal organization.

⁵⁶¹ Artículo 27. Circunstancias agravantes:

(...)

12. Prevalerse, el delincuente, de su carácter público o del poder inherente al cargo, oficio, ministerio o profesión, o cometerlo haciendo uso de funciones que anteriormente hubiere tenido.

Artículo 31. Podrán ser apreciadas como circunstancias atenuantes o agravantes, según la naturaleza, los móviles y los afectos del delito:

Ser el agraviado cónyuge o concubinario, o pariente del ofensor por consanguinidad o por afinidad dentro de los grados de ley; así como las relaciones de respeto, amistad, gratitud, dependencia y hospitalidad que existan en el imputado con respecto al ofendido.

(...)

11. HONDURAS – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 149 D of the Penal Code
2 – Has a clear definition of child pornography	No
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 149 D of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, Article 149 D of the Penal Code
6 – Criminalizes virtual images and sexually exploitative representations of children	No
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Yes, Article 5 of the Penal Code
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, Article 5 of the Penal Code
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Articles 38, 55, and 64 of the Penal Code and Decree 27-2010
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Articles 38, 55, and 64 of the Penal Code and Decree 27-2010
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 165 of the CNA
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes, Line 111
16 – Creates data retention or data preservation policies or provisions	Article 221 of Criminal Procedure Code
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No
18 – Has a national plan to combat violence against children	Yes, National Plan of Action against sexual exploitation
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes, Penal code
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Online Advertising – Article 149-E of the Penal Code
23 – Has specific legislation on online grooming, considering it a standalone offense	No
24 – Has a clear definition of online grooming	Does not apply
25 – Considers everyone under 18 as a potential victim of online grooming	Does not apply
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Does not apply
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	Showing pornography to a child is not criminalized
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	Only 2 levels of penalties
31 – Law establishes aggravating circumstances for child abuse offenses	Only for a person cohabiting with the child

HONDURAS – COUNTRY REPORT

Honduras is a democratic constitutional republic, divided into 18 departments and one central district, Tegucigalpa. It has a civil law legal system. It has a unicameral congress composed of 128 members, and the highest court is the Supreme Court of Justice (Corte Suprema de Justicia). The President is elected to a term of four years.

Spanish is the official language, but five indigenous languages are also spoken.

According to the CIA World Factbook, “Honduras is one of the poorest countries in Latin America, and has the world’s highest murder rate. More than half of the population lives in poverty and *per capita* income is one of the lowest in the region. Poverty rates are higher among rural and indigenous people. Although primary-school enrollment is high, educational quality is poor, the drop-out rate and grade repetition remain high and teacher and school accountability is low.”⁵⁶² It suffers from extraordinarily unequal distribution of income, as well as high underemployment, and it is historically dependent on the export of bananas and coffee, especially to the U.S.

The former Special Rapporteur on the Sale of Children, Child Prostitution and Child for the UN, Najat Maalla M’jid, made an official visit to Honduras for nine days in 2012 and was unable to clearly understand the issue of child sexual exploitation, because there were no centralized data to be analyzed.⁵⁶³ The data on child pornography is almost non-existent, so the magnitude of the problem is unknown. There was a follow up visit in April 2014, concluding that the advances achieved by Honduras in the prevention and elimination of the sale and sexual exploitation of children since her first visit were not significant. She concluded that despite the absence of accurate and verifiable statistical data, the lack of complaints and inadequate level of reporting, child pornography and other kinds of child sexual exploitation remained widespread, particularly due to the absence of abatement in the causes and risk factors identified during her first visit.

Najat Maalla M’jid stressed the need to fight the impunity surrounding the sale and sexual exploitation of children by improving and reinforcing criminal investigation processes and punishing perpetrators. She reported that there are substantial gaps in the legislation concerning the protection of children and adolescents against violence, stressing that the Government must take measures to eradicate poverty, support families and communities in precarious situations, and assist vulnerable children, such as those on the streets or child labourers.

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

According to Article 18 of the Honduran Constitution, if there is a conflict between an international treaty and a domestic law, the former takes precedent. Article 111 of the Constitution proscribes that the family, marriage, maternity, and childhood are under the protection of the State.⁵⁶⁴

⁵⁶² Honduras, *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ho.html> (last visited Oct. 13, 2014).

⁵⁶³ Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Special Rapporteur on the sale of children, child prostitution and child pornography—Mission to Honduras*, Human Rights Council, U.N. Doc. A/HRC/22/54/Add.2 (Jan. 21, 2013) (by Najat M’jid Maalla), available at http://www.ohchr.org/Documents/Issues/Children/SR/A.HRC.22.54.Add.2_sp.pdf (last visited Jan. 19, 2015).

⁵⁶⁴ Artículo 18. En caso de conflicto entre el tratado o convención y la Ley prevalecerá el primero.

Chapter IV of the Honduran Constitution is related to the rights of children, and includes many programmatic norms about their protection.

The Código de la Niñez y la Adolescencia (CNA) was enacted after the ratification of the Convention on the Rights of the Child, so its norms are aligned with this international instrument. The CNA stipulates that the CRC is a source of law regarding issues on children, placing it in a superior hierarchical position than the CNA or any other law. Article 1 defines a child as a person under 18 years of age, for all the legal effects. It divides childhood into two phases, the first of which extends from birth to 12 years of age for males or from the birth to 14 years of age for females; the second of which is adolescence and goes from 12 or 14 years of age for males and females respectively, to 18 years of age.⁵⁶⁵ Young adults are defined as those between 18 and 21 years of age. In cases of doubt, childhood is presumed.

In 2005 there was a reform of Title II, Second Book of the Special Part of the Penal Code, related to sexual exploitation offenses. It established enhanced penalties when the victim is a child, and introduced a specific chapter on the trafficking of persons.

In 2006, the Integral Development of Juvenile (Ley Marco para el Desarrollo Integral de La Juventud) (LMDIJ) was enacted, which protects persons between 12 and 30 years of age.

The Law on Trafficking in Persons, Legislative Decree 59/2012 was created to complement the Penal Code.

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

Article 149-D of the Honduran Penal Code criminalizes the production of child pornography, punishing whoever, through any means (including electronic means), finances, produces, reproduces, distributes, imports, exports, offers, commercializes or disseminates material in which a minor, or an image of a minor is used, in pornographic or erotic activities.⁵⁶⁶

⁵⁶⁵ Artículo 1. Las disposiciones contenidas en este Código son de orden público y los derechos que establecen en favor de la niñez son irrenunciables e intransmisibles.

Para todos los efectos legales se entiende por niño o niña a toda persona menor de dieciocho años.

La niñez legal comprende los períodos siguientes: La infancia que se inicia con el nacimiento y termina a los doce (12) años en los varones y a los catorce (14) años en las mujeres y la adolescencia que se inicia en las edades mencionadas y termina a los dieciocho (18) años. Los mayores de edad pero menores de veintiún (21) años toman el nombre de menores adultos.

En caso de duda sobre la edad de un niño o una niña se presumirá mientras se establece su edad efectiva que no ha cumplido los dieciocho (18) años.

⁵⁶⁶ Artículo 149-D. Comete el delito de pornografía, quien por cualquier medio sea directo, mecánico o con soporte informático, electrónico o de otro tipo financie, produzca, reproduzca, distribuya, importe, exporte, ofrezca, comercialice, o difunda material donde se utilice la persona e imagen de personas menores de dieciocho (18) años de edad en acciones o actividades pornográficas o eróticas, será sancionado con pena de diez (10) a quince (15) años de reclusión y multa de doscientos (200) a trescientos (300) salarios mínimos.

La tenencia de material pornográfico de niños, niñas y adolescentes será sancionada con pena de cuatro (4) a seis (6) años de reclusión.

This article does not provide a clear definition of child pornography, a problem noted by the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Najat Maalla M'jid during her last official visit to Honduras.⁵⁶⁷ She recommended that “the country should update the definition of child pornography to reflect the wording of the OPSC.”

The age of the victim is adequately fixed as under 18 years, according to the CRC and Optional Protocol.

The CNA also has an article related to the protection of children against economic exploitation, punishing with imprisonment for three to five years, whoever promotes or engages a child in dishonest activities such as prostitution, pornography, obscenity or immorality, or incite him/her to engage in illicit activities (article 134).⁵⁶⁸ It does not give a definition of pornography.

4 – Criminalizes accessing or downloading child pornography images

No, accessing or downloading child pornography is not criminalized in the law.

5 – Criminalizes simple possession of child pornography

Simple possession is a crime under the first paragraph of article 149-D of the Penal Code.⁵⁶⁹

6 – Criminalizes virtual images or sexually exploitative representations of children

Honduras' legislation does not criminalize pornography made through virtual images or sexually exploitative representations of children.

7 – Addresses the criminal liability of children involved in pornography

The legislation treats the minor as a victim, not as an offender. Articles 139 and 141 of the CAN establish that a minor is in a situation of social risk (abandonment or danger) when used in any form of sexual abuse, or when exploited or used in illicit activities, and that he/she should receive protective measures.⁵⁷⁰

⁵⁶⁷ NACIONES UNIDAS DERECHOS HUMANOS, http://ap.ohchr.org/documents/dpage_s.aspx?m=102 (last visited Oct. 13, 2014).

⁵⁶⁸ Artículo 134. Incurrirán en el delito de explotación económica y serán sancionados con reclusión de tres (3) a cinco (5) años:

a) (...)

b) (...)

c) Quien promueva, incite o haga que un niño realice actividades deshonestas tales como la prostitución, la pornografía, la obscenidad y la inmoralidad.

ch) Quien incite u obligue a un niño a realizar actividades ilícitas; y, (...)

⁵⁶⁹ Artículo 149-D. (...)

La tenencia de material pornográfico de niños, niñas y adolescentes será sancionada con pena de cuatro (4) a seis (6) años de reclusión.

⁵⁷⁰ Artículo 139. Un niño se hallará en situación de riesgo social cuando:

a) Se encuentre en estado de abandono o de peligro.

b) (...)

c) (...)

ch) (...)

d) Sea objeto de maltratos o de corrupción.

e) Se encuentren en una situación especial que atente contra sus derechos o su integridad; y,

f) (...)

8 – Establishes the criminal liability of legal persons for child pornography offenses

Legal persons cannot currently be held criminally liable for child pornography offenses. The legislation establishes criminal liability of the legal representatives of a legal person, which includes wrongful acts or omissions for crimes committed on behalf of the corporation (Article 34-A of the Penal Code).⁵⁷¹ Only for the offenses of terrorist financing are there penalties such as closure, dissolution, and liquidation, according to Article 335-G of the Penal Code.⁵⁷²

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory; and

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

Extraterritorial jurisdiction is recognized in these situations under to Article 5 of the Penal Code.⁵⁷³ However, regarding crimes committed by Hondurans abroad, it requires a request of extradition from

Artículo 140. Los niños que se encuentren en una situación de riesgo social quedarán sujetos a las medidas de protección consagradas en el presente Título.

SECCIÓN PRIMERA

DEL MENOR EN SITUACIÓN DE ABANDONO O DE PELIGRO

Artículo 141. Un menor se encontrará en situación de abandono o de peligro cuando:

a) (...)

b) (...)

c) (...)

ch) Sea objeto de acciones u omisiones que tiendan a pervertir su personalidad, tales como promover o facilitar la prostitución o cualquier otra forma de abuso sexual; las ofensas al pudor; las exhibiciones sexuales impropias; la exposición de desnudos que ofendan la decencia pública; el alcoholismo habitual y excesivo; el uso, consumo y tráfico de drogas, estupefacientes y sustancias psicotrópicas; la práctica de juegos prohibidos o violentos; la entrada a garitos, casas de prostitución u otros sitios inapropiados; el acoso sexual; las incitaciones deshonestas o corruptoras, incluso aquellas que se manifiestan por medio de preguntas y proposiciones irrespetuosas y, en general, todas las incitaciones que afecten el desarrollo psicológico, la dignidad, la autoestima y el sano juicio de los niños.

d) Sea explotado en cualquier forma o utilizado en actividades contrarias a la ley, ala moral o a las buenas costumbres, o cuando tales actividades se ejecuten en su presencia.

e) (...)

⁵⁷¹ Artículo 34-A. Por los delitos cometidos en nombre y por cuenta de una persona jurídica responderán personalmente los representantes legales de la misma que hayan hecho posible la acción u omisión ilícita. La responsabilidad civil, sin embargo, recaerá en la persona jurídica.

⁵⁷² Artículo 335-G. Cuando quienes cometan el delito de financiamiento del terrorismo tipificado en los artículos precedentes sean funcionarios, empleados o representantes de una personería jurídica, serán sancionados de conformidad a lo establecido en los artículos del 335-A al 335-E, anteriores. Respecto de la persona jurídica, será condenada, salvo que se trate del Estado, al pago de una multa equivalente al doble de lo establecido en los artículos precedentes; y además será condenada a.

1) La inhabilitación de cinco(5) años o en forma definitiva para el ejercicio directo o indirecto de ciertas actividades profesionales;

2) El cierre definitivo o por un período de hasta cinco (5) años de los establecimientos que han servido para cometer el delito;

3) La disolución y liquidación, cuando hayan sido constituidas para cometer los actos tipificados como delito; y,

4) La difusión dela decisión en la prensa escrita o en cualquier otro medio de comunicación.

⁵⁷³ Artículo 5. Los Tribunales hondureños conocerán, asimismo, de los delitos cometidos en el extranjero cuando el imputado se halle en Honduras y concurra alguna de las situaciones siguientes:

1) (...)

2) Si siendo hondureño el imputado se solicita su extradición por el Estado en cuyo territorio se cometió el hecho punible;

3) (...)

4) Si el responsable del delito cometido contra un hondureño no ha sido juzgado en el país en que aquél se perpetró ni se ha pedido su

the country where the crime was committed, and a negative response from Honduras. Regarding crimes committed against Hondurans, it requires that the offender is in Honduran territory, that his/her extradition was not required, and that he/she was not convicted or has not fled from a country where convicted.

Item 5 of Article 5 of the Penal Code opens up the possibility for applying universal jurisdiction for crimes committed against children when it establishes Honduras jurisdiction for any crime against human rights universally recognized.

**11 – Establishes forfeiture of assets used to commit or facilitate offenses; and
12 – Establishes forfeiture of proceeds derived from such offenses**

Articles 38⁵⁷⁴, 55⁵⁷⁵, and 64⁵⁷⁶ of the Penal Code regulate the forfeiture of assets used to commit or facilitate offenses, and forfeiture of proceeds derived from each crime.

Decree 27-2010 regulates, specifically, the deprivation of domain of goods from illicit origin, including sexual exploitation. In Article 11, it establishes that this can be declared even if the crime is committed abroad.⁵⁷⁷

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 165 of the CNA (Decree 73-96) determines that directors of public or private hospitals and social and care centers have to report suspicion of abuses against a child or an adolescent.⁵⁷⁸

extradición o cuando habiendo sido juzgado se haya evadido y dejado de cumplir total o parcialmente la condena; y,

5) Cuando de conformidad con los convenios internacionales de que Honduras forme parte, el delito se encuentre sometido a la ley penal hondureña por razones distintas de las mencionadas en los numerales precedentes o lesione gravemente los derechos humanos universalmente reconocidos. Se dará preferencia, sin embargo, a la pretensión del Estado en cuyo territorio se haya cometido el hecho punible con tal que la haga valer antes de que se ejercite en el juzgado hondureño competente la respectiva acción penal.

⁵⁷⁴ Artículo 38. Las penas se dividen en principales y accesorias:

Son penas principales: La reclusión, la prisión, la multa, la inhabilitación absoluta y la inhabilitación especial.

Son penas accesorias: La interdicción civil y el comiso.

La inhabilitación absoluta o la especial la impondrán como pena accesoria a la de reclusión, siempre que la ley no la imponga como pena principal en determinado delito.

⁵⁷⁵ Artículo 55. El comiso consiste en la pérdida de los efectos que provengan de un delito o falta, y de los instrumentos con que se ejecute, a menos que pertenezcan a un tercero no responsable del hecho.

⁵⁷⁶ Artículo 64. La sentencia condenatoria comprenderá el comiso y el pago de las costas en los casos en que sea aplicable.

⁵⁷⁷ Artículo 11. Procedencia de la acción de privación definitiva del dominio. La acción de privación definitiva del dominio de los bienes, productos, instrumentos o ganancias procederá y será declarada la privación de éstos, mediante sentencia dictada por el órgano jurisdiccional, en cualquiera de los casos siguientes:

1. (...)

2. (...)

3. Cuando los bienes, productos, instrumentos o ganancias de que se trata provengan directa o indirectamente de actividades ilícitas, indistintamente si éstas, se han realizado en el territorio de La República de Honduras o en el extranjero;

4. Cuando los bienes, productos, instrumentos, ganancias o negocios de que se trate hayan sido utilizados como medio o instrumento para la comisión de actividades ilícitas o sean destinadas a estas actividades ilícitas o cuando correspondan al objeto del delito;

5. Cuando los bienes, productos, instrumentos o ganancias de que se trate, provengan de la enajenación o permute de otros que tengan su origen, directa o indirectamente, en actividades ilícitas, o que hayan sido destinados a actividades ilícitas o sean producto, efecto, instrumento y objeto del ilícito; ...

⁵⁷⁸ Artículo 165. Los directores de los hospitales públicos y privados y de los demás centros asistenciales informarán a la Junta Nacional de Bienestar Social, al Ministerio Público y a la Secretaría de Estado en los Despachos de Salud Pública y Asistencia Social, dentro de las

14 – Requires Internet Service Providers to report child pornography

The domestic legislation does not require reports from Internet Service Providers.

15 – Has a support telephone or online hotline to enable the public to report child abuse

In 2010, the project Rompiendo el silencio (Breaking the Silence) was launched, enabling the public to report abuses against children through the line 111. Unfortunately, it was suspended because the support provided by international cooperative partners has come to an end.⁵⁷⁹

There is a helpline for victims of trafficking (505 89905187).

16 – Creates data retention and preservation policies or provisions

Article 221 of the Honduran Criminal Procedure Code allows the interception of any kind of communication related to a crime under investigation.⁵⁸⁰ A prosecutor must make a request, explaining the reason why the interception is necessary, a decision made at the discretion of a judge based on the gravity of the offense, and the usefulness and proportionality of the measure. There is no established period of time for the measure.

The legislation does not regulate data retention.

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

No, the law does not require identification of users of public computers.

18 – Has a national plan to combat violence against children

On the official report presented to the Committee on the Rights of the Child on 2012, the Government of Honduras declared that they were working on the first national plan of action on human rights, which

veinticuatro (24) horas siguientes al ingreso, sobre los niños que muestren signos evidentes de agresión y sobre aquellos cuyos exámenes revelen que han sido víctimas de malos tratos.

La omisión de estos informes se sancionará con multa de cinco mil (L. 5,000.00) lempiras, sin perjuicio del cumplimiento de la obligación

⁵⁷⁹ Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Special Rapporteur on the sale of children, child prostitution and child pornography Follow-up Visit to Honduras*, Human Rights Council, U.N. Doc. A/HRC/28/56/Add.1 (Dec. 18. 2014) (by Najat Maalla M'jid), available at http://www.ohchr.org/Documents/Issues/Children/SR/A.HRC.28.56.Add.1_en.pdf (last visited Nov. 9, 2015).

⁵⁸⁰ Artículo 221. Interceptación de Correspondencia.

El Juez, a petición del Ministerio Público o de parte acusadora, podrá ordenar mediante resolución fundada, la interceptación de la correspondencia postal, telegráfica, facsimilar o de cualquier otra clase remitida por el imputado o destinada al mismo, cuando existan razones para creer que tienen relación con el delito investigado.

Esta facultad comprende las comunicaciones hechas a través de un intermediario o bajo nombre supuesto.

El Juez valorará, en su resolución, la gravedad del delito investigado, la utilidad y proporcionalidad de la medida.

En caso de urgencia que impida solicitar la autorización judicial, el secuestro de correspondencia podrá efectuarse por el Ministerio Público o incluso por la autoridad policial.

La autoridad policial entregará al correspondencia secuestrada, sin abrirla, al Ministerio Público.

El Ministerio Público hará entrega, a su vez, de la correspondencia recibida o cuyo secuestro haya ordenado, sin proceder a su apertura, al Juez competente, exponiendo las razones que dieron lugar a su interceptación sin autorización judicial. El Juez, en el plazo de veinticuatro (24) horas, convalidará o anulará la interceptación. Si la convalidare, se procederá con arreglo a lo establecido en el Artículo siguiente. Si la anulare, se devolverá a la oficina postal o telegráfica de su procedencia, para que se le dé el curso ordinario.

Lo dispuesto en este Artículo no será aplicable a las personas a que se refiere el Artículo 228, siguiente.

was going to be transformed into a statute.⁵⁸¹ It was established in March 2013, but is not specific to child sexual exploitation.⁵⁸² The plan was approved at a Council of Ministers meeting held on April 22, 2014, and it covers the years 2013-2022.

There was a National Plan of Action against sexual exploitation for 2006-2011, specifically aimed to combat child sexual exploitation.⁵⁸³

In Honduras, there is a Committee against the Commercial Sexual Exploitation and Trafficking (CICESCT), which orients and plans legal and administrative measures to combat commercial sexual exploitation.

19 – International instruments ratified

- Ratified the Convention on the Rights of the Child on August 10, 1990
- Ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on May 8, 2002
- Ratified the ILO Minimum Age Convention on June 9, 1980
- Ratified the ILO Worst Forms of Child Labor Convention on October 25, 2001

20 – Age of criminal liability

According to Article 23 of the Penal Code, adolescents under 18 years of age do not have criminal liability. Adolescents between 12 and 18 years of age are subject to a juvenile justice system.⁵⁸⁴

In the report made on the last visit to the country (April 2014), the former Special Rapporteur on sale of children, child prostitution and child pornography, Najat Maalla M'jid, stressed that the Government should not succumb to the temptation to support any reform that might seek to reduce the minimum age of criminal responsibility on the pretext of combating insecurity, and instead, should invest in reinforcing the justice and child protection systems.

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

Yes, Article 149-D of the Penal Code specifically refers to the distribution or commercialization of child pornography through computers or any electronic means.⁵⁸⁵

⁵⁸¹ UN COMM. ON THE RIGHTS OF THE CHILD, *Consideration of reports submitted by States Parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Initial reports of States Parties: Honduras due in 2004*, U.N. Doc. CRC/C/OPSC/HND/1 (Nov. 15, 2012), at 22, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fHND%2f1&Lang=en (last visited Nov. 9, 2015).

⁵⁸² LA GRACETA, Mar. 12, 2013, available at http://www.salud.gob.hn/documentos/upeg/taller_de_rutas_criticas_para_la_sostenibilidad_de_politicas_publicas/politica_de_derecho_humanos_y_su_plan_de_accion.pdf.

⁵⁸³ COMISIÓN NACIONAL PARA LA ERRADICACIÓN GRADUAL Y PROGRESIVA DEL TRABAJO INFANTIL, IL PLAN DE ACCIÓN NACIONAL PARA LA PREVENCIÓN Y ERRADICACIÓN DEL TRABAJO INFANTIL EN HONDURAS 2008-2015, available at <http://www.ilo.org/ipceinfo/product/download.do?type=document&id=10911>.

⁵⁸⁴ Artículo 23.- No es imputable:

1) El menor de doce años (12) años tanto éste como el mayor de dicha edad pero menor de dieciocho (18) años quedaran sujetos a una ley especial; y,

2) (...)

⁵⁸⁵ Artículo 149-D.- Comete el delito de pornografía, quien por cualquier medio sea directo, mecánico o con soporte informático, electrónico o de otro tipo financie, produzca, reproduzca, distribuya, importe, exporte, ofrezca, comercialice, o difunda material donde se utilice la persona e imaginen de personas menores de dieciocho (18) años de edad en acciones o actividades pornográficas o eróticas, será sancionado con pena de diez (10) a quince (15) años de reclusión y multa de doscientos (200) a trescientos (300) salarios mínimos.

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of sex tourism with children

The online advertising of sex tourism with children is criminalized by Article 149-E of the Penal Code, with imprisonment from eight to 12 years.⁵⁸⁶

Honduras defines trafficking in persons in Article 6 of Decree 59-2012, and mentions the intent to promote sexual exploitation, forced labor, or slavery.⁵⁸⁷ Honduras criminalizes trafficking in persons in Article 52 of this same Decree. Child pornography is not mentioned as a specific intent of trafficking in persons.⁵⁸⁸

La tenencia de material pornográfico de niños, niñas y adolescentes será sancionada con pena de cuatro (4) a seis (6) años de reclusión.

⁵⁸⁶ Artículo 149-E. Quien, para atraer la afluencia de turistas, promueva o realice programas publicitarios o campañas de todo tipo, haciendo uso de cualquier medio para proyectar el país a nivel nacional e internacional como un destino turístico accesible para el ejercicio de actividades sexuales con personas de uno y otro sexo, será sancionado con pena de reclusión de ocho (8) a doce (12) años más multa de ciento cincuenta (150) a doscientos cincuenta (250) salarios mínimos.

Las penas se agravarán en un medio (1/2)

1) cuando las víctimas sean personas menores de dieciocho (18) años de edad

(...)

⁵⁸⁷ Artículo 6. Definiciones. Para los efectos de la presente ley, se entenderá por:

1. Trata de personas: la captación, el transporte, el traslado, la acogida o la recepción de personas, recurriendo a la amenaza o al uso de la fuerza u otras formas de coacción, al rapto, al fraude, al engaño, al abuso de poder o de una situación de vulnerabilidad o a la concesión o recepción de pagos o beneficios para obtener el consentimiento de una persona que tenga autoridad sobre otra, con fines de explotación. Esa explotación incluirá, como mínimo, la explotación de la prostitución ajena u otras formas de explotación sexual, los trabajos o servicios forzados, la esclavitud o las prácticas análogas a la esclavitud, la servidumbre o la extracción de órganos.

⁵⁸⁸ Artículo 52. Incurrir en el delito de Trata de Personas, quien facilite, promueva o ejecute la captación, la retención, el transporte, el traslado, la entrega, la acogida o la recepción de personas, dentro o fuera del territorio nacional, para someterlas a servidumbre, esclavitud o sus prácticas análogas, trabajos o servicios forzosos, mendicidad y embarazo forzado, matrimonio forzado o servil, tráfico ilícito de órganos, fluidos y tejidos humanos, venta de personas, explotación sexual comercial, adopción irregular y el reclutamiento de personas menores de dieciocho (18) años para su utilización en actividades criminales y será sancionado con pena de diez (10) a quince (15) años de reclusión, más inhabilitación absoluta por el doble del tiempo que dure la reclusión y multa de ciento cincuenta (150) a doscientos cincuenta (250) salarios mínimos.

Las penas anteriores aumentará en un medio (1/2), en los casos siguientes:

1) Cuando la víctima sea menor de dieciocho (18) años de edad;

2) Cuando el autor sea cónyuge, conviviente o pariente de la víctima hasta el tercer grado de consanguinidad o segundo de afinidad;

3) Cuando el sujeto activo haga uso de fuerza, intimidación, engaño, promesa de trabajo o le suministre drogas o alcohol a la víctima;

4) Cuando el sujeto activo se aprovecha de su negocio, oficio, profesión o función que desempeña;

5) Cuando el sujeto activo se aprovecha de la relación de confianza con las personas que tienen autoridad sobre la víctima o hace pagos, prestamos o concesiones para obtener su consentimiento;

6) Cuando el hecho punible fuese cometido por un grupo delictivo integrado por tres (3) o más miembros; y, o contrae una enfermedad que amenace su vida.

7) Cuando la víctima en razón del abuso al que es sometida, queda en estado de discapacidad o contrae una enfermedad que amenace su vida.

En ningún caso se tendrá en cuenta el consentimiento otorgado por la víctima de Trata de Personas o por su representante legal.

23 – Has specific legislation on online grooming considering it a standalone offense

No, online grooming is not criminalized in the law.

24 – Has a clear definition on online grooming

Does not apply.

25 – Age of potential victims of online grooming

Does not apply.

26 – Criminalizes grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

Does not apply.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense, or considers it an aspect of grooming

It is forbidden by the Code of Childhood and Adolescence (Article 96), which establishes a fine, and proscribes that showing pornography to a child shall be punished according to the Penal Code.⁵⁸⁹ However, the related punishment in the Penal Code could not be found.

28 – Has specific legislation on cyberbullying

Honduras does not have specific legislation on cyberbullying.

29 – Has specific legislation concerning sexting

Honduras does not have specific legislation on sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

There are only two levels of penalties for offenses related to the exploitation of children in Honduras. The Penal Code punishes offenses related to production with the same penalties established for offenses related to distribution of child abuse images, establishing a lower penalty only for the possession of this kind of material.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

The Penal Code establishes heightened penalties through a general provision when the offense is committed by a person cohabiting with the child, and is not specifically related to crimes committed against children (Article 27, item 24).⁵⁹⁰ It does not proscribe this same consequence for crimes

⁵⁸⁹ Artículo 96. Ninguna persona natural o jurídica podrá vender, donar o entregar a un niño, a cualquier título:

a) Armas, municiones, explosivos y pólvora en general.

b) Fuegos artificiales, salvo aquellos que carezcan de poder explosivo; y,

c) Material pornográfico o cuyo contenido induzca a la violencia, a la perversión, a la degradación o a la delincuencia. El incumplimiento de estas disposiciones será sancionado con multa hasta de cincuenta mil lempiras (L. 50,000.00), sin perjuicio de las demás medidas civiles, administrativas y penales que sean aplicables.

⁵⁹⁰ Artículo 27. Son circunstancias agravantes

committed by a member of the child's family or by a person who has abused a recognized position of trust or authority.

No legal provisions could be found related to sexual exploitation of children that establish an increased penalty when the offense is committed by several persons acting together, or when it was committed within the framework of a criminal organization.

(...)

La violación de deberes especiales que las relaciones de respeto, amistad, gratitud, dependencia y hospitalidad impongan al inculpaado respecto del ofendido.”

12. MEXICO – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 202 of the Penal Code
2 – Has a clear definition of child pornography	Yes, Article 202 of the Penal Code
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 202 of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	No
6 – Criminalizes virtual images and sexually exploitative representations of children	No
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No, but sanctions can be imposed
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Partly, only for nationals, according to Article 4 of the Penal Code
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, according to Article 4 of the Penal Code
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Article 10 of the Penal Code
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Article 10 of the Penal Code
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 13 of the Law for the Protection of Children
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes, line 01800 02 10 343
16 – Creates data retention or data preservation policies or provisions	Yes, Article 190 of the Telecommunications Law
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	Not in a federal level
18 – Has a national plan to combat violence against children	Yes
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes, Article 202 of the Penal Code
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Sex tourism and trafficking in person
23 – Has specific legislation on online grooming, considering it a standalone offense	No
24 – Has a clear definition of online grooming	Does not apply
25 – Considers everyone under 18 as a potential victim of online grooming	Does not apply
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Does not apply
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	Yes, Article 200 of the Penal Code
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	No
31 – Law establishes aggravating circumstances for child abuse offenses	Yes

MEXICO – COUNTRY REPORT

Mexico is the fifth largest country in the Americas, with an estimated population of over 113 million people. It was the first Latin American member of the Organization OECD (since 1994). It is considered an upper-middle income country, and according to the World Bank, is the second largest economy in Latin America.⁵⁹¹ The recent UN Human Development Report (2013) asserts that Mexico ranks 57th with a HDI of 0.71.⁵⁹²

Mexico has a conditional transfer payment program, “Oportunidades”, similar to Brazil’s Bolsa Família, which has become a basis for a more comprehensive social floor. It has been linked to a 17 percent decline in extreme poverty.⁵⁹³ Despite this decline, according to World Bank, the economic growth in 2013 decreased 1.1%, compared to the strong recovery Mexico experienced between 2010 and 2012.⁵⁹⁴

According to a study from the Universidad Nacional Autónoma de México (UNAM), sponsored by Nextel, millions of children and adolescents are raised in violent environments.⁵⁹⁵ Approximately 185,000 children are exposed to various types of violence, such as the sex-trade, human trafficking, juvenile crimes, sexual abuse, and violence between gangs.

It is important to note that Mexico has a large Indian population. Millions of Mexicans (between 12 and 15 million) define themselves as Indians. Recent studies have disclosed that 60 percent of the total Indian population lives in the countryside, especially in the counties of Oaxaca, Chiapas, Guerrero, and Yucatán Peninsula. Indian children are likely the most vulnerable, since the large majority of them do not even speak Spanish.

According to the National Institute of Statistics and Geography (INEGI), the number of Internet users in Mexico climbed 12.5%, compared to the previous year, to 49 million users in 2013. The Institute asserted that approximately 30.7% of Mexico's households are connected to the Internet. However, there are notable disparities in Internet access when the regions are compared to each other.⁵⁹⁶

In Mexico, the first unit of cyber police (policía cibernética) was established in 2002. It is composed of 168 specialists whose mission is to identify and monitor illegal activities on the Internet, including child pornography. The cyber police have a hotline and a web site to receive reports of child pornography and other illegal activities on the Internet. The cyber police’s website also provides information on and recommendations for preventing child pornography and other forms of child exploitation on the

⁵⁹¹ *Mexico Overview*, THE WORLD BANK, <http://www.worldbank.org/en/country/mexico/overview#1> (last visited Oct. 13, 2014).

⁵⁹² *Human Development Report 2014 Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience*, UNITED NATIONS DEVELOPMENT PROGRAMME, <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf> (last visited Nov. 9, 2015).

⁵⁹³ *Id.*

⁵⁹⁴ *Mexico Overview*, THE WORLD BANK, <http://www.worldbank.org/en/country/mexico/overview#1> (last visited Oct. 13, 2014).

⁵⁹⁵ CENTRO ESTUDIOS SOCIALES Y DE OPINIÓN PÚBLICA, REPORTE TEMÁTICO NÚM. 1: VIOLENCIA Y MALTRATO A MENORES EN MÉXICO (2005), available at http://www.google.com.br/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCcQFjAB&url=http%3A%2F%2Fwww.catedradh.unesco.unam.mx%2FBibliotecaV2%2FDocumentos%2Feducacion%2FInformes%2FCESOP_INFORME_VIOLENCIA_MEXICO_2005.pdf&ei=6Y0yVN3DlcKHsQS7pGoDA&usg=AFQjCNFjUxpDfnu0DPV30NaDZrKDLqTwMw&bvm=bv.76802529,d.cWc; see also *Mexico Overview*, THE WORLD BANK, <http://www.worldbank.org/en/country/mexico/overview#1> (last visited Oct. 13, 2014).

