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**A Critical Evaluation on Combating Child Sexual Abuse and the
Limitations of International Law: A Case Study of United Arab Emirates**

**Submitted in accordance with the requirements for the degree of Doctor of
Philosophy**

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Abstract

Child sexual abuse is a heinous crime. It consists of a variety of pernicious practices which include, but are not limited to, online child pornography, rape and incest. Globally, an estimated 15 million female adolescents have been coerced into sex during their lifetime, whilst the figure for boys is unknown.¹ In many instances, this crime is perpetrated by those who are closest to the victims. Child victims may be severely traumatised and as a result become dysfunctional members of society. Child sexual abuse harms the very fabric of society and society thus pays a heavy price for continuing to tolerate this crime. As such, as this crime predominantly takes place behind closed doors and victims only very rarely report cases,² a comprehensive legislative and policy approach must be adopted in order to effectively combat child sexual abuse.

Legislators around the world as well as the international community must therefore make combating child sexual abuse a priority. However, the question arises whether there exist difficulties and weaknesses within international law which contribute to the persistent problem of child sexual abuse. Accordingly, this research probes whether international law accords adequate protection to the rights of the children and, if not, whether it fails to adequately protect children from sexual abuse. For this purpose, a detailed examination of relevant UAE laws is undertaken in the form of a case study.

It is argued that international law has failed to clearly establish norms and also lacks enforcement mechanisms. The main international instrument, the Convention on the Rights of the Child, fails to determine the age of the child. Instead, it empowers domestic law to do this. Other shortcomings also limit the effectiveness of international law, particularly implementation issues. In the context of the UAE, the fundamental problem is that cultural values entrenched in Islamic criminal and family law have not shown an understanding of the child sexual abuse paradigm. Instead, the honour ideology has been reinforced.

¹ UNICEF, 'Sexual Violence: Current Status and Progress' (*UNICEF*, November 2017) <<https://data.unicef.org/topic/child-protection/violence/sexual-violence/>> accessed 1 November 2017.

² *ibid.*

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List of Abbreviations and Acronyms

| | |
|----------|--|
| ACHR | Arab Charter on Human Rights |
| ACRWC | African Charter on the Rights and Welfare of the Child |
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment |
| CDHRI | Cairo Declaration on Human Right in Islam |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CESCR | Committee on Economic, Social and Cultural Rights |
| COE | Council of Europe |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| CSEC | Commercial Sexual Exploitation of Children |
| ECHR | European Commission of Human Rights |
| ECSR | European Committee of Social Rights |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| GANHRI | Global Alliance of National Human Rights Institutions |
| GCC | Gulf Cooperation Council |
| HRC | Human Rights Council |
| ICC | International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICTs | Information and Communication Technologies |
| ILO | International Labour Organization |
| INTERPOL | International Criminal Police Organisation |
| LAS | League of Arab States |

| | |
|---------|---|
| NGO | Non-governmental organization |
| NHRIs | National Human Rights Institutions |
| OHCHR | Office of the United Nations High Commissioner for Human Rights |
| OIC | Organisation of Islamic Conference/Cooperation |
| OPSC | Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography |
| PLO | Palestinian Liberation Organization |
| RUDs | Reservations, Understandings and Declarations |
| SCSL | Special Court for Sierra Leone |
| STDs | Sexually Transmitted Diseases |
| UDHR | Universal Declaration of Human Rights |
| UIDHR | Universal Islamic Declaration of Human Rights |
| UNCESCR | Human Rights Commission on Economic, Social and Cultural Rights |
| UNCRC | Committee on the Rights of the Child |
| UNEP | United Nations Environment |
| UNESCO | United Nations Education, Scientific and Cultural Organization |
| UNGA | United Nations General Assembly |
| UNICEF | United Nations Children’s Fund |
| UPR | Universal Periodic Review |
| VCLT | Vienna Convention on the Law of Treaties |
| WFCL | Worst Forms of Child Labour |
| WHO | World Health Organization |

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Charter of Fundamental Rights of the European Union

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Dedication

I dedicate this thesis to all the victims of child sexual abuse and those children affected by the commission of the crime of sexual abuse on persons – past, present and future.

Declaration

I, Ali Mohammad Juma Majed Al Matrooshi, declare that this thesis is an original work of my own and has been submitted for the degree of Ph.D at Brunel University London; it has never been submitted to any other institute before. All information derived from the work of others has been quoted and acknowledged via complete referencing.

Part I

Chapter One: Introduction

1.0 Introduction

Sexual abuse is treated as a serious crime so its perpetrators are punished with lengthy terms of imprisonment. The majority of states further extend this sentence when the victim is a minor and the perpetrator is an adult by imposing more severe conditions for release. Despite these penalties, a certain group of offenders repeatedly eludes the stringent penal regime provided by states for child sexual abuse. ‘Interfamilial child sexual abuse’, where the child-victims are related to their sexual offenders by blood or affinity, often goes unpunished. In the majority of cases of child sexual abuse, the child victim knows the abuser.³ International law has recognised the problem of child sexual abuse, in particular in Articles 19 and 34 of the Convention on the Rights of the Child 1989 (CRC). These two provisions require state parties to take all requisite steps to safeguard children, including against sexual abuse, whilst they are being cared for by their parents or others. State parties must also safeguard children against all types of sexual abuse and exploitation. However, whilst international law addresses the issue, customary laws continue to protect interfamilial child sexual offenders in many states. It is submitted that the reason for this is that international law is weak, thereby enabling states to only pay lip-service to their CRC obligations in respect of child sexual abuse. Subedi has reiterated that ‘in spite of the existence of a plethora of human rights instruments and institutions, there have been many setbacks and a number of tragic failures to prevent atrocities and safeguard human rights’,⁴ including children from sexual abuse.

1.1 The concept of rights in child protection

The child protection narrative includes the concept of rights.⁵ Consequently, youths should be protected because they also have rights. This is due to youths being entitled to special rights. But this development is recent. The distinctions between the concepts of childhood and

³ American Psychological Association, ‘Sexual Abuse’ <<http://www.apa.org/topics/sexual-abuse/index.aspx>> accessed 2 February 2018.

⁴ Surya P Subedi, *The Effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights* (Taylor & Francis 2017) 22.

⁵ Michael DA Freeman and Philip E Veerman, *The Ideologies of Children's Rights*, vol 23 (Martinus Nijhoff 1992) 47.

adulthood evolved over the 20th century.⁶ The topic of child rights gained momentum at the international level for the first time following the First World War. The founder of the Save the Children Fund, Eglantyne Jebb (1876-1928),⁷ was greatly influenced by children who were casualties of World War I. Jebb was responsible for drafting the 1924 Geneva Declaration of the Rights of the Child, which was subsequently adopted by the League of Nations.⁸ Granting children their own rights was a new concept at the international level and the Declaration is thus one of the earliest modern documents in this respect.⁹ The Declaration was a precursor to the Universal Declaration of Human Rights (UDHR), which was adopted two decades later.¹⁰ The focus of the Declaration on the Rights of the Child 1924 was on protection, and it therefore contained related provisions, but despite its name it did not actually set out rights for children. Instead, it emphasised that mankind owes the child various duties, for example, to give the child the means requisite for its normal development and to receive relief in times of distress.¹¹ Hence, it only spelled out duties which adults owe to children. These duties were rather an expression of optimism and recognised that international law promotes obedience.¹² The Declaration recognised that ‘mankind owes to the child the best it has to give’ and this same approach is also reflected in subsequently enacted international instruments which deal with the rights of the child.¹³

The Declaration is significant since it identified the first concepts to protect children and was the first international acknowledgment of the relationship between the rights of a child and his/her welfare. The Declaration also encouraged states to pay attention to protecting children.¹⁴ It outlawed discrimination on the grounds of race, nationality, sex and social

⁶ Don Harrison, *Regardless of Frontiers: Children's Rights and Global Learning* (Trentham Books 2008) 1; Jane Fortin, ‘Children as Rights Holders: Awareness and Scepticism’ in Jane Williams and Antonella Invernizzi, *Children and Citizenship* (Sage 2008) 64.

