

Protection Against Violence

Szilárd SZTRANYICZKI

ABSTRACT

Violence against children includes all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, and exploitation, including sexual abuse.¹

Under international law, States have an obligation to protect children from various forms of violence. The United Nations Convention on the Rights of the Child is the primary international human rights instrument addressing children's protection against violence. The Convention came into force in September 1990 and has been ratified by 195 countries, making it 'the single most ratified treaty in existence'.² However, only two countries, the United States and Somalia, have not yet ratified the Convention.

This chapter analyses the specific types of violence against children and the response of the major regional human rights systems: the African, the Inter-American and the European [human rights system], the Inter-American and the African human rights systems.

KEYWORDS

physical violence, mental violence, injury, abuse, neglect, negligent treatment, maltreatment, exploitation, Convention on the Rights of the Child, regional human rights systems

1. Corporal punishment in schools

1.1. Overview

Regional human rights systems have different regulations regarding corporal punishment in schools. Under international human rights law, the practice of corporal punishment breaches three of the most basic human rights principles: the right to human dignity, physical integrity, and equal protection. States are obligated to enact legislation prohibiting corporal punishment.

The African Human Rights System also explicitly bans school corporal punishment of children.

1 Convention on the Rights of the Child, art.19 (1).

2 Children's Rights [Online]. Available at: <https://www.hrw.org/legacy/wr2k/Crd.htm> (Accessed: 1 February 2023).

However, in the U.S. legal system, corporal punishment in schools is legal in all States.

What is the definition of corporal punishment in regional human rights systems?

The United Nations Committee on the Rights of the Child defines corporal punishment as ‘any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light’.³

The Resolution on the Rights of the Child adopted by The United Nations General Assembly⁴ extends the meaning of corporal punishment beyond the physical realm and states that ‘mental, psychological...violence’ against children also constitutes corporal punishment.

In the U.S., corporal punishment is defined in a physical sense, strictly as a means of disciplining a child. An example of State definition of corporal punishment is the one provided by the Texas Education Code,⁵ according to which corporal punishment is ‘the deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means of discipline’.

In Africa, corporal punishment is defined similarly as in the U.S., as ‘any deliberate act against a child that inflicts pain or physical discomfort to punish or contain him/her’.⁶

Is corporal punishment legal in regional human rights systems?

In the U.S., corporal punishment in schools is legal in almost every private school, with the only two exceptions being New Jersey and Iowa. Moreover, it is legal in the public schools of 19 US States.⁷ Even if corporal punishment is legal in the State, school district superintendents and individual school principals within districts can decide whether to discipline children using corporal punishment.⁸ Moreover, local school districts can set limits on corporal punishment. For example, in the Covington County school district, teachers receive a student handbook containing a chapter called ‘Corporal Punishment’, which sets some limits on school corporal punishment. It can

3 UNCRC Committee, General Comment No. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, CRC/C/GC/8, 2 June 2006. [Online]. Available at: <https://www.ohchr.org/sites/default/files/english/bodies/crc/docs/co/CRC.C.GC.8.pdf> (Accessed: 2 February 2023).

4 According to Resolution on the Rights of the Child, A/RES/62/141.

5 According to Texas Education Code Title 2§ 37.0011 (2013).

6 Veriava and Power, 2017, p. 333.

7 Gershoff and Font. 2016 [Online]. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5766273/> (Accessed: 9 February 2023).

8 Ibid.

be ‘applied only to the student’s buttocks in such a manner that there will be no permanent effects’,⁹ and there can be ‘no more than three licks and one paddling a day’.¹⁰

In the European Human Rights System, the United Nations Convention on the Rights of the Child is the primary instrument that addresses the protection of children against corporal punishment in schools.¹¹ The Convention came into force in September 1990 and has been ratified by 195 countries, making it ‘the single most ratified treaty in existence’.¹² According to the provisions of the Convention, ‘States Parties must take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with that Convention’.¹³

As all European countries have ratified the Convention and subsequently implemented legislation prohibiting school corporal punishment, it is illegal in every European country.

Corporal punishment is also expressly prohibited in the African human rights system, and South African law states that ‘no person may administer corporal punishment at a school against a learner’.¹⁴ However, this legislation is not supported by local educators or parents, resulting in several cases of corporal punishment being administered throughout the continent.¹⁵

The 2012 National School Violence Study surveyed 6000 children, and 49.8% admitted to being victims of school violence.

1.2. Case laws regarding corporal punishment

The benchmark case for corporal punishment in the US is *Ingraham vs. Wright*.¹⁶ In this case, the Supreme Court ruled that there was no prohibition of corporal punishment in schools, at the federal level. Each US State has the power to decide whether to allow corporal punishment. However, the Supreme Court set an important limit: corporal punishment that is being applied must be reasonable.