⁵⁹⁶ *Mexico Internet Users Soar to 49 Million in 2013*, BANDERAS NEWS, (Dec. 3, 2013), <http://www.banderasnews.com/1312/nr-computeruseinmexico.htm> (last visited Oct. 13, 2014).

Internet. So far, the cyber-police have identified 397 websites containing child pornography, 197 of which were created in Mexico.

Mexico ratified the Convention on the Rights of the Child (CRC) on September 21, 1990. Mexico has also signed the two Optional Protocols to the CRC, on the involvement of children in armed conflict (2002) and on the sale of children, child prostitution and child pornography (2002).⁵⁹⁷

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

The Mexican Constitution states, in its first Article⁵⁹⁸, that every person shall possess the human rights recognized in the Constitution and in international treaties that Mexico has ratified, as well as the guarantee for their protection. Norms, related to human rights, will be interpreted in accordance with the Constitution and international treaties favoring wide protection.

Under Article 4 of the Mexican Constitution, amended by the Law for the Protection of the Rights of Children and Adolescents, the State recognizes and guarantees the rights of the children to health, nutrition, education, and recreation, among others.⁵⁹⁹ The public police must be guided by this principle.

Article 73 of the Mexican Constitution establishes that the National Congress is responsible for promulgating laws on the delegation of competences for the Federation, the States, the Federal District and the Municipalities to protect the rights of children and adolescents, according to international treaties governing the subject.⁶⁰⁰

The Law of Minors (Ley de Menores) establishes that criminal liability begins at 18 years of age. Minors under 11 years old are subject to social assistance by public and private institutions, and adolescents between 12 and 18 years old are assisted by the Council of Minors (Consejo de Menores).⁶⁰¹ Article 21

⁵⁹⁷ *Los Derechos De La Infancia Y Adolescencia En México*, UNICEF, Apr. 2010, http://www.unicef.org/socialpolicy/files/Los_Derechos_de_la_Infancia_y_la_Adolescencia_en_Mexico.pdf (last visited Nov. 9, 2015).

⁵⁹⁸ Artículo 1o. En los Estados Unidos Mexicanos todas las personas gozarán de los derechos humanos reconocidos en esta Constitución y en los tratados internacionales de los que el Estado Mexicano sea parte, así como de las garantías para su protección, cuyo ejercicio no podrá restringirse ni suspenderse, salvo en los casos y bajo las condiciones que esta Constitución establece.

Las normas relativas a los derechos humanos se interpretarán de conformidad con esta Constitución y con los tratados internacionales de la materia favoreciendo en todo tiempo a las personas la protección más amplia.

⁵⁹⁹ Artículo 4º. En todas las decisiones y actuaciones del Estado se velará y cumplirá con el principio del interés superior de la niñez, garantizando de manera plena sus derechos. Los niños y las niñas tienen derecho a la satisfacción de sus necesidades de alimentación, salud, educación y sano esparcimiento para su desarrollo integral. Este principio deberá guiar el diseño, ejecución, seguimiento y evaluación de las políticas públicas dirigidas a la niñez.

⁶⁰⁰ Artículo 73. Expedir leyes que establezcan la concurrencia de la Federación, los Estados, el Distrito Federal y los Municipios, en el ámbito de sus respectivas competencias, en materia de derechos de niñas, niños y adolescentes, velando en todo momento por el interés superior de los mismos y cumpliendo con los tratados internacionales de la materia, de los que México sea parte.

⁶⁰¹ Ley Para El Tratamiento de Menores Infractores Para El Distrito Federal en Materia Comun y Para Toda Law Republic en Materia Federal

ARTICULO 6o. El Consejo de Menores es competente para conocer de la conducta de las personas mayores de 11 y menores de 18 años de edad, tipificada por las leyes penales señaladas en el artículo 1o. de esta Ley. Los menores de 11 años, serán sujetos de asistencia social por parte de las instituciones de los sectores público, social y privado que se ocupen de esta materia, las cuales se constituirán, en este aspecto, como auxiliares del Consejo.

Cuando el menor alegue tener la calidad de indígena, la misma se acreditará con su sola manifestación. Cuando exista duda de ella o fuere cuestionada, se solicitará a las autoridades comunitarias la expedición de la Constancia que acredite la pertenencia del individuo a un determinado pueblo o comunidad”.

establishes that children and adolescents have the right to be protected against acts or omissions that may affect their physical or mental health, development, or right to education as established in Article 3 of the Constitution.⁶⁰²

Article 6 of the Penal Code states that, in cases of crimes committed against children and adolescents, the superior interest of childhood will guide the application of the norms.⁶⁰³

Article 85 of the Penal Code states that no preparatory freedom will be conceded to those who practice the conduct proscribed in Articles 201 (corruption of minors), 202 (child pornography), 203 (sex tourism), 204 (pimping), and 209 BIS (pedophilia), all of which are related to the rights of children.⁶⁰⁴ The same restriction is applied to trafficking of children, as proscribed in Article 366 Ter of the Penal Code.⁶⁰⁵

It is important to note that Mexico has autonomous States that are free to legislate on the protection of children. Mexico has a Federal Criminal Code and 31 State Criminal Codes. There is only one Federal Criminal Procedural Code, with jurisdiction over federal matters throughout the country.

After the constitutional reform in 2008, Mexico initiated an effort to unify the criminal justice system.⁶⁰⁶ In February 2014, the National Code of Criminal Procedures was enacted, which applies to federal and local crimes.⁶⁰⁷ It will gradually be implemented until June 2016, when it will be in full force.

There is an attempt to federalize or unify the Criminal Code.⁶⁰⁸ This Regional Study will analyze only the federal legislation with regard to compliance with international instruments. There are numerous state laws that regulate the protection of children. The table below was transcribed from information

⁶⁰² Ley Para El Tratamiento de Menores Infractores Para El Distrito Federal en Materia Comun y Para Toda Law Republic en Materia Federal, Artículo 21, Dec. 24, 1991, <http://info4.juridicas.unam.mx/adprojus/leg/10/391/7.htm?s>.

⁶⁰³ Artículo 6. En caso de delitos cometidos en contra de niñas, niños y adolescentes siempre se procurará el interés superior de la infancia que debe prevalecer en toda aplicación de ley.

⁶⁰⁴ Artículo 85. No se concederá la libertad preparatoria a:

I. Los sentenciados por alguno de los delitos previstos en este Código que a continuación se señalan:

c) Corrupción de personas menores de dieciocho años de edad o de personas que no tienen capacidad para comprender el significado del hecho o de personas que no tienen capacidad para resistirlo previsto en el artículo 201; Pornografía de personas menores de dieciocho años de edad o de personas que no tienen capacidad para comprender el significado del hecho o de personas que no tienen capacidad para resistirlo, previsto en el artículo 202; Turismo sexual en contra de personas menores de dieciocho años de edad o de personas que no tienen capacidad para comprender el significado del hecho o de personas que no tienen capacidad para resistirlo, previsto en el artículo 203 y 203 bis; Lenocinio de personas menores de dieciocho años de edad o de personas que no tienen capacidad para comprender el significado del hecho o de personas que no tienen capacidad para resistirlo, previsto en el artículo 204; Pederastia, previsto en el artículo 209 Bis;

f) Tráfico de menores, previsto en el artículo 366 Ter.

⁶⁰⁵ Artículo 366 Ter. Comete el delito de tráfico de menores, quien traslade a un menor de dieciséis años de edad o lo entregue a un tercero, de manera ilícita, fuera del territorio nacional, con el propósito de obtener un beneficio económico indebido por el traslado o la entrega del menor.

⁶⁰⁶ Hanako Taniguchi, *Penalistas apoyan la propuesta de unificar los códigos penales en México*, CNN México (Dec. 5, 2012), <http://mexico.cnn.com/nacional/2012/12/05/penalistas-apoyan-la-propuesta-de-unificar-los-codigos-penales-en-mexico> (last visited Oct. 13, 2014).

⁶⁰⁷ Código Nacional De Procedimientos Penales, http://www.diputados.gob.mx/LeyesBiblio/pdf/CNPP_291214.pdf (last visited Oct. 13, 2014).

⁶⁰⁸ *Mexican Congress Approves New Unified Criminal Code*, JUSTICE IN MEXICO, Feb, 19, 2014, <https://justiceinmexico.org/mexican-congress-approves-new-unified-criminal-code/> (last visited Nov. 9, 2015).

produced by the Centro de Estudios Sociales y de Opinión Pública, in a study called “Violencia y Maltrato a Menores in México”⁶⁰⁹, showing the legislative measures taken up until 2005:

ENTIDAD FEDERATIVA	LEYES	FECHAS DE DECRETO Y REFORMAS DE LEY
Estados Unidos Mexicanos	Le para la protección de niños, niñas y adolescentes	29-mayo-2005 (Nueva Ley)
Aguascalientes	Ley para la protección y defensa de la niñez y la adolescencia	31-enero-2001
Baja California	Ley de protección y defensa de los derechos del menor y la familia	15-octubre-1999
	Ley de atención y defensa de los derechos del menor y la familia	04-julio-2003
Baja California Sur	Ley que crea el instituto de protección a la infancia	02-abril-1975
	Ley de los derechos de las niñas y los niños	07-diciembre-2001
Campeche	Ley de prevención y atención de la violencia intrafamiliar	27-junio-2002
Coahuila de Zaragoza	Ley de asistencia y atención para la prevención de la violencia intrafamiliar	07-enero-1997
	Ley de prevención, asistencia y atención de la violencia intrafamiliar	25-octubre-2002
Colima	Ley para la prevención y atención a la violencia intrafamiliar	14-febrero-1998
Chiapas	Ley de prevención, asistencia y atención de violencia familiar	08-julio-1998 22-agosto-2001 (reforma) 04-enero-2004 (reforma)
Distrito Federal	Ley de asistencia y prevención de la violencia familiar	09-julio-1996 02-julio-1998 (reforma)
Durango	Ley para asistencia, atención y prevención de la violencia familiar	23-diciembre-1999
	Ley para la protección de los derechos de las niñas, niños y adolescentes	23-mayo-2002
Guanajuato	Ley de atención a la violencia intrafamiliar	04-febrero-2000
	Ley de justicia para menores	16-septiembre-1994 01-agosto-1995 (reforma)
Guerrero	Le para la protección y desarrollo de los menores	15-enero-2002
	Ley de asistencia y prevención de la violencia familiar	13-abril-1999 13-julio-2004 (reforma)
Hidalgo	Ley para la protección de los derechos de las niñas, niños y adolescentes	20-octubre-2003
Jalisco	Ley de prevención y atención de la violencia intrafamiliar	09-diciembre-2003 26-febrero-2004 (reforma)
México	Ley para la prevención y atención e la violencia familiar	Septiembre-2004 (actualización)
	Ley para la protección de los derechos de las niñas, niños y adolescentes	Septiembre-2004 (actualización)
Michoacán de Ocampo	Ley de los derechos de las niñas y niños	5-febrero-2002

⁶⁰⁹ CENTRO ESTUDIOS SOCIALES Y DE OPINIÓN PÚBLICA, *supra* note 599.

	Ley para la atención prevención de la violencia familiar	11-febrero-2002
Morelos	Ley de prevención y asistencia contra la violencia intrafamiliar	12-enero-2001
Nayarit	Ley del consejo de menores	Enero-2005 (actualizaciones)
	Ley que crea la procuraduría de la defensa del menor y la familia	Enero-2005 (actualizaciones)
	Ley de prevención, asistencia y atención de la violencia familiar	Enero-2005 (actualizaciones)
Nuevo León	Ley de la procuraduría de la defensa del menor y la familia	21-octubre-1992 03-enero-2000 (reforma)
Oaxaca	Ley de asistencia y prevención de la violencia intrafamiliar	15-septiembre-2001
Quintana Roo	Ley que crea la procuraduría de la defensa al menor y la familia	30-septiembre-1978
San Luis Potosí	Ley para la protección de los derechos de las niñas, niños y adolescentes	04-mayo-2004 (nueva ley)
	Ley de prevención, atención de la violencia intrafamiliar	25-junio-1998
Sinaloa	Ley sobre los derechos de las niñas, niños y adolescentes	08-agosto-2003
	Ley para la protección de los derechos de niñas, niños y adolescentes	15-octubre-2001
Sonora	Ley para prevenir y atender la violencia intrafamiliar	07-diciembre-2001
	Ley de prevención y atención de la violencia intrafamiliar	25-abril-2003
Tabasco	Ley para la protección de los derechos de niñas, niños y adolescentes	25-abril-2003
	Ley para la prevención y tratamiento de la violencia intrafamiliar	Año 2003
Tamaulipas	Ley de prevención, atención y asistencia de la violencia intrafamiliar	27-mayo-1999
Tlaxcala	Ley de los derechos de las niñas y niños	05-junio-2001
	Ley para la protección de los derechos de las niñas y niños	10-junio-2004
Veracruz	Ley de asistencia social y protección de niñas y niños	08-septiembre-1998
Yucatán	Ley de asistencia y prevención de violencia familiar	08-septiembre-1998
	Ley para la protección de la familia	07-agosto-1999
Zacatecas	Ley para prevenir y atender la violencia familiar	19-noviembre-2002

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

Article 202 of the Criminal Code criminalizes child pornography and the production of pornography using a person that is not able to understand the meaning of it, or cannot resist.⁶¹⁰ This same article defines the conduct criminalized: to seek, compel, facilitate or induce, by any means, a person described as a victim to practice sexual acts or corporal exhibitionism, with real or simulated purposes, in order to record, photograph, film, display or describe them through print ads, transmission of data files in public or private telecommunications network, computer systems, electronics or substitutes. The punishment for this conduct is seven to 12 years of imprisonment and a fine.

Article 201 bis proscribes a penalty of one to five years of imprisonment for those who store, buy or rent child abuse material with no intent of distribution, requiring also that the perpetrator be subjected to specialized psychiatric treatment.

When the child abuse material is produced or distributed with the intent of profit, it is regulated by the Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y para la Protección y Asistencia a las víctimas de estos Delitos (LGPSDDT), which proscribes a penalty of 15 to 30 years of imprisonment under Article 16.

When it cannot be proven that the perpetrator committed the crime of production of child pornography with the intent to profit, he/she shall be subjected to the penalties established by Article 13 of the Criminal Code (seven to 12 years of imprisonment). If the crime is committed with intent to profit, he/she shall be subjected to the penalties established by the LGPSDDT (15 to 30 years of imprisonment and a fine).

The Act to Prevent and Punish Trafficking In Person states, in its first Article, that the legislation was designed to prevent and punish trafficking in persons, as well as to protect, take care of, and assist the victims of this behavior.⁶¹¹ Article 5 defines a trafficker in persons as one who promotes, solicits, offers, provides, gets, moves, gives or receives, for himself or for another person, a person, through violence

⁶¹⁰ Artículo 202. Comete el delito de pornografía de personas menores de dieciocho años de edad o de personas que no tienen capacidad para comprender el significado del hecho o de personas que no tienen capacidad para resistirlo, quien procure, obligue, facilite o induzca, por cualquier medio, a una o varias de estas personas a realizar actos sexuales o de exhibicionismo corporal con fines lascivos o sexuales, reales o simulados, con el objeto de video grabarlos, fotografíarlos, filmarlos, exhibirlos o describirlos a través de anuncios impresos, transmisión de archivos de datos en red pública o privada de telecomunicaciones, sistemas de cómputo, electrónicos o sucedáneos. Al autor de este delito se le impondrá pena de siete a doce años de prisión y de ochocientos a dos mil días multa.

A quien fije, imprima, video grabe, fotografíe, filme o describa actos de exhibicionismo corporal o lascivos o sexuales, reales o simulados, en que participen una o varias personas menores de dieciocho años de edad o una o varias personas que no tienen capacidad para comprender el significado del hecho o una o varias personas que no tienen capacidad para resistirlo, se le impondrá la pena de siete a doce años de prisión y de ochocientos a dos mil días multa, así como el decomiso de los objetos, instrumentos y productos del delito.

La misma pena se impondrá a quien reproduzca, almacene, distribuya, venda, compre, arriende, exponga, publicite, transmita, importe o exporte el material a que se refieren los párrafos anteriores.

Artículo 202 BIS. Quien almacene, compre, arriende, el material a que se refieren los párrafos anteriores, sin fines de comercialización o distribución se le impondrán de uno a cinco años de prisión y de cien a quinientos días multa. Asimismo, estará sujeto a tratamiento psiquiátrico especializado.

⁶¹¹ This Act is designed to prevent and punish trafficking in persons and as protection, care and assistance to the victims of these behaviors in order to ensure respect for the free development of personality of the victims and potential victims, residents or transferred to the national territory and to the Mexican people abroad. This law applies throughout the national territory in terms of federal law.

physical or moral, deception or abuse of power to submit to sexual exploitation, work or services labor, slavery or practices similar to slavery, servitude or the removal of an organ, tissue or its components. Intent is not required when this crime is perpetrated against persons under 18 years of age, or against those who do not have the capacity to understand the meaning of the act, or ability to resist.⁶¹²

4 – Criminalizes accessing or downloading child pornography images

Mexican legislation does not criminalize accessing or downloading child pornography.

5 – Criminalizes simple possession of child pornography

Possession of child pornography is not a crime in Mexico. Article 202 states that it is a crime to store child pornography. As explained in the Country Report on Chile, the Committee on the Right of Children does not interpret “storage” as synonymous with “possession” because the former carries and idea of a large quantity and a intention of commercialization.

6 – Criminalizes virtual images or sexually exploitative representations of children

This is not criminalized as Article 202 of the Criminal Code requires the use of a child or adolescent.⁶¹³

7 – Addresses the criminal liability of children involved in pornography

The legislation does not address the criminal liability of children involved in pornography.

8 – Establishes the criminal liability of legal persons for child pornography offenses

Mexican legislation does not establish criminal liability of legal persons, but Article 11 of the Federal Criminal Code authorizes its dissolution when it is used to commit a crime.⁶¹⁴

⁶¹² Artículo 5. Comete el delito de trata de personas quien promueva, solicite, ofrezca, facilite, consiga, traslade, entregue o reciba, para sí o para un tercero, a una persona, por medio de la violencia física o moral, engaño o el abuso de poder para someterla a explotación sexual, trabajos o servicios forzados, esclavitud o prácticas análogas a la esclavitud, servidumbre, o a la extirpación de un órgano, tejido o sus componentes.

Cuando este delito sea cometido en contra de personas menores de dieciocho años de edad, o en contra de quien no tenga capacidad para comprender el significado del hecho o capacidad para resistirlo no se requerirá acreditación de los medios comisivos.

⁶¹³ Artículo 202. Comete el delito de pornografía de personas menores de dieciocho años de edad o de personas que no tienen capacidad para comprender el significado del hecho o de personas que no tienen capacidad para resistirlo, quien procure, obligue, facilite o induzca, por cualquier medio, a una o varias de estas personas a realizar actos sexuales o de exhibicionismo corporal con fines lascivos o sexuales, reales o simulados, con el objeto de video grabarlos, fotografiarlos, filmarlos, exhibirlos o describirlos a través de anuncios impresos, transmisión de archivos de datos en red pública o privada de telecomunicaciones, sistemas de cómputo, electrónicos o sucedáneos. Al autor de este delito se le impondrá pena de siete a doce años de prisión y de ochocientos a dos mil días multa. A quien fije, imprima, video grabe, fotografíe, filme o describa actos de exhibicionismo corporal o lascivos o sexuales, reales o simulados, en que participen una o varias personas menores de dieciocho años de edad o una o varias personas que no tienen capacidad para comprender el significado del hecho o una o varias personas que no tienen capacidad para resistirlo, se le impondrá la pena de siete a doce años de prisión y de ochocientos a dos mil días multa, así como el decomiso de los objetos, instrumentos y productos del delito.

La misma pena se impondrá a quien reproduzca, almacene, distribuya, venda, compre, arriende, exponga, publicite, transmita, importe o exporte el material a que se refieren los párrafos anteriores.

⁶¹⁴ Artículo 11. Cuando algún miembro o representante de una persona jurídica, o de una sociedad, corporación o empresa de cualquiera clase, con excepción de las instituciones del Estado, cometa un delito con los medios que para tal objeto las mismas entidades le proporcionen, de modo que resulte cometido a nombre o bajo el amparo de la representación social o en beneficio de ella, el juez podrá, en los casos exclusivamente especificados por la ley, decretar en la sentencia la suspensión de la agrupación o su disolución, cuando lo estime necesario para la seguridad pública.

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

Article 4 of the Criminal Code establishes extraterritorial jurisdiction, the active personality principle, when the offender is a national.⁶¹⁵ Certain conditions must be fulfilled: the offender must be in the country, the accused may not have been judged in the country where he/she committed the offense; and the conduct must also be punishable in the country where it was committed.

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

Article 4 of the Criminal Code establishes extraterritorial jurisdiction for crimes committed abroad against Mexicans. The same conditions identified above must be observed.⁶¹⁶

11 – Establishes forfeiture of assets used to commit or facilitate offenses

Under Article 40 of the Criminal Code, the forfeiture of assets used to commit or facilitate offenses is an automatic consequence of a criminal conviction, but only when possession of them is also illicit. If their use is legal, the forfeiture will only occur when the offense is intentional.⁶¹⁷

12 – Establishes forfeiture of proceeds derived from such offenses

This is provided for in Article 40 of the Criminal Code.

⁶¹⁵ Artículo 4o. Los delitos cometidos en territorio extranjero por un mexicano contra mexicanos o contra extranjeros, o por un extranjero contra mexicanos, serán penados en la República, con arreglo a las leyes federales, si concurren los requisitos siguientes:

- I.-Que el acusado se encuentre en la República;
- II.-Que el reo no haya sido definitivamente juzgado en el país en que delinquirió, y
- III.-Que la infracción de que se le acuse tenga el carácter de delito en el país en que se ejecutó y en La República.

Artículo 6o.-Cuando se cometa un delito no previsto en este Código, pero sí en una ley especial o en un tratado internacional de observancia obligatoria en México, se aplicarán éstos, tomando en cuenta las disposiciones del Libro Primero del presente Código y, en su caso, las conducentes del Libro Segundo.

Quando ni misma materia aparezca regulada por diversas disposiciones, la especial prevalecerá sobre la general.

⁶¹⁶ Artículo 4o. Los delitos cometidos en territorio extranjero por un mexicano contra mexicanos o contra extranjeros, o por un extranjero contra mexicanos, serán penados en la República, con arreglo a las leyes federales, si concurren los requisitos siguientes:

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Artículo 6o. Cuando se cometa un delito no previsto en este Código, pero sí en una ley especial o en un tratado internacional de observancia obligatoria en México, se aplicarán éstos, tomando en cuenta las disposiciones del Libro Primero del presente Código y, en su caso, las conducentes del Libro Segundo.

Quando ni misma materia aparezca regulada por diversas disposiciones, la especial prevalecerá sobre la general.

⁶¹⁷ Artículo 40. Los instrumentos del delito, así como las cosas que sean objeto o producto de él, se decomisarán si son de uso prohibido. Si son de uso lícito, se decomisarán cuando el delito sea intencional. Si pertenecen a un tercero, sólo se decomisarán cuando el tercero que los tenga en su poder o los haya adquirido bajo cualquier título, esté en alguno de los supuestos a los que se refiere el artículo 400 de este Código, independientemente de la naturaleza jurídica de dicho tercero propietario o poseedor y de la relación que aquel tenga con el delincuente, en su caso. Las autoridades competentes procederán al inmediato aseguramiento de los bienes que podrían ser materia del decomiso, durante la averiguación o en el proceso. Se actuará en los términos previstos por este párrafo cualquiera que sea la naturaleza de los instrumentos, objetos o productos del delito. Si los instrumentos o cosas decomisados son sustancias nocivas o peligrosas, se destruirán a juicio de la autoridad que esté conociendo, en los términos previstos por el Código de Procedimientos Penales, pero aquélla, cuando lo estime conveniente, podrá determinar su conservación para fines de docencia o investigación. Respecto de los instrumentos del delito, o cosas que sean objeto o producto de él, la autoridad competente determinará su destino, según su utilidad, para beneficio de la procuración e impartición de Justicia, o su inutilización si fuere el caso, de conformidad con las disposiciones aplicables.

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 13 of the Law for the Protection of the Right of Children and Adolescents states that in order to guarantee the rights provided in legislation, the family, neighbors, physicians, teachers, social workers and public servants, or any person that is aware of a children or adolescents rights violation, is required to report the situation to the competent authorities.⁶¹⁸

14 – Requires Internet Service Providers to report child pornography

The legislation does not require mandatory reporting from ISPs.

15 – Has a support telephone or online hotline to enable the public to report child abuse

The line National Central Reception of Anonymous and Confidential Report on Offenses is organized by the Procuraduría General, and is specifically used to report crimes against sexual dignity, such as prostitution, child pornography, and sexual exploitation.⁶¹⁹ The number of the line is 01800 02 10 343. The Cyber Police and Crimes against Children have a website, which provides an email for making reports.⁶²⁰

16 – Creates data retention and preservation policies or provisions

The Mexican Telecommunications and Broadcasting Law entered into effect on August 13, 2014.⁶²¹ Article 190 compels ISPs to retain details of all online communications, such as:

- Name, corporate name, and address of the subscriber;
- Type of communication or service used;
- Data showing the origin and destination of the communications;
- Data to determine the date, hour, and length of the communication or service;
- Date and hour of the first activation and localization tag;
- Technical characteristics of the device; and
- Geographic position of the lines.⁶²²

⁶¹⁸ Artículo 13. La obligación de familiares, vecinos, médicos, maestros, trabajadores sociales, servidores públicos, o cualesquiera persona, que tengan conocimiento de casos de niñas, niños o adolescentes que estén sufriendo la violación de los derechos consignados en esta ley, en cualquiera de sus formas, de ponerlo en conocimiento inmediato de las autoridades competentes, de manera que pueda seguirse la investigación correspondiente.

⁶¹⁹ CENTRAL NACIONAL RECEPTORA DE DENUNCIA ANÓNIMA Y CONFIDENCIAL DE DELITOS SOBRE ESCI. PROCURADURÍA GENERAL DE LA REPÚBLICA (PGR).

En el marco de la segunda fase de la Campaña Nacional contra la prostitución pornografía infantil "Abre los Ojos, pero no Cierres la Boca", a partir del 22 de octubre del año 2002, en la Procuraduría General de la República se instaló una Central Nacional Receptora de Denuncia Anónima sobre ESCI, con teléfono sin costo: 01800 02 10 343.

⁶²⁰ The Cyber Police webpage is <http://www.ssp.gob.mx> and the email address is denuncia@ssp.gob.mx.

⁶²¹ Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se reforman, adicionan y derogan diversas disposiciones en materia de telecomunicaciones y radiodifusión, available at http://www.dof.gob.mx/nota_detalle.php?codigo=5352323&fecha=14/07/2014.

⁶²² Article 190. Los concesionarios de telecomunicaciones y, en su caso, los autorizados, deberán:

I. Colaborar con las instancias de seguridad, procuración y administración de justicia, en la localización geográfica, en tiempo real, de los equipos de comunicación móvil, en los términos que establezcan las leyes.

Cualquier omisión o desacato a estas disposiciones será sancionada por la autoridad, en los términos de lo previsto por la legislación penal aplicable.

El Instituto, escuchando a las autoridades a que se refiere el artículo 189 de esta Ley, establecerá los lineamientos que los concesionarios de telecomunicaciones y, en su caso, los autorizados deberán adoptar para que la colaboración a que se refiere esta Ley con dichas autoridades, sea efectiva y oportuna;

II. Conservar un registro y control de comunicaciones que se realicen desde cualquier tipo de línea que utilice numeración propia o arrendada, bajo cualquier modalidad, que permitan identificar con precisión los siguientes datos:

ISPs must retain this information for two years, and be able to provide it in real time to competent authorities within 48 hours. ISPs must preserve this information for 12 months. They must have a department responsible for this function, 24 hours a day, 365 days a year, to immediately provide the information required to the authorities. A prior judicial order to obtain this information is not needed.

-
- a) Nombre, denominación o razón social y domicilio del suscriptor;
 - b) Tipo de comunicación (transmisión de voz, buzón vocal, conferencia, datos), servicios suplementarios (incluidos el reenvío o transferencia de llamada) o servicios de mensajería o multimedia empleados (incluidos los servicios de mensajes cortos, servicios multimedia y avanzados);
 - c) Datos necesarios para rastrear e identificar el origen y destino de las comunicaciones de telefonía móvil: número de destino, modalidad de líneas con contrato o plan tarifario, como en la modalidad de líneas de prepago;
 - d) Datos necesarios para determinar la fecha, hora y duración de la comunicación, así como el servicio de mensajería o multimedia;
 - e) Además de los datos anteriores, se deberá conservar la fecha y hora de la primera activación del servicio y la etiqueta de localización (identificador de celda) desde la que se haya activado el servicio;
 - f) En su caso, identificación y características técnicas de los dispositivos, incluyendo, entre otros, los códigos internacionales de identidad de fabricación del equipo y del suscriptor;
 - g) La ubicación digital del posicionamiento geográfico de las líneas telefónicas, y
 - h) La obligación de conservación de datos, comenzará a contarse a partir de la fecha en que se haya producido la comunicación.

Para tales efectos, el concesionario deberá conservar los datos referidos en el párrafo anterior durante los primeros doce meses en sistemas que permitan su consulta y entrega en tiempo real a las autoridades competentes, a través de medios electrónicos. Concluido el plazo referido, el concesionario deberá conservar dichos datos por doce meses adicionales en sistemas de almacenamiento electrónico, en cuyo caso, la entrega de la información a las autoridades competentes se realizará dentro de las cuarenta y ocho horas siguientes, contadas a partir de la notificación de la solicitud.

La solicitud y entrega en tiempo real de los datos referidos en este inciso, se realizará mediante los mecanismos que determinen las autoridades a que se refiere el artículo 189 de esta Ley, los cuales deberán informarse al Instituto para los efectos de lo dispuesto en el párrafo tercero, fracción I del presente artículo.

Los concesionarios de telecomunicaciones y, en su caso, los autorizados, tomarán las medidas técnicas necesarias respecto de los datos objeto de conservación, que garanticen su conservación, cuidado, protección, no manipulación o acceso ilícito, destrucción, alteración o cancelación, así como el personal autorizado para su manejo y control.

Sin perjuicio de lo establecido en esta Ley, respecto a la protección, tratamiento y control de los datos personales en posesión de los concesionarios o de los autorizados, será aplicable lo dispuesto en la Ley Federal de Protección de Datos Personales en Posesión de los Particulares;

III. Entregar los datos conservados a las autoridades a que se refiere el artículo 189 de esta Ley, que así lo requieran, conforme a sus atribuciones, de conformidad con las leyes aplicables.

Queda prohibida la utilización de los datos conservados para fines distintos a los previstos en este capítulo, cualquier uso distinto será sancionado por las autoridades competentes en términos administrativos y penales que resulten.

Los concesionarios de telecomunicaciones y, en su caso, los autorizados, están obligados a entregar la información dentro de un plazo máximo de veinticuatro horas siguientes, contado a partir de la notificación, siempre y cuando no exista otra disposición expresa de autoridad competente;

IV. Contar con un área responsable disponible las veinticuatro horas del día y los trescientos sesenta y cinco días del año, para atender los requerimientos de información, localización geográfica e intervención de comunicaciones privadas a que se refiere este Título.

Para efectos de lo anterior, los concesionarios deberán notificar a los titulares de las instancias a que se refiere el artículo 189 de esta Ley el nombre del responsable de dichas áreas y sus datos de localización; además deberá tener facultades amplias y suficientes para atender los requerimientos que se formulen al concesionario o al autorizado y adoptar las medidas necesarias. Cualquier cambio del responsable deberá notificarse previamente con una anticipación de veinticuatro horas;

(...)

Las comunicaciones privadas son inviolables. Exclusivamente la autoridad judicial federal, a petición de la autoridad federal que faculte la ley o del titular del Ministerio Público de la entidad federativa correspondiente, podrá autorizar la intervención de cualquier comunicación privada.

According to the first paragraph of Article 190, the content of the communication is protected, and can only be disclosed with prior authorization of the federal judiciary.

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

The General Law for Prevention, Punishment and Ending Crimes on Trafficking in Persons and for the Protection and Assistance to Victims of These Crimes establishes, in Article 115, IV that counties and states should legislate on this issue.⁶²³

18 – Has a national plan to combat violence against children

The National System for the Integral Development of the Family (Sistema Nacional para el Desarrollo Integral de la Familia) (SNDIF) was created in a partnership with private and public sectors, to make possible the execution of the National Plan of Action to Prevent, Assist and Eradicate the Commercial Sexual Exploitation of Children (Plan de Acción Nacional para Prevenir, Atender y Erradicar la Explotación Sexual Comercial Infantil).⁶²⁴

19 – International instruments ratified by Mexico

- The Convention on the Rights of the Child, ratified on September 21, 1990
- The Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography, ratified on March 15, 2002
- The ILO Minimum Age Convention, ratified on August 9, 1961
- The ILO Worst Forms of Child Labor Convention, ratified on June 30, 2000

20 – Age of criminal liability

Article 6 of the Children’s Law determines that minors less than 18 years of age are not criminally liable. Adolescents between 12 and 18 years old are subject to protective measures when they commit acts that are equivalent to crimes (which can only be committed by adults).⁶²⁵ Article 3 of this law establishes

⁶²³ Nueva Ley publicada en el Diario Oficial de la Federación el 14 de junio de 2012 – LEY GENERAL PARA PREVENIR, SANCIONAR Y ERRADICAR LOS DELITOS EN MATERIA DE TRATA DE PERSONAS Y PARA LA PROTECCIÓN Y ASISTENCIA A LAS VÍCTIMAS DE ESTOS DELITOS.