⁷ For more, see Chapter Nine ‘A Perfect Jungle of Intrigues, Suspicion and Hypocrisies’: The Early Save the Children Fund in Time of Crisis’ in Linda Mahood, *Feminism and Voluntary Action: Eglantyne Jebb and Save the Children, 1876-1928* (Springer 2009) 166.

⁸ Zoe Moody, ‘The United Nations Declaration of the Rights of the Child (1959): Genesis, Transformation and Dissemination of a Treaty (re) Constituting a Transnational Cause’ (2015) 45 *Prospects* 15, 18.

⁹ Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press 2003) 35; Rebecca MM Wallace, *International Human Rights: Text and Materials* (Sweet & Maxwell 1997) 213.

¹⁰ Geraldine Van Bueren, ‘Child Sexual Abuse and Exploitation: A Suggested Human Rights Approach’ (1994) 2 *International Journal of Child Rights* 45, 59.

¹¹ Geneva Declaration of the Rights of the Child (adopted 26 September 1924).

¹² Nuttaki Satish, ‘Promotion and Protection of Child Rights: A Study with Reference to the Role of Child Welfare Committee Andhra Pradesh under the Juvenile Justice (Care and Protection of Children) Act 2000’ (PhD thesis, Acharya Nagajuna, 2011) 92.

¹³ Geraldine Van Bueren, *The International Law on the Rights of the Child*, vol 35 (Martinus Nijhoff 1998) 7.

¹⁴ *ibid* 8.

position.¹⁵ Nonetheless, various commentators have highlighted the shortcomings of the Geneva Declaration, namely that it relegates the rights of the child to a duty instead of emphasising the specific liberties and rights of children.¹⁶ While the Declaration is not considered to be binding upon signatories, it is nevertheless considered important since it reflects the aspiration to introduce the first basic principles for a global framework.¹⁷ It thereby set the stage for the development of international standards which were subsequently concluded.

The Declaration laid the foundations for subsequent advancements in this regard. It firstly formally recognised child welfare and conferred corresponding rights and thus contributed to the matter being addressed at the national level.¹⁸ Whilst this non-binding Declaration has been overshadowed in its importance following the adoption of the seminal CRC, it nevertheless highlights how the topic of child rights has incrementally developed. Understanding the concept of child rights is therefore very important in order to effectively protect children. Therefore, a significant move both nationally and internationally towards the ultimate goal of a safer world for children would consist of the development of legal standards. In the national legal systems of states around the world, there may be variations in articulating concepts related to children and those who have not reached the age of maturity because of diverse traditions and cultures. However, the terms ‘childhood, adolescence, youth and young people ... have different meaning in different cultural contexts’.¹⁹ Moreover, as is discussed next, ‘the international community is still some way from agreeing on a universal definition of childhood’.²⁰

1.2 Conceptual issues: Definition of a ‘child’

Categorising a child is not an easy task. Defining the point at which childhood starts and ends has been an issue to many institutions including the UN. This study attempts to address the numerous contestations in order to explain what constitutes childhood. The first part of contestation is how the definitions of a child and youth overlap. For example, under 18 years

¹⁵ *ibid* 9.

¹⁶ Rita Shackel, 'The United Nations Convention on the Rights of the Child – A Review of its Successes and Future Directions' (2003) *Australian International Law Journal* 21, 24.

¹⁷ Hans-Joachim Heintze, 'The UN Convention and the Network of International Human Rights Protection by the UN' in Freeman and Veerman (n 3) 73.

¹⁸ Van Bueren (n 13) 8.

¹⁹ Gerison Lansdown, 'Programming Strategy with and for Adolescents in East Asia and Pacific' (UNICEF EAPRO, 2004) 4.

²⁰ Van Bueren (n 13) 38.

of age is deemed a child by the CRC ‘unless under the law applicable to the child, maturity is attained earlier’.²¹ By contrast, youth is considered to be between the ages of 15 and 24 by UNESCO.²² As such, an individual between the ages of 15 and 18 falls into both categories. The United Nations General Assembly considers those who are below 15 years to be children and describes those between 15 and 24 as youths.²³ These definitions highlight the complexities which exist when defining what amounts to childhood. The reason for this is that the ‘concept of childhood’ is politically, culturally and socially constructed and is also shaped by the history of the particular state.²⁴ Children and youths are therefore defined in different ways. The controversial nature of the concept of childhood has resulted in the CRC allowing states to adopt legislation which defines the age at which adulthood is reached.²⁵ The general trend, however, is that 18 years of age is increasingly the predominant marker at which childhood ends.²⁶ The overlap also means that youth employment, as encouraged by governments and numerous NGOs, could possibly violate Article 32 of the CRC. The arduous task of defining a child is an issue for other bodies as well as UNESCO. Article 77(2) of the Additional Protocol 1 of the Geneva Convention reads:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.²⁷

It is uncertain whether this Convention envisioned childhood to end at 15 years or only confers special protection in criminal proceedings for those less than 15 years. Nevertheless, 15 years of age was sanctioned by the Special Court for Sierra Leone (SCSL) as the age at which a child could be held criminally responsible in order to efficiently deal with child soldiers,²⁸ which was highly disapproved of by NGOs who stated that children are not

²¹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 1.

²² UNESCO, ‘What Do We Mean by “Youth”?’ (*UNESCO*, 2017) <<http://www.unesco.org/new/en/social-and-human-sciences/themes/youth/youth-definition/>> accessed 7 April 2017.

²³ Douglas Richardson and others, *The International Encyclopedia of Geography, 15 Volume Set: People, the Earth, Environment, and Technology* (John Wiley & Sons 2017) 542.

²⁴ *ibid.*

²⁵ Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict* (Oxford University Press 1997) 9.

²⁶ *ibid.*

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) 1125 UNTS 3.