The reasonableness limit set by the Supreme Court was not new, in the sense that corporal punishment had its limits throughout history. In common law, punishment was not allowed to exceed what was required for disciplinary purposes, that is, to exceed moderation.¹⁷

9 Mathewson (2022) State-sanctioned violence: Inside one of the thousands of schools that still paddle students, The Hechinger Report, 6 June 2022 [Online]. Available at: <https://hechingerreport.org/state-sanctioned-violence-inside-one-of-the-thousands-of-schools-that-still-paddles-students/> (Accessed: 19 February 2023).

10 Ibid.

11 Ghandhi, 1984, pp. 488-494.

12 Children’s Rights [Online]. Available at: <https://www.hrw.org/legacy/wr2k/Crd.htm> (Accessed: 19 February 2023).

13 According to Art. 28 (2) of the Convention on the Rights of the Child.

14 According to South African School Act, section 10(1).

15 According to South African School Act, section 10 (1).

16 *Ingraham vs. Wright*, 498 F.2d 248 (5th Cir. 1974).

17 Edwards, 1996, p. 984.

Nowadays, it is generally accepted by State Statutes and related Court Decisions that corporal punishment must be ‘reasonable and justifiable’.¹⁸ A few examples of unreasonable school corporal punishment are as follows: conducting a strip search of a student to check her underwear for drugs,¹⁹ holding a nine-year-old upside down by her ankle while beating her with a wooden paddle, and creating a two-inch bleeding cut on her leg.²⁰

The European Court of Human Rights first delivered a judgement condemning corporal punishment 45 years ago. In the case of *Tyrer vs. UK*²¹ the Court ruled that the judicial birching of a 15 year-old from the Isle of Man constituted ‘degrading punishment’ and breaches Article 83 of the Convention. This judgement was followed by a series of other judgements that condemned corporal punishment.

Examples can be found in the case law of the European Court of Human Rights, in which verbal abuse was found to be a breach of Article 8 of the Convention. For example, in the case of *F.O. vs. Croatia*,²² the European Court of Human Rights found that a teacher calling a pupil ‘a moron, an idiot, a fool, hillbilly’ on more than one occasion was an act of ‘verbal abuse amounting to humiliation, belittling and ridicule’.

2. Sexual abuse of children

2.1. Overview

Sexual abuse of children is a serious public health concern worldwide. The estimated global prevalence of child sexual abuse ranges from 8%-31% in girls and 3%-17.6% in boys.²³

Definition of child sexual abuse: the World Health Organization defines child sexual abuse as

the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society.²⁴

U.S. Law defines child sexual abuse as:

the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually

18 Edwards, 1996, p. 985.

19 See Safford, 557 U.S. pp. 375–77.

20 United States Court of Appeals, Tenth Circuit, *Garcia vs. Miera*, 817 F.2d 650., 1987.

21 European Court of Human Rights, *Tyrer vs. UK*, 1978.

22 ECtHR, *F.O. vs. Croatia*, No. 29555/13, 22 April 2021.

23 Barth et al., 2013, pp. 469–483.

24 WHO, Report of the consultation on child abuse prevention, Geneva, World Health Organization, 1999, p. 15.

explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or the rape, and in cases of caretaker or inter-familial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.²⁵

2.2. Child sexual abuse laws in regional human rights systems

In the European Union law, the primary legal instrument on combating sexual child abuse, sexual exploitation of children, and child pornography is Directive 2011/93/EU²⁶ and Convention 201/2007/CETS Protection of Children against Sexual Exploitation and Sexual Abuse. These instructions oblige States to criminalise various forms of sexual abuse and seek to harmonise the minimum criminal sanctions granted by member States against various offences of child sexual abuse. These directives also require States to adopt measures to prevent sexual abuse of children.

EU law has accorded special consideration to online child sexual abuse material. Under Directive 2011/93/EU, member States are obligated to remove webpages containing child sexual abuse material.

In South Africa, the most important legislation addressing sexual abuse among children is the Sexual Offences Act.²⁷ It not only criminalises sexual abuse against children but also requires the obligation to report such offences; failure to do so may result in a conviction of up to five years in prison.²⁸

The US also criminalises the sexual abuse of a minor through its federal law.²⁹

2.3. Case laws regarding the sexual abuse of children

In the case of *Guzmán Albarracín and Others vs. Ecuador*,³⁰ as a teenager, Paola was repeatedly sexually abused by her school's vice principal, and she later committed suicide. School officials were aware of the situation and of the vice principal's similar interactions with other students. The Inter-American Court of Human Rights found that the State had violated Paola's rights to life, humane treatment, protection of honour and dignity, and education under the American Convention on Human Rights and Protocol of San Salvador in connection with its obligation to respect the rights of the child.

In the case of *R.B. vs. Estonia*,³¹ the applicant claimed that she was sexually abused by her father when she was nine years old. She reported the abuse to the police, after

25 Federal Child Abuse Prevention and Treatment Act, 42 U.S.C.A § 510g.

26 Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, OJ 2011 L 335/1.

27 South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

28 South Africa's Criminal Law (Sexual Offences and Related Matters), Section 54, Amendment Act 32 of 2007.

29 18 U.S. Code § 2243.