Artículo 115. Corresponde a los municipios y a las demarcaciones territoriales del Distrito Federal en el ámbito de sus respectivas facultades y competencias, de conformidad con esta Ley, la legislación aplicable en la materia y las políticas y programas federales, estatales y del Distrito Federal:

I. Instrumentar políticas y acciones para prevenir y erradicar la esclavitud, la trata de personas o demás delitos previstos en esta Ley;

II. Apoyar la creación de programas de sensibilización y capacitación para las y los servidores públicos y funcionarios que puedan estar en contacto con posibles víctimas de los delitos previstos en esta Ley;

III. Apoyar la creación de refugios o modelos de protección y asistencia de emergencia, hasta que la autoridad competente tome conocimiento del hecho y proceda a proteger y asistir a la víctima, ofendido o testigo de los delitos previstos en esta Ley;

IV. Detectar y prevenir la trata de personas y demás delitos previstos en esta Ley, en el territorio bajo su responsabilidad, a través de la autorización de funcionamiento de establecimientos como bares, clubs nocturnos, lugares de espectáculos, recintos feriales o deportivos, salones de masajes, hoteles, baños, vapores, loncherías, restaurantes, vía pública, cafés internet y otros, así como a través de la vigilancia e inspección de estos negocios, y

V. Las demás aplicables sobre la materia y las que les confiera esta Ley y otros ordenamientos jurídicos.

⁶²⁴ México Ante La Explotación Sexual Comercial Infantil, 2003, available at <http://www.ilo.org/ipecinfo/product/download.do?type=document&id=7535> (last visited Oct. 30, 2015).

⁶²⁵ Ley Para El Tratamiento de Menores Infractores Para El Distrito Federal en Materia Comun y Para Toda Law Republic en Materia Federal

Artículo 6. El Consejo de Menores es competente para conocer de la conducta de las personas mayores de 11 y menores de 18 años de edad, tipificada por las leyes penales señaladas en el artículo 1o. de esta Ley. Los menores de 11 años, serán sujetos de asistencia social por parte de las instituciones de los sectores público, social y privado que se ocupen de esta materia, las cuales se constituirán, en este aspecto, como auxiliares del Consejo.

that when a minor commits an offense, he/she will be treated fairly and humanly; therefore, any mistreatment, psychological coercion, or other actions that violate his/her dignity, or mental or physical integrity are prohibited.⁶²⁶

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

Article 202 of the Penal Code states that the transmission of data can occur through public or private communication networks, computer systems, electronics, or similar means.

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of sex tourism with children

According to Article 203 of the Penal Code, sex tourism is criminalized defining it as whoever promotes, publishes, invites, facilitates or administrates the entrance or exit of the territory with the intent of practicing real or simulated sexual acts will be punished.⁶²⁷

Human trafficking is sanctioned through the Law to Prevent and Punish Trafficking in Persons, which states in Article 13 that whoever benefits from the sexual exploitation of one or more persons, through pornography and other conduct can be sentenced to 15 to 30 years of imprisonment.

Article 366 of the Penal Code defines the trafficking of minors as transferring a person under 16 years of age, or giving him/her to another person, illegally, out of the national territory, with the purpose of obtaining an economic benefit for the action.⁶²⁸

23 – Has specific legislation on online grooming considering it a standalone offense

There is no specific legislation on online grooming, and it is not considered a standalone offense. However, there is a Bill in Congress, proposed by the deputy Ricardo Mejía Berdeja, which adds a description of online grooming to Article 202 TER.⁶²⁹

Quando el menor alegue tener la calidad de indígena, la misma se acreditará con su sola manifestación. Cuando exista duda de ella o fuere cuestionada, se solicitará a las autoridades comunitarias la expedición de la Constancia que acredite la pertenencia del individuo a un determinado pueblo o comunidad”.

⁶²⁶ Ley Para El Tratamiento de Menores Infractores Para El Distrito Federal en Materia Comun y Para Toda Law Republic en Materia Federal

Artículo 3. El menor a quien se atribuya la comisión de una infracción, recibirá un trato justo y humano, la coacción psicológica o cualquier otra acción que atente contra su dignidad física o mental. quedando prohibidos en consecuencia, el maltrato, la incomunicación

⁶²⁷ Artículo 203. Comete el delito de turismo sexual quien promueva, publicite, invite, facilite o gestione por cualquier medio a que una o más personas viajen al interior o exterior del territorio nacional con la finalidad de que realice cualquier tipo de actos sexuales reales o simulados con una o varias personas menores de dieciocho años de edad, o con una o varias personas que no tienen capacidad para comprender el significado del hecho o con una o varias personas que no tienen capacidad para resistirlo. Al autor de este delito se le impondrá una pena de siete a doce años de prisión y de ochocientos a dos mil días multa.

Artículo 203 BIS. A quien realice cualquier tipo de actos sexuales reales o simulados con una o varias personas menores de dieciocho años de edad, o con una o varias personas que no tienen capacidad para comprender el significado del hecho o con una o varias personas que no tienen capacidad para resistirlo, en virtud del turismo sexual, se le impondrá una pena de doce a dieciséis años de prisión y de dos mil a tres mil días multa, asimismo, estará sujeto al tratamiento psiquiátrico especializado.

⁶²⁸ Artículo 366 Ter. Comete el delito de tráfico de menores, quien traslade a un menor de dieciséis años de edad o lo entregue a un tercero, de manera ilícita, fuera del territorio nacional, con el propósito de obtener un beneficio económico indebido por el traslado o la entrega del menor.

⁶²⁹ Project of criminalización of online grooming - Artículo 202 Ter. Al que busque y contacte a través de cualquier dispositivo electrónico o tecnología de la información a menores de edad con el objetivo de solicitarle imágenes y/o videos con contenido sexual del mismo, y mediante dichos medios con engaños, amenazas y violencia psicológica convenzan e incentiven concertar un encuentro a fin de cometer cualquier acto que vaya en contra de la integridad física y sexual del menor. Al autor de este delito se le impondrá pena de uno a cinco años de prisión y de ochocientos a dos mil días multa.

24 – Has a clear definition of online grooming

There is no clear definition of online grooming. However, the new project for the criminalization of online grooming defines the conduct as seeking or contacting, through any electronic dispositive or informative technology, minors with the objective of asking pictures or videos with sexual content, using lies, threats and psychological violence to promote a meeting in order to commit any act that goes against the physical and sexual integrity of children.

25 – Age of potential victims of online grooming

Does not apply.

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

Does not apply.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense, or considers it an aspect of grooming

Article 200 of the Criminal Code states that if someone trades, distributes, exposes, circulates or offers to minors books, texts, records, movies, photographs, pictures or objects with pornographic connotation, physically or through any means, he/she will be punished with six months to five years of imprisonment.⁶³⁰ This can be considered the showing of pornography to a child as a standalone offense in the legislation.

28 – Has specific legislation on cyberbullying

Mexico does not have specific legislation on cyberbullying.

29 – Has specific legislation concerning sexting

There is currently no legislation concerning sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

Practically, there is only one level of penalty.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

The Federal Criminal Code increases the penalties for crimes committed by a person who has abused a recognized position of trust or authority.

⁶³⁰ Artículo 200. Al que comercie, distribuya, exponga, haga circular u oferte, a menores de dieciocho años de edad, libros, escritos, grabaciones, filmes, fotografías, anuncios impresos, imágenes u objetos, de carácter pornográfico, reales o simulados, sea de manera física, o a través de cualquier medio, se le impondrá de seis meses a cinco años de prisión y de trescientos a quinientos días multa.

No se entenderá como material pornográfico o nocivo, aquel que signifique o tenga como fin la divulgación científica, artística o técnica, o en su caso, la educación sexual, educación sobre la función reproductiva, la prevención de enfermedades de transmisión sexual y el embarazo de adolescentes, siempre que estén aprobados por la autoridad competente.

There is no provision related to the sexual exploitation of children that establishes a heightened penalty when the offense is committed by several persons acting together, or when it was committed within the framework of a criminal organization.

13. NICARAGUA – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 175 of the Penal Code
2 – Has a clear definition of child pornography	Yes, Article 175 of the Penal Code
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 175 of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, Article 175 of the Penal Code
6 – Criminalizes virtual images and sexually exploitative representations of children	No
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No, but sanctions can be imposed
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Article 14 of the Penal Code, and indirectly through the Universal Jurisdiction Principle, Article 16, m of the Penal Code
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Indirectly, through the Universal Jurisdiction Principle, Article 16, m of the Penal Code
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Article 112 of the Penal Code
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Article 112 of the Penal Code
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 48 of the CNA
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes
16 – Creates data retention or data preservation policies or provisions	Article 213 of the Criminal Procedure Code – interception only
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No
18 – Has a national plan to combat violence against children	Yes
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years of age
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes, Article 175 of the Penal Code
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Trafficking with intent – Article 182 of the Penal Code
23 – Has specific legislation on online grooming, considering it a standalone offense	No
24 – Has a clear definition of online grooming	Does not apply
25 – Considers everyone under 18 as a potential victim of online grooming	Does not apply
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Does not apply
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	No
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	Same penalties for production and distribution; different for possession
31 – Law establishes aggravating circumstances for child abuse offenses	Yes

NICARAGUA – COUNTRY REPORT

Nicaragua is a representative democratic republic. The country declared its independence from Spain in 1821, but was not recognized as independent until 1838.

Beginning in the 1940s, Nicaragua experienced a period of almost 40 years of dictatorship, interrupted in 1979 by the People's Sandinista Revolution. During this period of revolutionary government, the Political Constitution of the Republic was approved in 1987 with an essential democratic framework.⁶³¹

After a period of democratic elections from 1990 to 2001, the Sandinista president, Daniel Ortega, was elected in 2006 and reelected in 2011. According to CIA World Factbook, during his government period, "elections were marred by widespread irregularities. Nicaragua's infrastructure and economy - hard hit by the earlier civil war and by Hurricane Mitch in 1998 - are slowly being rebuilt, but democratic institutions have been weakened under the ORTEGA administration."⁶³²

The country is subdivided into 15 departments and two autonomous regions. The legislative branch is unicameral (Asamblea nacional). The Courts of Justice (Tribunales de Justicia) form a unitarian system of justice, and under Article 159 of the Constitution, makes the Supreme Court of Justice (Corte Suprema de Justicia) the highest court. The executive branch is composed of the chief of state (President Jose Daniel Ortega Saavedra, in office since January 10, 2007), the Vice President (Moises Omar Halleslevens Acevedo, in office since January 10, 2012), both offices of which constitute the head of government, and the cabinet, which is formed by a Council of Ministers appointed by the president.

Nicaragua is considered one of the poorest countries in Latin America based on the HDI index, ranking in the 111th position. According to CIA World Factbook, "Nicaragua's income distribution is very uneven, and the poor, agriculturalists, and indigenous people continue to have less access to healthcare services. Nicaragua's total fertility rate has fallen from around six children per woman in 1980 to just above replacement level today, but the high birth rate among adolescents perpetuates a cycle of poverty and low educational attainment."⁶³³

Almost 30% of Nicaragua's population is under 14 years of age.⁶³⁴

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

The Nicaraguan Constitution proscribes that the family is the core of society, and must be protected by the State (Article 70).⁶³⁵ Article 71, amended by Law n. 192, includes in its first paragraph that childhood has the special protection of the State, and that the Convention on the Rights of the Child is in full force.

⁶³¹ *Juvenile Justice Systems: Good Practices in Latin America*, UNICEF, 2006, available at http://www.unicef.org/lac/JUSTICIA_PENALingles.pdf (last visited Nov. 9, 2015).

⁶³² *Nicaragua, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/nu.html> (last visited Oct. 13, 2014).

⁶³³ *Id.*

⁶³⁴ *Id.*

⁶³⁵ Artículo 70. La familia es el núcleo fundamental de la sociedad y tiene derecho a la protección de ésta y del Estado.

Article 76 establishes that minors have the right to prevention, protection, and education by family, society, and the State.

Articles 84 and 85 of the Constitution protect minors from any form of economic or social exploitation, requiring the State to adopt all the necessary measures to protect and rescue minors whose physical, psychological, or moral integrity are in danger.

The Code of Childhood and Adolescence (Código de La Niñez y Adolescencia) (CNA), Law n. 2002-100, entered in force in July 2003 and recognizes the rights and guarantees of, and responsibilities to minors. The first part (Libro I) is related to the rights, freedom, guarantees, and duties of minors; the second part (Libro II) addresses the need to establish a comprehensive policy and to create the National Council of Comprehensive Care for Children and Adolescents (Consejo Nacional de Atención Integral a la Niñez y la Adolescencia) (CONAPINA); and the third part is focuses on the special System of Criminal Justice for Adolescents, applicable to those who are between 13 and 18 years of age.

According to Article 2 of the CNA, children are considered those less than 13 years of age, and adolescents are between 13 and 18 years of age. In cases of doubt, childhood and adolescence are presumed.⁶³⁶

Article 5 of the CNA proscribes that any child or adolescent can suffer discrimination, exploitation, trafficking, violence, or any kind of physical, psychological or sexual abuse.⁶³⁷ Article 12 guarantees that they have the right to freedom, security, respect, and dignity as human beings in a development process.⁶³⁸ Article 19 proscribes that the State must give special attention to minors who are in danger or at sociological, social, or material risk.⁶³⁹

⁶³⁶ Artículo 2. Definición

Para los efectos de este Código, se considerará niño o niña a toda persona desde su concepción hasta los doce años de edad cumplidos, y adolescente a toda persona mayor de doce años y menor de dieciocho. Ante la duda, prevalecerá la condición de adolescente frente a la de adulto y la de niño frente a la de adolescente.

⁶³⁷ Artículo 5. Ninguna niña, niño o adolescente será objeto de cualquier forma de discriminación, explotación, traslado ilícito dentro o fuera del país, violencia, abuso o maltrato físico, psíquico y sexual, tratamiento inhumano, aterrador, humillante, opresivo, trato cruel, atentado o negligencia, por acción u omisión a su derechos y libertades.

Es deber de toda persona velar por la dignidad de la niña, niño y adolescente, poniéndolo a salvo de cualquiera de las situaciones anteriormente señaladas.

La niña, niño y adolescente tiene derecho a la protección de la Ley contra esas injerencias o ataques y los que los realizaren incurrirán en responsabilidad penal y civil.

⁶³⁸ Artículo 12. Las niñas, niños y adolescentes tienen derecho intrínseco a la vida desde su concepción y la protección del Estado a través de políticas que permitan su nacimiento, supervivencia y desarrollo integral y armonioso en condiciones de una existencia digna.

La niña, el niño y los adolescentes tienen derecho a la libertad, a la seguridad, al respeto y a la dignidad como personas humanas en proceso de desarrollo y con características particulares como sujetos de los derechos establecidos en la Constitución Política y en las leyes.

⁶³⁹ Código de La Niñez y Adolescencia, Artículo 19.

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

Chapter III of the Penal Code regulates offenses related to the sexual exploitation of children, and those related to crimes against freedom and sexual integrity.

Article 175 of the Penal Code criminalizes child sexual exploitation and pornography, punishing anyone who promotes, finances, produces, reproduces, publishes, commercializes, imports, exports, disseminates, or distributes, through any means (direct, mechanical, audio visual, or electronic), the image or voice of a person under 18 years of age in sexual or erotic activities, real or simulated, explicit and implicit, or the representation of his/her genitals for sexual purposes, with imprisonment from five to seven years, and a fine.⁶⁴⁰ The penalty for possession is lower at one to two years of imprisonment. This Article has a clear and appropriate definition of child pornography, aligned with the Optional Protocol.

The penalty is aggravated when there is a purpose of profit, when the perpetrator is part of an organized crime group, when the perpetrator commits the offense by taking advantage of a relationship of superiority, authority, kinship, dependency or trust with the victim, or is one who permanently shares the family home with the child (Article 176).⁶⁴¹ The maximum penalty is always applied when the victim is under the age of 14.

⁶⁴⁰ Artículo 175. Explotación sexual, pornografía y acto sexual con adolescentes mediante pago

Quien induzca, facilite, promueva o utilice con fines sexuales o eróticos a personas menor de dieciséis años o discapacitado, haciéndola presenciar o participar en un comportamiento o espectáculo público o privado, aunque la víctima consienta en presenciar ese comportamiento o participar en él, será penado de cinco a siete años de prisión y se impondrá de cuatro a seis años de prisión, cuando la víctima sea mayor de dieciséis y menor de dieciocho años de edad.

Quien promueva, financie, fabrique, reproduzca, publique, comercialice, importe, exporte, difunda, distribuya material para fines de explotación sexual, por cualquier medio sea directo, mecánico, digital, audio visual, o con soporte informático, electrónico o de otro tipo, la imagen, o la voz de persona menor de dieciocho años en actividad sexual o eróticas, reales o simuladas, explícitas e implícitas o la representación de sus genitales con fines sexuales, será sancionado con pena de prisión de cinco a siete años de prisión y de ciento cincuenta a quinientos días de multa.

Quien con fines de explotación sexual, posea material pornográfico o erótico en los términos expresado en el párrafo anterior, será castigado con la pena de uno a dos años de prisión.

Quien ejecute acto sexual o erótico con persona mayor de catorce años y menor de dieciocho años de edad de cualquier sexo, pagando o prometiéndole pagar o darle a cambio ventaja económica o de cualquier naturaleza, será sancionado con pena de prisión de cinco a siete años.

⁶⁴¹ Artículo 176. Agravantes específicas en caso de explotación sexual, pornografía y acto sexual con adolescentes mediante pago

La pena será de seis a ocho años de prisión cuando:

- a) El hecho sea ejecutado con propósitos de lucro;
- b) El autor o autores sean parte de un grupo organizado para cometer delitos de naturaleza sexual, salvo que concurra el delito de crimen organizado;
- c) Medie engaño, violencia, abuso de autoridad o cualquier medio de intimidación o coerción; o
- d) El autor cometa el delito prevaliéndose de una relación de superioridad, autoridad, parentesco, dependencia o confianza con la víctima, o de compartir permanentemente el hogar familiar con ella.

Si concurren dos o más de las circunstancias previstas, la pena que se impondrá será de siete a nueve años de prisión. Se impondrá la pena máxima cuando sea persona con discapacidad o menor de catorce años de edad.

When sexual offenses are committed against children and adolescents, there is no place for a mediation process, or any benefit of suspension of sentence (Article 181 of the Penal Code).⁶⁴² The potential victims of child pornography are children under 18 years of age.

4 – Criminalizes accessing or downloading child pornography images

The accessing or downloading child pornography is not considered a crime.

5 – Criminalizes simple possession of child pornography

Article 175 of the Penal Code criminalizes possession of pornography when the goal is sexual exploitation.⁶⁴³

6 – Criminalizes virtual images or sexually exploitative representations of children

Nicaragua's legislation does not criminalize pornography made through virtual images or sexually exploitative representations of children.

7 – Addresses the criminal liability of children involved in pornography

No, the law does not address the criminal liability of children involved in pornography.

8 – Establishes the criminal liability of legal persons for child pornography offenses

The Nicaraguan Penal Code establishes penalties for legal persons in Article 113.⁶⁴⁴

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

Article 14 of the Penal Code uses the active personality principle, and allows Nicaraguan jurisdiction over crimes committed abroad, when the offender is a Nicaraguan or someone that has acquired Nicaraguan

⁶⁴² Artículo 181. Restricción de mediación y otros beneficios

Cuando el delito sexual sea cometido contra niños, niñas y adolescentes, no habrá lugar al trámite de la mediación, ni cualquier beneficio de suspensión de pena.

⁶⁴³ Artículo 175. Quien con fines de explotación sexual, posea material pornográfico o erótico en los términos expresado en el párrafo anterior, será castigado con la pena de uno a dos años de prisión.

⁶⁴⁴ Artículo 113. Consecuencias accesorias que recaen sobre la persona jurídica

Cuando el hecho delictivo se cometa en el ámbito de una persona jurídica o en beneficio de ella, el Juez o Tribunal, previa audiencia de las partes o de sus representantes legales, podrá imponer, motivadamente y cuando en el caso concreto resulten necesarias, una o varias de las siguientes consecuencias accesorias:

a) La intervención de la empresa para salvaguardar los derechos de los trabajadores o de los acreedores por el tiempo necesario y sin que exceda de un plazo máximo de cinco años;

b) Clausura de la empresa, sus locales o establecimientos, con carácter temporal o definitivo. La clausura temporal no podrá exceder de cinco años;

c) Disolución de la sociedad, asociación o fundación;

d) Suspensión de las actividades de la sociedad, empresa, fundación o asociación por un plazo que no podrá exceder de cinco años;

e) Prohibición de realizar en el futuro actividades, operaciones mercantiles o negocios de la clase de aquéllos en cuyo ejercicio se haya cometido, favorecido o encubierto el delito. Esta prohibición podrá tener carácter temporal o definitivo. Si tuviere carácter temporal, el plazo de prohibición no podrá exceder de cinco años.

La clausura temporal prevista en el literal b) y la suspensión señalada en el literal d) del párrafo anterior, podrán ser acordadas por el Juez también durante la tramitación de la causa.

Las consecuencias accesorias previstas en este artículo estarán orientadas en su imposición y cumplimiento a prevenir la continuidad en la actividad delictiva y los efectos de la misma.

citizenship after committing the crime, if certain requirements are fulfilled. This provision only applies to citizens of Nicaragua.⁶⁴⁵

Extraterritorial jurisdiction can be applied according to the universal jurisdiction principle (Article 16, “m” of the Penal Code), when the act is related to sexual offenses against children and adolescents.⁶⁴⁶

The Committee on the Rights of the Child, in its considerations on the report submitted by Nicaragua under Article 12, item 1, of the OPSC, presented at the fifty-fifth session from September 13, 2010 to October 1, 2010, welcomed the fact that Article 19 of the Penal Procedure Code provides for universal jurisdiction. However, the Committee expressed concern that Article 16 of the Penal Code, which lists the offenses covered by the Principle of Universality, does not refer explicitly to the sale of children, child pornography, and child prostitution.⁶⁴⁷

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

Extraterritorial jurisdiction is not recognized in this situation. However, the legislation authorizes Nicaragua to exert jurisdiction over and prosecute offenses committed abroad, based on the universal jurisdiction principle.

11 – Establishes forfeiture of assets used to commit or facilitate offenses; and

12 – Establishes forfeiture of proceeds derived from such offenses

Forfeiture is applied generally to crimes in Article 112 of the Penal Code, and is not specifically related to crimes against children.⁶⁴⁸

⁶⁴⁵ Artículo 14. Principio personal. Las leyes penales nicaragüenses son aplicables a los hechos previstos en ellas como Delitos, aunque se hayan cometido fuera del territorio, siempre que los penalmente responsables fueren nicaragüenses o extranjeros que hayan adquirido la nacionalidad nicaragüense con posterioridad a la comisión del hecho y concurren los siguientes requisitos:

- a) que el hecho sea punible en el lugar de la ejecución
- b) que la víctima, ofendido o agraviado o la representación del Estado interponga acusación ante los juzgados o tribunales nicaragüenses;
- c) que el delincuente no haya sido absuelto, amnistiado o indultado o no haya cumplido la condena en el extranjero. Si solo la hubiera cumplido en parte, se le tendrá en cuenta para rebajarle proporcionalmente lo que le corresponda. En el caso de indulto, éste deberá llenar los requisitos de la ley especial.

⁶⁴⁶ Artículo 16. Principio de universalidad

Las leyes penales nicaragüenses serán también aplicables a los nicaragüenses o extranjeros que hayan cometido fuera del territorio nacional algunos de los siguientes delitos:

(...)

- f) Delitos de tráfico de migrantes y Trata de personas con fines de esclavitud o explotación sexual y explotación laboral;

(...)

- m) Delitos sexuales en perjuicio de niños, niñas y adolescentes y

- n) Cualquier otro delito que pueda ser perseguido en Nicaragua, conforme los instrumentos internacionales ratificados por el país.

Para todos los supuestos expresados en este artículo rige el literal contenido en el artículo 14.

⁶⁴⁷ UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography*, Nicaragua (2010), at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fNIC%2fCO%2f1&Lang=en (last visited Oct. 9, 2015).

⁶⁴⁸ Artículo 112. Decomiso

Toda pena que se imponga por un delito doloso, imprudente o falta, llevará consigo la pérdida de los efectos que de ellos provengan o de bienes adquiridos con el valor de dichos efectos, de los instrumentos con que se haya ejecutado o hubieren estado destinados a su ejecución, o de las ganancias provenientes de la infracción penal, cualesquiera que sean las transformaciones que pudieran experimentar. Los unos y las otras serán decomisados, a no ser que pertenezcan a un tercero de buena fe no responsable del delito y que los haya

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 48 of the Code of Childhood and Adolescence determines that principals of schools must report cases of sexual abuse, first to the mother, father, or tutor, and in case of recidivism, to the authorities.

14 – Requires Internet Service Providers to report child pornography

The legislation does not establish mandatory reporting for ISPs.

15 – Has a support telephone or online hotline to enable the public to report child abuse

According to the Nicaragua's initial Periodic Report on the Sale of Children, Child Prostitution and Child Pornography, discussed on the 55th session of the Committee on the Rights of the Child in 2010, Nicaragua has a hotline that works at a national level, and is accessible inside and outside the capital. People can call to register complaints or ask questions about their rights.

16 – Creates data retention and preservation policies or provisions

The intervention or interception of telephonic communication (and other unspecified types of communication) is regulated under Article 213 of the Criminal Procedure Code, which requires a request from the General Attorney or the Director of the National Police, who must indicate the reasons why the request should be authorized and the period of time it is needed.⁶⁴⁹ These requests for interception are possible only for terrorism, kidnapping, trafficking in persons for sexual exploitation, trafficking in

adquirido legalmente.

Los efectos, instrumentos o ganancias decomisados se venderán si son de lícito comercio, aplicándose su producto a cubrir las responsabilidades civiles del penado; si no lo son, se les dará el destino que corresponda y, en su defecto, se inutilizarán. Cuando se trate de armas de fuego o de guerra, pasarán a disposición de la Policía Nacional o del Ejército de Nicaragua, según corresponda.

Cuando los referidos efectos e instrumentos sean de lícito comercio y su valor no guarde proporción con la naturaleza o gravedad de la infracción penal, o se satisfagan completamente las responsabilidades civiles, podrá el Juez o Tribunal no decretar el decomiso, o decretarlo parcialmente.

⁶⁴⁹ Artículo 213. Intervenciones telefónicas.

Procederá la interceptación de comunicaciones telefónicas o de otras formas de telecomunicaciones cuando se trate de:

1. Terrorismo;
2. Secuestro extorsivo;
3. Tráfico de órganos y de personas con propósitos sexuales;
4. Delitos relacionados con estupefacientes, psicotrópicos y otras sustancias controladas;
5. Legitimación de capitales o lavado de dinero y activos; y
6. Tráfico internacional de armas, explosivos y vehículos robados.

La interceptación de telecomunicaciones sólo procede a solicitud expresa y fundada del Fiscal General de la República o del Director General de la Policía Nacional, quienes deben hacer constar que han valorados los antecedentes y que la intervención se justifica en su criterio, e indicarán también la duración por la que solicita la medida, así como las personas que tendrán acceso a las comunicaciones.

El juez determinará la procedencia de la medida, por resolución fundada, y señalará en forma expresa la fecha en que debe cesar la interceptación, la cual no puede durar más de treinta días, los que se podrán prorrogar por una sola vez por un plazo igual.

Al proceso solo se introducirán las grabaciones de aquellas conversaciones o parte de ellas, que, a solicitud del Fiscal, se estimen útiles para el descubrimiento de la verdad. No obstante, el acusado podrá solicitar que se incluyan otras conversaciones y otras partes que han sido excluidas, cuando lo considere apropiado para su defensa. El juez ordenará la destrucción de las secciones no pertinentes al proceso.

Salvo su uso para los fines del proceso, todas las personas que tengan acceso a las conversaciones deberán guardar absoluta reserva de su contenido. Los funcionarios públicos que violaren esta disposición podrán ser destituidos de sus cargos, sin perjuicio de las responsabilidades civiles y penales que correspondan.

organs, drug trafficking, money laundering, and trafficking of international arms, explosives, and stolen vehicles. It must be authorized by a judge, and cannot last more than 30 days, renewable only once.

The interception of electronic communications is specifically regulated by Article 214, which does not establish a maximum time for interception.⁶⁵⁰ This interception is possible for only the same offenses indicated above in Article 213, which does not include child pornography offenses. It must be requested to a competent judge, indicating the reasons why it should be authorized, and the type of information expected to be preserved.

No data retention provisions, aside from the interception provisions, could be found.

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

No, the law does not require the identification of users of public computers.

18 – Has a national plan to combat violence against children

Article 56 of the CNA determines that the State shall have a national policy of comprehensive protection for children and adolescents.

Article 62 creates the National Council of Comprehensive Care and Protection to Childhood and Adolescence (Consejo Nacional de Atención y Protección Integral a la Niñez y la Adolescencia).

19 – International instruments ratified

- The Convention on the Rights of the Child, signed on February 6, 1990 and ratified on October 5, 1990
- The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, ratified on December 2, 2004
- The ILO Minimum Age Convention, ratified on November 2, 1981
- The ILO Worst Forms of Child Labor Convention, ratified on November 6, 2000

20 – Age of criminal liability

The age of criminal liability is 18 under Article 33 of the Penal Code.⁶⁵¹ The juvenile system of justice establishes measures for adolescents between 13 and 18 years of age.

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

Article 175 of the Penal Code addresses the use of ICTs to commit crimes against children.

⁶⁵⁰ Artículo 214. Interceptación de comunicaciones escritas, telegráficas y electrónicas.

Procederá la interceptación de comunicaciones escritas, telegráficas y electrónicas, cuando se trate de los delitos a los que se refiere el artículo anterior, previa solicitud ante juez competente con clara indicación de las razones que la justifican y de la información que se espera encontrar en ellas. La resolución judicial mediante la cual se autoriza esta disposición deberá ser debidamente motivada.

La apertura de la comunicación será realizada por el juez y se incorporará a la investigación aquellos contenidos relacionados con el delito.

⁶⁵¹ Artículo 33. Minoría de Edad

Cuando una persona menor de dieciocho años cometa un delito o falta, no se le aplicará ninguna de las penas, medidas o consecuencias accesorias previstas en este Código; pero si es un adolescente, podrá ser responsable con arreglo a lo dispuesto en el libro tercero.

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of sex tourism with children

Trafficking in persons with the intent of sexual exploitation is punished in Article 182 of the Penal Code with seven to 10 years of imprisonment, and with 10 to 12 years of imprisonment when the victim is less than 18 years of age.⁶⁵²

Article 177 of the Penal Code criminalizes the conduct of promoting the country as a sexual tourist destination, but does not mention use of the Internet.⁶⁵³

23 – Has specific legislation on online grooming considering it a standalone offense

No, online grooming is not criminalized in the law.

24 – Has a clear definition of online grooming

Does not apply.

25 – Age of potential victims of online grooming

Does not apply.

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

Does not apply.

27 – Criminalizes showing pornography to a child as a standalone offense, or considers it as an aspect of grooming

Under Article 175 of the Penal Code of Nicaragua, the possession of pornographic material with the intent of sexual exploitation is a crime.⁶⁵⁴ It is important to note that this Article is specifically related to child pornography. Since the possession of pornographic material with the intent to sexually exploit is criminalized, it can be inferred that the showing of pornography to a child is also a crime. However, it is unclear whether this is considered an aspect of grooming.

⁶⁵² Artículo 182. Trata de personas con fines de esclavitud, explotación sexual o adopción

Quien en ejercicio de poder o valiéndose de amenazas, ofrecimientos, engaños, promueva, facilite, induzca o ejecute la captación, reclutamiento, contratación, transporte, traslado, retención, acogida o recepción de personas, con fines de esclavitud, explotación sexual o adopción, para que la misma sea ejercida dentro o fuera del territorio nacional, aun con el consentimiento de la víctima será sancionado con pena de prisión de siete a diez años.

Si la víctima es una persona menor de dieciocho años, o persona con discapacidad, o el hecho fuere cometido por algún familiar, tutor o encargado de la educación, guarda o custodia, guía espiritual o comparta permanentemente el hogar familiar de la víctima, o medie una relación de confianza, la pena será de diez a doce años de prisión.

Quien venda, ofrezca, entregue, transfiera o acepte a una niña, niño, o adolescente en la que medie o no, pago o recompensa con fines de explotación sexual, será sancionado con pena de ocho a doce años de prisión. Igual pena se aplicará a quien oferte, posea, adquiera o acepte la venta de una niña, niño o adolescente con fines de adopción ilegítima

⁶⁵³ Artículo 177. Promoción del Turismo con fines de explotación sexual

Los que dentro o fuera del territorio nacional, en forma individual o a través de operadores turísticos, campañas publicitarias, reproducción de textos e imágenes, promuevan al país como un atractivo o destino turístico sexual, utilizando personas menores de dieciocho años, serán sancionados con la pena de cinco a siete años de prisión y de ciento cincuenta a quinientos días multa.

⁶⁵⁴ Artículo 175. (...)

Quien con fines de explotación sexual, posea material pornográfico o erótico en los términos expresado en el párrafo anterior, será castigado con la pena de uno a dos años de prisión.

28 – Has specific legislation on cyberbullying

No, cyberbullying is not addressed in the law.

29 – Has specific legislation concerning sexting

No, sexting is not addressed in the law.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

There are two levels of penalties for offenses related to the exploitation of children in Nicaragua. The Penal Code punishes offenses related to production at the same level for offenses related to the distribution of child abuse images. It establishes a lower penalty for the possession of this kind of material.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

The Penal Code of Nicaragua establishes aggravated penalties for offenses committed by a member of the child’s family, by a person cohabiting with the child, and by a person who has abused a recognized position of trust or authority (Article 176, item d, of the Penal Code).⁶⁵⁵

There is no provision related to the sexual exploitation of children that establishes a heightened penalty when the offense is committed by several persons acting together.

Nicaragua’s legislation does establish as an aggravating circumstance, offenses committed within the framework of a criminal organization.

⁶⁵⁵ Artículo 176. Agravantes específicas en caso de explotación sexual, pornografía y acto sexual con adolescentes mediante pago

La pena será de seis a ocho años de prisión cuando:

(...)

d) El autor cometa el delito prevariándose de una relación de superioridad, autoridad, parentesco, dependencia o confianza con la víctima, o de compartir permanentemente el hogar familiar con ella.