²⁸ UN Security Council (UNSC), ‘Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone’ (4 October 2000) UN Doc S/2000/915, 32.

capable of understanding the consequence of serving as militants so are essentially victims.²⁹ Though 15 years remained on its statute, no child appeared before the SCSL due to this condemnation.³⁰ The disagreement regarding the age of criminal responsibility is possibly clearer in domestic jurisdiction where States have very low ages for criminal responsibility, with England and Wales setting the age at 10 years.³¹

According to Veerman, it was perhaps difficult for the drafters to imagine that children (like adults) could be addicted to alcohol or drugs. Yet, times have changed and even an uncontroversial article such as Article 1 (definition of the child) needs to be reviewed in light of new findings from modern neurobiological science and neuro-imaging (for instance, MRI scans). Thus, neuroscientists argue that the period of special protection of childhood should be expanded until 24 years of age because the brain is growing until that age.³²

1.3 The concept of child protection

Child protection is one of the most important tasks for societies. Various United Nations agencies have therefore made child protection one of their core objectives.³³ Article 1 of the UDHR also proclaims that '[a]ll human beings are born free and equal in dignity and rights'. Yet, as children are more vulnerable, the UN legal framework has additionally afforded them special protection.³⁴ This is recognised in Article 25 of the UDHR which mentions childhood and that those in this category are entitled 'to special care and assistance'. The International Covenant on Civil and Political Rights 1966 (ICCPR) has articles which deal specifically with children, namely Articles 14(1), 23(4) and 24.³⁵ The same is the case with the International Covenant on Economic, Social and Cultural Rights (ICESCR) which confers specific rights on children by virtue of Articles 10(3) and 13.³⁶ Provisions found in general human rights treaties also apply to children. However, the CRC is particularly important for

²⁹ See IRIN, 'Should Child Soldiers Be Prosecuted for Their Crimes?' (*IRIN*, 2011) <<http://www.irinnews.org/analysis/2011/10/06/should-child-soldiers-be-prosecuted-their-crimes>> accessed 7 April 2017.

³⁰ *ibid.*

³¹ CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: United Kingdom of Great Britain and Northern Ireland (20 October 2008) CRC/C/GBR/CO/4, para 77 at 18.

³² Philip E Veerman, 'The Ageing of the UN Convention on the Rights of the Child' in Michael Freeman (ed), *The Future of Children's Rights* (Brill 2015) 16, 17.

³³ Farhad Malekian and Kerstin Nordlöf, *The Sovereignty of Children in Law* (Cambridge Scholars 2012) 5.

³⁴ Oliver C Ruppel, 'The Protection of Children's Rights under International Law from a Namibian Perspective' in Oliver C Ruppel (ed), *Children's Rights in Namibia* (MacMillan Education 2009) 53, 55.

³⁵ *ibid.*

³⁶ *ibid.*

ensuring child protection since it stipulates the most far-reaching child protection norms. The CRC rights are universal and have been designed on the basis of ‘the precious child of twentieth-century neo-liberal thought about the self-governing individual’.³⁷ Such an approach implies that children are no longer viewed as ‘passive dependents’ but as ‘individual rights-bearers’ entitled to distinct human rights.³⁸ International law has thus spelled out a very specific model of child protection. This model arguably conflicts with the *Sharia* approach which is more rooted in duties. Yet, the tension may be overcome through Pufall and Usworth’s approach which proposes to rethink childhood:

Rethinking childhood makes sense only when it is not driven by our fears or by our idealizing visions. It is not a call to a romantic view of children that requires respect and active listening with the handing over of keys to the kingdom. Rethinking requires a thorough examination of the validity of both sides of this apparent ambivalence in society’s estimation of its children patronizing on the one side and idealizing on the other. It is a challenge to understand children as they are and where they are by listening to them and understand the ways in which they act to create their own futures.³⁹

In other words, it is imperative to rethink childhood within the context of present knowledge and ongoing research about children, especially for Muslim states, so that the new realities of childhood can be taken into consideration.⁴⁰ Only this can ensure that children are properly protected by society,⁴¹ including in the Middle East where child protection appears to be still more based on the old passive dependent approach. To improve the protection system, there first needs to be a clearer comprehension of the status of children in society. More importantly, the child protection approach must be aligned with that of the CRC. This adaptation requirement does not change the cultural relativist discourse about childhood because a debate regarding this is essential to attain the goal of universal standards.⁴² The reason for this is that there exist many different types of childhood and the term is understood differently depending on the context and the particular country.⁴³ The universal ideals stipulated in the CRC are frequently not experienced by children.⁴⁴ Hence, the CRC aspirations differ greatly from the realities of children.⁴⁵ For instance, when a woman marries

³⁷ Yvan Droz, ‘Conflicting Realities: The Kikuyu Childhood Ethos and the Ethic of the CRC’ in K Hanson and O Nieuwenhuys (ed), *Reconceptualizing Children’s Rights in International Development: Living Rights, Social Justice, Translations* (Cambridge University Press 2013) 116.

³⁸ Jason M Pobjoy, *The Child in International Refugee Law* (Cambridge University Press 2017) 6.

³⁹ Peter B Pufall and Richard P Unsworth, *Rethinking Childhood* (Rutgers University Press 2004) 2.

⁴⁰ *ibid.*

⁴¹ Bob Lonnie and others, *Reforming Child Protection* (Routledge 2008) 13.

⁴² Karen Wells, *Childhood in a Global Perspective* (John Wiley & Sons 2015) 2.

⁴³ Martin D Ruck and Michele Peterson-Badali, *Handbook of Children’s Rights: Global and Multidisciplinary Perspectives* (Routledge 2016) 15.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

and becomes a mother, she may become an adult before she reaches 18 years of age.⁴⁶ The preamble of the CRC also recognises that ‘traditions and cultural values of each people for the protection and harmonious development of the child’ must be duly considered. Whilst the concept of child protection is therefore not universally agreed, the CRC has ‘helped to establish an internationally accepted framework for the treatment of all children, encouraged a positive and optimistic image of children as active holders of rights, and stimulated a greater commitment to safeguarding these rights’.⁴⁷ However, the failure to agree on who should be considered a child weakens the available safety net which the CRC creates for children, including in the context of child abuse.

1.4 The concept and typology of child abuse

Like the concept of childhood, the definition of child abuse changes depending on the society and peoples’ perspectives.⁴⁸ UN Independent Expert Withit Muntarbhorn writes that, whilst the terms ‘abuse’ and ‘sexual abuse’ have not been exhaustively defined in any international instrument, there are many instances where they have been defined in national legislation.⁴⁹ The Child Abuse Prevention and Treatment Act 2010⁵⁰ describes ‘child abuse and neglect’ as any ‘act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm’.⁵¹ The Oxford Dictionary defines abuse as ‘[u]se (something) to bad effect’; ‘treat with cruelty or violence, especially regularly or repeatedly’ including ‘assaulting (someone, especially a woman or child) sexually’ and ‘[u]sing or treat[ing] in such a way as to cause damage or harm’; ‘speak[ing] to (someone) in an insulting and offensive way’.⁵² Undeniably, it can be agreed by many that abuse is cruel, violent or an unfair way to treat somebody.⁵³ According to the dictionary definition provided, child abuse has a unique end, namely to hurt the child. Still, abuse can come in a variety of forms in their administration, and these forms, irrespective of differences, are equally

⁴⁶ *ibid.*

⁴⁷ International Save the Children Alliance, *Children's Rights: Realities or Rhetoric?* (International Save the Children Alliance 1999) 5.

⁴⁸ David Finkelhor and Jill Korbin, 'Child Abuse as an International Issue' (1988) 12 *Child Abuse & Neglect* 3, 6.