30 Inter-American Court of Human Rights, Paola del Rosario Guzmán Albarracín et al. vs. Ecuador, Court Decision-Case C No. 405 (June 24, 2020) [Online]. Available at: https://corteidh.or.cr/docs/casos/articulos/seriec_405_esp.pdf (Accessed: 21 February 2023).

31 Case of R.B. vs. Estonia, application 22597/16.

which criminal proceedings were initiated. The applicant was not called to testify because, under domestic law, child victims could not appear in court to avoid victimisation. However, two previously recorded interviews conducted in the presence of her mother, a lawyer, and a psychologist were presented during the trial. These video recordings were later dismissed by the Estonian Supreme Court owing to a breach of procedure because prior to questioning R.B. was not informed by her investigator of her procedural rights, that is, the duty to tell the truth and the right not to testify against a member of her family. The European Court of Human Rights ruled that Estonia violated Articles 3 and 8 of the ECHR because it failed to consider the child's vulnerability and corresponding needs in a child-friendly justice system.

3. Domestic violence

3.1. Overview

Domestic violence is a simultaneous attack on children's and women's human rights.³²

It denies children the right to safe and stable home environments. Studies have estimated that between 3.3 million and 10 million children are exposed to domestic violence annually.³³

Definition of domestic violence: The Istanbul Convention defines domestic violence as: 'all acts of physical, sexual, psychological, or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with them.'³⁴

The South African Violence Act defines domestic violence as physical, emotional, sexual, verbal, psychological or economic abuse; intimidation; harassment; stacking; damage to property; entry into a person's property without consent; and any other form of abusive or controlling behaviour where such conduct causes or can cause harm to a person's well-being, health, or safety.³⁵

According to the provisions of the US Violence Against Women Act,

the term "domestic violence" means a pattern of behaviour involving the use or attempted use of physical, sexual, verbal, psychological, economic, or technological abuse or any other coercive behaviour committed, enabled, or solicited to gain or maintain power and control over a victim, by a person who: (A) is a current or former spouse or dating partner of the victim, or other

32 Morrison, and Houghton, 2022, [Online]. Available at: <https://www.tandfonline.com/doi/full/10.1080/13642987.2022.2057963> (Accessed: 21 February 2023).

33 Children And Youth Exposure To Domestic Violence [Online]. Available at: <https://nccadv.org/domestic-violence-info/children> (Accessed: 21 February 2023).

34 The Council of Europe Convention on Preventing and Combating Violence against Women, art. 3(b).

35 South African Domestic Violence Act 116 of 1998, section 1.

person similarly situated to a spouse of the victim; (B) is cohabitating with or has cohabitated with the victim as a spouse or dating partner; (C) shares a child common with the victim; (D) is an adult family member of, or paid or nonpaid caregiver in an ongoing relationship of trust with, a victim aged 50 or older or an adult victim with disabilities; or (E) commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.³⁶

3.2. Legislation regarding the protection of children exposed to domestic violence in regional human rights systems

The United Nations Convention on the Rights of the Child (UNCRC) and the Istanbul Convention are the primary instruments for protecting children from domestic violence in Europe.

Article 19 of the UNCRC guarantees the right to live free from the threat of violence to every child and obliges States to implement appropriate measures to protect children from all forms of violence.

The Council of Europe's Convention on Preventing and Combating Violence against Women (known as the Istanbul Convention) strongly focuses on different forms of gender-based violence, including domestic violence. The Convention contains provisions regarding children witnessing violence at home between their parents, as well as when they are direct victims of violence in their homes. Child-specific provisions of the Convention include obligations for States to adopt measures to address the needs of child victims, raise awareness among children, and protect witnesses.

The Violence Against Women Act and the Adoption and Safe Families Act are the primary federal laws of the U.S. that address violence against women.

The Violence Against Women Act provides support services for battered women, better law enforcement, and prosecution of cases involving domestic violence; however, it has limited reference to the needs of children exposed to domestic violence.³⁷

The primary goal of the Adoption and Safe Families Act is to promptly place foster children in permanent homes. The timely services addressing the needs of children exposed to domestic violence are commendable, however, the swift nature of these services leave battered women limited time to improve their circumstances (find a new job and a new home, recover from the trauma that they have experienced), which often leads to the termination of their parental rights. Although federal laws significantly influence State child protection laws and practices, States have substantial freedom to define specific child protection laws.

An example of such laws is failure to protect laws, according to which the non-abusive parent, who is also the victim of domestic violence, is charged with 'failure to protect' the child from witnessing domestic violence or experiencing abuse at the

³⁶ 34 USC § 12291(a)(12).

³⁷ Weithorn et al., 1999, p. 11.

hands of the other parent. If the child is only a witness to domestic violence, many States have instituted a policy of temporarily removing the child from the custody of the non-abusive parent and charging the parent with neglect.³⁸ However, if a child becomes a victim of physical or sexual abuse, the non-abusive parent is charged with the same crime as the abuser.³⁹

The Constitution and Domestic Violence Act 116 of 1998 are the primary laws protecting victims of domestic violence in South Africa.