14. PANAMA – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 184 of the Penal Code
2 – Has a clear definition of child pornography	Yes, Article 184 of the Penal Code
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 184 of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, Article 185 of the Penal Code – voluntarily acquisition
6 – Criminalizes virtual images and sexually exploitative representations of children	Yes, Article 184 of the Penal Code
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No, but sanctions can be imposed - Article 51 of the Penal Code
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Yes, Article 20, item 4 of the Penal Code
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, Article 20 of Penal Code
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Articles 50, 68 and 75 of Penal Code
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Articles 50, 68 and 75 of Penal Code
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 189 of the Penal Code, criminalizes failure to report
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes, Line 147
16 – Creates data retention or data preservation policies or provisions	Only preservation provisions – Art. 311 of the Criminal Procedure Code
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No
18 – Has a national plan to combat violence against children	No
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years of age
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes, Articles 184 and 187 of the Penal Code
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Trafficking with intent to produce child pornography is a crime, as well as advertising of sex tourism
23 – Has specific legislation on online grooming, considering it a standalone offense	Yes, Article 187 of the Penal Code
24 – Has a clear definition of online grooming	Yes, Article 187 of the Penal Code
25 – Considers everyone under 18 as a potential victim of online grooming	Yes, Article 187 of the Penal Code
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Only when there is an intent of sexual contact
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	Yes, Article 188 of the Penal Code
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	Two levels – 1) production and distribution; and 2) possession
31 – Law establishes aggravating circumstances for child abuse offenses	Yes, only offenses committed within the framework of a criminal organization

PANAMA – COUNTRY REPORT

Explored by the Spanish, Panama joined the union of Colombia, Ecuador, and Venezuela, the Republic of Gran Colombia, which was dissolved in 1830. At this time Panama remained a part of Colombia. With support from the U.S., Panama seceded from Colombia in 1903 and signed a treaty with the U.S. allowing for the construction of a canal, and granting U.S. sovereignty over a strip of land on either side of the structure (the Panama Canal zone).⁶⁵⁶

Panama has a dollar-based economy with one of the fastest growing economies in Latin America, and dedicates substantial funding to social programs.⁶⁵⁷ Yet, poverty and inequality remain prevalent. Panama has the second worst income distribution in Latin America.

The Republic of Panama is a constitutional democracy divided into nine provinces. It has a civil law system, with judicial review of legislative acts by the Supreme Court of Justice.

The legislative branch is a unicameral National Assembly (Article 146 of the Panamanian Constitution).⁶⁵⁸ The highest court is the Supreme Court of Justice (Article 202 of the Constitution).⁶⁵⁹

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

Panama has an impressive legal framework for the protection of children. Article 110, item 3 of the Constitution establishes that the State has the duty to protect the health of children and adolescents, guaranteeing that they have comprehensive care during their development.⁶⁶⁰ Article 5 of the Penal Code proscribes that all norms and principles related to human rights that are in the Constitution, or in International Treaties ratified by Panama, are a part of the Code.

⁶⁵⁶ Panama, *The World Factbook*, CIA, www.cia.gov/library/publications/the-world-factbook/geos/pm.html (last visited Oct. 13, 2014).

⁶⁵⁷ *Id.*

⁶⁵⁸ Artículo 146. El Órgano Legislativo estará constituido por una corporación denominada Asamblea Nacional, cuyos miembros serán elegidos mediante postulación partidista o por libre postulación, mediante votación popular directa, conforme esta Constitución lo establece.

Los requisitos y procedimientos que se establezcan en la Ley para formalizar la libre postulación, serán equivalentes y proporcionales a los que se exijan para la inscripción de los partidos políticos y para la presentación de las postulaciones partidistas en lo que sean aplicables.

⁶⁵⁹ Artículo 202. El Órgano Judicial está constituido por la Corte Suprema de Justicia, los tribunales y los juzgados que la Ley establezca. La administración de justicia también podrá ser ejercida por la jurisdicción arbitral conforme lo determine la Ley. Los tribunales arbitrales podrán conocer y decidir por sí mismos acerca de su propia competencia.

⁶⁶⁰ Artículo 110. En materia de salud, corresponde primordialmente al Estado el desarrollo de las siguientes actividades, integrando las funciones de prevención, curación y rehabilitación:

(...)

3. Proteger la salud de la madre, del niño y del adolescente, garantizando una atención integral durante el proceso de gestación, lactancia, crecimiento y desarrollo en la niñez y adolescencia.

4. Combatir las enfermedades transmisibles mediante el saneamiento ambiental, el desarrollo de la disponibilidad de agua potable y adoptar medidas de inmunización, profilaxis y tratamiento, proporcionadas colectiva o individualmente, a toda la población.

(...)

The legislation that regulates the system of criminal liability of adolescents (Law 40/1999) specifically proscribes that it has to be interpreted and applied according to the CRC (Article 12).⁶⁶¹

The Penal Code has been amended several times and currently provides appropriate legislation for the punishment of the production, possession, and commercialization of child abuse images.

The production and commercialization of child pornography is criminalized in Article 184 of the Penal Code, which punishes the conduct of manufacturing, developing by any means or producing pornographic material, as well as the offering, trading, displaying, publishing, advertising, disseminating or distributing child abuse images.⁶⁶² This Article specifically mentions the dissemination of the material through Internet or any mass media, national or international. It clearly defines child pornography as the presentation or virtual representation of one or several minors in sexual activities, real or simulated. However, it is not wholly aligned with the OPSC because it does not include the representation of sexual parts of a child for primarily sexual purposes.

The penalty is enhanced if the victim is under 14 years old, if the offender belongs to a criminal organization, national or international, and if the act is committed with the purpose of obtaining profit. Victims are persons under 18 (considered minors).

Article 187 punishes those who acquiesce to or allow the participation of a minor in pornographic acts, whether or not photographed, filmed or recorded by any means, to third parties or alone, with another person or other minors or adults, of the same or opposite sex, or with animals. The second part of this Article is specifically related to the use of e-mails or web sites, or any other mass media to promote online sex with minors, offer sexual activities with minors, or make minors simulate sexual acts, by telephone or in person.⁶⁶³

4 – Criminalizes accessing or downloading child pornography images

Panama does not have specific legislation on accessing or downloading child pornography.

5 – Criminalizes simple possession of child pornography

Simple possession is a crime under Article 185 of the Penal Code.⁶⁶⁴ However, the Article requires that the person has voluntarily acquired the child abuse images.

⁶⁶¹ Artículo 12. Criterios interpretativos. Esta Ley deberá ser interpretada y aplicada con fundamento en la Convención de los Derechos del Niño, aprobada por la Ley 15 de 1990, de forma que se garanticen los derechos fundamentales que reconocen la Constitución Política y los tratados, convenios, pactos y demás instrumentos internacionales normativos, suscritos por la República de Panamá.

⁶⁶² Artículo 184. Quien fabrique, elabore por cualquier medio o produzca material pornográfico o lo ofrezca, comercie, exhiba, publique, publicite, difunda o distribuya a través de Internet o de cualquier medio masivo de comunicación o información nacional o internacional, presentando o representando virtualmente a una o varias personas menores de edad en actividades de carácter sexual, sean reales o simuladas, será sancionado con prisión de cinco a diez años.

La pena será de diez a quince años de prisión si la víctima es una persona menor de catorce años, si el autor pertenece a una organización criminal nacional o internacional o si el acto se realiza con ánimo de lucro.

⁶⁶³ Artículo 187. Quien utilice, consienta o permita que una persona menor de edad participe en actos de exhibicionismo obsceno o en pornografía, sea o no fotografiada, filmada o grabada por cualquier medio, ante terceros o a solas, con otra persona u otras personas menores de edad o adultos, del mismo o de distinto sexo o con animales, será sancionado con prisión de seis a ocho años.

Igual sanción será aplicada a quien se valga de correo electrónico, redes globales de información o cualquier otro medio de comunicación individual o masiva, para incitar o promover el sexo en línea en personas menores de edad o para ofrecer sus servicios sexuales o hacer que lo simulen por este conducto, por teléfono o personalmente.

⁶⁶⁴ Artículo 185. Quien posea para su propio uso material pornográfico que contenga la imagen, real o simulada, de personas menores de edad, voluntariamente adquirido, será sancionado con pena de prisión de tres a cinco años.

6 – Criminalizes virtual images or sexually exploitative representations of children

Article 184 of the Penal Code specifically mentions the presentation or virtual representation of one or several minors in sexual activities, real or simulated.

7 – Addresses the criminal liability of children involved in pornography

No, the legislation does not address the criminal liability of children.

8 – Establishes the criminal liability of legal persons for child pornography offenses

Article 51 of the Penal Code establishes criminal liability of legal persons generally to all crimes, affirming that when a legal person is used or created to commit a crime, whenever benefited by it, a sanction will be applicable.⁶⁶⁵

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

The Panama Penal Code does not have a clear provision establishing the active personality principle, but Article 20, item 4 of the Penal Code proscribes the jurisdiction of Panamanian Courts when a request of extradition of a national or a foreigner is denied.⁶⁶⁶

It should be noted that there is a general rule allowing the application of the universal jurisdiction principle for some specific crimes, among which crimes against children are not included (Article 19 of the Penal Code⁶⁶⁷). Article 21 of the Penal Code determines the application of Panamanian laws to crimes committed abroad, when international treaties have accorded extraterritorial jurisdiction to Panama.⁶⁶⁸ However, the CRC does provide for extraterritorial jurisdiction and instead recommends reforms in domestic legislation in order to allow the punishment of a national of the country, or a person who has habitual residence in the country when the person commits a crime abroad.

⁶⁶⁵ Artículo 51. Cuando una persona jurídica sea usada o creada para cometer delito, siempre que sea beneficiada por él, se le aplicará cualesquiera de las siguientes sanciones:

1. Cancelación o suspensión de la licencia o registro por un término no superior a cinco años.
2. Multa no inferior a cinco mil balboas (B/.5,000.00) ni superior al doble de la lesión o al beneficio patrimonial.
3. Pérdida total o parcial de los beneficios fiscales.
4. Inhabilitación para contratar con el Estado, directa o indirectamente, por un término no superior a cinco años, la cual será impuesta junto con cualquiera de las anteriores
5. Disolución de la sociedad.

⁶⁶⁶ Article 20. También se aplicará la ley penal panameña a los delitos cometidos en el extranjero cuando:

(...)

4. Una autoridad nacional haya negado la extradición de un panameño o de un extranjero.

⁶⁶⁷ Artículo 19. Es aplicable la ley penal panameña, aunque se hayan cometido en el exterior, a los delitos contra la Humanidad, contra la Personalidad Jurídica del Estado, contra la Salud Pública, contra la Economía Nacional y contra la Administración Pública, así como a los delitos de desaparición forzada de personas, trata de personas, y falsedad de documentos de crédito público panameño, de documentos, sellos y timbres oficiales, de la moneda panameña y demás monedas de curso legal en el país, siempre que, en este último caso, se hayan introducido o pretendido introducir al territorio nacional.

⁶⁶⁸ Artículo 21. Independientemente de las disposiciones vigentes en el lugar de la comisión del delito y de la nacionalidad del imputado, se aplicará la ley penal panameña a quienes cometan hechos punibles previstos en los tratados internacionales vigentes en la República de Panamá, siempre que estos le concedan competencia territorial.

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

Article 20 of the Penal Code establishes Panamanian jurisdiction over crimes committed abroad, when committed against Panamanians (not only children).⁶⁶⁹

11 – Establishes forfeiture of assets used to commit or facilitate offenses; and

12 – Establishes forfeiture of proceeds derived from such offenses

Articles 50, 68, and 75 of the Penal Code proscribe the forfeiture of assets as an accessory penalty.⁶⁷⁰

13 – Establishes mandatory reporting requirements for professionals who work with children

The Penal Code specifically regulates this subject, criminalizing a failure to report offenses against children by anyone who comes know to know of its existence as a result of their work or profession. The penalty ranges from six months to two years of imprisonment (Article 189 of the Penal Code).⁶⁷¹

14 – Requires Internet Service Providers to report child pornography

There is currently no legislation requiring reporting by Internet Service Providers.

15 – Has a support telephone or online hotline to enable the public to report child abuse

Line 147 is used to report any kind of violence against children and is run by the Department of Social Development. It was created by Law 29 on August 1, 2005.

16 – Creates data retention and preservation policies or provisions

There is currently no data retention policy or law.

⁶⁶⁹ Artículo 20. También se aplicará la ley penal panameña a los delitos cometidos en el extranjero, cuando:

1. Produzcan o deban producir sus resultados en el territorio panameño.
2. Sean cometidos en perjuicio de un panameño o sus derechos.
3. Sean cometidos por agentes diplomáticos, funcionarios o empleados panameños que no hubieran sido juzgados en el lugar de su comisión por razones de inmunidad diplomática.
4. Una autoridad nacional haya negado la extradición de un panameño o de un extranjero.

⁶⁷⁰ Artículo 50. Las penas que establece este Código son:

(...)

3. Accesorias:

(...)

d) Comiso.

(...)

Artículo 68. La pena accesoria es consecuencia de la pena principal. En su aplicación, el juzgador deberá seleccionar entre las penas accesorias previstas en el artículo 50 de este Código la que, según la gravedad o naturaleza del delito, tenga relación directa con el delito o contribuya a evitar el peligro para los derechos de las víctimas.

Es obligatoria la aplicación de la pena accesoria, según las reglas del párrafo anterior, aunque no esté prevista en el delito de que se trate.

Artículo 75. El comiso consiste en la adjudicación de los bienes, activos, valores e instrumentos utilizados o provenientes de la comisión del delito. Se excluyen los pertenecientes a terceros no responsables del hecho.

⁶⁷¹ Artículo 189. Quien tuviera conocimiento de la utilización de personas menores de edad en la ejecución de cualquiera de los delitos contemplados en este Capítulo, sea que este conocimiento lo haya obtenido por razón de su oficio, cargo, negocio o profesión, o por cualquiera otra fuente y omita denunciarlo ante las autoridades competentes será sancionado con prisión de seis meses a dos años.

En caso de no probarse la comisión del delito, el denunciante quedará exento de cualquier responsabilidad legal por razón de la denuncia de que trata este artículo, salvo los casos de denuncia manifiestamente falsa.

Article 311 of the Criminal Procedural Code authorizes the interception or recording of any kind of personal communication, with prior judicial order.⁶⁷² It is an exceptional measure that must be requested by a prosecutor and authorized by a trial judge. It must not exceed 20 days, and can be extended only if there is a clear reason for the request.

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

There is currently no legislation concerning the identification of the users of public computers in Panama.

18 – Has a national plan to combat violence against children

Panama has a National Plan of Integral Action for Education in Human Rights; however, there is currently no specific plan to combat violence against children. In 2011, the United Nations Committee on The Rights of the Child strongly reiterated that the State Party should “adopt a comprehensive national policy and related plans to promote, protect and fulfill the rights of all children through their life cycle, as an integral part of the National Development Plan.”⁶⁷³

19 – International instruments ratified

- The Convention on the Rights of the Child, signed on January 26, 1990 and ratified on December 12, 1990
- The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, ratified on February 9, 2001
- The ILO Minimum Age Convention, ratified on October 31, 2000
- The ILO Worst Forms of Child Labor Convention, ratified on October 31, 2000

20 – Age of criminal liability

Under Article 7 of Law 40/1999, modified by Article 2 of Law 6/2010, offenses committed by children between 12 and 18 years of age are subject to a juvenile system of justice. Criminal liability begins at 18 years of age.⁶⁷⁴

⁶⁷² Artículo 311. Interceptación de comunicaciones. La interceptación o grabación por cualquier medio técnico de otras formas de comunicación personal requieren de autorización judicial. A solicitud del Fiscal, el Juez de Garantías podrá, atendiendo a la naturaleza del caso, decidir si autoriza o no la grabación de las conversaciones e interceptación de comunicaciones cibernéticas, seguimientos satelitales, vigilancia electrónica y comunicaciones telefónicas para acreditar el hecho punible y la vinculación de determinada persona.

La intervención de las comunicaciones tendrá carácter excepcional.

En caso de que se autorice lo pedido, el juzgador deberá señalar un término que no exceda de los veinte días y solo podrá ser prorrogado a petición del Ministerio Público, que deberá explicar los motivos que justifican la solicitud.

A quien se le encomiende interceptar y grabar la comunicación o quien la escriba tendrá la obligación de guardar secreto sobre su contenido, salvo que, citado como testigo en el mismo procedimiento, se le requiera responder sobre ella.

El material recabado en la diligencia y conservado en soporte digital deberá permanecer guardado bajo una cadena de custodia.

Las transcripciones de las grabaciones e informaciones receptadas constarán en un acta en la que solo se debe incorporar lo que guarde relación con el caso investigado, la que será firmada por el Fiscal.

⁶⁷³ UN COMM. ON THE RIGHTS OF CHILD, *Concluding observations on the combined third and fourth periodic reports of Panama*, adopted by the Committee at its fifty-eighth session (19 September – 7 October 2011), U.N. Doc. CRC/C/PAN/CO/3-4 (Oct. 6, 2011), at 3, available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.PAN.CO.3-4.doc> (last visited Oct. 30, 2015).

⁶⁷⁴ Artículo 7. Ámbito subjetivo de aplicación según los sujetos. Esta ley es aplicable a todas las personas que hayan cumplido los doce años y no hayan cumplido dieciocho años de edad, al momento de cometer el delito que se les imputa.

Igualmente se aplica a los procesados que cumplan los dieciocho años durante los tramites del proceso, así como a las personas mayores de edad acusadas por actos cometidos luego de haber cumplido los doce años y antes de cumplir los dieciocho años.

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

Article 184 of the Penal Code specifically addresses the use of ICTs to commit crimes against children related to child pornography.⁶⁷⁵ Article 187 of the Penal Code is related to online grooming and criminalizes the conduct of using e-mails or the web to promote “virtual sex” with children.⁶⁷⁶

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of sex tourism with children

Panama has specific legislation concerning trafficking with the intent of producing child pornography. Article 181 of the Penal Code specifically criminalizes human trafficking with sexual intent, increasing the penalty when the victim is a minor.⁶⁷⁷ Article 183 proscribes that whoever promotes, encourages, facilitates or executes the recruitment, transportation, transfer, harboring or reception of minors, inside or outside the country, for sexual exploitation or to subject them to sexual servitude, shall be punished with imprisonment of eight to 10 years.⁶⁷⁸ Article 207 criminalizes the conduct of selling, offering, giving, transferring or accepting a child for money or reward, and increases the penalty when these acts are intended to sexually exploit the victim.⁶⁷⁹

⁶⁷⁵ Artículo 184. Quien fabrique, elabore por cualquier medio o produzca material pornográfico o lo ofrezca, comercie, exhiba, publique, publicite, difunda o distribuya a través de Internet o de cualquier medio masivo de comunicación o información nacional o internacional, presentando o representando virtualmente a una o varias personas menores de edad en actividades de carácter sexual, sean reales o simuladas, será sancionado con prisión de cinco a diez años.

La pena será de diez a quince años de prisión si la víctima es una persona menor de catorce años, si el autor pertenece a una organización criminal nacional o internacional o si el acto se realiza con ánimo de lucro.

⁶⁷⁶ Artículo 187. Quien utilice, consienta o permita que una persona menor de edad participe en actos de exhibicionismo obsceno o en pornografía, sea o no fotografiada, filmada o grabada por cualquier medio, ante terceros o a solas, con otra persona u otras personas menores de edad o adultos, del mismo o de distinto sexo o con animales, será sancionado con prisión de seis a ocho años.

Igual sanción será aplicada a quien se valga de correo electrónico, redes globales de información o cualquier otro medio de comunicación individual o masiva, para incitar o promover el sexo en línea en personas menores de edad o para ofrecer sus servicios sexuales o hacer que lo simulen por este conducto, por teléfono o personalmente.

⁶⁷⁷ Artículo 181. Quien facilite, promueva, reclute u organice de cualquier forma la entrada o salida del país o el desplazamiento dentro del territorio nacional de una persona de cualquier sexo para someterla a actividad sexual remunerada no autorizada o a servidumbre sexual será sancionado con prisión de cuatro a seis años.

La sanción aumentará en la mitad cuando:

La víctima sea mayor de catorce años y menor de dieciocho.

La víctima sea utilizada en actos de exhibicionismo, a través de medios fotográficos, filmadoras o grabaciones obscenas.

El hecho sea ejecutado por medio de engaño, coacción, sustracción o retención de documentos migratorios o de identificación personal, o la contratación en condiciones de vulnerabilidad.

El hecho sea cometido por pariente cercano, tutor o quien tenga a su cargo la guarda, crianza, educación o instrucción de la víctima.

5. Alguna de las conductas anteriores se realice en presencia de terceras personas.

6. El agente se organiza para ofrecer esos servicios como explotación sexual comercial.

⁶⁷⁸ Artículo 183. Quién promueva, favorezca, facilite o ejecute la captación, el transporte, el traslado, la acogida o la recepción de personas menores de edad, dentro o fuera del territorio nacional con fines de explotación sexual o para someterlas a servidumbre sexual será sancionado con prisión de ocho a diez años.

⁶⁷⁹ Artículo 207. Quien venda, ofrezca, entregue, transfiera o acepte a un niño, niña o adolescente a cambio de remuneración, pago o recompensa será sancionado con pena de prisión de cinco a diez años.

Igual pena se aplicará a quien oferte, posea, consienta, adquiera o induzca la venta de una niña, niño o adolescente con fines de adopción ilegítima, en violación a los instrumentos jurídicos aplicables en materia de adopción. Cuando la venta, ofrecimiento, entrega, transferencia o aceptación de un niño, niña o adolescente tenga como fin la explotación sexual, la extracción de sus órganos, el trabajo forzado o la servidumbre, la pena se aumentará de un tercio a la mitad del máximo.

The advertising of sex tourism with children is criminalized in Article 190 of the Penal Code.⁶⁸⁰ It proscribes that whoever promotes, directs, organizes, publishes, invites, facilitates or coordinates sex tourism with minors through any communication means shall be punished with imprisonment of 8 to 10 years. The penalty is increased by half when the victim is less than 14 years old. The legislation also punishes the owners, landlords, or managers of establishments where these sorts of acts are practiced.⁶⁸¹

There is an important provision in the Penal Code that enhances the penalties for crimes related to child pornography when committed by an organized group of persons.⁶⁸²

23 – Has specific legislation on online grooming considering it a standalone offense

Article 187 of the Penal Code criminalizes the use of the Internet or any associated technology to incite or promote sex with minors, or to stimulate it through computers, telephones or in person.⁶⁸³ This is similar to online grooming.

Article 178 of the Penal Code establishes a penalty for other similar conduct committed offline.⁶⁸⁴ It proscribes that whoever, for sexual motivations, harasses another person, will be punished with imprisonment from one to three years, a penalty that is increased when the victim is a minor.

⁶⁸⁰ Artículo 190. Quien promueva, dirija, organice, publicite, invite, facilite o gestione por cualquier medio de comunicación individual o de masas, turismo sexual local o internacional, que implique el reclutamiento de una persona mayor de catorce años y menor de dieciocho, para su explotación sexual, aunque esta no llegara a ejecutarse o consumarse, será sancionado con prisión de ocho a diez años.

La pena de prisión será aumentada hasta la mitad del máximo si la víctima es una persona con discapacidad o que no haya cumplido catorce años.

⁶⁸¹ Artículo 191. El propietario, arrendador o administrador de un establecimiento o lugar que lo destine a la realización de algunos de los delitos tipificados en este Capítulo será sancionado con prisión de diez a quince años

⁶⁸² Artículo 329. Cuando tres o más personas se concierten con el propósito de cometer delitos, cada una de ella será sancionada por ese solo hecho con prisión de tres a cinco años.

La pena será de seis a doce años de prisión, si la asociación es para cometer homicidio doloso, asesinato, secuestro, extorsión, robo, hurto de autos y accesorios, delitos relacionados con el tráfico de drogas, blanqueo de capitales, delitos financieros, violación sexual, pornografía infantil, trata de personas, terrorismo o tráfico de armas.

Artículo 330. Quienes constituyan o formen parte de una de pandilla serán sancionados con pena de prisión de cuatro a seis años.

La pena será de siete a catorce años de prisión. si la pandilla es para cometer homicidio, secuestro, extorsión, robo, hurto de autos y accesorios, delitos relacionados con el tráfico de drogas, blanqueo de capitales, delitos financieros, violación sexual, trata de personas, pornografía infantil, terrorismo o tráfico de armas.

Artículo 448. Quien viole las prescripciones sobre alojamiento de mujeres o familias o sobreprotección especial de mujeres o niños establecidas en los tratados internacionales en los que la República de Panamá sea parte y, en particular, reclute o aliste a menores de dieciocho años o los utilice para participar activamente en las hostilidades; induzca o fuerce a la prostitución o a cualquier otra forma de atentado al pudor y a la libertad sexual; induzca o cause embarazo forzado o esterilización forzada; atente contra la inviolabilidad o retenga indebidamente a parlamentarios o a cualquiera de las personas que los acompañen, a personal de la Potencia Protectora o de su sustituto, o a los miembros de la Comisión Internacional de Encuesta; o despoje de sus efectos a un cadáver, herido, enfermo, náufrago, prisionero de guerra o persona civil internada será sancionado con pena de diez a doce años de prisión.

⁶⁸³ Artículo 187. Quien utilice, consienta o permita que una persona menor de edad participe en actos de exhibicionismo obsceno o en pornografía, sea o no fotografiada, filmada o grabada por cualquier medio, ante terceros o a solas, con otra persona u otras personas menores de edad o adultos, del mismo o de distinto sexo o con animales, será sancionado con prisión de seis a ocho años.

Igual sanción será aplicada a quien se valga de correo electrónico, redes globales de información o cualquier otro medio de comunicación individual o masiva, para incitar o promover el sexo en línea en personas menores de edad o para ofrecer sus servicios sexuales o hacer que lo simulen por este conducto, por teléfono o personalmente.

⁶⁸⁴ Artículo 178. Quien por motivaciones sexuales hostigue a una persona de uno u otro sexo será sancionado con prisión de uno a tres años o su equivalente en días-multa o arresto de fines de semana.

Se agravará la pena de dos a cuatro años de prisión, en los siguientes casos: 1. Si la víctima no hubiera cumplido dieciocho años de edad. 2. Si el autor cometiera el hecho abusando de suposición.

24 – Has a clear definition of online grooming

The definition in Article 187 of the Penal Code can be considered a sufficient definition of online grooming as it includes the use of emails, global information nets, or any other means to incite or promote sex online with minors, or make them simulate it through phone or in person.

25 – Age of potential victims of online grooming

Article 187 refers to minors, meaning all persons under 18 can be considered a potential victim of online grooming.

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

The legislation criminalizes online grooming when there is the intent of sexual contact.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense, or considers it an aspect of grooming

Panamanian legislation considers showing porn to a child a standalone offense. Article 188 of the Penal Code proscribes that whoever exhibits pornographic material or facilitates the access to pornographic shows to minors will be punished with imprisonment of four to six years.⁶⁸⁵ The same article also criminalizes the act of showing porn to persons with disabilities, and increases the penalty to five to eight years when the perpetrator is one of the parents, or a guardian of the victim.

28 – Has specific legislation on cyberbullying

The Panamanian legislation does not have a specific provision on cyberbullying, which is considered as the use of information and communication technologies to support deliberate, repeated, and hostile behavior by an individual or group, intended to harm others.⁶⁸⁶ However, when reading Article 195⁶⁸⁷ in conjunction with Articles 193⁶⁸⁸ and 194⁶⁸⁹ of the Penal Code, the penalty is enhanced when the crime committed online offends the dignity of a person.

29 – Has specific legislation concerning sexting

There is no currently legislation concerning sexting.

⁶⁸⁵ Artículo 188. Quien exhiba material pornográfico o facilite el acceso a espectáculos pornográficos a personas menores de edad, incapaces o con discapacidad que no les permita resistir será sancionado con prisión de cuatro a seis años.

Si el autor de la conducta descrita en el párrafo anterior es el padre, la madre, el tutor, el curador o el encargado, a cualquier título, de la víctima la sanción será de cinco a ocho años y perderá los derechos de la patria potestad o el derecho que le haya permitido, según sea el caso, tenerla a su cargo hasta la fecha de ocurrencia del delito.

⁶⁸⁶ Sameer Hinduja, *Cyberbullying: Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CENTER, Oct. 2014, <http://cyberbullying.org/Cyberbullying-Identification-Prevention-Response.pdf> (last visited Nov. 9, 2015).

⁶⁸⁷ Artículo 195. Cuando alguno de los delitos anteriores se cometa a través de un medio de comunicación social oral o escrito o utilizando un sistema informático, será sancionado en caso de injuria con prisión de seis a doce meses o su equivalente en días-multa, y tratándose de calumnia, con prisión de doce a dieciocho meses o su equivalente en días-multa.

⁶⁸⁸ Artículo 193. Quien ofenda la dignidad, la honra o el decoro de una persona mediante escrito o por cualquier forma será sancionado con sesenta a ciento veinte días-multa.

⁶⁸⁹ Artículo 194. Quien atribuya falsamente a una persona la comisión de un hecho punible será sancionado con noventa a ciento ochenta días-multa.

30 – Existence of different levels of penalties for offenses related to the production, distribution or possession of child pornography

There are two levels of penalties for offenses related to the exploitation of children in Panama. The Penal Code punishes offenses related to production at the same level as offenses related to the distribution of child abuse images, and establishes a lower penalty for the possession of this kind of material.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

Panama’s legislation does not establish aggravated penalties for situations that involve personal relationships amongst the offender and the victim (member of the child’s family, person cohabiting with the child, or a person who has abused a recognized position of trust or authority).

No legal provisions could be found related to the sexual exploitation of children that establish a heightened penalty when the offense is committed by several persons acting together.

Panamanian legislation does establish as an aggravating circumstance, when offenses are committed within the framework of a criminal organization (Article 180 of the Penal Code).

15. PARAGUAY – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 140 of the Penal Code
2 – Has a clear definition of child pornography	Yes, Article 140 of the Penal Code
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Article 140 of the Penal Code
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, Article 140 of the Penal Code
6 – Criminalizes virtual images and sexually exploitative representations of children	No
7 – Addresses the criminal liability of children involved in pornography	Partially, Item 6 of Article 135
8 – Establishes criminal liability of legal persons for child pornography offenses	No
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Only for the crime of trafficking with the intent of committing child pornography (item 7 of Article 8 of the Penal Code). Indirectly, also, based on the universal jurisdiction principle
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Indirectly – Universal Jurisdiction Principle
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Partly, Article 86 of the Penal Code – when they offer danger or can be used to commit another crimes
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Articles 90, 91, 92, 93, 94 of the Penal Code
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 5 of the CNA, but it does not establish a penalty
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes, the Fono Ayuda – 559-200
16 – Creates data retention or data preservation policies or provisions	Only preservation provisions – Criminal Procedure Code
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No
18 – Has a national plan to combat violence against children	Yes, National Plan for the Prevention and Elimination of Abuse and Sexual Exploitation – 2008/2013
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years old
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	No
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Trafficking with sexual purposes – Article 129b of the Penal Code
23 – Has specific legislation on online grooming, considering it a standalone offense	Indirectly – corruption of children – Article 135 of the Penal Code
24 – Has a clear definition of online grooming	No
25 – Considers everyone under 18 as a potential victim of online grooming	No
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	No
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	Yes, Article 135 of the Penal Code
28 – Has specific legislation on cyberbullying	Indirectly – Article 143 of the Penal Code
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	No, only one level of penalty
31 – Law establishes aggravating circumstances	Yes, only for personal relations with the child

PARAGUAY – COUNTRY REPORT

The Republic of Paraguay is a constitutional republic that achieved independence from Spain on May 14, 1811. It is divided into 17 departments, and capital city is Asunción. The President, Horacio Cartes, came into office in August 2013 serves as the Chief of State and Head of Government.

Paraguay lost a significant portion of its territory in the War of the Triple Alliance (Argentina, Brazil, and Uruguay) in 1865-1870.

Alfredo Stroessner ruled the country from 1954 to 1989, creating the government after an army coup and staying in power for a long period of dictatorship. He was forced from power in a military coup led by General Andrés Rodríguez, and forced into exile in Brazil.

According to the CIA World Factbook, since the end of Stroessner's military dictatorship, Paraguay has held relatively free and regular presidential elections with the country's return to democracy. It has some of the higher rates of income inequality, and child and maternal mortality in Latin America, and more than one-third of the population is below the poverty line.⁶⁹⁰

The Legislative branch is bicameral (Chamber of Senators and Chamber of Deputies). The highest court is the Supreme Court of Justice.

Paraguay has a market economy distinguished by a large informal sector. The Argentina-Brazil-Paraguay border is known as a place for money laundering, smuggling arms, and illegal narcotics trafficking. Sexual exploitation of children is also a big problem in the area, especially trafficking in persons.

The Country Rapporteur for the UN, Mr. Jean Zermatten, analyzed Paraguay's report to the Committee on the Rights of the Child.

"In his introductory remarks, Mr. Zermatten highlighted that while 43% of children lived in rural areas, most services were concentrated in the capital. In addition, indigenous people's (an estimated 110,000 people) rights were often neglected in terms of care and respect (this inequality was often brought up by other treaty bodies). For instance, 16% of the indigenous population lived in extreme poverty while others lived in poverty. In addition to the food and economic crisis, there was inequality of wealth distribution, a weak taxation culture, a dependency on agriculture as the main source of income, a centralized culture (despite claims to be decentralized) and corruption. However, he noted recent changes, including the hope to better respect human and children's rights. He congratulated them on the progress made, including the adoption of the Children's Code, laws to suppress the trade and commercial use of child pornography, laws on the education of indigenous children, and laws amending the civil registry of children. The State party had also ratified the Optional Protocol on the involvement of children in armed conflict (OPAC), the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC), the UN Convention against Transnational Organized Crime, the ILO Convention 138 and 182, the Convention on the Rights of Persons with Disabilities and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Finally, he welcomed the

⁶⁹⁰ Paraguay, *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/pa.html> (last visited Oct. 13, 2014).

establishment of the SNNA and noted its status as a ministry (although it did not seem to be considered to have the same importance attached to it).⁶⁹¹

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

The Constitution of Paraguay was promulgated in 1992, and amended in 2011. It regulates the rights of children in Article 54, which proscribes that family, civil society, and the State have to protect them against any kind of abandonment, malnutrition, violence, abuse, trafficking, and exploitation.⁶⁹²

According to the Code of Childhood and Adolescence (can), Law 1.680, Article 2, if there is doubt whether someone is a child or adolescent, childhood is presumed; and if there is a doubt whether someone is an adolescent or an adult, adolescence is presumed. The best interests of children are guaranteed by Article 3.