⁴⁹ Withit Mantāphōn, *Article 34: Sexual Exploitation and Sexual Abuse of Children*, vol 34 (Martinus Nijhoff 2007) 2.

⁵⁰ Child Abuse Prevention and Treatment Act 2010 (20 December 2010) 111-320.

⁵¹ *ibid* s 3(2).

⁵² *Oxford Dictionaries* (2017) <<https://en.oxforddictionaries.com/definition/abuse>> accessed 1 November 2017.

⁵³ See ‘abuse’, *Oxford English Dictionary* (Oxford University Press 2015).

universal. Most agree that there are four different types of child abuse: physical, neglect, sexual and emotional.

Clearly, the attitudes and actions towards children make this concept an area of focus for society. For this reason, around the mid-1970s, US authorities described this issue as urgent⁵⁴ and steps were taken to prevent child abuse and neglect. In contrast, in the UAE the topic of child abuse has only recently received increasing attention when a draft child law was passed in 2014 and finally enacted in 2016.⁵⁵ In many other Muslim majority states, the topic has received insufficient attention, primarily because of cultural practices, such as child marriages, and subject related religious dogmas.⁵⁶ Furthermore, no valid and reliable data exists about child abuse and there is no agreement on what constitutes child abuse.⁵⁷ There is no consensus on how to characterise the abuser or the child victim. These disagreements contribute to the problem which is damaging to children.⁵⁸ Outlining the problem would help to gain a better understanding of it and address the numerous underlying issues.

Despite the lack of consensus on what amounts to child abuse, this subject is debated internationally because it is universal in nature. Article 3 of the CRC requires state parties to protect the child and provide him/her with the requisite care for his/her well-being. Articles 19 and 34 specifically mandate that steps must be taken to safeguard children against all types of sexual abuse, as well as sexual exploitation. It has also been further explained what this means in the CRC General Comment 13. The content of Articles 19 and 34 highlights the complexities of defining child sexual abuse, as well as exploitation.⁵⁹ Article 34 employs the term ‘unlawful’ sexual activity and practices which is a compromise also because the age at which one can consent has not been clearly confirmed.⁶⁰ State parties are required to ‘take all

⁵⁴ Zila Welner, Amos Welner and Eli Robins, 'Child Abuse: A Case for a Different Approach' (1977) 18 *Comprehensive Psychiatry* 363, 363.

⁵⁵ Samir Salama, 'Child Sexual Abusers May Face 10 Years' Jail' (*Gulf News*, 21 January 2014) <<http://gulfnews.com/news/uae/government/child-sexual-abusers-may-face-10-years-jail-1.1280341>> accessed 1 November 2017; Janice Ponce de Leon, 'Law to Make Reporting Child Abuse Mandatory in UAE' (*Gulf News*, 19 May 2016) <<http://gulfnews.com/news/uae/society/law-to-make-reporting-child-abuse-mandatory-in-uae-1.1831238>> accessed 1 November 2017.

⁵⁶ Shaista Gohir, 'The Hypocrisy of Child Abuse in Many Muslim States' (*The Guardian*, 24 April 2010) <<https://www.theguardian.com/commentisfree/2010/apr/25/middle-east-child-abuse-pederasty>> accessed 1 November 2017.

⁵⁷ Welner, Welner and Robins (n 54) 363.

⁵⁸ *ibid.*

⁵⁹ Anne McGillivray, 'Child Sexual Abuse and Exploitation, What Progress Has Canada Made?' in RB Howe and K Covell (eds), *A Question of Commitment: Children's Rights in Canada*, vol 11 (Wilfrid Laurier University Press 2007) 127.

⁶⁰ *ibid.*

appropriate legislative, administrative, social and educational measures to protect the child'.⁶¹ In practice, this means identifying, reporting, referring, investigating and following-up cases of child maltreatment.⁶² Article 34 requires states to adopt 'national, bilateral, and multilateral measures'. Despite these clear CRC provisions, many states do not always comply with these international obligations.⁶³ In other words, state practice diverges, especially in states in North Africa and the Middle East.⁶⁴ Legislation which exists is frequently outdated and as a result insufficient to safeguard children and does not fully comply with the CRC.⁶⁵ For instance, the law often does not recognise that boys can also be victims of sexual abuse.⁶⁶ Even in Europe, many cases are not being reported and perpetrators are only being brought to justice in a small minority of cases.⁶⁷ As McAlinden states, the 'fear of retribution, abandonment and feelings of blame, guilt and shame all conspire to silence children and inhibit their disclosures of sexual abuse'.⁶⁸ Perpetrators may explicitly silence children with threats to harm them, their parents or relatives.⁶⁹ UNICEF informs that in the Middle East and North Africa legal cases are hardly ever brought when children are subjected to sexual abuse and violence by family members.⁷⁰ They report that this is largely due to cultural, traditional and/or religious notions of shame and honour; female victims of sexual abuse are considered a dishonour to their families which can carry severe repercussions.⁷¹ They may be rejected, ostracised, put under house arrest or even forced to marry their abuser.⁷² In some cases the female victim may ultimately become a fatality in an 'honour killing'.⁷³ The subject of shame and honour in relation to the reporting of child sexual abuse and violence will be examined in more detail in Chapter Eight.

⁶¹ CRC (n 21) art 19(1).

⁶² *ibid* art 19(2).

⁶³ McGillivray (n 59) 127.

⁶⁴ Ioana Cismas, *Religious Actors and International Law* (Oxford University Press 2014) 55.

⁶⁵ Julia Sloth-Nielsen, *Children's Rights in Africa: A Legal Perspective* (Routledge 2016) 24.

⁶⁶ Adele Jones and others, *An Integrated Systems Model for Preventing Child Sexual Abuse: Perspectives from the Caribbean* (Palgrave Macmillan 2014) 248.

⁶⁷ Council of Europe, *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, an Explanatory Report, Lanzarote (Spain, 25.X.2007)* (Council of Europe 2008) 31.

⁶⁸ Anne-Marie McAlinden, 'Setting'Em Up': Personal, Familial and Institutional Grooming in the Sexual Abuse of Children' (2006) 15 *Social & Legal Studies* 339, 347.

⁶⁹ Tina B Goodman-Brown and others, *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse* (2003) 27 *Child Abuse and Neglect* 525, 527.

⁷⁰ UNICEF, 'Commercial Sexual Exploitation of Children: The Situation in the Middle East/North Africa Region' (2017) <<https://www.unicef.org/events/yokohama/background8.html>> accessed 1 November 2017.

⁷¹ *ibid*.

⁷² *ibid*.

⁷³ *ibid*.