The Constitution of South Africa poses a direct obligation on the State to protect victims of domestic violence and also provides that when interpreting the Bill of Rights, the Court must consider international law, and when the Court is interpreting legislation, a law that is consistent with international law must be preferred.⁴⁰ This Act is in accordance with the United Nations Convention on the Right of the Child and the United Nations Convention on the Elimination of All Forms of Discrimination against Women that was ratified by South Africa.

South African legislation does not recognise domestic violence as a crime of its own; it is currently being reported as an assault, sexual assault, damage to property and so on.⁴¹ However, the Domestic Violence Act enables victims of domestic violence to obtain protective orders against abusers.

3.3. Protection orders

Courts can issue protective orders prohibiting a batterer from approaching an adult victim and children at various locations such as the home, the victim's workplace, or the children's school. If a batterer violates an order, victims of domestic violence may contact the police.

Protective orders can be obtained by women in all regional human rights systems.

Moreover, the EU has implemented a mechanism for the mutual recognition of protection measures. If a victim of domestic violence has a criminal protection order issued by an EU Member State, the victim may request a European Protection Order. Moreover, if a victim has a civil law protection order issued in the Member State of their residence, the EU grants access to the mutual direct recognition of protective measures in civil matters between member States.

3.4. Domestic violence case laws in regional human rights systems

In Europe, many domestic violence cases presented to the ECtHR were filed under Article 2 of the European Convention of Human Rights.

38 Trepiccione, 2001, p. 1491.

39 Mahoney, 2019, p. 435.

40 Gadinabokao 2019 p. 13, [Online]. Available at: https://repository.up.ac.za/bitstream/handle/2263/53127/Gadinabokao_Comparative_2016.pdf?sequence=1&isAllowed=y (Accessed: 23 February 2023).

41 Ibid.

For example, in *Kurt vs. Austria*,⁴² an applicant's son was murdered by his father. The father came to his son's school, asked his teacher if he could speak to him in private, and later shot him in the school basement. The applicant had previously reported domestic violence against her husband. The Court found that there had been no violation of Article 2 of the Convention. There had been no obligation on the authorities to take further preventive operational measures, as there was no immediate risk of an attack that could put the child's life in danger.

The Court's reasoning is based on a test first developed by the ECtHR in the case of *Osman v United Kingdom*.⁴³ This applies to cases where it is alleged that the victim was killed or subjected to inhumane or degrading treatment.

It must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁴⁴

In another case *Kontrová vs. Slovakia*,⁴⁵ the Court held that the State should have known that there was an immediate risk to the lives of the applicant and her children, as the applicant had previously complained to the police about having been physically assaulted by her husband on several occasions and a relative had reported an incident to the police that the husband had threatened to murder the children.

In the U.S. class action case of *Nicholson vs. Williams*,⁴⁶ a group of women, who were victims of domestic violence, and their children challenged the New York City's Administration for Children's Services policy of removing children from homes after having been exposed to domestic violence when the children suffered no physical harm. The plaintiff was brutally beaten by her child's father, while her child was sleeping in another room, in her crib. Although she arranged for a babysitter for her daughter before going to the hospital, New York City's Administration for Children's Services removed the child from the babysitter's home on the grounds of a failure to protect her child from being exposed to domestic violence. The mother and child spent a total of 21 days apart. The U.S. District Court for the Eastern District of New York found that removing children from their mothers solely because they had been exposed to domestic violence constituted an unconstitutional infringement on mother's and children's due process rights.

In the case of *Custody of Vaughn*,⁴⁷ Vaughn witnessed his father physically and verbally abuse his mother. The day after the mother obtained a restraining order against

42 ECtHR, *Kurt vs. Austria* [GC], No. 62903/15.

43 *Osman vs. the United Kingdom* - 23452/94, Judgment 28.10.1998 [GC].

44 *Osman* (App. No.87/1997/871/1083) at para. 116.

45 ECtHR, *Kontrová vs. Slovakia*, No. 7510/04.

46 *Nicholson vs. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

47 *Custody of Vaughn*, 664 N.E.2d 434, 440 (Mass. 1996).

Vaughn's father, the father filed for custody of Vaughn. The Probate and Family Court awarded the father the primary custody of Vaughn. The mother appealed to this decision. The appellate court reversed the decision on the grounds that it had committed an error by not considering Ross's abusive acts and the impact of the abuse on Vaughn. 'Following Vaughn, courts must make specific "Vaughn findings" about the extent of domestic violence, its effect on children, and how it impacts the abuser's parenting'.⁴⁸

In South Africa, in *State vs. Baloyi*,⁴⁹ Baloyi's wife obtained an interdict that prevented him from assaulting her and their child. Later, he was convicted of violating the interdict because he had assaulted his wife and threatened to kill her. Baloyi appealed to the Transvaal High Court, where he claimed that the prevention of Family Violence Act 133 of 1993 allowed his wife to obtain the interdict, which unconstitutionally infringed on his right to be presumed innocent. The Constitutional Court found that the purpose of an interdict was to protect the victim of domestic violence and that the fairness of the complainant required that the enquiry proceedings be speedy; however, this would not affect the presumption of the innocence of the accused.