In compliance with the CRC and OPSC, Paraguayan Congress enacted Law 1600/00 (domestic violence), Law 1680/01 (Code on Children and Adolescents), Law 2861/06 (suppression of the trade and commercial dissemination of child abuse images, in force until 2008), Law 3440/08 (amended the Penal Code), and Law 2169/03 (age of majority).

The Committee was surprised to see that the penalties for child pornography had been reduced in the new Criminal Code compared to the previous law. It recommended that the criminal code be aligned with the previous law with its tougher sanctions.

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

The crime of child pornography is proscribed in Article 140 of the Paraguayan Penal Code, introduced by Law 3440/08.⁶⁹³ The legislation revoked Law 2861/06, which was specifically enacted to combat the

⁶⁹¹ NGO Group for the CRC, State Party Examination of the Paraguay's Third Periodic Report 53rd Session of the Committee in the Rights of the Child 11-29 January 2010, at <http://www.childrightsconnect.org/wp-content/uploads/2013/10/Paraguay-CRC-Amended53.pdf> (last visited Oct. 10, 2015).

⁶⁹² Artículo 54. La familia, la sociedad y el Estado tienen la obligación de garantizar al niño su desarrollo armónico e integral, así como el ejercicio pleno de sus derechos protegiéndolo contra el abandono, la desnutrición, la violencia, el abuso, el tráfico y la explotación. Cualquier persona puede exigir a la autoridad competente el cumplimiento de tales garantías y la sanción de los infractores. Los derechos del niño, en caso de conflicto, tienen carácter prevaleciente.

⁶⁹³ Artículo 140. Pornografía relativa a niños y adolescentes.

1° El que:

1. produjere publicaciones, en el sentido del Artículo 14, inciso 3°, que representen actos sexuales con participación de personas menores de dieciocho años de edad o la exhibición de sus partes genitales;
2. organizara, financiara o promocionara espectáculos, públicos o privados, en los que participe una persona menor de dieciocho años en la realización de actos sexuales, o;
3. distribuyera, importara, exportara, ofertara, canjeara, exhibiera, difundiera, promocionara o financiara la producción o reproducción de publicaciones en sentido del numeral 1, será castigado con pena privativa de libertad de hasta cinco años o multa.

2° El que reprodujera publicaciones según el numeral 1 del inciso 1°, será castigado con pena privativa de libertad de hasta tres años o multa.

3° La pena de los incisos anteriores podrá ser aumentada hasta diez años cuando:

trade and diffusion, commercial or non-commercial, of child abuse material. This was an unfortunate setback because the penalties were diminished, and mere possession of child pornography was decriminalized. The penalties for production and diffusion were made equal.

Law 2861, used to punish the production and reproduction of child pornography with 5 to 10 years of imprisonment; the dissemination, distribution, import, export, offer, exchange exhibition of child pornography with 3 to 8 years of imprisonment. The law used to criminalize the mere possession, establishing a penalty of six months up to three years of imprisonment.

Law 3440, enacted in 2008, diminished the penalties, establishing imprisonment up to five years for the production, distribution, import, export, offer, exchange, exhibition, and dissemination of child pornography, and establishing a lower penalty for reproduction (up to three years of imprisonment). It criminalized possession only with the intent of distribution, export, offer, exchange, exhibition, and dissemination of the material, with up to three years of imprisonment. Law 4439, enacted in 2011, kept the penalties established by Law 3440/08.

Currently, the first paragraph of Article 140 of the Penal Code indirectly defines child pornography as material that contains sexual activity with persons less than 18 years old, or the exhibition of their genital parts. This article was modified by Law 4439/11, which brought more objectivity to the definition by taking away the expression “produced to excite the sexual appetite.” The requirement in Article 140 of the Criminal Code (before its amendment by Law 4439/11) that the material was produced to excite the sexual appetite was inappropriate due to its subjectivity.⁶⁹⁴

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1. las publicaciones y espectáculos en el sentido de los incisos 1° y 2° se refieran a menores de catorce años o se dé acceso a los menores de dicha edad a publicaciones y espectáculos, en sentido de los incisos citados;
 2. el autor tuviera la patria potestad, deber de guarda o tutela del niño o adolescente, o se le hubiere confiado la educación o cuidado del mismo;
 3. el autor operara en connivencia con personas a quienes compete un deber de educación, guarda o tutela respecto del niño o adolescente;
 4. el autor hubiere procedido, respecto del niño o adolescente, con violencia, fuerza, amenaza, coacción, engaño, recompensa o promesa remuneratoria de cualquier especie; o
 5. el autor actuara comercialmente o como miembro de una banda dedicada a la realización reiterada de los hechos punibles señalados.

4° El que obtuviera la posesión de publicaciones en el sentido de los incisos 1° y 3°, será castigado con pena privativa de libertad de hasta tres años o con multa.

⁶⁹⁴ Artículo 140. Pornografía relativa a niños y adolescentes.

1°.- El que:

1. por cualquier medio produjere publicaciones, que contengan como temática actos sexuales con participación de personas menores de dieciocho años de edad y que busquen excitar el apetito sexual, así como la exhibición de sus partes genitales con fines pornográficos;
2. organizara, financiara o promocionara espectáculos, públicos o privados, en los que participe una persona menor de dieciocho años en la realización de actos sexuales; o
3. distribuyera, importara, exportara, ofertara canjeara, exhibiera, difundiera, promocionara o financiara la producción o reproducción de publicaciones en sentido del numeral 1, será castigado con pena privativa de libertad de hasta cinco años o multa.

2°.- El que reprodujera publicaciones según el numeral 1 del inciso 1°, será castigado con pena privativa de libertad de hasta tres años o multa.

3°.- La pena de los incisos anteriores podrá ser aumentada hasta diez años, cuando:

1. las publicaciones y espectáculos en el sentido de los incisos 1° y 2° se refieran a menores de catorce años;

Law 4439/11 restricted the concept of child pornography, defining it as the representation of sexual acts with the participation of people less than 18 years of age, and the exhibition of their genital parts. Prior to this law, the production or reproduction of any material with sexual connotation involving minors was considered child pornography, not requiring the effective use of a child in its production.

Penalties are enhanced when children under 14 years old are used, when the perpetrator is in exercise of parental authority, guardianship or care over the victim, or when there is the use of force, violence, threats, coercion, deception, payment or any promise of remuneration or attempts to make commercial gain.

4 – Criminalizes accessing or downloading child pornography images

Downloading or accessing child pornography is not a crime.

5 – Criminalizes simple possession of child pornography

The mere possession of child pornography is not a crime; it is criminalized only when it is related to the distribution, commercialization or reproduction of child pornography (item 4 of Article 140 of the Penal Code). It is important to note that Law 2861/06 criminalized the mere possession before it was revoked by Law 3440/09.⁶⁹⁵

6 – Criminalizes virtual images or sexually exploitative representations of children

The production, distribution, and possession of virtual images or sexually exploitative representations of children are not criminalized in Paraguay. Article 140 of the Criminal Code specifically requires the use of a child in the production of child pornography.

7 – Addresses the criminal liability of children involved in pornography

Paraguay's legislation does not address the criminal liability of children involved in pornography. Regarding the sexual abuse of children less than 14 years of age, item 6 of Article 135 proscribes that in cases in which the offender is younger than 18, punishment can be avoided.⁶⁹⁶

2. el autor tuviera la patria potestad, deber de guarda o tutela del niño o adolescente, o se le hubiere confiado la educación o cuidado del mismo;

3. el autor operara en connivencia con personas a quienes compete un deber de educación, guarda o tutela respecto del niño o adolescente;

4. el autor hubiere procedido, respecto del niño o adolescente, con violencia, fuerza, amenaza, coacción, engaño, recompensa o promesa remuneratoria de cualquier especie; o

5. el autor actuar a comercialmente o como miembro de una banda dedicada a la realización reiterada de los hechos punibles señalados.

4°. El que con la intención prevista en el numeral 1 del inciso 1° obtuviera la posesión de publicaciones en el sentido de los incisos 1° y 3°, será castigado con pena privativa de libertad de hasta tres años o con multa.

5°. Se aplicará, en lo pertinente, también lo dispuesto en los artículos 57 y 94.6°.- Los condenados por la comisión de hechos punibles descriptos en este artículo, generalmente no podrán ser beneficiados con el régimen de libertad condicional.

⁶⁹⁵ Artículo 6. Consumo y posesión de pornografía infantil.

1. El que adquiriese o, a cualquier otro título, poseyese la imagen con las características prescriptas en el Artículo 1 de la presente Ley, será castigado con pena privativa de libertad de seis meses a tres años

(...).

⁶⁹⁶ Artículo 135- 6°. Cuando el autor sea menor de diez y ocho años, se podrá prescindir de la pena.

8 – Establishes the criminal liability of legal persons for child pornography offenses

Paraguayan legislation does not establish criminal liability of legal persons for the production or commercialization of child pornography.

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

Extraterritorial jurisdiction is partly recognized. Article 8 of the Penal Code regulates extraterritorial jurisdiction of Paraguayan Courts. It indicates that some crimes, even when committed abroad, can subject the perpetrator to Paraguayan legislation (paragraph 1, items 1, 2, 3, 4, 5, and 6), and identifies trafficking in persons (regulated by Article 129), among those crimes (item 3). Since the crime of trafficking in persons is directly related to sexual purposes (including child pornography), there is a strong indication that trafficking in children or adolescents with the purpose of producing child abuse images can attract the application of Paraguayan laws by Paraguayan Courts, even when the crime is committed abroad.

It should be noted though that Item 8 of Article 8 of the Criminal Code establishes the universal jurisdiction principle for offenses against the interests protected by the international community.⁶⁹⁷ However, Paraguay's legislation is not clear about its application because it is only a possibility, and is limited in scope.

The Committee on the Rights of the Child in its concluding observations on Paraguay's report, was concerned about the fact is that there are no legal provisions that explicitly provide for extraterritorial jurisdiction for all offenses under the OPSC.⁶⁹⁸ They recommended that the State Party take all the necessary measures to ensure that domestic legislation explicitly enables it to establish and exercise extraterritorial jurisdiction over all offenses under the Optional Protocol. The CRC also urged the State party to ensure that offenses referred to in Article 3, paragraph 1, of the Optional Protocol were included as extraditable offenses in the existing extradition treaties, and to consider the OPSC as a legal basis for extradition in respect for these offenses.

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

The legislation does not recognize extraterritorial jurisdiction when the victim is a national of the State. However, the universal jurisdiction principle can guarantee, in some cases, the prosecution of child pornography crimes when the victim is a national of the State.

⁶⁹⁷ Artículo 8°. Hechos realizados en el extranjero contra bienes jurídicos con protección universal.

1°.- La ley penal paraguaya se aplicará también a los siguientes hechos realizados en el extranjero:

(...) 8. hechos punibles que la República del Paraguay, en virtud de un convenio o tratado internacional aprobado y ratificado, esté obligada a perseguir aun cuando hayan sido realizados en el extranjero.

2°.- La ley penal paraguaya se aplicará solo cuando el autor o partícipe haya ingresado al territorio nacional.

3°.- Queda excluida la punición en virtud de la ley penal paraguaya, cuando un tribunal extranjero:

1. haya absuelto al autor o partícipe por sentencia firme; o

2. haya condenado al autor o partícipe a una pena o medida privativa de libertad, y la condena haya sido ejecutada, prescrita o indultada."

⁶⁹⁸ UN COMM. ON THE RIGHTS OF CHILD, *supra* note 92.

11 – Establishes forfeiture of assets used to commit or facilitate offenses

Article 86 of the Penal Code is applicable to all of the crimes regulated by it, and it establishes generally that the judge can determine the forfeiture of instruments or assets used to commit a crime, but only when they pose a danger to society, or when they can be used to commit other unlawful acts.⁶⁹⁹ In paragraph 2, it proscribes that forfeiture can be replaced by the destruction of those objects.

12 – Establishes forfeiture of proceeds derived from such offenses

Article 90 of the Penal Code is applicable to all of the crimes regulated but it, and it establishes generally that when the offender has obtained profits from an unlawful act, the judge can order the deprivation of those profits.⁷⁰⁰ Article 91 makes it possible to execute the forfeiture of substitutive assets or through the payment of a sum of money corresponding to the value obtained.⁷⁰¹

Article 94 of the Criminal Code establishes a broader forfeiture of assets, but is only applied if the legislation specifically provides for it.⁷⁰² It proscribes the forfeiture of all objects obtained from an unlawful act, allowing also the substitution proscribed in Article 91.

Article 140, which criminalizes child pornography, determines the application of this broader forfeiture (Article 94), and also allows the judge to apply a financial penalty that is determined according to the offender's condition.⁷⁰³

⁶⁹⁹ Artículo 86. 1º Cuando se haya realizado un hecho antijurídico doloso, podrán ser decomisados los objetos producidos y los objetos con los cuales éste se realizó o preparó. El comiso se ordenará sólo cuando los objetos, atendidas su naturaleza y las circunstancias, sean peligrosos para la comunidad o exista el peligro de su uso para la realización de otros hechos antijurídicos.

2º El comiso será sustituido por la inutilización, si ello fuera suficiente para proteger la comunidad.

⁷⁰⁰ Artículo 90. Privación de beneficios o comiso especial

1. Cuando el autor o el partícipe de un hecho antijurídico haya obtenido de éste un beneficio, se ordenará la privación del mismo. No se procederá al comiso especial si ello perjudicara la satisfacción del derecho de la víctima al resarcimiento.

2. Cuando el autor o el partícipe haya actuado por otro y éste haya obtenido el beneficio, la orden de comiso especial se dirigirá contra el que obtuvo el beneficio.

3. La orden de comiso especial podrá abarcar también el usufructo y otro beneficio proveniente de lo obtenido. Cuando lo originalmente obtenido haya sido sustituido por otro objeto, podrá ordenarse el comiso especial de éste.

4. La orden de comiso especial no procederá sobre cosas o derechos que al tiempo de la decisión, pertenezcan a un tercero que no es autor, partícipe, ni beneficiario en los términos del inciso 2.

⁷⁰¹ Artículo 90. Comiso especial del valor sustitutivo

Cuando con arreglo al artículo 90, comiso especial, sea imposible su ejecución o se prescinda de ejecutarla en una cosa sustitutiva, se ordenará el pago de una suma de dinero que corresponda al valor de lo obtenido.

⁷⁰² Artículo 94. Comiso especial extensivo

1º En caso de la realización de un hecho antijurídico descrito en una ley que se remita expresamente a este artículo, también se ordenará el comiso especial de objetos del autor o del partícipe, si las circunstancias permiten deducir que fueron obtenidos mediante un hecho antijurídico.

2º Cuando el comiso especial de un objeto determinado no sea total o parcialmente posible, debido a razones posteriores a la realización del hecho, se aplicará en lo pertinente lo dispuesto en los artículos 91 y 93.

⁷⁰³ Artículo 140. Pornografía relativa a niños y adolescentes.

1º El que:

1. produjere publicaciones, en el sentido del Artículo 14, inciso 3º, que representen actos sexuales con participación de personas menores de dieciocho años de edad o la exhibición de sus partes genitales;

2. organizara, financiara o promocionara espectáculos, públicos o privados, en los que participe una persona menor de dieciocho años en la realización de actos sexuales, o;

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 5 of the CNA establishes that all persons are required to immediately report any violation of the rights or guarantees of children or adolescents to the Consejería Municipal por los Derechos del Niño, Niña y Adolescentes (CONENI), prosecutors, or public defenders.⁷⁰⁴ It also states that the duty to report is especially required for professionals who work with children or adolescents, such as health workers, educators, and teachers. It does not establish any penalty for noncompliance with this duty. Article 134 of the Penal Code establishes penalties for educators, tutors, or guardians that somehow mistreat children.⁷⁰⁵ The legislation proscribes a punishment of imprisonment up to three years, and, in some cases, may be heightened if there is serious injury, as described in Article 112 of the same Code.⁷⁰⁶

3. distribuyera, importara, exportara, ofertara, canjeara, exhibiera, difundiera, promocionara o financiara la producción o reproducción de publicaciones en sentido del numeral 1, será castigado con pena privativa de libertad de hasta cinco años o multa.

2° El que reprodujera publicaciones según el numeral 1 del inciso 1°, será castigado con pena privativa de libertad de hasta tres años o multa.

3° La pena de los incisos anteriores podrá ser aumentada hasta diez años cuando:

1. las publicaciones y espectáculos en el sentido de los incisos 1° y 2° se refieran a menores de catorce años o se dé acceso a los menores de dicha edad a publicaciones y espectáculos, en sentido de los incisos citados;
2. el autor tuviera la patria potestad, deber de guarda o tutela del niño o adolescente, o se le hubiere confiado la educación o cuidado del mismo;
3. el autor operara en connivencia con personas a quienes compete un deber de educación, guarda o tutela respecto del niño o adolescente;
4. el autor hubiere procedido, respecto del niño o adolescente, con violencia, fuerza, amenaza, coacción, engaño, recompensa o promesa remuneratoria de cualquier especie; o
5. el autor actuara comercialmente o como miembro de una banda dedicada a la realización reiterada de los hechos punibles señalados.

4° El que obtuviera la posesión de publicaciones en el sentido de los incisos 1° y 3°, será castigado con pena privativa de libertad de hasta tres años o con multa.

5° Se aplicará, en lo pertinente, también lo dispuesto en los Artículos 57 y 94

⁷⁰⁴ Artículo 5°. DE LA OBLIGACIÓN DE DENUNCIAR: Toda persona que tenga conocimiento de una violación a los derechos y garantías del niño o adolescente, debe comunicarla inmediatamente a la Consejería Municipal por los Derechos del Niño, Niña y Adolescente (CODENI) o, en su defecto, al Ministerio Público o al Defensor Público. El deber de denunciar incumbe en especial a las personas que en su calidad de trabajadores de la salud, educadores, docentes o de profesionales de otra especialidad desempeñen tareas de guarda, educación o atención de niños o adolescentes. Al recibir la información, la Consejería Municipal por los Derechos del Niño, Niña y Adolescente (CODENI), el Ministerio Público y el Defensor Público adoptarán las medidas correspondientes, que les competen.

⁷⁰⁵ Artículo 134. El encargado de la educación, tutela o guarda de una persona menor de dieciocho años de edad, que sometiera a éste a sufrimientos psíquicos, maltratos graves y repetidos o lesiones en su salud, será castigado con pena privativa de libertad de hasta tres años o con multa, salvo que el hecho sea punible como lesión grave según el artículo 112.

⁷⁰⁶ Artículo 112. Lesión grave

1° Será castigado con pena privativa de libertad de hasta diez años el que, intencional o conscientemente, con la lesión:

1. pusiera a la víctima en peligro de muerte;
2. la mutilara considerablemente o la desfigurara por largo tiempo;
3. la redujera considerablemente y por largo tiempo en el uso de su cuerpo o de sus sentidos, en su capacidad de cohabitación o de reproducción, en sus fuerzas psíquicas o intelectuales o en su capacidad de trabajo; o
4. causara una enfermedad grave o afligente.

2° El que dolosamente maltratara físicamente o lesionara a otro y con ello causara uno de los resultados señalados en el inciso 1°, habiéndolos tenido como posibles, será castigado con pena privativa de libertad de hasta cinco años. Será castigada también la tentativa.

14 – Requires Internet Service Providers to report child pornography

The legislation does not establish mandatory reporting for ISPs.

15 – Has a support telephone or online hotline to enable the public to report child abuse

The Fono Ayuda line 559-200 was developed by NGOs, and its technical operation was transferred to the National Secretariat for Children and Adolescents, an organization attached to the Office of the President of the Republic.

16 – Creates data retention and preservation policies or provisions

The Paraguayan Congress is currently reviewing Bill S-146438, which determines that ISPs retain data one year. Senators Roberto Acevedo, Arnaldo Giuzzio, Fernando Silva Facetti, and Arnold Wiens introduced this Bill.⁷⁰⁷ It applies to all kinds of Internet data, such as IP address, time of connection, origin, etc., indicated in Article 5, but it expressly excludes information content. Data can be requested by a judge or a prosecutor.

CONATEL, the Telecommunications Agency, presented an alternative bill suggesting a retention period of six months, and establishing the need for a prior judicial order.

Currently, Law 5241, which creates the System of National Intelligence (SINAI), allows the interception of communications through the Internet, but specifically when it is necessary for the preservation of peace and national security, institutional stability, protection against threats of terrorism, organized crime, or drug trafficking.

Article 200 of the Criminal Procedural Code regulates the interception of communications, through any means, requiring a prior judicial order. This is considered an exceptional measure.

Therefore, Paraguay does not have provisions on the retention of Internet data, and the Criminal Procedure Code poorly regulates the preservation provisions.

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

The country does not have legislation that determines the identification of users of public computers.

18 – Has a national plan to combat violence against children

According to the first report Paraguay presented to the Committee on the Rights of Children (2010), the implementation of Law n. 1680, establishing the Code on Children and Adolescents, has led to the establishment of administrative institutions such as the National System for the Comprehensive Protection and Advancement of Children and Adolescents, which coordinates different institutions in order to ensure the full enjoyment by children and adolescents of their rights. The National Secretariat for Children and Adolescents was introduced by Decree n. 15.201/01, to ensure the implementation of policies developed by the System, and to carry out plans and programs emphasizing those public policies related to children.

There are several National Plans related to the subject of child protection, particularly the National Policy on Childhood and Adolescence (2002-2013), and its related plan of action (2003-2008); National Plan for the Prevention and Elimination of Sexual Exploitation of Children and Adolescents (2003-2008);

⁷⁰⁷ Tramitacion de Proyectos Sistema de Informacion Legislativa, REPUBLICA DE PARAGUAY, <http://sil2py.diputados.gov.py/formulario/VerDetalleTramitacion.pmf?q=VerDetalleTramitacion%2F102821> (last visited Nov. 9, 2015).

and the Plan for the Prevention and Elimination of Abuse and Sexual Exploitation (2008-2013).

Decree n. 3279/04 established May 31 as the National Day against the ill treatment and sexual and labor abuse of children and adolescents, and June 18 as the international day against the commercial sexual exploitation of children.

19 – International instruments ratified

- Convention on the Rights of the Child, ratified on September 25, 1990
- The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, ratified on August 18, 2003
- The ILO Minimum Age Convention, ratified on March 3, 2004
- The ILO Worst Forms of Child Labor Convention, ratified on March 7, 2001

20 – Age of criminal liability

According to Article 21 of the Penal Code (amended by Law 3440/09), children less than 14 years old do not have criminal liability. Children from 14 to 18 years old are subjected to the juvenile system of criminal liability.⁷⁰⁸ The CNA proscribes that adolescents have criminal liability when they have psychosocial maturity, and the capability for understanding the wrongfulness of the act committed. Anyone older than 18 is considered an adult and can be held criminally responsible.

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

Paraguay's legislation does not address the use of ICTs to commit crimes against children. Law 4439, enacted in 2011, removed the expression "by any means" in Article 140 of the Penal Code, suggesting a setback in this area of the law.

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of sex tourism with children

The Paraguayan Penal Code does not specifically criminalize the conduct of trafficking with the intent of producing child pornography. However, Paraguayan legislation criminalizes the conduct of trafficking in persons with sexual purposes. Article 129b of the Penal Code, amended by Law 3440/2008, states that it is a crime to induce another person to practice prostitution or other sexual exploitative acts, taking advantage of his/her vulnerability for being in another country.⁷⁰⁹ The penalty, imprisonment up to eight

⁷⁰⁸ Artículo 21. Está exenta de responsabilidad penal la persona que no haya cumplido catorce años de edad.

⁷⁰⁹ Artículo 129b. Trata de personas con fines de su explotación sexual.

1º.- El que, valiéndose de una situación de estreñimiento o vulnerabilidad de otro por encontrarse en un país extranjero, le induzca o coaccione al ejercicio o a la continuación del ejercicio de la prostitución o a la realización de actos sexuales en si, con otro o ante otro, con fines de explotación sexual, será castigado con pena privativa de libertad de hasta ocho años. Con la misma pena será castigado el que induzca a otra persona menor de dieciocho años al ejercicio o la continuación del ejercicio de la prostitución o a la realización de los actos señalados en el párrafo 10.

2º.- Con pena privativa de libertad de hasta doce años será castigado el que mediante fuerza, amenaza con un mal considerable o engaño:

1. induzca a otro al ejercicio o la continuación del ejercicio de la prostitución o a la realización de actos sexuales señalados en el inciso 10, párrafo 2;

2. capture a otro con la intención de inducirle al ejercicio o la continuación del ejercicio de prostitución o a la realización de actos sexuales señalados en el inciso 10, párrafo 2.

3º.- La misma pena se aplicará, cuando la víctima sea:

1. una persona menor de catorce años; o

2. expuesta. al realizarse el hecho, a maltratos físicos graves o un peligro para su vida.

years, is also applicable to those who induce a minor to practice or continue the practice of such acts, which certainly includes child pornography.

The online advertising of child sex tourism is not criminalized.

23 – Has specific legislation on online grooming considering it a standalone offense

Paraguay does not have specific legislation on online grooming. However, Article 135 of the Penal Code, introduced by Law 3440/2008, establishes the penalties related to what can be understood as the concept of offline grooming.⁷¹⁰ It states that it is a crime to contact a child, through verbal, obscene manifestations or pornographic publications, with the intention of sexually stimulating him/her. Paragraph 1 of the same Article criminalizes the conduct of inducing a child to have sexual relations. This Article does not indicate the means or methods for the commission of this crime, which suggests it can be committed through the Internet or associated technologies. Case law would need to be referenced to understand how judges are applying this provision.

24 – Has a clear definition of online grooming

Paraguay does not have a specific definition of online grooming.

25 – Age of potential victims of online grooming

Does not apply.

4º.- Con la misma pena será castigado el que actuara comercialmente o como miembro de una banda que se ha formado para la realización de hechos señalados en los incisos anteriores. En este caso se aplicará también lo dispuesto en los artículos 57 y 94.

El consentimiento dado por la víctima a toda forma de explotación no se tendrá en cuenta cuando se haya recurrido a cualquiera de los medios enunciados en este artículo.

⁷¹⁰ Artículo 135. Abuso sexual en niños.

1º El que realizara actos sexuales con un niño o lo indujera a realizarlos en sí mismo o a terceros, será castigado con pena privativa de libertad de hasta tres años o con multa.

Con la misma pena será castigado el que realizara actos sexuales manifiestamente relevantes ante un niño y dirigidos a él, o lo indujera a realizarlos ante sí o ante terceros.

2º En los casos señalados en el inciso anterior la pena privativa de libertad será aumentada hasta cinco años cuando el autor:

1. al realizar el hecho haya maltratado físicamente a la víctima en forma grave;
2. haya abusado de la víctima en diversas ocasiones; o
3. haya cometido el hecho con un niño que sea su hijo biológico, adoptivo o hijastro, o con un niño cuya educación, tutela o guarda esté a su cargo.

3º Cuando concurren varios agravantes de los señalados en el inciso 2º, el autor será castigado con pena privativa de libertad de hasta seis años.

4º En los casos señalados en el inciso 1º, la pena privativa de libertad será de dos a diez años cuando el autor haya realizado el coito con la víctima.

5º Será castigado con pena de multa el que:

1. realizara delante de un niño actos exhibicionistas aptos para perturbarle; o
2. con manifestaciones verbales obscenas o publicaciones pornográficas en los términos del artículo 14, inciso 3º se dirigiera al niño para estimularlo sexualmente o causarle rechazo respecto al sexo.

6º Cuando el autor sea menor de diez y ocho años, se podrá prescindir de la pena.

7º En los casos de los incisos 1º y 5º se podrá prescindir de la persecución penal, cuando el procedimiento penal intensificara desproporcionadamente el daño ocasionado a la víctima.

8º Se entenderá por niño, a los efectos de este artículo, a la persona menor de catorce años.

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

Does not apply.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense, or considers it an aspect of grooming

The fifth paragraph, item 2, of Article 135 in the Criminal Code establishes that it is a crime to intentionally show pornography to a child. It proscribes a fine for those who, through obscene, verbal manifestations or pornographic publications, stimulate a child sexually.

28 – Has specific legislation on cyberbullying

There is no specific legislation on cyberbullying. However, Article 143 of the Penal Code states that it is a crime to expose another person's intimacy in front of other people, or by publication.⁷¹¹ It also establishes a fine as the penalty for this conduct. It can be inferred that cyberbullying falls under this classification as a form of public exposition, and is therefore subject to sanctions.

29 – Has specific legislation concerning sexting

There is no specific legislation concerning sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

There are only two levels of penalties for offenses related to the exploitation of children in Paraguay. The Penal Code punishes offenses related to production at the same level for offenses related to the distribution of child abuse images, establishing a lower penalty only for the possession of this kind of material.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child's family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

The Penal Code of Paraguay establishes aggravating circumstances for offenses committed by a member of the family, or a person who has abused a recognized position of trust or authority (Article 140, item 2).⁷¹² However, it does consider a perpetrator who cohabits with a child as an aggravated circumstance.

⁷¹¹ Artículo 143. Lesión de la intimidad de la persona

1º El que, ante una multitud o mediante publicación en los términos del artículo 14, inciso 3º, expusiera la intimidad de otro, entendiéndose como tal la esfera personal íntima de su vida y especialmente su vida familiar o sexual o su estado de salud, será castigado con pena de multa.

2º Cuando por su forma o contenido, la declaración no exceda los límites de una crítica racional, ella quedará exenta de pena.

3º Cuando la declaración, sopesando los intereses involucrados y el deber de comprobación que según las circunstancias incumba al autor, sea un medio adecuado para la persecución de legítimos intereses públicos o privados, ella quedará exenta de pena.

4º La prueba de la verdad de la declaración será admitida sólo cuando de ella dependiera la aplicación de los incisos 2º y 3º.

⁷¹² Artículo 140. Pornografía relativa a niños y adolescentes.

(...)

3º. La pena de los incisos anteriores podrá ser aumentada hasta diez años, cuando:

There is no provision related to the sexual exploitation of children that establishes a heightened penalty when the offense is committed by several persons acting together.

Paraguayan legislation does establish as an aggravated circumstance, offenses committed within the framework of a criminal organization (Article 140, item 5 of the Penal Code).⁷¹³

-
1. las publicaciones y espectáculos en el sentido de los incisos 1 ° Y 2° se refieran a menores de catorce años;
 2. el autor tuviera la patria potestad, deber de guarda o tutela del niño o adolescente, o se le hubiere confiado la educación o cuidado del mismo;
 3. el autor operara en connivencia con personas a quienes compete un deber de educación, guarda o tutela respecto del niño o adolescente;
- (...)

⁷¹³ Artículo 140. Pornografía relativa a niños y adolescentes.

(...)

3°.- La pena de los incisos anteriores podrá ser aumentada hasta diez años, cuando:

(...)

5. el autor actuara comercialmente o como miembro de una banda dedicada a la realización reiterada de los hechos punibles señalados.

16. PERU – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Article 183-A of the Penal Code
2 – Has a clear definition of child pornography	Yes, Article 183-A of the Penal Code
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, but the penalty is enhanced when under 14
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	Yes, Article 183-A of the Penal Code
6 – Criminalizes virtual images and sexually exploitative representations of children	No
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No, but penalties can be imposed to them
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Yes, Article 2, item 4 of the Penal Code
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, Article 2, item 4 of the Penal Code
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Article 102 of the Criminal Code
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Article 102 of the Criminal Code
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes, Article 18 of Law 27337
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes, Line 100
16 – Creates data retention or data preservation policies or provisions	Only preservation – Article 230 Criminal Procedure Code
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	Yes, Law 29137
18 – Has a national plan to combat violence against children	Yes, PNAIA and PNLTP
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	Juvenile Justice system for 12-18 years of age
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Online advertising of sex tourism and trafficking in person linked to commercial sexual exploitation of children
23 – Has specific legislation on online grooming, considering it a standalone offense	Yes, Law 300096, Article 4
24 – Has a clear definition of online grooming	Yes, Law 300096, Article 4
25 – Considers everyone under 18 as a potential victim of online grooming	Yes, but adolescents between 14 and 18 years of age have to be deceived
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Criminalizes grooming with a specific intent – get pornographic material or engage in sexual activity with a child
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	Yes, Article 183 of the Penal Code
28 – Has specific legislation on cyberbullying	No, only on bullying
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	No, only one level
31 – Law establishes aggravating circumstances for child abuse offenses	Yes

PERU – COUNTRY REPORT

Located in western South America, Peru is bordered in the north by Ecuador and Colombia, in the east by Brazil, in the southeast by Bolivia, in the south by Chile, and in the west by the Pacific Ocean.

Peru was the home to ancient cultures and civilizations, particularly the Incas, who were captured and decimated by the Spanish in the 16th century. The country declared its independence from Spain in 1823, recognized in 1824. In the twentieth century, like many others Latin American countries, Peru experienced a period of military dictatorship, which ended in the 1980s. However, the return of the democratic leadership was accompanied by economic problems and violent insurgency. Today, the country faces the issue of consolidating a democracy that respects human rights.⁷¹⁴

The Republic of Peru is a democratic constitutional republic with a civil law system. It is administratively divided into 25 regions and one province.

Under the current constitution, the President also serves as the Chief of State and Head of Government, and is elected for five years. The Legislative branch is composed of a unicameral Congress of the Republic of Peru. The Supreme Court is the highest court of the judiciary branch.

Peru has important mineral resources and is the world's second largest producer of silver and third largest producer of copper. The economy of Peru is classified by the World Bank as upper middle income, and is the 39th largest in the world.⁷¹⁵ Inequality of wealth is a reality in Peru, as in most Latin American countries, however programs of cash transfers have helped to reduce poverty.

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

Peru Ratified the Convention on the Rights of the Child on September 4, 1990, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography on May 5, 2002, and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict on May 8, 2002.