Finkelhor and Korbin have noted that ‘child abuse arose as a social issue primarily in the developed States of the Western world’.⁷⁴ Nevertheless, during the passage of time, there has been a growing awareness that this exists in some form everywhere. Thus, ‘international organizations in recent years have started to build international awareness about child abuse’.⁷⁵

In regard to the first type of abuse, Barker and Rhodes write that physical abuse ‘starts at one end of the continuum with minor injuries or bruising, and ends at the other with injuries that can prove fatal’.⁷⁶ According to the National Research Council, physical abuse can be defined as ‘[n]on-accidental physical injury as a result of punching, beating, kicking, biting, shaking, throwing, stabbing, choking, hitting, burning, or otherwise harming a child, that is inflicted by a parent, caregiver, or other person who has responsibility for the child’.⁷⁷ It is understood that the child can be ‘subject to hitting, shaking, throwing, poisoning, burning or scalding, drowning, suffocating, or otherwise causing physical harm to a child’.⁷⁸

Sexual abuse can happen to a child of any age, even the very young. Another way to describe it is the sexual molestation of children by older children and adults. The term ‘sexual’ incorporates many forms of intimate contact.⁷⁹ It can consist of voyeurism and exhibition to oral, anal and vaginal penetration, and may be committed by a single or multitude of perpetrators on one or more occasions.⁸⁰ The third type of child abuse, neglect, means the breakdown or absence of parental care. This type of parenting is called ‘passive abuse’ through acts of parental omission. It also includes lack of physical care, supervision and control or limited emotional responsiveness. These can be expressed through neglecting necessities like warmth, affection, food and protection.

When states fail to enact laws to outlaw these different types of abuse, a legislative loophole is generated. A reduced criminal charge may be pursued against perpetrators who are related

⁷⁴ Finkelhor and Korbin (n 48) 3.

⁷⁵ *ibid* 3.

⁷⁶ Judy Barker and Deborah Hodes, *The Child in Mind: A Child Protection Handbook* (Routledge 2004) 23.

⁷⁷ National Research Council, *New Directions in Child Abuse and Neglect Research* (National Academies Press 2014) 6.

⁷⁸ Barker and Hodes (n 76) 23.

⁷⁹ Oxford Dictionary of English, ‘Sexual’ <http://www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m_en_gb0759820?rskey=X7NplT&result=1> accessed 2 February 2018.

⁸⁰ *ibid* 33.

to their victims.⁸¹ As a result, the duration of imprisonment is much shorter than those given to perpetrators who sexually assault and abuse unrelated children. Moreover, a few states may allow perpetrators who are related to their victims to avoid punishment completely. Unrelated perpetrators of child sexual assaults receive significant prison time and civil penalties; whereas, given the exact same fact pattern, related perpetrators repeatedly receive much lighter penalties. Additionally, prosecutors can grant probation-only sentences and forms of judicial diversion that are exclusively available to perpetrators who can claim some familial relationship to their victims. In the UAE, the Child Protection Law was only enacted in 2016 and the subject of child sexual abuse was until then largely a taboo topic. Outdated laws and conservative *Sharia* interpretations particularly resulted in perpetrators of child sexual abuse being rarely brought to justice. The lack of a legal framework provided a protective cloak for perpetrators until very recently. A study highlighted that child sexual abuse perpetrated by relatives and maids is on the increase.⁸² As a result, UAE federal police encounters many cases. This crime is undermining the basic norms of society and is badly affecting children; it destroys their physical and mental capabilities, damaging them permanently.

1.5 Scope and significance of the research

Child sexual abuse is an enormous topic, full of never ending problems. The study is limited to examination of the weaknesses within international law through the detailed analyses of practice of the UAE. Furthermore, the UAE has social and cultural restrictions (like most Arabic and Islamic states), which do not allow discussion of incidents of child sexual abuse irrespective of whether they are inter-familial or intra-familial. Hence, there is lack of resources, studies and information about the UAE and the Arab world. This raises some issues for consideration. First, there is a scarcity of information either from official sources or through publications on cases of child sexual abuse. Second, the law against child sexual abuse has not been tested yet although it entered into force in June 2016. Furthermore, in this study loopholes are identified, legislation and mechanisms of implementation are criticised.

⁸¹ For example, see the Californian Penal Code § 1203.066(a)(3): '(a) *Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken ... for any of the following persons: (3) A person who is convicted of a violation of Section 288 or 288.5 and who was a stranger to the child victim or befriended the child victim for the purpose of committing an act in violation of Section 288 or 288.5 ...*'

⁸² Amira Agarib, '40% of Child Abuse Cases in UAE Involve Maids' (*Khaleej Times*, 20 November 2016) <<https://www.khaleejtimes.com/nation/dubai/children-are-precious-save-them-from-abuse>> accessed 1 November 2017.

Notwithstanding the aforementioned effort, the crime of child sexual abuse is unfortunately a primary source of concern.

At the level of state practice, child sexual abuse takes many diverse and clandestine forms within modern societies, and therefore requires considerable attention in establishing laws, regulations as well as their effective enforcement. Child sexual abuse primarily takes place at the hands of a family member or a person of trust, and therefore requires law enforcing agencies to intrude, by so doing violating sacrosanct religious, cultural or family values. The UAE population is still not aware of child rights except perhaps in the legal and academic community. Thus, the need for a child rights law has to be discussed in public, in schools, during parent-teacher meetings and in other public places.

The term international law describes both the regulatory network and common legal vocabulary within which states and other actors are obliged to operate.⁸³ In the hectic interplay of world affairs, large numbers of agreements and customs are employed to impart stability and predictability⁸⁴ into situations and provide a common frame of reference for conceptions of what is 'legal' and/or 'right'. Since the establishment of the international community, there were two major sources of international law:⁸⁵ 1. international agreements, or treaties between states which created binding rules on the signatories; and 2. customary rules which identified practices by states that were recognised as representative of acceptable codes of conduct.⁸⁶

Customary international law, it is generally agreed, finds its source in the widespread consistent practice of states.⁸⁷ Customary international law is traditionally an important source of international law that is derived from the harmonious rules of State practice and *opinio juris*.⁸⁸ The idea is that if states act in a particular consistent manner, other states are be encouraged to reciprocate such actions to the point that they follow these actions with a

⁸³ Ralph Zacklin, 'A Personal Perspective on International Law' in Malcolm D Evans, *International Law* (Oxford University Press 2003) 22.

⁸⁴ Malcolm N Shaw, *International Law* (Cambridge University Press 2008) 7.

⁸⁵ Andre Da Rocha Ferreira and others, 'Formation and Evidence of Customary International Law' (2013) 1 UFRGS Model United Nations Journal 182.

⁸⁶ Shaw (n 84) 6.

⁸⁷ Thomas Buergenthal and Sean Murphy, *Public International Law in a Nutshell* (West Academic 2013) 2-4.

⁸⁸ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 2002) 44.

sense of legal obligation.⁸⁹ Whenever sufficient numbers of states act in this consistent manner, with the requisite mental element of *opinion juris* of a sense of legal obligation a customary norm is generated.⁹⁰

Customary international law is a constantly evolving body of largely custom based, unwritten law that together with written law (treaties) goes to represent the corpus of international law. Unlike treaties, which are only binding upon states that have ratified them, customary international law binds States without any formal acquiescence on their part, unless they have clearly and persistently objected to the emerging concept as it develops.⁹¹

Customary international law has developed from the practice of states.⁹² It can arise from various State practices inter alia the national legislation, the practice of international organisations, the State reporting to UN organs, and ratifying international treaties that might be said to represent the behaviour of state practice.⁹³

Since the Second World War, the modern authority which constitutes and defines the sources of international law and custom⁹⁴ is Article 38(1) of the Statute of the International Court of Justice⁹⁵ (formerly, the Permanent Court of International Justice).⁹⁶ It gives it as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified

⁸⁹ Roozbeh Rudy B Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21 *European Journal of International Law* 173, 176.