4. Exploitation and Forced Labour

4.1. Overview

Child labour is a serious issue, particularly in developing countries. UNICEF estimates that almost one in ten children is subjected to child labour worldwide.⁵⁰ Africa has the highest number of child labourers in the regional human rights system, and it is estimated that 72.1 million African children are involved in child labour.⁵¹

Definition: The International Labour Organization (ILO) Convention No. 138 on the Minimum Age for Admission to Employment and Convention No. 182 on the Worst Forms of Child Labour define child labour as employment below the minimum age as

48 Kaiser and Foley 2021, p. 171.

49 *State vs. Baloyi* (CC168/17) [2018] ZAGPPHC 19 (1 October 2018).

50 UNICEF: What is child labour? [Online]. Available at: <https://www.unicef.org/protection/child-labour> (Accessed: 25 February 2023).

51 ILO: Child labour in Africa [Online]. Available at: <https://www.ilo.org/africa/areas-of-work/child-labour/lang--en/index.htm> (Accessed: 25 February 2023).

established in national legislation, as well as child labour that is considered hazardous⁵² or a part of the worst forms of child labour.⁵³

4.2. Legislation regarding exploitation and forced labour in regional human rights system

International Labour Organization Convention No. 138 on Minimum Age and Convention No. 182 on the Worst Forms of Child Labour⁵⁴ Are the two primary international human rights instruments regulating child labour. The first was ratified by all ILO member States, including Africa, and the second by most States.

The Minimum Age Convention sets the general minimum age for work at 15 years (13 years for light work), and the general minimum age for hazardous work at 18 years (16 years under certain strict conditions). In less-developed States, the general minimum age can be reduced to 14 years (12 years for light work).

The Worst Forms of Child Labour Convention requires States that have ratified the Convention to eliminate the worst forms of child labour, including forced labour.

In accordance with the ILO Conventions, EU Law prohibits forced and compulsory labour.⁵⁵ According to Article 32 of the EU Charter of Fundamental Rights, children can only be employed if they reach the minimum school-leaving age. The minimum school-leaving age varies from country to country across the EU; however, it is between the ages 14-18 years.⁵⁶

Most African Countries have ratified the ILO Conventions. Additionally, the African Constitution expressly prohibits forced labour.⁵⁷ The minimum employment age for children in Africa is 15 years.⁵⁸

52 ILO Recommendations 190, art. 3 ‘work which exposes children to physical, psychological or sexual abuse; work underground, under water, at dangerous heights or in confined spaces; work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads; work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health; work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer’.

53 ILO Convention 182 art. 3 ‘all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children’.

54 ILO Conventions on child labour [Online]. Available at: <https://www.ilo.org/ipecc/facts/ILOconventionsonchildlabour/lang--en/index.htm> (Accessed: 1 March 2023).

55 EU Charter of Fundamental Rights, art. 5 (2).

56 European Commission: Compulsory education in Europe, 2022. [Online]. Available at: <https://eacea.ec.europa.eu/media/2837/download> (Accessed: 1 March 2023).

57 Children’s Amendment Act, art. 141.

58 Basic Conditions of Employment Act, art. 43.

The US has not yet ratified the ILO Convention No. 138, however the US did ratify Convention No. 182.⁵⁹

The US federal law governing child labour is the Fair Labor Standards Act (FLSA). According to its provisions, the minimum age for most non-agricultural types of work is 14 years, which also limits the number of hours that minors under the age of 16 may work. It also prohibits minors under the age of 18 years from working in any occupation deemed hazardous.

4.3. Case laws regarding child labour in regional human rights systems

In Europe, the case of *C.N. and V. vs. France*⁶⁰ concerns the forced labour claims of two sisters of Burundi origin. They lived with their aunt and her family in France after the death of their parents. They lived in the basement of their aunt's house under allegedly bad conditions. The older sister did not attend school and had to take care of her aunt's disabled son while helping with housework. The younger sister attended school and helped around the house after doing her homework. Both sisters lodged a complaint with the ECtHR, stating that they had been held in servitude and subjected to forced labour. The ECtHR found that the first applicant had indeed been subject to forced labour, as she had to work seven days a week with no remuneration or holiday. The Supreme Court's ruling acknowledged that parental authority was not above State limitations. The State has the power to restrict parental control, including the regulation of child labour.

In the US, in the case of *Prince v. Massachusetts*⁶¹ *Betty Simmons*, a 9 year-old child was taken by her aunt, who had her custody, to sell religious pamphlets produced by Jehovah's Witnesses. This violated the Massachusetts regulations that prohibited boys younger than age 12 years and girls younger than age 18 years from selling newspapers in the streets and public places. The aunt argued that Massachusetts law was in violation of the Fourteenth Amendment's free exercise of religious clauses. The Supreme Court rejected the aunt's challenge of a State statute and argued that parental authority was not above State limitations. This is a substantial legal precedent that limits State regulation of parental authority involving child labour.