Article 4 of the Constitution establishes that civil society and the State must protect children and adolescents.⁷¹⁶ Article 2 guarantees that every person has the right not to have information related to their private life and intimacy placed online.⁷¹⁷

The Peruvian Code of Children and Adolescents, Law 27337, defines children in Article 1 as a human being from conception until 12 years of age, and an adolescent as a person between 12 and 18 years of

⁷¹⁴ Peru, *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/pe.html> (last visited Oct. 13, 2014).

⁷¹⁵ Peru, WORLD BANK, <http://data.worldbank.org/country/peru> (last visited Oct. 13, 2014).

⁷¹⁶ Artículo 4°. La comunidad y el Estado protegen especialmente al niño, al adolescente, a la madre y al anciano en situación de abandono. También protegen a la familia y promueven el matrimonio. Reconocen a estos últimos como institutos naturales y fundamentales de la sociedad.(...).

⁷¹⁷ Artículo 2°. Toda persona tiene derecho:

(...)

6. A que los servicios informáticos, computarizados o no, públicos o privados, no suministren informaciones que afecten la intimidad personal y familiar.

age, clarifying that if there is any doubt, he/she will be considered a child or an adolescent until it is proved otherwise.⁷¹⁸

When interpreting the Code of Children and Adolescent (CNA), the principles and norms of the Constitution and of the CRC must be applied, as well as the principles and norms from any other international conventions ratified by Peru (Article 7).⁷¹⁹ Article 8 determines that the State, the family, and all the institutions must promote the correct application of principles, rights, and norms of the CNA.⁷²⁰ Article 9 guarantees that every measure adopted will consider the best interests of the child or adolescent.⁷²¹

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

Peru has specific legislation, but does not have a clear definition of child pornography. Article 183-A of the Penal Code, introduced by Article 1 of Law 28251/2004, criminalizes the conduct of: possessing, promoting, manufacturing, distributing, exhibiting, offering, commercializing, publishing, importing or exporting by any means, including the Internet, material of pornographic content with a minor between the ages of 14 and 18 years old, establishing as an aggravating circumstance when the victim is a minor under 14.⁷²² This provision was modified by Law 28251, and more recently by Law 30096, Ley contra los

⁷¹⁸ Artículo I. Definición. Se considera niño a todo ser humano desde su concepción hasta cumplir los doce años de edad y adolescente desde los doce hasta cumplir los dieciocho años de edad. El Estado protege al concebido para todo lo que le favorece. Si existiera duda acerca de la edad de una persona, se le considerará niño o adolescente mientras no se pruebe lo contrario.

⁷¹⁹ Artículo VII. Fuentes. En la interpretación y aplicación del presente Código se tendrá en cuenta los principios y las disposiciones de la Constitución Política del Perú, la Convención sobre los Derechos del Niño y de los demás convenios internacionales ratificados por el Perú. En todo lo relacionado con los niños y adolescentes, las instituciones familiares se rigen por lo dispuesto en el presente Código y el Código Civil en lo que les fuere aplicable.

Las normas del Código Civil, Código Penal, Código Procesal Civil y Código Procesal Penal se aplicarán cuando corresponda en forma supletoria al presente Código. Cuando se trate de niños o adolescentes pertenecientes a grupos étnicos o comunidades nativas o indígenas, se observará, además de este Código y la legislación vigente, sus costumbres, siempre y cuando no sean contrarias a las normas de orden público.

⁷²⁰ Artículo 8. Obligatoriedad de la ejecución.- Es deber del Estado, la familia, las instituciones públicas y privadas y las organizaciones de base, promover la correcta aplicación de los principios, derechos y normas establecidos en el presente Código y en la Convención sobre los Derechos del Niño.

⁷²¹ Artículo 9. Interés superior del niño y del adolescente.-En toda medida concerniente al niño y al adolescente que adopte el Estado a través de los Poderes Ejecutivo, Legislativo y Judicial, del Ministerio Público, los Gobiernos Regionales, Gobiernos Locales y sus demás instituciones, así como en la acción de la sociedad, se considerará el Principio del Interés Superior del Niño y del Adolescente y el respeto a sus derechos

⁷²² Artículo 183-A. Pornografía infantil (modified by Law 300096 – Ley de los Delitos Informáticos)

El que posee, promueve, fabrica, distribuye, exhibe, ofrece, comercializa o publica, importa o exporta por cualquier medio, objetos, libros, escritos, imágenes, videos o audios, o realiza espectáculos en vivo de carácter pornográfico, en los cuales se utilice a personas de catorce y menos de dieciocho años de edad, será sancionado con pena privativa de libertad no menor de seis ni mayor de diez años y con ciento veinte a trescientos sesenta y cinco días multa.

La pena privativa de libertad será no menor de diez ni mayor de doce años y de cincuenta a trescientos sesenta y cinco días multa cuando:

1. El menor tenga menos de catorce años de edad.
2. El material pornográfico se difunda a través de las tecnologías de la información o de la comunicación.

Si la víctima se encuentra en alguna de las condiciones previstas en el último párrafo del artículo 173, o si el agente actúa en calidad de integrante de una organización dedicada a la pornografía infantil la pena privativa de libertad será no menor de doce ni mayor de quince años.

Delitos Informaticos, and enhanced the penalties from six up to 10 years of imprisonment when the victim is between 14 and 18 years old; and for 10 up to 12 years of imprisonment when the victim is less than 14 years old.

It should be noted that this Article specifies that the distribution of the pornography can occur by any means, but it enhances the penalties when the Internet is used. Because Internet enhances the potentiality of the damage caused to the victims, this is a positive measure for regulation this method of committing this crime.

Peruvian legislation does not have a clear definition of child pornography, simply referring to it as material with pornographic nature (Article 183-A). Peru would need to adapt its legislation in order to align with the OPSC.

According to Peru's report on the OPSC, the definition of child pornography is in the PNACT 2011/2016, a National Plan of Action that defines it as the "depiction, through any means, of a child involved in explicit sexual activity, real or simulated, or the representation of his/her sexual parts, for sexual purposes."⁷²³ It is unclear if the PNACT is considered a legal instrument and is used by judges in their decisions. Ultimately, the best way of regulating this is through the Criminal Code. To have adequate legislation, Peru needs to make improvements to its legal frame.

Potential victims are children younger than 18 years of age.

It is an aggravating circumstance when the perpetrator is a person who belongs to an organization dedicated to child pornography. Parents, relatives, brothers, or any person who, with abuse of authority, charge or trust, help the perpetrator to commit the crime, are also punished as perpetrators under Article 184 of the Penal Code.⁷²⁴ Article 181-B also determines that parents or tutors shall receive an accessory penalty of inability by the same decision that establishes their imprisonment.⁷²⁵

The First Article of the Cyberlaw's Complementary Provisions establishes that the National Police can maintain, with prior authorization and supervision of the prosecutors, child abuse images in media storage of computer data, for the exclusive purpose of assisting investigations.⁷²⁶ The second Article

De ser el caso, el agente será inhabilitado conforme a los numerales 1, 2 y 4 del artículo 36.

⁷²³ According to Peru's Report on the OPSC, the PNACT defines child pornography as "toda exposición, por cualquier medio de un niño, niña o adolescentes involucrados en actividades sexuales explícitas, reales o simuladas, o toda representación de las partes sexuales, para propósitos sexuales, que se vienen reproduciendo a través de Internet".

⁷²⁴ Artículo 184. Castigo a cómplices

Los ascendientes, descendientes, afines en línea recta, hermanos y cualquier persona que, con abuso de autoridad, encargo o confianza, cooperen a la perpetración de los delitos comprendidos en los Capítulos IX, X y XI de este Título actuando en la forma señalada por el artículo 25 primer párrafo, serán reprimidos con la pena de los autores.

⁷²⁵ Artículo 181-B. Formas agravadas

En los casos de los delitos previstos en los artículos 179, 181 y 181-A, cuando el agente sea el padre o la madre, el tutor o curador, en la sentencia se impondrá, además de la pena privativa de libertad que corresponda, la pena accesoria de inhabilitación a que se refiere el numeral 5) del artículo 36."(*)

⁷²⁶ PRIMERA. Codificación de la pornografía infantil.

La Policía Nacional del Perú puede mantener en sus archivos, con la autorización y supervisión respectiva del Ministerio Público, material de pornografía infantil en medios de almacenamiento de datos informáticos, para fines exclusivos del cumplimiento de suya función. (...)

regulates the activity of undercover agents in investigations that involve organized crime and child pornography.⁷²⁷

4 – Criminalizes accessing or downloading child pornography images

The conduct of accessing or downloading child pornography is not a crime.

5 – Criminalizes simple possession of child pornography

The possession of child pornography is a crime, according to Article 183-A of the Criminal Code, regardless of the intent.

6 – Criminalizes virtual images or sexually exploitative representations of children

Peru's legislation does not criminalize pornography made through virtual images or sexually exploitative representations of children, because the legislation requires the effective use of a child or an adolescent in the production of the material.

7 – Addresses the criminal liability of children involved in pornography

The legislation does not address the criminal liability of children involved in pornography.

8 – Establishes the criminal liability of legal persons for child pornography offenses

Article 105 of the Criminal Code, modified by the Legislative Decree n. 982/2007, lists the penalties that can be applied to legal persons, such as temporary or definitive closure and extinction, when they are used to commit crimes.⁷²⁸ It is not specifically linked to child pornography or crimes against children, being applicable to any crime committed by someone that is representing a company.

According to article 27 of the Criminal Code, the person who represents a legal person that has committed unlawful activities is also individually liable for that conduct.⁷²⁹

⁷²⁷ Segunda. Agente encubierto en delitos informáticos.

El fiscal, atendiendo a la urgencia del caso particular y con la debida diligencia, puede autorizar la actuación de agentes encubiertos a efectos de realizar las investigaciones de los delitos previstos en la presente Ley y de todo delito que se cometa mediante tecnologías de la información o de la comunicación, con prescindencia de si los mismos están vinculados a una organización criminal de conformidad con el artículo 341 del Código Procesal Penal, aprobado mediante el Decreto Legislativo 957.

⁷²⁸ Artículo 105. Medidas aplicables a las personas jurídicas

Si el hecho punible fuere cometido en ejercicio de la actividad de cualquier persona jurídica o utilizando su organización para favorecerlo o encubrirlo, el Juez deberá aplicar todas o algunas de las medidas siguientes:

1. Clausura de sus locales o establecimientos, con carácter temporal o definitivo. La clausura temporal no excederá de cinco años.
2. Disolución y liquidación de la sociedad, asociación, fundación, cooperativa o comité.
3. Suspensión de las actividades de la sociedad, asociación, fundación, cooperativa o comité por un plazo no mayor de dos años.
4. Prohibición a la sociedad, fundación, asociación, cooperativa o comité de realizar en el futuro actividades, de la clase de aquellas en cuyo ejercicio se haya cometido, favorecido o encubierto el delito.

La prohibición podrá tener carácter temporal o definitivo. La prohibición temporal no será mayor de cinco años.

Cuando alguna de estas medidas fuera aplicada, el Juez ordenará a la autoridad competente que disponga la intervención de la persona jurídica para salvaguardar los derechos de los trabajadores y de los acreedores de la persona jurídica hasta por un período de dos años.

El cambio de la razón social, la personería jurídica o la reorganización societaria, no impedirá la aplicación de estas medidas.”

⁷²⁹ Artículo 27. Actuación en nombre de otro

El que actúa como órgano de representación autorizado de una persona jurídica o como socio representante autorizado de una sociedad y realiza el tipo legal de un delito es responsable como autor, aunque los elementos especiales que fundamentan la penalidad de este tipo no concurran en él, pero sí en la representada

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory; and

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

According to Article 2, item 4 of the Penal Code, Peruvian legislation is applicable to crimes committed abroad when the offender or the victim are Peruvian, the crime is one that authorizes extradition, and crime is also criminalized in the place where it was committed and the perpetrator is in Peruvian territory.⁷³⁰

Item 5 of Article 2 generally establishes that the country can exercise extraterritorial jurisdiction when the crime committed abroad is one of those that Peru agreed to punish under international treaties.

11 – Establishes forfeiture of assets used to commit or facilitate offenses; and

12 – Establishes forfeiture of proceeds derived from such offenses

Article 102 of the Criminal Code, modified by Article 1 of the Legislative Decree number 982/2007, establishes that the judge can determine the forfeiture of instruments used to commit a crime, as well as the proceeds derived from such offenses.⁷³¹ This provision is not specifically related to crimes committed against children, but it applies to them.

Law 27765, related to money laundering, determines the forfeiture of assets.

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 18 of Law 27337, Code of the Children and Adolescents, establishes that directors of schools must report ill treatment, abuses, and sexual violence suffered by any student.⁷³²

⁷³⁰ Artículo 2. La Ley Penal peruana se aplica a todo delito cometido en el extranjero, cuando:

1. (...)

2. (...)

3. (...)

4. Es perpetrado contra peruano o por peruano y el delito esté previsto como susceptible de extradición según la Ley peruana, siempre que sea punible también en el Estado en que se cometió y el agente ingresa de cualquier manera al territorio de la República;

5. El Perú está obligado a reprimir conforme a tratados internacionales.

⁷³¹ Artículo 102. Decomiso o pérdida de efectos provenientes del delito

El Juez resolverá el decomiso o pérdida de los objetos de la infracción penal o los instrumentos con que se hubiere ejecutado así como los efectos, sean éstos bienes, dinero, ganancias o cualquier producto proveniente de dicha infracción, salvo que exista un proceso autónomo para ello.

El Juez podrá disponer en todos los casos, con carácter previo, la medida de incautación, debiendo además proceder conforme a lo previsto en otras normas especiales.

⁷³² Artículo 18o. A la protección por los Directores de los centros educativos.- Los Directores de los centros educativos comunicarán a la autoridad competente los casos de:

a) Maltrato físico, psicológico, de acoso, abuso y violencia sexual en agravio de los alumnos;

b) Reiterada repotencia y deserción escolar;

c) Reiteradas faltas injustificadas;

d) Consumo de sustancias tóxicas;

e) Desamparo y otros casos que impliquen violación de los derechos del niño y adolescente;

f) Rendimiento escolar de niños y adolescentes trabajadores; y,

A special law was enacted to prevent sexual abuses of female rural children, Law 27.558, that in article 21 determines the creation of committees in schools and small villages and establishes enhanced penalties for perpetrators that work in the educational field.⁷³³

14 – Requires Internet Service Providers to report child pornography

The legislation does not establish mandatory reports for ISPs.

15 – Has a support telephone or online hotline to enable the public to report child abuse

Line 100 was created in order to allow anyone to report any kind of familial violence or sexual abuse, and to offer help to the victims. It is free and can be accessed 24 hours/day. Line 21 is a hotline offered to report cases of bullying and offer help to the victims.

16 – Creates data retention and preservation policies or provisions

Article 2, item 10, of the Peruvian Constitution establishes that the interception of communication can occur with prior judicial order.

Article 230 of the Criminal Procedure Code regulates the interception of all kinds of communication, establishing that they can be recorded when there are sufficient grounds to consider that a crime punished with a penalty higher than four years of imprisonment is being committed. It requires a prior judicial order, and cannot last more than 30 days.⁷³⁴ In exceptional circumstances, this period can be extended or renewed, by a motivated judicial decision.

g) Otros hechos lesivos.

⁷³³ Ley 27558 – Education of Female Rural Children

Artículo 21 – De la prevención y sanciones por abuso sexual

A fin de combatir el acoso y abuso sexual contra las niñas y adolescentes rurales el Ministerio de Educación, en coordinación con el PROMUDEH y la Defensoría del Pueblo, promueve la creación y funcionamiento de comités escolares, municipales, comunales, para la prevención de ese delito; asimismo, dispone la aplicación de severas sanciones administrativas para los casos en que los culpables fueran trabajadores del Sector Educación.

⁷³⁴ Artículo 230º Intervención o grabación o registro de comunicaciones telefónicas o de otras formas de comunicación.

1. El Fiscal, cuando existan suficientes elementos de convicción para considerar la comisión de un delito sancionado con pena superior a los cuatro años de privación de libertad y la intervención sea absolutamente necesaria para proseguir las investigaciones, podrá solicitar al Juez de la Investigación Preparatoria la intervención y grabación de comunicaciones telefónicas, radiales o de otras formas de comunicación. Rige lo dispuesto en el numeral 4) del artículo 226º.

2. La orden judicial puede dirigirse contra el investigado o contra personas de las que cabe estimar fundadamente, en mérito a datos objetivos determinados que reciben o tramitan por cuenta del investigado determinadas comunicaciones, o que el investigado utiliza su comunicación.

3. El requerimiento del Fiscal y, en su caso, la resolución judicial que la acuerde, deberá indicar el nombre y dirección del afectado por la medida, así como, de ser posible, la identidad del teléfono u otro medio de comunicación o telecomunicación a intervenir y grabar o registrar. También indicará la forma de la interceptación, su alcance y su duración, al igual que la autoridad o funcionario, policial o de la propia Fiscalía, que se encargará de la diligencia de interceptación y grabación o registro.

4. Las empresas telefónicas y de telecomunicaciones deberán posibilitar la diligencia de intervención y grabación o registro, bajo apercibimiento de ser denunciados por delito de desobediencia a la autoridad. Los encargados de realizar la diligencia y los servidores de las indicadas empresas deberán guardar secreto acerca de la misma, salvo que se les citare como testigos al procedimiento.

5. Si los elementos de convicción tenidos en consideración para ordenar la medida desaparecen o hubiere transcurrido el plazo de duración fijado para la misma, ella deberá ser interrumpida inmediatamente.

6. La interceptación no puede durar más de treinta días. Excepcionalmente podrá prorrogarse por plazos sucesivos, previo requerimiento del Fiscal y decisión motivada del Juez de la Investigación Preparatoria.

Law 27697, modified by Legislative Decree n. 991, regulates the interception of communications, and authorizes the interception of the communication of persons that are being investigated for some specific crimes, amongst which child pornography is included.⁷³⁵

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

Law 29137 both prohibits the access of minors to any kind of pornographic content on the Internet (Article 1), and regulates the activity of Internet cafes.⁷³⁶ It requires the use of filters and software to avoid the access by minors to pornographic sites or the participation in chats involving sexual content.⁷³⁷ It modified Law 28.119, requiring Internet Cafés to register every person that is willing to use their services, and to maintain their identification (ID number), number of the computer used, and time of use for a period of six months.⁷³⁸ Counties can deny authorization of functioning to Internet Cafés that do not comply with those requirements. They have the obligation to verify whether the cafés are compliant with those requirements.⁷³⁹

⁷³⁵ Ley que otorga facultad al Fiscal para la intervención y control de comunicaciones y documentos privados en Caso Excepcional, LEY Nº 2769, available at <http://www4.congreso.gob.pe/comisiones/2001/justicia/ley27697.htm> (last visited Oct. 9, 2015).

⁷³⁶ Artículo 1. Objeto y ámbito de la Ley

Prohíbe se el acceso de menores de edad a páginas web, canales de conversación o cualquier otra forma de comunicación en red de contenido y/o información pornográfica u otras formas reñidas con la moral o el pudor, que atenten contra su integridad física, psicológica o que afecten su intimidad personal y/o familiar.

La presente Ley es de aplicación a los establecimientos que brindan servicio de cabinas públicas de internet u otras formas de comunicación en red y cuyos equipos pueden ser utilizados por menores de edad.

Dichos establecimientos deberán tener por conductores, administradores o encargados a personas mayores de edad.

⁷³⁷ Artículo 2. Instalación de software especiales Los propietarios, conductores, administradores o encargados de establecimientos que brindan el servicio de cabinas públicas de internet están obligados a garantizar que los menores de edad, que concurran a sus establecimientos, no tengan acceso a páginas web, canales de conversación o cualquier otra forma de comunicación en red de contenido y/o información pornográfica u otras formas reñidas con la moral o el pudor, que atenten contra su integridad o afecten su intimidad personal y/o familiar, bajo responsabilidad.

El cumplimiento de esta obligación se hace efectivo mediante la instalación, en todas las computadoras, de programas o software especiales de filtro y bloqueo o cualquier otro medio para impedir que menores de edad tengan acceso a las citadas páginas web, canales de conversación u otra forma de comunicación en red, siendo además, responsables de la actualización y vigencia de los mismos. De igual modo, se debe colocar en lugar visible la advertencia correspondiente.

⁷³⁸ Artículo 2. Incorporación

Incorpóranse los artículos 5 y 6 a la Ley Nº 28119, Ley que prohíbe el acceso de menores de edad a páginas web de contenido pornográfico, con los siguientes textos:

Artículo 5. Registro de usuarios

Los administradores de cabinas públicas de internet llevan un registro escrito de los usuarios mayores de edad, que incluye el número del Documento Nacional de Identidad - DNI o el documento que, por disposición legal, esté destinado a la identificación personal, número de cabina y hora de ingreso y salida, por un período no inferior a los seis (6) meses.

(...)

⁷³⁹ Artículo 3. Fiscalización y sanciones

Las municipalidades sólo otorgan licencia de funcionamiento para brindar el servicio de cabinas públicas de internet a los establecimientos que cumplan con los requisitos previstos en la presente Ley y en su reglamento.

Las municipalidades, en coordinación con la Policía Nacional del Perú, fiscalizan el cumplimiento de la presente Ley. Para ello, deben realizar, en forma trimestral, inspecciones inopinadas para verificar que dichos establecimientos cumplan con las obligaciones previstas en la presente Ley y en su reglamento.

Las municipalidades, de acuerdo a sus atribuciones, imponen las sanciones por infracciones a las disposiciones de la presente Ley. Por vía reglamentaria se especificarán dichas infracciones y se graduarán las sanciones de acuerdo a su gravedad, pudiendo ser éstas las de multa, suspensión de autorización o de licencia, cancelación de la misma, clausura, decomiso, entre otras.

18 – Has a national plan to combat violence against children

The most important national plans to combat child prostitution and child pornography are the PNAIA 2012-2021 and the PNLTP 2011-2016.

The Ministério de Promoción de la Mujer y del Desarrollo Humano (PROMUDEH) is the institution responsible for developing plans and programs to help children that were victims of sexual abuse (Code for Children and Adolescents, Articles 34, 35 and 38).⁷⁴⁰

19 – International instruments ratified

- The Convention on the Rights of the Child, Signed on January 26, 1990 and ratified on September 4, 1990
- The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, signed on November 1, 2000 and ratified on May 8, 2002
- The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, signed on November 1, 2000, and ratified on May 8, 2002 with the following declaration:
 - In depositing the instrument of ratification of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the Government of Peru declares that, in compliance with its article 3, paragraph 2, the minimum age for voluntary recruitment into the national armed forces, under national legislation, is 18 years.

20 – Age of criminal liability

According to Article 20 of the Criminal Code, minors are not criminally liable. However, in cases of terrorism, the age of criminal liability is reduced to 15 years of age.⁷⁴¹ Adolescents are subjected to a juvenile justice system if they are between 12 and 18 years of age, and children less than 12 years of age are subjected only to protection measures (Articles 183 and 184 of the Code of Children and Adolescents).⁷⁴²

Para el caso de la infracción por permitir el acceso de menores de edad a las citadas páginas web, canales de conversación u otra forma de comunicación en red, la sanción será la cancelación de la licencia de funcionamiento.

⁷⁴⁰ Artículo 34o. Condiciones para el desarrollo de planes y programas.- Los planes, programas y acciones se desarrollarán teniendo en cuenta la situación social y cultural del niño y del adolescente, en concordancia con la política nacional dictada por el PROMUDEH.

Artículo 35o. Programas especiales.- El PROMUDEH desarrollará programas especiales para los niños y adolescentes que presenten características peculiares propias de su persona o derivadas de una circunstancia social.

Artículo 38o. Programas para niños y adolescentes maltratados o víctimas de violencia sexual.- El niño o el adolescente víctimas de maltrato físico, psicológico o de violencia sexual merecen que se les brinde atención integral mediante programas que promuevan su recuperación física y psicológica. El servicio está a cargo del Sector Salud. Estos programas deberán incluir a la familia.

El Estado garantiza el respeto de los derechos de la víctima en todos los procedimientos policiales y judiciales. El PROMUDEH promueve y establece programas preventivos de protección y atención, públicos y privados, tendentes a prevenir, atender y reducir los efectos de la violencia dirigida contra el niño o el adolescente.

⁷⁴¹ Artículo 20. Inimputabilidad

Está exento de responsabilidad penal:

(...)

2. El menor de 18 años.

⁷⁴² Artículo 183o. Definición. Se considera adolescente infractor a aquél cuya responsabilidad ha sido determinada como autor o partícipe de un hecho punible tipificado como delito o falta en la ley penal.

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

The legislation specifically addresses the use of ICTs to commit crimes against children, even enhancing the penalties when Internet is used for child pornography (Article 183-A of the Penal Code).⁷⁴³ Article 181-A of the Penal Code criminalizes the use of Internet for sexual exploitation of children.⁷⁴⁴

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of sex tourism with children

An autonomous crime was introduced in the Penal Code by Law 29408, and is related to the commercial sexual exploitation of a child or an adolescent in tourism. This shows that the legislature is making progress on the criminalization of the incorrect use of Internet, particularly since Article 181-A, modified in 2009 by the Law 29408, establishes that it is a crime to promote, publish, assist, or facilitate the commercial sexual exploitation linked to tourism, by any written means, folder, printed, visual, audio, electronic, magnetic or through the Internet, offering sexual activities with children or adolescents.⁷⁴⁵

The managers (directors) of newspapers, or other companies that publish advertisements of child prostitution, child sex tourism, or trafficking in children can commit a crime under 182-A of the Penal Code, and shall be punished with a penalty of imprisonment of six years, loss of the habilitation for its work, and have to pay a fine.⁷⁴⁶

Artículo 184o. Medidas. El niño menor de doce años que infrinja la ley penal será pasible de medidas de protección previstas en el presente Código.

⁷⁴³ Artículo 183-A. Pornografía infantil (modified by Law 300096 – Ley de los Delitos Informáticos)

El que posee, promueve, fabrica, distribuye, exhibe, ofrece, comercializa o publica, importa o exporta por cualquier medio, objetos, libros, escritos, imágenes, videos o audios, o realiza espectáculos en vivo de carácter pornográfico, en los cuales se utilice a personas de catorce y menos de dieciocho años de edad, será sancionado con pena privativa de libertad no menor de seis ni mayor de diez años y con ciento veinte a trescientos sesenta y cinco días multa.

La pena privativa de libertad será no menor de diez ni mayor de doce años y de cincuenta a trescientos sesenta y cinco días multa cuando:

1. El menor tenga menos de catorce años de edad.
2. El material pornográfico se difunda a través de las tecnologías de la información o de la comunicación.

Si la víctima se encuentra en alguna de las condiciones previstas en el último párrafo del artículo 173, o si el agente actúa en calidad de integrante de una organización dedicada a la pornografía infantil la pena privativa de libertad será no menor de doce ni mayor de quince años.

De ser el caso, el agente será inhabilitado conforme a los numerales 1, 2 y 4 del artículo 36.”

⁷⁴⁴ Artículo 181-A. Explotación sexual comercial infantil y adolescente en ámbito del turismo

El que promueve, publicita, favorece o facilita la explotación sexual comercial en el ámbito del turismo, a través de cualquier medio escrito, folleto, impreso, visual, audible, electrónico, magnético o a través de Internet, con el objeto de ofrecer relaciones sexuales de carácter comercial de personas de catorce (14) y menos de dieciocho (18) años de edad será reprimido con pena privativa de libertad no menor de cuatro (4) ni mayor de ocho (8) años.

Si la víctima es menor de catorce años, el agente, será reprimido con pena privativa de la libertad no menor de seis (6) ni mayor de ocho (8) años.

El agente también será sancionado con inhabilitación conforme al artículo 36 incisos 1, 2, 4 y 5.

Será no menor de ocho (8) ni mayor de diez (10) años de pena privativa de la libertad cuando ha sido cometido por autoridad pública, sus ascendientes, maestro o persona que ha tenido a su cuidado por cualquier título a la víctima.

⁷⁴⁵ *Id.*

⁷⁴⁶ Artículo 182-A. Publicación en los medios de comunicación sobre delitos de libertad sexual a menores

Los gerentes o responsables de las publicaciones o ediciones a transmitirse a través de los medios de comunicación masivos que publiciten la prostitución infantil, el turismo sexual infantil o la trata de menores de dieciocho años de edad serán reprimidos con pena privativa de la libertad no menor de dos ni mayor de seis años.

Trafficking in person is criminalized in Article 153 of the Penal Code, which specifically links it to the commercial sexual exploitation of children.⁷⁴⁷

23 – Has specific legislation on online grooming considering it a standalone offense

Law 300096 (Cybercrime Law) regulates online grooming in Article 5.⁷⁴⁸ It states that it is a crime to contact a minor with the use of any ICT, with the intent of soliciting or obtaining pornographic material or to have sexual activity with him/her, establishing a penalty of four up to eight years of imprisonment.

24 – Has a clear definition of online grooming

Article 5 of Law 300096 has an adequate definition of online grooming, describing the conduct of contacting a minor, through the Internet, in order to obtain or ask for pornographic material, or to have a sexual activity with him/her.⁷⁴⁹

25 – Age of potential victims of online grooming

Potential victims of online grooming are children less than 18 years of age, but for those who are between 14 and 18 years old, she/he has to be deceived.

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

Online grooming must be committed with a specific intent: to request or obtain pornographic material or have a sexual contact with a minor.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense, or considers it an aspect of grooming

Article 183 of the Penal Code, item 1, modified by Article 1 of Law 28.251/2004, proscribes that it is a crime to show, sell, or give pornographic images to a child or adolescent. This is an important provision, because this act is normally the way that adults prepare a child or adolescent for future sexual activities, a preparatory act for grooming.⁷⁵⁰

El agente también será sancionado con inhabilitación conforme al inciso 4 del artículo 36 y con trescientos sesenta días multa.” (*)

⁷⁴⁷ Artículo 153. Trata de personas

El que promueve, favorece, financia o facilita la captación, transporte, traslado, acogida, recepción o retención de otro, en el territorio de la República o para su salida o entrada del país, recurriendo a: la violencia, la amenaza u otras formas de coacción, la privación de libertad, el fraude, el engaño, el abuso del poder o de una situación de vulnerabilidad, o la concesión o recepción de pagos o beneficios, con fines de explotación, venta de niños, para que ejerza la prostitución, someterlo a esclavitud sexual u otras formas de explotación sexual, obligarlo a mendigar, a realizar trabajos o servicios forzados, a la servidumbre, la esclavitud o prácticas análogas a la esclavitud u otras formas de explotación laboral, o extracción o tráfico de órganos o tejidos humanos, será reprimido con pena privativa de libertad no menor de ocho ni mayor de quince años.

La captación, transporte, traslado, acogida, recepción o retención de niño, niña o adolescente con fines de explotación se considerará trata de personas incluso cuando no se recurra a ninguno de los medios señalados en el párrafo anterior.

⁷⁴⁸ Artículo 5 Ley 300096 – Ley de los Delitos Informáticos

El que, a través de las tecnologías de la Información o de la comunicación, contacta con un menor de catorce años para solicitar u obtener del material pornográfico, o para llevar a cabo actividades sexuales con el, será reprimido con pena privativa de libertad no menor de cuatro ni mayor de ocho años e inhabilitación conforme a los numerales 1, 2 y 4 del artículo 36 del Código Penal.

Cuando la víctima tiene entre catorce y menos de dieciocho años de edad y medie engaño, la pena será no menor de tres ni mayor de seis años e inhabilitación conforme a los numerales 1, 2 y 4 del artículo 36 del Código Penal.

⁷⁴⁹ *Id.*

⁷⁵⁰ Artículo 183.

28 – Has specific legislation on cyberbullying

There is no a specific legislation on cyberbullying. However, Article 2 of the Constitution guarantees that every person has the right not to have information related to their private life and intimacy placed online. Law 29719 was enacted to diagnose, prevent, avoid, punish, and eradicate violence and intimidation amongst students, but it is not specifically related to online violence. It determines that every school must hire a psychologist to prevent and treat cases of violence amongst students, and creates a council to analyze cases of bullying, and to establish duties for teachers, principals, and parents.⁷⁵¹

29 – Has specific legislation concerning sexting

There is no specific legislation on sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

The Peruvian legislation proscribes only one level of penalty for all offenses related to child pornography. Thus, there is a high penalty for possession, equivalent to that established for the production, which is a more harmful offense.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

The Penal Code of Peru establishes aggravating circumstances for offenses committed by a member of the family, or a person who has abused a recognized position of trust or authority (Article 183-A).⁷⁵² However, it does give the same treatment when a person cohabiting with the child commits the crime.

(...)

Será reprimido con pena privativa de libertad no menor de tres ni mayor de seis años:

1. El que muestra, vende o entrega a un menor de dieciocho años, por cualquier medio, objetos, libros, escritos, imágenes, visuales o auditivas, que por su carácter obsceno, pueden afectar gravemente el pudor, excitar prematuramente o pervertir su instinto sexual.
2. El que incita a un menor de dieciocho años a la práctica de un acto obsceno o le facilita la entrada a los prostíbulos u otros lugares de corrupción.
3. El administrador, vigilante o persona autorizada para controlar un cine u otro espectáculo donde se exhiban representaciones obscenas, que permita ingresar a un menor de dieciocho años.

⁷⁵¹ Artículo 2°. Toda persona tiene derecho:

(...)

6. A que los servicios informáticos, computarizados o no, públicos o privados, no suministren informaciones que afecten la intimidad personal y familiar.

⁷⁵² Artículo 183-A. Pornografía infantil

(...)

Si la víctima se encuentra en alguna de las condiciones previstas en el último párrafo del artículo 173, o si el agente actúa en calidad de integrante de una organización dedicada a la pornografía infantil la pena privativa de libertad será no menor de ocho ni mayor de doce años.

De ser el caso, el agente será inhabilitado conforme al artículo 36, incisos 1, 2, 4 y 5.

This is the mentioned last paragraph of Article 183-A:

The Peruvian legislation does not establish an aggravating circumstance for offenses committed by several persons working together, but it does so for offenses within the framework of a criminal organization (Article 183-A of the Penal Code).⁷⁵³

Artículo 173. (...)