⁹⁰ Alina Kaczorowska-Ireland, *Public International Law* (Routledge 2015) 30.

⁹¹ Smelcer JD, 'Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights: Towards Enforcement in U.S. and Australian Domestic Courts' (2006) 15(1) *Pacific Rim Law & Policy Journal* 301, 304.

⁹² H Thirlway, 'Human Rights in Customary Law: An Attempt to Define Some of the Issues' (2015) 28(3) *Leiden Journal of International Law* 495, 502; Alexander Orakhelashvili, 'Natural Law and Customary Law' (2008) *Heidelberg Journal of International Law* 69, 70.

⁹³ Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases and Materials on International Law* (Oxford University Press 2016) 25.

⁹⁴ Bankole Justice Thompson, *Universal Jurisdiction: The Sierra Leone Profile*, vol 3 (Springer 2015) 12.

⁹⁵ Statute of the International Court of Justice (18 April 1946) art 38(1).

⁹⁶ Da Rocha Ferreira and others (n 85) 183.

publicists of the various nations, as subsidiary means
for the determination of rules of law.

According to Article 38(1), the three main sources of international law are international conventions (or treaties), international custom and general principles of law.⁹⁷ As stated above, international custom does not arise from a deliberate legislative process but rather is a description of ‘the collateral effect of the conduct of States in their international relations’.⁹⁸ It is a form of tacit agreement whereby the behaviour of States towards each other is deemed to be an indicative guarantee of their future conduct, which they tacitly agree to be legally bound to.⁹⁹ Two key elements of international custom law are state practice and *opinio juris sive necessitatis* - or *opinio juris* -, which literally translates to ‘opinion of law or necessity’. As noted already, forms of state practice inter alia incorporate state legislation, diplomatic correspondence and policy statements.¹⁰⁰ *Opinio juris* is reflected in Article 38(1)(b) which establishes that for custom to exist, a general practice must be accepted as law.¹⁰¹ Although, under the UN Charter most of the General Assembly Resolutions are recommendations and are not legally binding (except those dealing with the budget and internal organisational matters).¹⁰² That said a number of General Assembly Resolutions, for example, the Universal Declaration of Human Rights (1948) have attained a binding status within customary international law. The ICJ will refer to General Assembly resolutions to confirm the existence of *opinio juris* which will reveal the attitude of state parties to a particular treaty or UN resolution.¹⁰³

In contrast to customary law, international conventions (or treaties) are a more deliberate law-making method.¹⁰⁴ As elucidated in Article 38(1)(a), they are the intentional creation of written agreements which legally bind the participating states to act in particular ways or to set up specific relations between themselves.¹⁰⁵ A series of conditions and arrangements are laid out which the state parties are legally obliged to conform to; this binding nature of treaties is based on the customary international law principle of *pacta sunt servanda*. The

⁹⁷ *ibid* 185.

⁹⁸ *ibid* 186.

⁹⁹ *ibid*.

¹⁰⁰ *ibid* 186.

¹⁰¹ *ibid* 190.

¹⁰² Bin Cheng, ‘Whether International Law?’ in Freestone, David, Sūryaprasāda Suvēdī, and Scott Davidson, eds. *Contemporary issues in international law: a collection of the Josephine Onoh Memorial Lectures* (Martinus Nijhoff Publishers/Brill Academic Publication 2002) 40.

¹⁰³ Shaw (n 84) 88.

¹⁰⁴ Shaw (n 84) 93.

¹⁰⁵ *ibid*.

express and written consent – as opposed to tacit agreement – required of contracting state parties by treaties has constituted them as the most superior¹⁰⁶ and important source of modern international law.¹⁰⁷

In response to criticisms of the validity, effectiveness and usefulness of international law, it has been analogously suggested that just as murder and assaults continue to occur within domestic legislative orders without destroying the fundamental regulatory framework, there are also many gross violations by states towards international legal rules, albeit the vast majority of provisions are followed.¹⁰⁸ In addition, proponents point to the way that ‘soft-law’, United Nations declarations on human rights, the advancement of women, and the environment, has gradually, over time, moved from agenda-setting ‘fora’ to altering the international legal landscape.¹⁰⁹ Hence, it is believed that as a representation of the expectations and perspectives of substantial segments of humanity, international law should not be dismissed because of its inherent weaknesses.¹¹⁰ The plausibility of these claims will be considered in the light of child sexual abuse and the UAE. This study will look at some of the key international legislation (to be presented in the next section) created to address this serious global issue and the institutions and organisations that have formulated them. In so doing, it will consider whether the patterns of conduct laid down by the international community are being complied with or flouted, and at what cost to the international protection of vulnerable children.¹¹¹

Hence, this study is focused upon highlighting the limitations of the aforementioned sources in relation to the protection of children from sexual abuse through a detailed examination of the state practices of the UAE and other Gulf GCC states. The study takes the position that international law in itself provides limited mechanisms for the protection of child rights at the global level; child sexual abuse, regrettably and for reasons examined in this study, notwithstanding its serious nature, has received insufficient attention, with a limited number of established international customary laws on the subject.

¹⁰⁶ *ibid.*

¹⁰⁷ Thompson (n 94) 12.

¹⁰⁸ Shaw (n 84) 6.

¹⁰⁹ Zacklin (n 83) 22.

¹¹⁰ *ibid* 23.

¹¹¹ Shaw (n 84) 6.

1.6 Research problem: Aims and objectives

Conceptually, the discourse of sexual abuse is controversial and researchers have not yet reached a consensus on how inclusive the discourse should be.¹¹² There is no clear consensus on the type of abuse, the age differential between victims and perpetrators, and the type of victims and perpetrators. The dominant narrative in relation to sexual abuse narrowly focuses on sexual abuse of female children.¹¹³ It also emphasises the issue of power and age difference between victims and abusers. On the other hand, the discourse of sexual abuse cannot be isolated from human rights, subjectivity, gender and age.¹¹⁴ Thus, in dealing with sexual abuse of children, unpacking the term ‘sexual abuse’ and exploring the existing assumptions and context is crucial.

This study contends that international law is limited in protecting children from sexual abuse. This contention is tested and examined through a detailed case study of the UAE. In broad terms, the study will enable a holistic understanding of the problem of child protection from sexual abuse, including its scope and nature, and the current responses to the problem. Nevertheless, the central objective is to critically evaluate the UAE’s current measures and policies. This objective can be achieved through answering the following research questions:

To what extent is international law limited in protecting children from sexual abuse? Is this reflected in the UAE’s practices and policies adopted to address the issue of child sexual abuse? To answer this question, it is necessary to examine and gain an understanding of the following issues:

1. The definition of *child* and *sexual abuse* in international and regional legal instruments and in the UAE’s domestic law.

The examination of this issue will consider whether international law is ineffective, including by analysing the definition of who is considered a child in the CRC, and the elements of the child sexual abuse definition contained in the CRC and whether this can be transposed into national legislation. Such an understanding is important when it comes to the assessment of

¹¹² Rebecca M Bolen, *Child Sexual Abuse: Its Scope and our Failure* (Springer Science & Business Media 2001) 42-43; Karen Burton and Wade C Myers, 'Child Sexual Abuse and Forensic Psychiatry: Evolving and Controversial Issues' (1992) 20 *Bulletin-American Academy of Psychiatry and the Law* 439, 443.