Is the work of the child influencers a form of child labour? "Kidfluencers" are children who have a large following on their own social media platforms or who regularly appear on their influencer-family members' social media platforms. These child influencers generate income through sponsored content and/or the monetisation policies of social media platforms.

Most social media platforms require users to be at least 13 years old to sign up for their platform; however, in many cases, parents manage children's accounts before

59 ILO: U.S. ratifies ILO Convention against the worst forms of child labour [Online]. Available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_071320/lang-en/index.htm (Accessed: 3 March 2023).

60 ECtHR, *C.N. and V. vs. France*, No. 67724/09, 11 October 2012.

61 *Prince vs. Massachusetts*, 321 US158.

they become 13 years old. Among the key legal concerns regarding child influencers are forced labour, child exploitation and loss of privacy.

Presently, the issue of child influencers is not regulated in African and the U.S. Regional human rights systems. However, the State of Washington is currently working on legislation that will protect children who heavily feature on online platforms and receive monetary compensation for their work.⁶²

In Europe, France is the first and only country to pass new child labour laws that protect “Kidfluencers” under the age of 16 years, who earn income through posting on social media platforms. The provisions of the law state that any income these children earn will be safeguarded in a bank account they can access only when they turn 16 years. Moreover, the law establishes a “right to be forgotten”, which forces social media and other internet platforms to remove any videos or content at the request of the child.⁶³

5. Child trafficking

5.1. Overview

‘Human trafficking is modern day slavery in which individuals, including children, are compelled into service and exploited’.⁶⁴ Worldwide, only 0.5% of victims have been identified.⁶⁵ Human trafficking is the most serious issue in the African human rights system. It is a major region of origin for victims trafficked to other parts of the world, such as Western Europe.⁶⁶

The definition of child trafficking in Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims:

the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁶⁷

62 Collins (2023) The US Is Finally Dealing With the Exploitation of Child Influencers [Online]. Available at: <https://www.cnet.com/news/politics/the-us-is-finally-dealing-with-the-exploitation-of-child-influencers/> (Accessed: 8 March 2023).

63 France passes new law to protect child influencers (2020) BBC, 7 October 2020. [Online]. Available at: <https://www.bbc.com/news/world-europe-54447491> (Accessed: 8 March 2023).

64 Carr, 2012, p. 77.

65 Carr, 2012, p. 79.

66 Country Narratives on Human Trafficking in U.S. Department of States, Trafficking in Persons Report 2016, [Online] Available at: <https://2009-2017.state.gov/j/tip/rls/rm/2016/262585.htm> (Accessed: 10 March 2023).

67 Directive 2011/36/EU, art. 2(1).

5.2. Legislation regarding child trafficking in regional human rights systems

The primary human rights instrument regulating child trafficking is Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting their victims. The directive is addressed to the Member States of the European Union. It provides minimum standards for preventing and combating human trafficking offences, and high standards of protection and support for victims. The Directive also applies to children and contains several child-specific provisions.

The Palermo Protocol is another important human rights instrument. It is a United Nations protocol to prevent, suppress, and punish the trafficking of human beings, particularly women and children, and supplements the UN Convention against Transnational Organized Crime and its Protocols.

Inter-American Convention on International Traffic in Minors is the primary instrument regulating child trafficking in the Inter-American Human Rights System. States Parties must designate one or more central authorities to oversee criminal and civil matters related to international traffic among minors. They must provide mutual assistance in judicial and administrative proceedings and establish mechanisms for information exchange.

The Trafficking Victims Protection Act (TVPA)⁶⁸ is the primary US Federal Law that establishes human trafficking and related offences as federal crimes. The law contains provisions for prevention, protection, and prosecution. The law is applicable to children as well and considers children who are trafficked to be ‘victims of severe forms of trafficking’ and therefore eligible for ‘enhanced benefits’.⁶⁹ Moreover, the law distinguishes legal procedures for unaccompanied children who are residents or nationals of non-contiguous and contiguous countries (Mexico and Canada).

In the African human rights system, 45 States have ratified the African Charter on the Rights and Welfare of the Child. The Charter requires States to implement appropriate measures to prevent ‘abduction, the sale of, or traffic of children for any purpose or in any form, by any person including parents or legal guardians of the child’.⁷⁰

Fifteen West African States ratified the Palermo Protocol⁷¹ and since then have adopted legislation consistent with the Protocol. Some African States have enacted legislations in this regard. One of the first African laws to address child trafficking originated from Benin and is called ‘the 5 July 1961 Act’. The law prohibits any displacement of a child outside the country prior to written authorisation from the chief of his/her district of origin. Anyone who infringes on this provision will be sentenced to two to five years of imprisonment or a fine of between 25,000 and 150,000 CFA whenever found within ten kilometres away from national boundaries.⁷² The Benin

68 Trafficking Victims Protection Act (TVPA), 22 U.S.C. § 7105 (2011).

69 Trafficking Victims Protection Act (TVPA), 22 U.S.C. 7105(b)(1)(C)(II)(I).

70 The African Charter on the Rights and Welfare of the Child, art. 29.

71 Ogunniyi, Idowu, 2022.

72 1961 Act of Benin, art. 3.