Si el agente tuviere cualquier posición, cargo o vínculo familiar que le dé particular autoridad sobre la víctima o le impulse a depositar en él su confianza, la pena será no menor de treinta años para los supuestos previstos en los incisos 2 y 3.

⁷⁵³ Artículo 183-A. Pornografía infantil.

(...)

Si la víctima se encuentra en alguna de las condiciones previstas en el último párrafo del artículo 173, o si el agente actúa en calidad de integrante de una organización dedicada a la pornografía infantil, la pena privativa de libertad será no menor de ocho ni mayor de doce años. (...)

17. URUGUAY – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes, Articles 1, 2, and 3 of Law 17.815
2 – Has a clear definition of child pornography	Yes, Articles 1, 2, and 3 of Law 17.815
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes, Articles 1, 2, and 3 of Law 17.815
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	No, only storage
6 – Criminalizes virtual images and sexually exploitative representations of children	Yes, Article 3 of Law 17815
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	No, but sanctions can be imposed
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Partly, only for nationals
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Yes, Articles 6 and 7 of the Penal Code
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes, Article 105 of the Penal Code
12 – Establishes forfeiture of proceeds derived from such offenses	Yes, Article 105 of the Penal Code
13 – Establishes mandatory reporting requirements for professionals who work with children	Partly
14 – Requires Internet Service Providers to report child pornography	No
15 – Has a support telephone or online hotlines to enable the public to report child abuse	Yes, the blue line of the Instituto del Niño y el Adolescente
16 – Creates data retention or data preservation policies or provisions	Only preservation provisions – Article 182 of the Criminal Procedure Code
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No
18 – Has a national plan to combat violence against children	Yes
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years of age
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	No
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	Trafficking with the intent to commercially exploit children
23 – Has specific legislation on online grooming, considering it a standalone offense	No
24 – Has a clear definition of online grooming	Does not apply
25 – Considers everyone under 18 as a potential victim of online grooming	Does not apply
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Does not apply
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	No
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenses	Two levels
31 – Law establishes aggravating circumstances for child abuse offenses	No

URUGUAY – COUNTRY REPORT

The Oriental Republic of Uruguay is the second smallest country in South America. It is bordered by Argentina, Brazil, and the Atlantic Ocean. According to the CIA World Factbook, it is one of the few countries in Latin America and the Caribbean where the entire population has access to clean water. Education is free, a fact that has contributed to the country's high levels of literacy. It is one of the most socially developed countries, and one of the most liberal nations in the world. It has a privileged position amongst Latin American countries, standing out for the population's high quality of life.⁷⁵⁴

Uruguay is a constitutional republic, divided into 19 departments. It achieved its independence from Brazil in 1825. Uruguay is a civil law country.

The President is the Chief of State and Head of Government, and is elected for a five-year term (may not serve consecutive terms). The legislative branch is bicameral.

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

The Constitution of Uruguay is inclusive of the rights of children. It provides in Article 41⁷⁵⁵ that domestic legislation will guarantee that children and adolescents are protected against exploitation and abuse, as well as abandonment.

The Code of Childhood and Adolescence (Código de La Niñez y la Adolescencia) (CNA) was enacted in 2004, and is applicable to every person under 18 years of age. Children are defined as those under 13 years old, and adolescents are between 13 and 18 years old (Article 1).⁷⁵⁶ Article 4 determines that the CNA should be interpreted according to the general principals and norms of the CRC and other international instruments binding on the country.⁷⁵⁷ Under Article 6, the best interests of the child shall be a primary consideration, a norm aligned with the CRC.

Article 15 establishes the State has the duty to protect all children and adolescents from abandonment, sexual abuse, and prostitution.⁷⁵⁸ Article 130 classifies child pornography, prostitution, and sexual abuse as forms of abuse or mistreatment.⁷⁵⁹

⁷⁵⁴ *Uruguay, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/uy.html> (last visited Nov. 9, 2015).

⁷⁵⁵ Artículo 41. El cuidado y educación de los hijos para que éstos alcancen su plena capacidad corporal, intelectual y social, es un deber y un derecho de los padres. Quienes tengan a su cargo numerosa prole tienen derecho a auxilios compensatorios, siempre que los necesiten.

La ley dispondrá las medidas necesarias para que la infancia y juventud sean protegidas contra el abandono corporal, intelectual o moral de sus padres o tutores, así como contra la explotación y el abuso.

⁷⁵⁶ Artículo 1o. (Ámbito de aplicación). El Código de la Niñez y la Adolescencia es de aplicación a todos los seres humanos menores de dieciocho años de edad.

A los efectos de la aplicación de este Código, se entiende por niño a todo ser humano hasta los trece años de edad y por adolescente a los mayores de trece y menores de dieciocho años de edad.

Siempre que este Código se refiera a niños y adolescentes comprende ambos géneros.

⁷⁵⁷ Artículo 4o. (Interpretación). Para la interpretación de este Código, se tendrán en cuenta las disposiciones y principios generales que informan la Constitución de la República, la Convención sobre los Derechos del Niño, leyes nacionales y demás instrumentos internacionales que obligan al país.

En los casos de duda se deberá recurrir a los criterios generales de interpretación y, especialmente, a las normas propias de cada materia.

⁷⁵⁸ Artículo 15. (Protección especial).- El Estado tiene la obligación de proteger especialmente a los niños y adolescentes respecto a toda

Crimes committed against children are handled both by the Criminal Code, and specific legislation such as Law 17.815, which is related to commercial or non-commercial sexual violence against children.

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

Article 1, 2 and 3 of Law 17.815 are related to child abuse images. Article 1 punishes the production of child pornography.⁷⁶⁰ Article 2 criminalizes the acts of people who commercialize, disseminate, exhibit, store with distribution purposes, import, export, distribute or offer the image or any other form of representation of a minor or a person with mental disability.⁷⁶¹ Article 3 punishes the facilitation of the commercialization and distribution of pornographic material by the image or other representation of one or more minors, or persons with mental disability (whoever facilitates, to benefit themselves or other, the commercialization, distribution, display, import, export, distribution, sale, storage or purchase of pornographic materials).⁷⁶² The definition of child abuse images is provided in the second part of Article 3, and is applicable to the crimes indicated in the previous articles. The definition states that a child abuse image is material that contains the image or any other form or representation of minors or people with mental disabilities, in explicit sexual activities, real or simulated, or images or representation of their genitals with sexual purposes.

An analysis of the Law 17.815 together with the CNA, leads to the conclusion that every person under 18 is a potential victim of child pornography (all minors).

This same statute also criminalizes the retribution or promise of retribution made to a minor, in order to get them to perform sexual or erotic activities (Article 4).⁷⁶³ It creates an autonomous felony of

forma de:

A) Abandono, abuso sexual o explotación de la prostitución.

(...)

⁷⁵⁹ Artículo 130. (Definición). A los efectos de este título entiéndase por maltrato y abuso del niño o adolescente las siguientes situaciones, no necesariamente taxativas: maltrato físico, maltrato psíquico-emocional, prostitución infantil, pornografía, abuso sexual y abuso psíquico o físico.

⁷⁶⁰ Artículo 10. (Fabricación o producción de material pornográfico con utilización de personas menores de edad o incapaces).- El que de cualquier forma fabricare o produjere material pornográfico utilizando a personas menores de edad o personas mayores de edad incapaces, o utilizare su imagen, será castigado con pena de veinticuatro meses de prisión a seis años de penitenciaría.

⁷⁶¹ Artículo 20. (Comercio y difusión de material pornográfico en que aparezca la imagen u otra forma de representación de personas menores de edad o personas incapaces).- El que comerciare, difundiere, exhibiere, almacenare con fines de distribución, importare, exportare, distribuyere u ofertare material pornográfico en el que aparezca la imagen o cualquier otra forma de representación de una persona menor de edad o persona incapaz, será castigado con pena de doce meses de prisión a cuatro años de penitenciaría.

⁷⁶² Artículo 30. (Facilitamiento de la comercialización y difusión de material pornográfico con la imagen u otra representación de una o más personas menores de edad o incapaces).- El que de cualquier modo facilitare, en beneficio propio o ajeno, la comercialización, difusión, exhibición, importación, exportación, distribución, oferta, almacenamiento o adquisición de material pornográfico que contenga la imagen o cualquier otra forma de representación de una o más personas menores de edad o incapaces será castigado con pena de seis meses de prisión a dos años de penitenciaría. A los efectos del presente artículo y de los anteriores, se entiende que es producto o material pornográfico todo aquel que por cualquier medio contenga la imagen u otra forma de representación de personas menores de edad o incapaces dedicadas a actividades sexuales explícitas, reales o simuladas, o la imagen o representación de sus partes genitales, con fines primordialmente sexuales. (Ley No 17.559, de 27 de setiembre de 2002, Protocolo Facultativo de la Convención sobre los Derechos del Niño relativo a la venta de niños, la prostitución infantil y la utilización de niños en la pornografía).

⁷⁶³ Artículo 40. (Retribución o promesa de retribución a personas menores de edad o incapaces para que ejecuten actos sexuales o eróticos

contributing, in any way, to child exploitation, prostitution, or servitude (Article 5), establishing a greater punishment for parents, caregivers, or public authorities.⁷⁶⁴

Article 6 of Law 17.815 criminalizes child trafficking when it is directly related to sexual exploitation or prostitution.⁷⁶⁵

4 – Criminalizes accessing or downloading child pornography images

The conduct of accessing or downloading child pornography is not criminalized.

5 – Criminalizes simple possession of child pornography

Possession is not a crime, only the storage with the purpose of commercialization is criminalized. The Committee on the Right of the Child, when analyzing Uruguay's report, concluded that storage is not equivalent to possession.

6 – Criminalizes virtual images or sexually exploitative representations of children

It is a crime to produce or distribute virtual images or sexually exploitative representations of children. Under the definition of Article 3 of Law 17815, child abuse images are those made with children and adolescents, or any representation of them.

7 – Addresses the criminal liability of children involved in pornography

The legislation does not address the criminal liability of children involved in pornography.

8 – Establishes the criminal liability of legal persons for child pornography offenses

No.

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

According to Item 5 of Article 10 of the Penal Code, Uruguay applies the active personality principle only when the offender is a national of the country, but this does not apply to foreigners that are living there.⁷⁶⁶ Item 7 of Article 10 allows extraterritorial jurisdiction when specifically determined by an

de cualquier tipo).- El que pagare o prometiére pagar o dar a cambio una ventaja económica o de otra naturaleza a persona menor de edad o incapaz de cualquier sexo, para que ejecute actos sexuales o eróticos de cualquier tipo, será castigado con pena de dos a doce años de penitenciaría.

⁷⁶⁴ Artículo 5o. (Contribución a la explotación sexual de personas menores de edad o incapaces).- El que de cualquier modo contribuyere a la prostitución, explotación o servidumbre sexual de personas menores de edad o incapaces, será castigado con pena de dos a doce años de penitenciaría. La pena será elevada de un tercio a la mitad si se produjere con abuso de las relaciones domésticas o de la autoridad o jerarquía, pública o privada, o la condición de funcionario policial del agente.

⁷⁶⁵ Artículo 6o. (Tráfico de personas menores de edad o incapaces).- El que de cualquier modo favorezca o facilite la entrada o salida del país de personas menores de edad o incapaces, para ser prostituidas o explotadas sexualmente, será castigado con pena de dos a doce años de penitenciaría.

⁷⁶⁶ Artículo 10. (La ley penal. El principio de la defensa y el de la personalidad) Se sustraen a la aplicación de la ley uruguaya, los delitos cometidos por nacionales o extranjeros en territorio extranjero, con las siguientes excepciones :

1. (...)

2. (...)

3. (...)

4. (...)

5. Los delitos cometidos por un uruguayo, castigados tanto por la ley extranjera como por la nacional, cuando se autor fuere habido en el territorio de la República y no fuese requerido por las autoridades del país donde cometió el delito, aplicándose en ese caso la ley más

international instrument, but that is not the case in the CRC, which only calls for a country to modify its legislation in order to allow extraterritorial jurisdiction.

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

Under subtitles 6 and 7 of Article 10 of the Penal Code, extraterritorial jurisdiction is recognized in this situation.⁷⁶⁷

11 – Establishes forfeiture of assets used to commit or facilitate offenses; and

12 – Establishes forfeiture of proceeds derived from such offenses

Generally, the Uruguayan Criminal Code establishes, through Article 105, the forfeiture of the proceeds of the crime and the instruments with which it was executed. However, this is not considered a criminal punishment, but instead a civil effect of the conviction.⁷⁶⁸

13 – Establishes mandatory reporting requirements for professionals who work with children

This is partially accounted for as Article 360 of the Penal Code establishes that health professionals commit a misdemeanor if they fail to report signs of a crime committed against anyone they examine (not specifically a child).⁷⁶⁹

benigna.

6. (...)

7. Todos los demás delitos sometidos a la ley uruguaya en virtud de disposiciones especiales de orden interno, o de convenios internacionales.

⁷⁶⁷ Artículo 10. (La ley penal. El principio de la defensa y el de la personalidad) Se sustraen a la aplicación de la ley uruguaya, los delitos cometidos por nacionales o extranjeros en territorio extranjero, con las siguientes excepciones :

1. (...)

2. (...)

3. (...)

4. (...)

5. (...)

6. Los delitos cometidos por un extranjero en perjuicio de un uruguayo, o en perjuicio del país, con sujeción a lo establecido en el inciso precedente, y siempre que concurran las circunstancias en él articuladas.

7. (...)

⁷⁶⁸ Artículo 105. (Normas de la responsabilidad civil) La responsabilidad civil se rige por lo dispuesto en el Código Civil, Libro IV, Título I, Capítulo II, Sección II, y aparece los siguientes efectos :

Confiscación de los efectos del delito y de los instrumentos con que fue ejecutado, salvo que unos y otros pertenezcan a un tercero, extraño al hecho, o que se trate de delitos culpables del procesado.

Embargo preventivo de los bienes del procesado.

Obligación de resarcir los daños y perjuicios causados.

Condenación a los gastos del proceso.

Obligación de indemnizar al Estado, los gastos de alimentación, vestido, alojamiento durante el proceso y la condena.

⁷⁶⁹ Artículo 360. Será castigado con 10 U.R. (diez unidades reajustables) a 100 U.R. (cien unidades reajustables) de multa o prisión equivalente:

(...)

10. (Omisión en denunciar hechos delictuosos, conocidos profesionalmente). El médico, partera o farmacéutico que notando en una persona o en su cadáver, señales de envenenamiento o de otro grave atentado, no diere parte a la autoridad, dentro del término de veinticuatro horas a partir del descubrimiento, salvo que la reserva se hallare amparada por el secreto profesional.

14 – Requires Internet Service Providers to report child pornography

The legislation does not require mandatory reports from ISPs.

15 – Has a support telephone or online hotline to enable the public to report child abuse

The blue line of the Instituto del Niño y el Adolescente del Uruguay (INAU), Línea Azul de INAU, is free and available nationally, and operates from Monday to Friday, 8 AM to 7 PM. (0800.5050). It is possible to report through e-mail: lineaazul@inau.gub.uy. In Montevideo, there is also the SOS NIÑOS line – Línea SOS NIÑOS – 0800.1929.

16 – Creates data retention and preservation policies or provisions

Article 182 of the Criminal Procedure Code generally regulates the interception of all kinds of communications, requiring prior judicial order.⁷⁷⁰

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

There is a bill in the House of Representatives called the Marco Regulatorio de Ciber Café, which will transfer the responsibility to supervise and monitor the use of computers in cybercafés to the INAU.⁷⁷¹ It was presented in 2008 but has not been voted on yet.

18 – Has a national plan to combat violence against children

In 2007, the National Committee for the Eradication of Commercial and Non-Commercial Sexual Exploitation of Children and Adolescents [Comité Nacional para la Erradicación de la Explotación Sexual Comercial y No Comercial de la Niñez y la Adolescencia] (Conapees) was created. It was coordinated by INAU, and has a Plan of Action that includes: training courses for operators around the country (over 700 in the last four years); promoting and supporting research regarding the subject; and creation of a team specialized in care for victims of sexual exploitation.⁷⁷² In 2007, the Conapees launched a National Plan for combating sexual exploitation (Plan Nacional de Erradicación de La Explotacion Sexual Comercial Y No Comercial Infantil y Adolescente).

19 – International instruments ratified

- The Convention on the Rights of the Child, ratified on November 20, 1990
- The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, ratified on July 3, 2003
- The ILO Minimum Age Convention, ratified on June 2, 1977

(...)

⁷⁷⁰ Artículo 182. Interceptación de correspondencia y otras comunicaciones).

182.1 Podrá ordenarse, por resolución fundada, la interceptación y el secuestro de la correspondencia o de toda otra forma de comunicación en que el imputado intervenga, directa o indirectamente, si existieran motivos graves para creer que la medida puede suministrar medios útiles para la comprobación del delito.

182.2 El Tribunal examinará el material obtenido y dispondrá su incorporación, total o parcial, si tuviere relación con el delito y, en caso contrario, ordenará su destrucción o devolución, con citación de las partes y demás interesados.

182.3 Tratándose de tercero, podrán dictarse las mismas medidas, siempre que el Juez tenga motivos seriamente fundados, que se harán constar, para suponer que, de las mencionadas comunicaciones, pueda resultar la prueba de la participación en un delito.

182.4 Toda persona que tuviere acceso a dicho material en razón de su empleo, tendrá el deber de guardar secreto.

⁷⁷¹ Proyecto de Ley (Draft Law) Ciber Café, Repartido N° 219 Abril de 2010, available at www.parlamento.gub.uy/repartidos/AccesoRepartidos.asp?Url=/repartidos/camara/d2010040219-00.htm (last visited Oct. 30, 2015).

⁷⁷² Created by the Decree 385/2004.

- Minimum age: 15
- The ILO Worst Forms of Child Labor Convention, ratified on August 3, 2001

20 – Age of criminal liability

According to the Penal Code, persons under 18 years of age do not have criminal liability.⁷⁷³ Under Article 74 of the CNA, only adolescents older than 13 years old are subjected to a special system of juvenile justice, when they commit infractions that are identified as crimes by the Penal Code.⁷⁷⁴

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

No, the law does not specifically address the use of ICTs to commit crimes against children.

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of sex tourism with children

Article 6 of Law 17.815 criminalizes trafficking in children for sexual exploitation.⁷⁷⁵

23 – Has specific legislation on online grooming considering it a standalone offense

No, the law does not criminalize online grooming.

24 – Has a clear definition of online grooming

Does not apply.

25 – Age of potential victims of online grooming

Does not apply.

26 – Criminalizes online grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

Does not apply.

⁷⁷³ Artículo 34. (Minoría de edad) No es imputable el que ejecuta el hecho antes de haber cumplido la edad de 18 años.

⁷⁷⁴ Artículo 74. (Principios que rigen).- En todos los casos en que al adolescente se le impute el haber incurrido en actos que se presumen comportan infracción a la ley penal, deberá asegurarse el cumplimiento estricto de las garantías del debido proceso, especialmente las siguientes:

A) Principios de judicialidad y legalidad.- El adolescente imputado de haber cometido una infracción a la ley penal, será juzgado por los Jueces competentes en conformidad a los procedimientos especiales establecidos por este Código. Se asegurará, además, la vigencia de las normas constitucionales, legales e instrumentos internacionales, especialmente la Constitución de la República, la Convención de los Derechos del Niño.

B) Principio de responsabilidad.- Sólo puede ser sometido a proceso especial, regulado por este Código, el adolescente mayor de trece y menor de dieciocho años de edad, imputado de infracción a la ley penal. La responsabilidad del adolescente tendrá lugar a partir de la sentencia definitiva que le atribuya la comisión del hecho constitutivo de infracción a la ley penal. Si se encuentran involucrados niños menores de trece años de edad, se procederá de acuerdo a lo preceptuado en el Capítulo XI, artículos 117 y siguientes de este Código.

(...)

⁷⁷⁵ Artículo 6. Tráfico de personas menores de edad o incapaces.

El que de cualquier modo favorezca o facilite la entrada o salida del país de personas menores de edad o incapaces, para ser prostituidas o explotadas sexualmente, será castigado con pena de dos a doce años de penitenciaría.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense, or considers it an aspect of grooming

Showing pornography to a child is not a crime.

28 – Has specific legislation on cyberbullying

There is no current provision related to cyberbullying.

29 – Has specific legislation concerning sexting

Sexting is not criminalized.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

Uruguay does not criminalize the possession of child abuse material. The Penal Code of Uruguay establishes two levels of penalties, observing the order suggested by the Directive 2011/92/EU. It proscribes a higher penalty for offenses related to the production of child abuse material, and a lower penalty for offenses related to the distribution of child abuse images.

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

Uruguay’s legislation does not establish aggravated penalties for situations that involve personal relationships amongst the offender and the victim (member of the child’s family, person cohabiting with the child, or a person who has abused a recognized position of trust or authority).

No legal provisions could be found related to the sexual exploitation of children that establish heightened penalties when the offense was committed by several persons acting together, or when it is committed within the framework of a criminal organization.

18. VENEZUELA – COUNTRY SUMMARY

1 – Has specific legislation on child pornography	Yes ⁷⁷⁶ - LEDI, LODO, LOPNNA, and LPNAI
2 – Has a clear definition of child pornography	No
3 – Considers everyone under age 18 as a victim, regardless of the age of sexual consent	Yes
4 – Criminalizes accessing or downloading child pornography images	No
5 – Criminalizes possession of child abuse material	No
6 – Criminalizes virtual images and sexually exploitative representations of children	Only the dissemination of child pornography
7 – Addresses the criminal liability of children involved in pornography	No
8 – Establishes criminal liability of legal persons for child pornography offenses	Yes – Article 26 of LODO and Article 5 of LEDI
9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory	Partly – Article 3 of LEDI and Article 31 of LODO
10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State	Partly – Article 3 of LEDI and Article 31 of LODO
11 – Establishes forfeiture of assets used to commit or facilitate offenses	Yes – Article 19 of LODO
12 – Establishes forfeiture of proceeds derived from such offenses	Yes – Article 19 of LODO
13 – Establishes mandatory reporting requirements for professionals who work with children	Yes – Article 91 of LOPNNA
14 – Requires Internet Service Providers to report child pornography	No, but they have liability. Article 27 RESORTE
15 – Has a support telephone or online hotlines to enable the public to report child abuse	No. For women there is the 0800-MUJERES hotline
16 – Creates data retention or data preservation policies or provisions	Only preservation provisions - Article 205 Organic Criminal Procedure Code
17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)	No
18 – Has a national plan to combat violence against children	Yes
19 – Has ratified international instruments	CRC, OPSC, and others
20 – Age of criminal liability	18 years, but children older than 12 and younger than 18 can be liable for a crime if they show discernment – Articles 69, 70, and 71 of the Penal Code
21 – Legislation specifically addresses the use of ICTs to commit crimes against children	Yes
22 – Related crimes: trafficking with the intent to produce child pornography and online advertising of child sex tourism	No
23 – Has specific legislation on online grooming, considering it a standalone offense	No
24 – Has a clear definition of online grooming	Does not apply
25 – Considers everyone under 18 as a potential victim of online grooming	Does not apply
26 – Criminalizes grooming when the offender has specific intent of having online or offline sexual contact with a child; or grooming regardless of the intent	Does not apply
27 – Criminalizes showing pornography to a child as a standalone offense; or considers it as an aspect of grooming	No, but has an administrative penalty
28 – Has specific legislation on cyberbullying	No
29 – Has specific legislation concerning sexting	No
30 – Legislation provides different levels of penalties for child abuse offenders	No
31 – Law establishes aggravating circumstances for child abuse offenses	Yes

⁷⁷⁶ Special law on cybercrimes (Ley Especial contra los Delitos Informáticos); Organic Law on the Protection of Children and Adolescents (Ley Orgánica de Protección al Niño, Niña y del Adolescente-LOPNNA); the Law on the Protection of Children and Adolescents in Establishments for the Use of Internet, Videogames and other Multimedia Systems (Ley para la Protección del Niño y del Adolescente en Salas de Uso de Internet, Videojuegos y otros Multimedia- LPNAI) and the Organic Law against the organized crime (LODO).

VENEZUELA – COUNTRY REPORT

The Bolivarian Republic of Venezuela, located in the north of South America, was colonized by Spain. It borders Colombia, Guyana, Brazil, and the Atlantic Ocean. It was one of the three countries that emerged from the collapse of Gran Colombia in 1830. According to the CIA World Factbook, for most of the first half of the 20th century, Venezuela was ruled by generally benevolent military strongmen, who promoted the oil industry and allowed for some social reforms.⁷⁷⁷ Democratically elected governments have been held away since 1959; Hugo Chavez, president from 1999 to 2013, sought to implement his 21st Century Socialism, which led to a weakening of democratic institutions, political polarization, politicized military, rampant violent crime, overdependence on the petroleum industry, high inflation, and a decline in the quality of fundamental human rights.

Venezuela is a federal presidential republic consisting of 23 states. It is among the most urbanized countries in Latin America. Venezuela has the world's largest oil reserves.

The president is elected by direct and universal suffrage, and serves as the Chief of State and Head of Government. The term of office is six years, and a president may be re-elected an unlimited number of times.

The parliament is unicameral. The highest judicial court is the Supreme Court of Justice.

Legal Framework – Constitution and Legislation – Norms related to children and violence against children

The Constitution of Venezuela was enacted in 2000, and has many provisions regulating the rights of children, in particular Article 78, which guarantees that the CRC and all the treaties ratified are respected.⁷⁷⁸ Article 23 proscribes that all treaties and conventions on human rights ratified by Venezuela have the status of constitutional rule and prevail over domestic law.⁷⁷⁹ The CRC and the Optional Protocol to the CRC on the sale of children, trafficking and child pornography must be applied by all branches, levels, and spheres of government in order to guarantee the rights of children, because these treaties were approved by the legislature in accordance with the Constitution. The Venezuelan State promulgated the Act ratifying the OPSC in 2002.⁷⁸⁰

⁷⁷⁷ Venezuela, *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ve.html> (last visited Oct. 13, 2014).

⁷⁷⁸ Artículo 78°. Los niños, niñas y adolescentes son sujetos plenos de derecho y estarán protegidos por la legislación, órganos y tribunales especializados, los cuales respetarán, garantizarán y desarrollarán los contenidos de esta Constitución, la Convención sobre los Derechos del Niño y demás tratados internacionales que en esta materia haya suscrito y ratificado la República. El Estado, las familias y la sociedad asegurarán, con prioridad absoluta, protección integral, para lo cual se tomará en cuenta su interés superior en las decisiones y acciones que les conciernan. El Estado promoverá su incorporación progresiva a la ciudadanía activa y creará un sistema rector nacional para la protección integral de los niños, niñas y adolescentes.

⁷⁷⁹ Artículo 23°.

Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por Venezuela, tienen jerarquía constitucional y prevalecen en el orden interno, en la medida en que contengan normas sobre su goce y ejercicio más favorables a las establecidas en esta Constitución y en las leyes de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público.

⁷⁸⁰ Gaceta Oficial n. 37355, 2nd of January of 2002.

The Organic Law for the Protection of Children and Adolescents (LOPNNA) establishes children's fundamental rights and obligations, determining that the State, the family, and civil society must guarantee absolute priority to them, including during the formulation and execution of public policies.⁷⁸¹

Article 2 of the LOPNNA establishes that children are those under 12 years old, and adolescents those who are older than 12 and under 18 years of age.⁷⁸² If there is any doubt that a person is a child or an adolescent, childhood is presumed; if there is any doubt if a person is an adolescent or an adult, adolescence is presumed. Article 33 proscribes that children and adolescents have the right to be protected against any kind of abuse and sexual exploitation.⁷⁸³ Articles 74 and 779 contain provisions that prevent children from accessing improper content, and contain norms related to the right of information.

The Penal Code establishes that children under 12 years old cannot be punished for crimes, and that adolescents older than 12 and under 15 years old can only be punished if it appears that he/she acted with discernment (vide Articles 69, 70 and 71 of the Penal Code).⁷⁸⁴

Former president Hugo Chavez declared in 2001 that the access and use of the Internet was a priority for the cultural, economic, social, and political development of Venezuela (Decreto 825, Article 1).⁷⁸⁵

⁷⁸¹ Artículo 7o. Prioridad Absoluta.

El Estado, la familia y la sociedad deben asegurar, con Prioridad Absoluta, todos los derechos y garantías de los niños y adolescentes. La prioridad absoluta es imperativa para todos y comprende:

- a) especial preferencia y atención de los niños y adolescentes en la formulación y ejecución de todas las políticas públicas;
- b) asignación privilegiada y preferente, en el presupuesto, de los recursos públicos para las áreas relacionadas con los derechos y garantías de los niños y adolescentes y para las políticas y programas de protección integral al niño y adolescente;
- c) precedencia de los niños y adolescentes en el acceso y la atención a los servicios públicos;
- d) primacía de los niños y adolescentes en la protección y socorro en cualquier circunstancia.

⁷⁸² Artículo 2o. Definición de niño y de adolescente.

Se entiende por niño toda persona con menos de doce años de edad. Se entiende por adolescente toda persona con doce años o más y menos de dieciocho años de edad.

Si existieren dudas acerca de si una persona es niño o adolescente se le presumirá niño, hasta prueba en contrario. Si existieren dudas acerca de si una persona es adolescente o mayor de dieciocho años, se le presumirá adolescente, hasta prueba en contrario.

⁷⁸³ Artículo 33. Derecho a ser protegidos contra abuso y explotación sexual. Todos los niños y adolescentes tienen derecho a ser protegidos contra cualquier forma de abuso y explotación sexual. El Estado debe garantizar programas permanentes y gratuitos de asistencia y atención integral a los niños y adolescentes que hayan sido víctimas de abuso o explotación sexual.

⁷⁸⁴ Artículo 69°. No es punible: el menor de doce años, en ningún caso ni el mayor de doce y menor de quince años, a menos que aparezca que obró con discernimiento.

El Tribunal tomará las medidas que considere oportunas respecto a la educación del menor irresponsable, el cual será mantenido en adecuado establecimiento de educación o en casa de familia de responsabilidad.

Artículo 70°. Si el mayor de doce años y menor de quince fuere declarado responsable, la pena correspondiente al hecho punible se convertirá en arresto, si fuere de presidio o prisión, con disminución de la mitad; asimismo se disminuirán por mitad las otras penas y todas las que estuviere sufriendo cesarán al cumplir los veintiún años.

Artículo 71°. El que cometiere un hecho punible siendo mayor de quince años, pero menor de dieciocho, será castigado con la pena correspondiente, disminuida en una tercera parte.

⁷⁸⁵ Artículo 1°: Se declara el acceso y el uso de Internet como política prioritaria para el desarrollo cultural, económico, social y político de la República Bolivariana de Venezuela.

The Law on the Protection of Children and Adolescents in Establishments for the Use of Internet, Videogames and other Multimedia Systems (Ley para la Protección del Niño y del Adolescente en Salas de Uso de Internet, Videojuegos y otros Multimedia – LPNAI) was enacted in 2006, in order to promote the adequate use of Internet. It regulates the activities of establishments that offer Internet access, requiring specific control devices, safety mechanisms, and software in the computers and equipment to be used by children and adolescents⁷⁸⁶, and includes the presence of employees who are supposed to verify if children are receiving the protection assured by law. This only regulates the use of cybercafés by children and adolescents.

Extracts of legislation related to the template:

1, 2, and 3 – Existence of specific legislation on child pornography; a clear definition of child pornography; and age of the victim

Venezuela has a very confusing legal framework regarding child pornography offenses. The country regulates these issues through five different laws:

- 1) The Penal Code;
- 2) The Organic Law on the Protection of Children and Adolescents (Ley Orgánica de Protección al Niño, Niña y del Adolescente) (LOPNNA);
- 3) The Special Law on Information Technology Crimes (Ley Especial contra los delitos informáticos) (LEDI);
- 4) The Law on the Protection of Children and Adolescents in Establishments for the Use of Internet, Videogames and other Multimedia Systems (Ley para la Protección del Niño y del Adolescente en Salas de Uso de Internet, Videojuegos y otros Multimedia) (LPNAI); and
- 5) The Organic Law against the organized crime (Ley Orgánica contra la Delincuencia Organizada) (LODO), enacted in 2005.

The Penal Code has general rules related to different degrees of criminal participation: attempt to commit a crime, aggravating circumstances, etc. It regulates sexual abuses of minors under Article 375. The Venezuelan Penal Code broadly allows the punishment to different degrees of involvement in the *iter criminis* of any crime, so any kind of accomplices or participants can be punished.⁷⁸⁷

The sexual exploitation of children is regulated by the Organic Law on the Protection of Children and Adolescents (LOPNNA), which covers behaviors similar to those described in the OPSC.

Article 237 of the LOPNNA punishes the production or direction of theater, a play, or a movie using a

⁷⁸⁶ Artículo 10. Todas las salas de juegos computarizados, electrónicos o multimedia y de servicios de Internet están obligadas a implementar controles, mecanismos de seguridad y programas en las computadoras y equipos destinados a niños, niñas y adolescentes para hacer cumplir el articulado establecido en esta ley. Los proveedores de servicios de internet deberán ofrecer y suministrar a todos sus usuarios y usuarias, de manera gratuita, estos controles, programas y mecanismos de seguridad.

⁷⁸⁷ Artículo 84. Incurrir en la pena correspondiente al respectivo hecho punible, rebajada por mitad, los que en el hayan participado de cualquiera de los siguientes modos:

- 1.- Excitando o reforzando la resolución de perpetrarlo o prometiendo asistencia y ayuda para después de cometido.
- 2.- Dando instrucciones o suministrando medios para realizarlo.
- 3.- Facilitando la perpetración del hecho o prestando asistencia o auxilio para que se realice, antes de su ejecución o durante ella.

La disminución de pena prevista en este artículo no tiene lugar, respecto del que se encontrare en algunos de los casos especificados, cuando sin su concurso no se hubiera realizado el hecho.

child or an adolescent in a pornographic scene that does not involve explicit sex.⁷⁸⁸ It also punishes persons who participate, photograph or publish a pornographic scene that uses a child or an adolescent and does not involve explicit sex. The penalty is a fine.