¹¹³ Helen Gavin, 'The Social Construction of the Child Sex Offender Explored by Narrative' (2005) 10 *The Qualitative Report* 395, 397.

¹¹⁴ Steven Angelides, 'Feminism, Child Sexual Abuse, and the Erasure of Child Sexuality' (2004) 10 *GIQ: A Journal of Lesbian and Gay Studies* 141, 151.

the definition of who is considered a child by UAE law, as well as the offence of sexual abuse, including the one stipulated in Federal Law No 3 of 2016 on Child Protection (the so-called Wadeema Law). Does UAE law comply with the universal definition of who is considered a child? Does UAE law protect children adequately against child sexual abuse? What are the gaps and shortcomings in the UAE's laws? How can these legislative weaknesses be improved?

2. The scale and nature of child protection within the UAE.

The examination of this issue aims to draw a picture of the problem and identify its scale and magnitude; the dominant forms of child sexual abuse; and the profile of victims. This is done in order to assess the effectiveness of current child protection legislation and policies at the international level and within the UAE.

3. The factors and consequences of child sexual abuse globally and within the UAE.

The examination of this issue aims at considering child sexual abuse in its broader context, not only as a legal issue but also as social, cultural and human rights issues. This includes exploring the legal, political and socioeconomic conditions or factors that increase sexual abuse of children, which lead to their abuse, and which encourage violence against children. It also includes exploring the impact of increasing awareness about the serious health, mental, social and legal consequences which child sexual abuse has on children. Such an examination of the root causes and consequence of child sexual abuse highlights the importance of the adoption of a more comprehensive approach to address the complex and multi-faceted problem of sexual abuse of children globally and within the UAE.

4. The effectiveness of current approaches to child protection globally and within the UAE.

The examination and evaluation of this issue requires investigating and exploring the following questions and concerns:

- A. How have international legal instruments addressed the issue of child sexual abuse? What exactly is required of states under these instruments in terms of specific actions and responses? What is the focus under these instruments: criminal justice or human rights? What are the gaps and shortcomings? To answer these questions, international legal instruments on children rights are examined as well as the various obligations

and standards that have been stipulated or adopted to prosecute offenders of child sexual abuse to prevent the root causes and to protect the rights of abused children. Reference is made to different legal instruments at the international and regional levels, such as the ICCPR,¹¹⁵ the ICESCR,¹¹⁶ the 1989 Children Rights Convention,¹¹⁷ the Arab League Charter 2004,¹¹⁸ the Cairo Declaration of Human Rights in Islam (OIC 1990),¹¹⁹ the Covenant Rights of the Child in Islam (OIC 2004),¹²⁰ the Rabat Declaration on Child Issues (First Islamic Ministerial Conference on Children's Rights 2005),¹²¹ the UN Principles and Guidelines on Child Sexual Abuse, and UN General Assembly Resolutions.

B. How does the limitation within international law reflect upon the state practice of the UAE? Is the current approach adopted by the UAE effective? What are the main challenges, and are the current child protection measures meeting these challenges? Does the UAE require an alternative approach to issues of child abuse and why? To answer these questions, the UAE's child protection legal framework will be examined, in particular the Wadeema Law. An enquiry will be made into whether this law is effective and whether the current provisions are sufficient to criminalise all forms of child abuse and to protect the rights of abused children. What do they focus on and what are the areas of concern?

This study also examines whether there are effective law enforcement mechanisms in place to ensure that the complexity of child sexual abuse is sufficiently understood by concerned agencies and result in successful identification, investigation, prosecution and conviction of sexual abuse cases; protection of abused child rights; and the identification of root causes and effective responses to address these. Such examination raises several questions and concerns, including whether:

¹¹⁵ International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

¹¹⁶ International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3.

¹¹⁷ CRC (n 21).

¹¹⁸ League of Arab States, Arab Charter on Human Rights (22 May 2004) Tunis: League of Arab States.

¹¹⁹ Organization of the Islamic Conference (OIC), Cairo Declaration on Human Rights in Islam (5 August 1990).

¹²⁰ OIC, Covenant on the Rights of the Child in Islam (June 2005) OIC/9-IGGE/HRI/2004/Rep.Final.

¹²¹ OIC, Rabat Declaration on Child's Issues in the Member States of the Organization of the Islamic Conference (8 November 2005).

- there are formal procedures or mechanisms in place to identify child abuse in the UAE;
- cases are identified, recorded or registered under Law No 3;
- there are mechanisms in place to protect the human rights of abused children and to prevent their re-victimisation;
- holistic, re-integrative and rehabilitative assistance is made available to victims of abuse;
- long-term strategies have been developed to prevent the root causes of child abuse and empower victims of abuse.

Therefore, the study tries to address how child sexual abuse can be combated through four perspectives. Firstly, it examines the contextual approach to child protection from the cultural and legal perspective of the UAE legal system with a focus on child sexual abuse. Secondly, it examines the nature of the problem, the magnitude and its adverse impact on UAE society as a whole. Thirdly, it analyses child sexual abuse with a focus on existing international, regional, sub-regional and national legal instruments. Fourthly, this study examines the way forward, particularly for the UAE to combat child sexual abuse. Based on the fact that the current legal framework has proven inefficient, the study identifies the social, legal and economic opportunities available to the UAE to move forward effectively in combating child sexual abuse. In other words, in order to establish that international law is an inadequate medium for protecting the rights of children, the study investigates the efficacy of the UAE practice.

This examination offers the opportunity to evaluate the legislative process in the UAE, the functioning of the existing legal framework, the institutional framework, the efficacy of the laws and the opportunity to undertake a holistic assessment of how child sexual abuse is being combated in the UAE. The study acknowledges that in the current environment, laws and policies remain inadequate, and therefore other avenues should be explored in addition to the legal approach.

1.7 Rights of the child

International instruments and documents that contain the terms ‘children’s rights’, ‘child rights’ and ‘the rights of the child’ as keywords are abundant. These include not only legal

normative instruments and academic research but also newspapers, television programmes and so on. While researching literature concerning the human rights of children, readers can at times find the question ‘what are children’s rights?’ posed as a sub-object of the research.¹²² Several studies also mention the notion of ‘children’s rights’, including ‘Children’s Human Rights: Challenging Global Barriers to the Child Liberation Movement’,¹²³ ‘Human Rights and Child Health’¹²⁴ and ‘Human Rights in Light of Childhood’¹²⁵. Despite this, it is often difficult to find a clear definition of the children’s rights concept. Surveying publications from the adoption of the CRC, it may be seen that studies on the topic of children’s rights sometimes refer to research published before the adoption of the CRC, and such works cite some international legal instruments, such as the Geneva Declaration of the Rights of the Child of 1924 and the Declaration of the Rights of the Child of 1954. However, the main content of those works focuses on and is based on the rights now set out in the CRC to analyse, discuss or propose indicators for children’s rights and so on, without debating the notion, features and content of ‘children’s rights’ or ‘the rights of the child’.