Penal Code criminalises child trafficking, and the sentence for this offence is broadly the death penalty.⁷³

5.3. Case laws regarding child trafficking

In the case of *Nestle, Cargill*⁷⁴ six individuals sued Nestlé USA and Cargill, Inc., claiming that they were victims of child trafficking. They claimed they were trafficked to the Ivory Coast as slaves to harvest cocoa beans. Although they were promised to pay for their labour, they were never paid; moreover, they were threatened with starvation if they did not work, and they were forced to work for up to 14 hours per day, six days per week, in hazardous conditions. They accused the companies with aiding and abetting child slavery because Nestlé and Cargill ‘knew or should have known’ that the cocoa farms were exploiting child slaves, and they ‘continued to provide those farms with resources’. The United States Supreme Court dismissed the lawsuit owing to a lack of jurisdiction.

In the case of *Rantsev vs. Russia and Cyprus*⁷⁵ the applicant was seeking justice for the death of his daughter. Oxana Rantseva was a young woman from the Soviet Union who travelled to Cyprus and received an artist visa. She died by falling off the balcony of an apartment belonging to her employer’s acquaintances, in what was believed to be an escape attempt. The father claimed that the authorities from Russia and Cyprus did not conduct proper investigations regarding his daughter’s death. The Court found that Russia and Cyprus both violated Article 4 of the European Convention on Human Rights. This clearly demonstrates that the European Court of Human Rights interprets Article 4 of the European Convention on Human Rights as including a prohibition of trafficking. Further, the Court concluded that considering the special circumstances of the case, the Cypriot authorities should have known that the applicant’s daughter was at risk of being trafficked.

5.4. The use of child soldiers: a form of child trafficking

The use of children in armed combat is a contemporary manifestation of child trafficking.

The international definition of the trafficking of child soldiers involves three necessary elements: consent (forced recruitment, lack of consent from legal guardians, and lack of information about what military service would involve), exploitation, and movement (within a country or across a border).⁷⁶

According to the provisions of the ILO Convention, child soldiering is ‘one of the worst forms of child labour’.⁷⁷ By the same convention, child soldiers are included in the form of slavery.

73 Benin Penal Code, art. 355.

74 Nestlé United States, Inc. vs. Doe, 141 S. Ct. 1931.

75 ECtHR, *Rantsev vs. Cyprus and Russia*, No. 25965/04, 7 January 2010.

76 Tiefenbrun, 2007, pp. 418-419.

77 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (I.L.O. No. 182), arts. 1-3.

Another international legal instrument that addresses the issue of child soldiers is the Children in Armed Conflict Protocol, an Optional Protocol to the Convention on the Rights of the Child. According to its provisions, the minimum age for compulsory recruitment by non-governmental armed groups into the armed forces is 18 years.⁷⁸ The protocol allows voluntary recruitment beginning at the age of 16 years; however, States have to ensure that the recruitment is genuinely voluntary, which is done with the consent of the parents/legal guardians, who were informed about their military duties and provided proof of age prior to recruitment.⁷⁹

The second major international criminal proceeding to focus on the use of child soldiers is the case of *Prosecutor vs. Dyilo*.⁸⁰ Thomas Lubanga Dyilo, former president of the Union of Congolese Patriots, was accused of war crimes comprising conscripting and enlisting child soldiers and using them to further the armed conflict in the Ituri region of the Democratic Republic of Congo. The Chamber confirmed that there was substantial evidence that Lubanga was indeed responsible for the aforementioned crimes as a co-perpetrator.

6. Sexual exploitation

6.1. Overview

Child sexual exploitation is a serious global issue that is becoming increasingly widespread owing to the use of technology and internet. Modern information and communication technologies have made children increasingly vulnerable to evolving forms of sexual exploitation.

Definition of the sexual exploitation of children in regional human rights systems: according to EUROPOL, ‘child sexual exploitation refers to the sexual abuse of a person below the age of 18, as well as to the production of images of such abuse and the sharing of those images online’.⁸¹

The Optional Protocol on the Sale of Children, Child Prostitution and Child pornography defines child pornography as ‘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’.⁸²

US Federal law defines child pornography as any visual depiction of sexually explicit conduct involving a minor.⁸³

78 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, art. 1.

79 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, art. 3(3).

80 *Prosecutor vs. Dyilo*, Doc. No. ICC-01/04-01/06.

81 EUROPOL: Child Sexual Exploitation [Online]. Available at: <https://www.europol.europa.eu/crime-areas-and-statistics/crime-areas/child-sexual-exploitation> (Accessed: 15 March 2023).