This special legislation relating to the rights of children and adolescents, suffers from a lack of definition of pornography, as it is simply identified as “pornographic scene” and is a term leaving space for subjective interpretations.

Article 258 of the LOPNNA criminalizes the sexual exploitation of children or adolescents, establishing a penalty of three to six years of prison for those who stimulate, conduct or make profits from the sexual activity of minors.⁷⁸⁹ The penalty is raised to four to eight years if the offender has any authority or is responsible for the victim. In its report to the Committee on the Rights of the Child, Venezuela specified that, according to the Guidelines for the Protection of Children and Adolescents published in the official newspaper, *Gaceta Oficial* n. 37815 on November 11, 2003, sexual exploitation is “a concept related to transactions that are compensated in cash or in kind in which children and adolescents are used in sexual activities in exchange for any other consideration. These include child pornography, child prostitution, the sale of children, sex tourism and trafficking of children and adolescents.”⁷⁹⁰

Article 14 of the Organic Law on Organized Crime (LODO) punishes those who exploit the industry or trade in pornography, establishing heavier penalties from 16 to 20 years of prison, if it is related to a performance of children or teenagers.⁷⁹¹ It defines the production and commercialization of pornography as the act of reproducing obscene or indecent material to the disclosure of the general public. The terms “obscene” or “indecent” are subjective concepts open to interpretation, thus, this definition of child pornography cannot be considered adequate according to the OPSC guidelines.

Article 24 of the Special Law on Information Technology Crimes (LEDI) criminalizes the “use of a child or adolescent or his/her image with pornographic or exhibitionists purposes.”⁷⁹² This Article does not

⁷⁸⁸ Artículo 237. Pornografía con niños o adolescentes.

Quien produzca o dirija una representación teatral, televisiva o cinematográfica, utilizando a un niño o adolescente en escena pornográfica que no implique sexo explícito, será sancionado con multa de diez a cincuenta meses de ingreso.

Parágrafo Primero: Incurrir en la misma sanción quien, en las condiciones referidas, participe en la escena con un niño o adolescente.

Parágrafo Segundo: Incurrir en la misma sanción quien fotografíe o publique una escena pornográfica, que no implique sexo explícito, involucrando a un niño o adolescente.

Parágrafo Tercero: En todo caso, se incautará la cinta, la fotografía o la publicación y se ordenará la suspensión de la obra o la transmisión del programa o la cinta.

⁷⁸⁹ Artículo 258. Explotación sexual.

Quien fomente, dirija o se lucre de la actividad sexual de un niño o adolescente será penado con prisión de tres a seis años.

Si el culpable ejerce sobre la víctima autoridad, guarda o vigilancia la prisión será de cuatro a ocho años.

⁷⁹⁰ UN COMM. ON THE RIGHTS OF THE CHILD, *Consideration of Reports submitted by States parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Initial reports of States parties due in 2004, Bolivarian Republic of Venezuela*, U.N. Doc. CRC/C/OPSC/VEN/CO/1 (Nov. 3, 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fVEN%2fCO%2f1&Lang=en (last visited Nov. 9, 2015).

⁷⁹¹ Artículo 14. Pornografía. Quien explote la industria o el comercio de la pornografía para reproducir lo obsceno o impúdico a fin de divulgarlo al público en general, será castigado con una pena de dos a seis años de prisión. Si la pornografía fuere realizada con niños, niñas o adolescentes o para ellos, la pena será de dieciséis a veinte años de prisión.

⁷⁹² Artículo 24. Exhibición pornográfica de niños o adolescentes. Toda persona que por cualquier medio que involucre el uso de tecnologías de información, utilice a la persona o imagen de un niño, niña o adolescente con fines exhibicionistas o pornográficos, será penada con

contain a clear definition of pornography because it uses the word “pornographic” to explain the term, making it a circular definition. The penalty is four to eight years of imprisonment, and a fine. The positive aspect of this article is that it is irrelevant whether or not there is explicit sexual activity because both situations attract criminal liability.

The structure of the Venezuelan legal framework indicates that:

- A person who participates in the production of child abuse images that involves explicit sex will be subjected to the penalties of Article 258 of the LOPNNA, with three to six years of imprisonment;
- A person who produces child pornography that does not involve explicit sex, will only be subjected to a penalty of fine, according to Article 237 of the LOPNNA;
- A person who exhibits child pornography on the web will be subjected to a penalty of five to 10 years of imprisonment, according to Article 24 of the LEDI; and
- The production of child pornography in the context of a criminal organization will attract a higher penalty of 16 to 20 years of prison, under Article 14 of the LODO.

For the purposes of this Regional Study, on the production of child abuse images is analyzed, through Article 24 of the LEDI, because it is focused on violence committed through the Internet.

Article 24 of the LEDI also criminalizes the mere exhibition of child pornography material by those who have not produced it, because it refers to the use of the *image* of a child with pornographic purposes. The penalty is the same: four to eight years of imprisonment.

According to Article 2 of LOPNNA, a child is someone under 12 years of age, and an adolescent is older than 11 years of age but less than 18 years of age.⁷⁹³ If there is any doubt whether a person is a child or an adolescent, he/she is presumed to be a child; if there is any doubt whether a person is an adolescent or an adult, he/she is presumed to be an adolescent.

Under Article 23 of the LEDI, the dissemination of adult pornography without a prior warning of the inappropriate content for children is also punished as a crime.⁷⁹⁴ This is a positive legislative initiative because it helps to control unintentional access by children to inappropriate content on web pages.

Article 56 of the Organic Law on the Women’s Right to a Life Free of Violence (LODMVLV) criminalizes the facilitation or promotion of trafficking in persons, including children and adolescents, with the purpose of sexual exploitation.

prisión de cuatro a ocho años y multa de cuatrocientas a ochocientas unidades tributarias.

⁷⁹³ Artículo 2o. Definición de niño y de adolescente.

Se entiende por niño toda persona con menos de doce años de edad. Se entiende por adolescente toda persona con doce años o más y menos de dieciocho años de edad.

Si existieren dudas acerca de si una persona es niño o adolescente se le presumirá niño, hasta prueba en contrario. Si existieren dudas acerca de si una persona es adolescente o mayor de dieciocho años, se le presumirá adolescente, hasta prueba en contrario.

⁷⁹⁴ Artículo 23. Difusión o exhibición de material pornográfico.

El que por cualquier medio que involucre el uso de tecnologías de información, exhiba, difunda, transmita o venda material pornográfico o reservado a personas adultas, sin realizar previamente las debidas advertencias para que el usuario restrinja el acceso a niños, niñas y adolescentes será sancionado con prisión de dos a seis años y multa de doscientas a seiscientas unidades tributarias.

4 – Criminalizes accessing or downloading child pornography images

Viewing (accessing or downloading) child pornography material is not a crime in Venezuela.

5 – Criminalizes simple possession of child pornography

The possession of child pornography material is not a crime in Venezuela. A direct reflection of this is shown in a report from the Inter-American Bar Association, which indicates that child pornography has increased by 64% in the last two years (2012-2013) in Venezuela.⁷⁹⁵

In a study conducted by professors of the University of Uruguay on the downloading of child abuse images, comparing 10 countries of Latin America (Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Paraguay, Peru, Uruguay and Venezuela), Venezuela had the second biggest offender of this crime.⁷⁹⁶ Among 20,000 inhabitants with access to Internet, 1.72, and 0.89 downloaded child abuse images in 2011 and 2012, respectively.

6 – Criminalizes virtual images or sexually exploitative representations of children

The legislation does not clearly or specifically criminalize the production and distribution of virtual images or sexually exploitative representations of children. However, since Article 24 of the Special Law on Information Technology Crimes (LEDI) criminalizes the use of an image of a child or adolescent with pornographic or exhibitionists purposes, the dissemination of altered or morphed images could attract criminal liability. Case law would need to be referenced to provide for a more precise conclusion.

7 – Addresses the criminal liability of children involved in pornography

The legislation does not address the criminal liability of children, but children under 12 are not criminally liable for their conduct.

8 – Establishes the criminal liability of legal persons for child pornography offenses

Article 26 of the LODO establishes the liability of legal persons for production or commercialization of child pornography.⁷⁹⁷ Article 27 of the same law provides sanctions for legal persons, punishing them with definitive closure, a ban on the exercise of any activity, fines, publishing of the decision in newspapers, and revocation of concessions, permits and authorizations granted by the State.⁷⁹⁸

⁷⁹⁵ Federación Inter-Americana de Abogados, Pornografía Infantil, http://www.iaba.org/site/index.php?option=com_content&view=article&id=313%3Apornografia-infantil&catid=23%3Aprogramas-sociales&Itemid=166&lang=es, (last visited Oct. 2014).

⁷⁹⁶ Omar França & Lic. Sergio Delgado, *Descarga de Material Pornográfico Infantil Online en Uruguay 2011-2012*, available at http://eldiario.com.uy/wp-content/uploads/2013/04/informe_pornografia_infantil.pdf.

⁷⁹⁷ Artículo 26. Responsabilidad penal de las personas jurídicas. Las personas jurídicas, con exclusión del Estado y sus empresas, son responsables penalmente de los hechos punibles relacionados con la delincuencia organizada cometidos por cuenta de ellas, por sus órganos directivos o sus representantes. Cuando se trate de personas jurídicas del sistema bancario o financiero que intencionalmente legitimen capitales, el tribunal ordenará su intervención preservando siempre los derechos de los depositantes.

⁷⁹⁸ Artículo 27. Sanciones penales a las personas jurídicas. El juez competente impondrá en la sentencia definitiva cualquiera de las siguientes penas de acuerdo a la naturaleza del hecho cometido, su gravedad, las consecuencias para la empresa y la necesidad de prevenir la comisión de hechos punibles por parte de éstas :

1. Clausura definitiva de la persona jurídica en el caso de la comisión intencional de los delitos tipificados en esta Ley.
2. La prohibición de realizar actividades comerciales, industriales, técnicas o científicas.
3. La confiscación o comiso de los instrumentos que sirvieron para la comisión del delito, de las mercancías ilícitas y de los productos del delito en todo caso.
4. Publicación íntegra de la sentencia en uno de los diarios de mayor circulación nacional a costa de la persona jurídica en todo caso.

The law on cybercrime (LEDI) also proscribes the responsibility of legal persons for the commission of the crime of exhibition of child abuse images in Article 5, when acting according to decisions of its board, in its regular activities, using its resources or when acting in its interest.⁷⁹⁹

While noting that Venezuela recognizes the liability of legal persons in the framework of the Law against Organized Crime, the Committee on the Rights of the Child observed in its conclusions to Venezuela's periodic report, that the liability of legal persons for all crimes under the OPSC is not included in the law, and recommended that the State Party incorporate it explicitly into law for all crimes under that international instrument, with the establishment of legal sanctions commensurate with the seriousness of the crime committed.⁸⁰⁰

9 – Recognizes extraterritorial jurisdiction when the offender is a national or a person who has habitual residence in its territory

Regarding the crime of exhibition of child abuse images through ICTs, Article 3 of the Law on Cybercrimes (LEDI) establishes the territoriality principle, considering that a person can be punished in Venezuela for a crime committed abroad when it produces effects on the Venezuelan territory, and the perpetrator has not been tried for the same act nor has evaded prosecution or conviction by foreign countries.⁸⁰¹

Regarding the exploitation of the industry or trade of pornography⁸⁰², this is a crime regulated by Article 31, 2⁸⁰³ of the Law on Organized Crime (LODO), and establishes that if the perpetrator is on Venezuelan territory, he/she can be tried in Venezuela.

5. Multa equivalente al valor de los capitales, bienes o haberes en caso de legitimación de capitales o de los capitales, bienes o haberes producto del delito en el caso de aplicársele la pena del numeral 2 de este artículo.

La revocatoria de las concesiones, habilitaciones y autorizaciones administrativas otorgadas por el Estado.

⁷⁹⁹ Artículo 5. Responsabilidad de las personas jurídicas. Cuando los delitos previstos en esta Ley fuesen cometidos por los gerentes, administradores, directores o dependientes de una persona jurídica, actuando en su nombre o representación, éstos responderán de acuerdo con su participación culpable.

La persona jurídica será sancionada en los términos previstos en esta Ley, en los casos en que el hecho punible haya sido cometido por decisión de sus órganos, en el ámbito de su actividad, con sus recursos sociales o en su interés exclusivo o preferente.

⁸⁰⁰ UN COMM. ON THE RIGHTS OF CHILD, *Concluding observations on the reports submitted by the Bolivarian Republic of Venezuela under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, adopted by the Committee at its sixty-seventh session (1 – 19 September 2014), U.N. Doc. CRC/C/OPSC/VEN/CO/1 (Nov. 3, 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fVEN%2fCO%2f1&Lang=en (last visited Nov. 9, 2015).

⁸⁰¹ Artículo 3. Extraterritorialidad.

Cuando alguno de los delitos previstos en la presente Ley se cometa fuera del territorio de la Republica, el sujeto activo quedara sometido a sus disposiciones si dentro del territorio de la Republica se hubieren producido efectos del hecho punible, y el responsable no ha sido juzgado por el mismo hecho o ha evadido el juzgamiento o la condena por tribunales extranjeros.

⁸⁰² Article 14 of the LODO. De los delitos contra las buenas costumbres y el buen orden de la familia

Artículo 14. Pornografía. Quien explote la industria o el comercio de la pornografía para reproducir lo obsceno o impúdico a fin de divulgarlo al público en general, será castigado con una pena de dos a seis años de prisión. Si la pornografía fuere realizada con niños, niñas o adolescentes o para ellos, la pena será de dieciséis a veinte años de prisión.

⁸⁰³ Artículo 31. Jurisdicción. Están sujetos a enjuiciamiento y se castigarán de conformidad con esta Ley :

1. (...)

2. El sospechoso o investigado que se encuentre en la República Bolivariana de Venezuela y haya cometido alguno de los delitos tipificados en esta Ley, o si parte del delito se ha cometido en el territorio de la República Bolivariana de Venezuela, en el mar extraterritorial o en el espacio aéreo internacional.

As observed by the Committee on the Rights of the Child, the legal recognition of extraterritorial jurisdiction for offenses under the OPSC is only possible when the offenses are committed in the framework of the law against organized crime. However, for the crime of participating in the production of child abuse images, regulated by the LOPNNA, there is no legal provision providing for the extraterritoriality of Venezuelan law.

The Committee on the Rights of the Child recommended that Venezuela modify its legal framework to introduce and establish extraterritorial jurisdiction for the prosecution of all offenses referred to in Article 3, paragraph 1 of the OPSC, when they are committed abroad by one of its nationals, by a person who has habitual residence in its territory, or when the victim is a national, and to ensure that there is no requirement of double criminality for the prosecution of such offenses.⁸⁰⁴

10 – Recognizes extraterritorial jurisdiction when the victim is a national of the State

The legal framework does not recognize extraterritorial jurisdiction just when the victim is Venezuelan.

11 – Establishes forfeiture of assets used to commit or facilitate offenses

Article 19 of the Law on Organized Crime (LODO) establishes the forfeiture of assets as an accessory penalty that shall be applied to the crime of exploitation of an industry or commerce of child abuse images.⁸⁰⁵ All of the instruments, equipment, weapons, and vehicles used to commit the crime can be confiscated.

The Special Law on Information Technology Crimes (Ley Especial contra los delitos informáticos – LEDI) proscribes the forfeiture of instruments used to commit the crimes in Articles 10 to 19, but the crimes of dissemination and exhibition of child pornography are in Article 26.

12 – Establishes forfeiture of proceeds derived from such offenses

The Law on Organized Crime (LODO), in Article 19, establishes the forfeiture of assets as an accessory penalty that shall be applied to the crime of exploitation of an industry or commerce of child abuse images.⁸⁰⁶ All the supplies, raw materials, machinery, equipment, capital, and products, and any benefits that are a product of the illicit activity, can be confiscated.

3. Este principio de jurisdicción extraterritorial se aplicará, salvo que haya sido juzgado en otro país y cumplido la condena.

⁸⁰⁴ UN COMM. ON THE RIGHTS OF CHILD, *supra* note 803.

⁸⁰⁵ Artículo 19. Comiso o confiscación. Es necesariamente accesoria a la pena principal el comiso o la confiscación de los bienes, insumos, materias primas, maquinarias, equipos, capitales o productos y sus beneficios provenientes de los delitos cometidos por los miembros de un grupo de delincuencia organizada, así se encuentren en posesión o propiedad de interpuestas personas o de terceros sin participación en estos delitos, ya sean personas naturales o jurídicas. (...)

Igualmente será pena accesoria el comiso de los instrumentos, equipos, armas, vehículos y efectos con el que se cometió el hecho punible, de conformidad con lo dispuesto en el Código Penal y en lo relativa a armas se ejecutará conforme a lo dispuesto en la Ley de Armas y Explosivos.

⁸⁰⁶ Artículo 19. Comiso o confiscación. Es necesariamente accesoria a la pena principal el comiso o la confiscación de los bienes, insumos, materias primas, maquinarias, equipos, capitales o productos y sus beneficios provenientes de los delitos cometidos por los miembros de un grupo de delincuencia organizada, así se encuentren en posesión o propiedad de interpuestas personas o de terceros sin participación en estos delitos, ya sean personas naturales o jurídicas. (...)

Igualmente sera pena accesoria el comiso de los instrumentos, equipos, armas, vehículos y efectos con el que se cometió el hecho punible, de conformidad con lo dispuesto en el Código Penal y en lo relativo a armas se ejecutará conforme a lo dispuesto en la Ley de Armas y Explosivos.

13 – Establishes mandatory reporting requirements for professionals who work with children

Article 91 of the Organic Law on the Protection of Children (LOPNNA) proscribes that anyone who works in the health field, schools, or institutions that work with children, has the duty to report any violation of a child right.⁸⁰⁷ First, the parents must be informed, unless they suspect that the parents are the perpetrators. Further, everybody has the right to report violations to a child rights (under the same article).

14 – Requires Internet Service Providers to report child pornography

In 2011, the Law on the Social Responsibility of Radio, TV and ICTs, the RESORTE, known as the “gag law,” was enacted. It establishes through Article 27 that Internet Providers Services (ISPs) cannot allow the diffusion of any material that is against the law, and that they are liable if they do not follow the guidelines of the CONATEL.⁸⁰⁸ It is not within the scope of this Regional Study to analyze this legislation’s adequacy in terms of the protection of the freedom of expression. However, it is clear that it is able to control the diffusion of child abuse images.

15 – Has a support telephone or online hotline to enable the public to report child abuse

There is a hotline for women that are suffering violence - *112 (movinet) or 0800-MUJERES, run by the Instituto Nacional de la Mujer (INAMUJER), which is national, free, and confidential. There is a web page

⁸⁰⁷ Artículo 91. Deber y derecho de denunciar amenazas y violaciones de los derechos y garantías de los niños y adolescentes. Todas las personas tienen derecho de denunciar ante las autoridades competentes los casos de amenazas o violaciones a los derechos o garantías de los niños y adolescentes.

Los trabajadores de los servicios y centros de salud, de las escuelas, planteles e institutos de educación, de las entidades de atención y de las Defensorías del Niño y del Adolescente, tienen el deber de denunciar los casos de amenaza o violación de derechos y garantías de los niños y adolescentes de que tengan conocimiento, mientras prestan tales servicios. Antes de proceder a la denuncia, estas personas deben comunicar toda la información que tengan a su disposición sobre el caso a los padres, representantes o responsables, salvo cuando sean éstos los que amenacen o violen los derechos a la vida, integridad y salud del niño o adolescente. En estos casos, los padres deben ser informados en las cuarenta y ocho horas siguientes a la denuncia.

⁸⁰⁸ Artículo 27. En los servicios de radio, televisión y medios electrónicos, no está permitida la difusión de los mensajes que:

1. Inciten o promuevan el odio y la intolerancia por razones religiosas, políticas, por diferencia de género, por racismo o xenofobia.
2. Inciten o promuevan y/o hagan apología al delito.
3. Constituyan propaganda de Guerra.
4. Fomenten zozobra en la ciudadanía o alteren el orden público.
5. Desconozcan a las autoridades legítimamente constituidas.
6. Induzcan al homicidio.
7. Inciten o promuevan el incumplimiento del ordenamiento jurídico vigente.

Los proveedores de medios electrónicos deberán establecer mecanismos que permitan restringir, sin dilaciones, la difusión de mensajes divulgados que se subsuman en las prohibiciones contenidas en el presente artículo, cuando ello sea solicitado por la Comisión Nacional de Telecomunicaciones en ejercicio de sus competencias, en cuyo caso se aplicará el procedimiento previsto en el artículo 33 de la presente Ley.

Los proveedores de medios electrónicos serán responsables por la información y contenidos prohibidos a que hace referencia el presente artículo, en aquellos casos que hayan originado la transmisión, modificado los datos, seleccionado a los destinatarios o no hayan limitado el acceso a los mismos, en atención al requerimiento efectuado por los órganos con competencia en la materia.

Parágrafo Primero: los responsables de los medios electrónicos serán sancionados con multa desde cincuenta hasta doscientos Unidades Tributarias (50 hasta 200 U.T.), cuando violen cualquiera de las prohibiciones contenidas en el presente artículo.

Parágrafo Segundo: los proveedores de medios electrónicos que no atiendan las solicitudes realizadas por los órganos competentes a los fines de dar cumplimiento a las disposiciones de la presente Ley, serán sancionados con multa de hasta un cuatro por ciento (4%) de los ingresos brutos generados en el ejercicio fiscal inmediatamente anterior a aquél en el cual se cometió la infracción.

for victims of sexual abuse, and while it focuses more on violence against women, there is an e-mail available for any kind of victim.

Prosecutors have a free line for complaints by victims of any kind of violence – 0800-34722-00. However, there is no hotline specific for reports on violence against children.

16 – Creates data retention and preservation policies or provisions

Article 205 of the Organic Criminal Procedure Code, enacted in 2012, generally allows the interception and recording of communications transmitted by any means.⁸⁰⁹ According to Article 206, there must be a prior judicial order, and the interception cannot last more than 30 days, though this period that can be extended with reasonable justification.⁸¹⁰

Article 6⁸¹¹ of the Law on the Protection of Privacy of Communications⁸¹² authorizes the interception and recording of all kinds of communications in investigations concerning crimes against State security or independency, against public assets, narcotic drugs trafficking, kidnapping, or extortion.

Article 30 of the Law on Organized Crime allows the interception and recording of all kinds of communications related to the crimes of production of child pornography, amongst others.⁸¹³

17 – Has legislation that requires the identification of users of public computers (cybercafés, libraries)

There is no legislation with this requirement, but the Law for Protection of Children and Adolescents in Cybercafés establishes some obligations for these types of institutions, including the compulsory adoption of filters to block illicit content, and establishes the periods of time that children can use these facilities.

⁸⁰⁹ Artículo 205. Podrá disponerse igualmente, conforme a la ley, la interception o gradation de communications privadas, sean sea en ambiente físico, telefónico o realizado por cualquier otro Medio, con el contenido se transcriba y agregará a las actuaciones. Se conservarán las fuentes originales de grabación, asegurando su inalterabilidad y su posterior identificación.

A los efectos del presente artículo, se entienden por comunicaciones ambientales aquellas que se realizan personalmente o en forma directa, sin ningún instrumento o dispositivo de que se valgan los interlocutores o interlocutoras.

⁸¹⁰ Artículo 206. En los casos señalados en el artículo anterior, el Ministerio Público, solicitará razonadamente al Juez o Jueza de Control del lugar donde se realizará la intervención, la correspondiente autorización con expreso señalamiento del delito que se investiga, el tiempo de duración, que no excederá de treinta días, los medios técnicos a ser empleados y el sitio o lugar desde donde se efectuará. Podrán acordarse prórrogas sucesivas mediante el mismo procedimiento y por lapsos iguales, medios, lugares y demás extremos pertinentes.

⁸¹¹ Artículo 6. Las autoridades de policía, como auxiliares de la administración de justicia podrán impedir, interrumpir, interceptar o grabar comunicaciones, únicamente a los fines de investigación de los siguientes hechos.

- a) Delitos contra la seguridad o independencia del Estado;
- b) Delitos previstos en la Ley Orgánica de Salvaguarda del Patrimonio Público;
- c) Delitos contemplados en la Ley Orgánica sobre Sustancias Estupefacientes o Psicotrópicas; y
- d) Delitos de secuestro y extorsión.

⁸¹² Ley sobre Protección a la Privacidad de las Comunicaciones, Gaceta Oficial de La República de Venezuela, Lunes, 16 de diciembre de 1991, n. 34863.

⁸¹³ Artículo 30. Interceptación o grabaciones telefónicas. En los casos de investigación de los delitos previstos en esta Ley, previa solicitud razonada del Ministerio Público, el juez de control podrá autorizar a éste el impedir, interrumpir, interceptar o grabar comunicaciones y otros medios radioeléctricos de comunicaciones únicamente a los fines de investigación penal, en concordancia con el artículo 6 de la Ley sobre Protección a la Privacidad de las Comunicaciones y de acuerdo a las normas establecidas en el Código Orgánico Procesal Penal. Las empresas privadas de telefonía están obligadas también a permitir que se usen sus equipos e instalaciones para la práctica de las diligencias de investigación antes señaladas.

18 – Has a national plan to combat violence against children

In 2003, the National Council of the Rights of Children (Consejo Nacional de Derechos del Niño y del Adolescente - CNDNA) established general guidelines against sexual abuse and commercial sexual exploitation of children.⁸¹⁴

In 2007, the same organization (CNDNA) developed a National Plan of Action against sexual abuse and commercial sexual exploitation of children, with the purpose of strengthening prevention, raising awareness, mobilizing, facilitating reporting, and promoting changes in legislation, among others. The Plan de Acción Nacional contra el Abuso Sexual y la Explotación Sexual Comercial was published in Gaceta Oficial n 38.631, on February 23, 2007.

The CNDNA was transformed into the Instituto Autónomo Consejo Nacional de Derechos de Niños, Niñas y Adolescentes (IDENNA) in 2007, and it is responsible for the policies on the implementation of the integral protection of children.

There is a committee that was created to combat the sexual exploitation of children – Comisión contra el Abuso Sexual y la Explotación Sexual Comercial (CICAES). Venezuela is finalizing the National Plan of Action for Children and Adolescents (2015-2019), and received recommendations from the Committee on the Rights of the Child to specifically address all issues covered by the OPSC, and to provide adequate human, financial, and technical resources for its implementation, paying special attention to the Declaration and Agenda for Action and the Global Commitment, adopted at the first, second, and third World Congress against Commercial Sexual Exploitation of Children.⁸¹⁵

19 – International instruments ratified

- The Convention on the Rights of the Child, ratified on September 13, 1990
- The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, ratified on May 8, 2002
- The ILO Minimum Age Convention, ratified on July 15, 1987
 - Minimum age: 14
- The ILO Worst Forms of Child Labor Convention, ratified on October 26, 2005

20 – Age of criminal liability

The Penal Code establishes that children under 12 years old do not have criminal liability, and that adolescents older than 12 and under 15 years old can only be punished if it appears that they acted with discernment (vide articles 69, 70 and 71 of the Penal Code).⁸¹⁶

⁸¹⁴ Directrices Generales para Garantizar la Protección de Niños, Niñas y Adolescentes Contra el Abuso Sexual y Explotación Sexual Comercial, in Gaceta Oficial n. 37.815, 11/11/2003, available at <http://www.pgr.gob.ve/dmdocuments/2003/37815.pdf>.

⁸¹⁵ UN COMM. ON THE RIGHTS OF CHILD, *supra* note 803.

⁸¹⁶ Artículo 69°. No es punible: el menor de doce años, en ningún caso ni el mayor de doce y menor de quince años, a menos que aparezca que obró con discernimiento.

El Tribunal tomará las medidas que considere oportunas respecto a la educación del menor irresponsable, el cual será mantenido en adecuado establecimiento de educación o en casa de familia de responsabilidad.

Artículo 70°. Si el mayor de doce años y menor de quince fuere declarado responsable, la pena correspondiente al hecho punible se convertirá en arresto, si fuere de presidio o prisión, con disminución de la mitad; asimismo se disminuirán por mitad las otras penas y todas las que estuviere sufriendo cesarán al cumplir los veintiún años.

Artículo 71°. El que cometiere un hecho punible siendo mayor de quince años, pero menor de dieciocho, será castigado con la pena correspondiente, disminuida en una tercera parte.

Under Article 528 of the Law on the Protection of Children and Adolescents, an adolescent who commit crimes that are in the Penal Code, is held criminally responsible, but is subject to a different jurisdiction and different penalties.⁸¹⁷

The Venezuelan legislation subjects minors to a special system of justice, similar to those of other Latin American countries, which prefers the establishment of special liability for minors.

21 – Legislation specifically addresses the use of ICTs to commit crimes against children

The legislation does address the use of ICTs to commit crimes against children by referring to the use of information technologies, computer and electronic means (Article 24 of the LEDI, and Article 235 of the LOPNNA).⁸¹⁸

22 – Related crimes: trafficking with the intent of producing child pornography and online advertising of sex tourism with children

Article 236 of the Law for the Protection of the Child and the Adolescent proscribes the penalty of a fine for the exhibition of pornographic material to children or adolescents.⁸¹⁹ It states that “sexual exploitation is defined in the guidelines for the protection of children and adolescents from child pornography as a form of commercial sexual exploitation, as a concept related to transactions that are compensated in cash or in kind in which children and adolescents are used in sexual activities in exchange for any other consideration.”⁸²⁰ It is criminalized as child sexual exploitation.

23 – Has specific legislation on online grooming considering it a standalone offense

No, online grooming is not criminalized in the law.

24 – Has a clear definition of online grooming

Does not apply.

⁸¹⁷ Artículo 528. Responsabilidad del adolescentes.

El adolescente que incurra en la comisión de hechos punibles responde por el hecho en la medida de su culpabilidad, de forma diferenciada del adulto. La diferencia consiste en la jurisdicción especializada y en la sanción que se le impone.

⁸¹⁸ Artículo 24°. Exhibición pornográfica de niños o adolescentes.

El que por cualquier medio que involucre el uso de tecnologías de información, utilice a la persona o imagen de un niño o adolescente con fines exhibicionistas o pornográficos, sera penado con prisión de cuatro a ocho años y multa de cuatrocientas a ochocientas unidades tributarias

Artículo 235. Suministro o entrega de material de difusión de imágenes o sonidos. Quien venda, suministre o entregue a un niño o adolescente, videos, cassettes y, en general, material de difusión de imágenes o sonidos por medios eléctricos, computarizados o electrónicos, en contraposición a esta Ley o a las regulaciones de los órganos competentes, será sancionado con multa de uno a veinte meses de ingreso.

En este caso, procede igualmente, según la gravedad de la infracción, el cierre del establecimiento en el cual la venta o el alquiler se llevó a cabo, hasta por cinco días.

⁸¹⁹ Artículo 236. Suministro y exhibición de material impreso. Quien venda, suministre o entregue a un niño o adolescente, libros, publicaciones y fotografías en contra de las regulaciones de los órganos competentes, o material que haya sido clasificado como no apto para niños o adolescentes, será sancionado con multa de dos a seis meses de ingreso.

En estos casos, procede igualmente, según la gravedad de la infracción, ordenar el retiro de circulación de la revista o publicación

⁸²⁰ UN COMM. ON THE RIGHTS OF CHILD, *supra* note 793.

25 – Age of potential victims of online grooming

Does not apply.

26 – Criminalizes grooming when the offender has a specific intent to have online or offline sexual contact with a child, or grooming regardless of the intent

Does not apply.

27 – Criminalizes the conduct of showing pornography to a child as a standalone offense, or considers it an aspect of grooming

It is not a crime, but it is an unlawful act in the law of protection of child and adolescents, and is punishable by fine (administrative penalty).⁸²¹

28 – Has specific legislation on cyberbullying

There is no legislation specific to cyberbullying.

29 – Has specific legislation concerning sexting

There is no legislation concerning sexting.

30 – Existence of different levels of penalties for offenses related to the production, distribution, or possession of child pornography

Regarding the production of child abuse image with intent to disseminate the material through the Internet, and the dissemination or distribution of this material, Venezuela does not establish different levels of penalties. Possession is not criminalized.⁸²²

31 – Legislation establishes aggravating circumstances for offenses concerning sexual exploitation of children when the offense was committed by a member of the child’s family, a person cohabiting with the child, a person who has abused a recognized position of trust or authority; and also when the offense was committed by several persons acting together, or within the framework of a criminal organization

It can be concluded that Venezuela’s Law for the Protection of the Child and the Adolescent (LPNNA), and the Law on the Organized Crime (LODO) establish aggravated penalties for the first, third, and fifth circumstances indicated above.

Article 258 of the LPNNA establishes a higher penalty for offenders that have any kind of authority over the victims, are their guardians, or have any surveillance responsibility over them. Article 14 of the

⁸²¹ Artículo 235. Suministro o entrega de material de difusión de imágenes o sonidos. Quien venda, suministre o entregue a un niño o adolescente, videos, cassettes y, en general, material de difusión de imágenes o sonidos por medios eléctricos, computarizados o electrónicos, en contraposición a esta Ley o a las regulaciones de los órganos competentes, será sancionado con multa de uno a veinte meses de ingreso.

En este caso, procede igualmente, según la gravedad de la infracción, el cierre del establecimiento en el cual la venta o el alquiler se llevó a cabo, hasta por cinco días.

Artículo 236. Suministro y exhibición de material impreso. Quien venda, suministre o entregue a un niño o adolescente, libros, publicaciones y fotografías en contra de las regulaciones de los órganos competentes, o material que haya sido clasificado como no apto para niños o adolescentes, será sancionado con multa de dos a seis meses de ingreso.

En estos casos, procede igualmente, según la gravedad de la infracción, ordenar el retiro de circulación de la revista o publicación.

LODO establishes enhanced penalties for the production of child abuse material within the context of a criminal organization.

No legal provisions could be found related to the sexual exploitation of children that establish increased penalties when the offense is committed by several persons acting together, or when it was committed by a person cohabiting with the child.



The World Bank

1818 H Street, NW
Washington, D.C. 20433
www.worldbank.org



SAU Quadra 3, bloco C
Brasília-DF Brasil
www.ajufer.org.br



1700 Diagonal Road, Ste. 625
Alexandria, Virginia 22314
www.icmec.org