82 The Optional Protocol on the Sale of Children, Child Prostitution and Child pornography, art. 2 (c).

83 United States Code, Section 2256, Title 18.

South African legislation defines child pornography to include any image which is created, or any description of a person real or simulated who is depicted as being under the age of 18 years, engaged in sexual conduct, assisting or assisting another to participate in sexual conduct exhibiting or describing body parts in a manner which amounts to sexual exploitation or in a manner which is capable of being used for the purposes of sexual exploitation.⁸⁴

6.2. Child sexual exploitation legislation in regional human rights systems

Directive 2011/93/EU is the primary legal instrument addressing sexual exploitation of children and child pornography under EU law.

The Directive defines the term exploitation in an extensive and explicit manner: recruiting, coercing, and forcing children to participate in pornographic performances or child prostitution and profiting from them; attending pornographic performances involving children; and engaging in sexual activities with a child forced into prostitution.⁸⁵

The directive also criminalises intentional production, acquisition, possession, distribution, dissemination, transmission, offering, supplying, or making available child pornography, as well as obtaining access to this type of content.⁸⁶

In the US, federal law prohibits the sexual exploitation of children, which includes employing or using children to produce sexually explicit materials.⁸⁷ Child pornography is a serious federal crime that involves the production, distribution, importation, reception, and possession of images of child pornography.

The African Charter on the Rights and Welfare of the Child, which has been ratified by 43 States, requires States to protect children from all forms of sexual exploitation and sexual abuse and to take preventative measures.⁸⁸

In South Africa, the Films and Publication Act is the primary legislation regulating the criminalisation of Internet pornography.⁸⁹ According to the provisions of the Act, the production, possession, and distribution of child pornography ARE illegal in South Africa.

84 Films and Publications Act 65/1996, section 1.

85 Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, art. 4.

86 Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, art. 5.

87 18 US Code § 2251.

88 The African Charter on the Rights and Welfare of the Child, art. 27.

89 Films and Publications Act 65/1996.

6.3. Child sexual exploitation cases in regional human rights systems

In *K.U. vs. Finland*,⁹⁰ someone placed an advertisement on a dating website in the name of a 12 years old boy without his knowledge or consent. The advertisement was of a sexual nature and contained the contact details of the boy (his telephone number). The internet provider could not divulge the identity of the person who placed the advertisement because of the legislation in place. The European Court of Human Rights found there was a breach of Article 8 of the European Convention on Human Rights as ‘both the public interest and the protection of the interests of victims of crimes committed against their physical or psychological well-being require the availability of a remedy enabling the actual offender to be identified and brought to justice’.

In the case of *Ashcroft vs. The Free Speech Coalition*⁹¹ the US Supreme Court struck down the expanded definition of child pornography under The Child Pornography Prevention Act. According to these provisions, child pornography included explicit sexual images which were meant to represent minors, but did not use any real children as subjects, and were produced by other means, such as computer imaging. The Court reasoned that by expanding the definition of child pornography, it would criminalise images that are neither obscene nor produced with any actual children, such as a picture in a psychological manual and award-winning theatrical films.

In the case of *De Reuck vs. Director of Public Prosecutions (Witwatersrand Local Division) and others*⁹² De Reuck was charged with possessing child pornography. He claimed that the provisions of the Films and Publications Act were unconstitutional as they violated his right to freedom of expression. The African Court rejected De Reuck’s claims and held that the Films and Publications Act constituted a reasonable and justifiable limitation on the right to freedom of expression.

7. Conclusions

In conclusion, there is a high level of harmony between regional human rights systems and children’s rights.

All major regional human rights systems – the African, the Inter-American and the Council of Europe – have enacted explicit legislation to protect children’s rights.

The main common element between the regional human rights system legislation regarding children’s rights is the United Nations Convention on the Right of the Child, as it is the only international human rights instrument that has been ratified by all United Nations member States, except the U.S.

Currently, the U.S. is under considerable pressure to ratify the Convention, and there are numerous newspaper article titles such as ‘Is America holding out on

90 ECtHR, *K.U. vs. Finland*, No. 2871/02, 2 December 2008.

91 535 US 234 (2002).

92 2003 (12) BCLR 1333 (CC).

protecting children's rights?';⁹³ academic opinions, articles, and reviews with titles such as 'Why the United States Should Ratify the United Nations Convention on the Rights of the Child'⁹⁴ which are pro-ratifying the Convention.

We believe that the harmonisation of regional approaches to children's rights will continue in the future, and it is likely that the U.S. will also succumb to tremendous international and national pressure to ratify the United Nations Convention on the Right of the Child.

93 Rothschild (2017) The Atlantic, 2 May 2017 [Online]. Available at: <https://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652/> (Accessed: 15 April 2023).

94 Gardiner (2017) Children's Rights: Why the United States Should Ratify the United Nations Convention on the Rights of the Child [Online]. Available at: <https://educate.bankstreet.edu/independent-studies/191> (Accessed: 15 April 2023).

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