In addition, while discussing a particular right of the child, researchers often mention other relevant instruments which relate to, or clarify, aspects of the CRC. For instance, Veerman and Sand¹²⁶ have studied the right of the child to freedom of thought, conscience and religion recognised in the CRC (Article 14) in relation to regulations of the ICCPR (Article 18) and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief.¹²⁷ The authors find that there is a contradiction between the CRC’s article and related provisions in the ICCPR and Declaration. In the ICCPR and Declaration, the ‘liberty of parents is stressed to ensure the religious and moral education of their children with their own convictions’, while following the CRC it can be understood that under certain

¹²² Gill Handley, ‘Children’s Right to Participation’ in Tim Waller and Geraldine Davis, *An Introduction to Early Childhood* (Sage 2014) 83; R Brian Howe and Katherine Covell, ‘Miseducating Children about their Rights’ (2010) 5 *Education, Citizenship and Social Justice* 91, 92; Ken Reid, ‘Some Reflections on Children’s Rights’ (2007) 25 *Pastoral Care in Education* 46, 46.

¹²³ Sonja C Grover, *Children’s Human Rights: Challenging Global Barriers to the Child Liberation Movement* (Sandstone Academic Press 2007) 1.

¹²⁴ Shanti Raman and others, ‘Human Rights and Child Health’ (2007) 43 *Journal of Paediatrics and Child Health* 581, 582.

¹²⁵ John Wall, ‘Human Rights in Light of Childhood’ (2008) 16 *The International Journal of Children’s rights* 523, 523.

¹²⁶ Philip Veerman and Caroline Sand, ‘Religion and Children’s Rights’ (1999) 7 *The International Journal of Children’s Rights* 385.

¹²⁷ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion of Belief, UNGA Res 36/55 (25 November 1981).

circumstances a child may choose a religion other than that of her or his parents'.¹²⁸ However, this work does not criticise or suggest changes to this aspect of the CRC.

From a legal standpoint, the implementation of the CRC is mandatory for its 196 states parties (almost every country in the world).¹²⁹ The human rights of children enshrined in the CRC are formally accepted by almost all states. This highlights the value of treaty law as an important source of international law, as also made clear in Article 38(1)(a) of the Statute of the International Court of Justice.¹³⁰ A treaty like the CRC is a source of obligation on state parties due to the *pacta sunt servanda* principle.¹³¹ Article 26 of the Vienna Convention on the Law of Treaties confirms this principle by mandating that '[e]very treaty is binding upon the parties to it and must be performed by them in good faith'. In other words, state parties must observe the CRC. It can also be argued that states are required to protect children against child sexual abuse due to customary international law.¹³² Customary international law is another important source, as confirmed in Article 38(1)(b) of the International Court of Justice which safeguards children against sexual exploitation and abuse in cases akin to slavery.¹³³ The CRC also stipulates '*jus cogens* norms', for instance, not to be tortured.¹³⁴

Accordingly, governments, including the UAE, have obligations to realise the rights of all children within their jurisdiction. In practice, particular provisions of the CRC have been constantly cited as common standards when the CRC Committee observes and evaluates the responsibility of states parties in terms of ensuring children's rights or proposes solutions for encouraging children's rights, even where a country has entered reservations to the Convention.

From the above analysis, it can be concluded that studies on human rights for the child are different in some ways but share the same approach. This is noted by Alanen: 'children's rights are assumed straightforwardly to be those enshrined in the UN Convention of the Rights of the Child',¹³⁵ and the CRC provides a common framework for research referring to

¹²⁸ Veerman and Sand (n 126) 386.

¹²⁹ CRC (n 21) arts 2-4.

¹³⁰ Anthony Aust, *Handbook of International Law* (2nd edn, Cambridge University Press 2010) 5.

¹³¹ Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) ch 2.

¹³² Trevor Buck, *International Child Law* (3rd edn, Routledge 2014) 49.

¹³³ *ibid.*

¹³⁴ Damon Barrett and Philip Veerman, *A Commentary on the United Nations Convention on the Rights of the Child, Article 33, Protection from Narcotic Drugs and Psychotropic Substances* (Martinus Nijhoff 2012) 79.

¹³⁵ Leena Alanen, *Editorial: Taking Children's Rights Seriously* (SAGE 2010) 5, 6.

children's rights or the rights of the child. In line with this trend, in this thesis children's rights are understood as the rights recognised in the CRC.

1.8 Structural framework of the study

This study is divided into five parts and nine chapters. Chapter One outlines the basic structure of the study. The chapter examines the significance, the research limitations and research problem and the aims and objectives of the work. Selected literatures relating to the issues mentioned in the study are analytically reviewed. The research aims, possibilities and limitations are discussed to spell out the correct framework of the thesis. The structural framework of the chapters is presented and the issues which are therein addressed.

Chapter Two discusses the issue of child sexual abuse. A textual analysis of the term 'child' is conducted. This chapter also investigates the child sexual abuse phenomenon in the context of international law and Islamic law (*Sharia*).

Chapter Three analyses how child sexual abuse is defined. This is done to understand the definition of child sexual abuse in various laws.

Chapter Four contextually analyses the CRC in order to identify flaws within the Convention. The primary objective of this chapter is to assess international instruments which deal with child sexual abuse so that better deterrent strategies can be promulgated. The chapter evaluates to what extent child rights are dealt with in different conventions, as well as the implementation process.

Chapter Five analyses the monitoring and implementation of the CRC. For this purpose, recourse is made to the Universal Periodic Review (UPR) mechanism and shortcomings are pointed out. Particular recourse is made to Articles 19 and 34 of the CRC and how they achieve the protection of children from sexual abuse and exploitation. The role which United Nations institutions play in the context of the CRC is assessed.

Chapter Six is the case study of the UAE. It examines possible reasons why children are inadequately protected against child sexual abuse in the UAE. For this purpose, the UAE penal code and the Wadeema Law are thoroughly analysed, as well as relevant *Sharia* law. It is also pointed out how non-involvement of NGOs and civil society has an adverse impact on

combating child sexual abuse. Although the UAE has ratified international conventions on human rights, including the CRC, it is argued that much more needs to be done to curb child sexual abuse in the country.

Chapter Seven evaluates the impact of the crime of child sexual abuse law upon child victims and society as a whole. It points out the limitation of international law in addressing the underlying factors which contribute to the occurrence of child sexual abuse and exploitation. In order to better understand this crime, child sexual abuse is discussed from various angles. Lastly, it is analysed how the problem of child sexual abuse is addressed in the UAE and neighbouring Middle East states.

Chapter Eight discusses how child sexual abuse is addressed within the framework of Islamic law. This is important since the UAE's law are based on *Sharia*. Problems are identified with certain religious interpretations. These interpretations, for example, although dealing with *zina* offences and practice of honour killing, caused difficulties in combating child sexual abuse effectively. Possible Islamic solutions to overcome the most glaring issue, namely that child sexual abuse victims may be punished, are discussed.

Chapter Nine concludes how the study has addressed the research questions. In doing so, this concluding chapter endeavours to understand the problems and mechanisms to identify the limitations of international law. Furthermore, it also addresses how the UAE can overcome the limitations of international law.

Part II: Definition and Conceptual Issues

Chapter Two: Definition of the Child under Various Jurisdictions

2.0 Introduction

Children are the most vulnerable members of society. Generally, children's rights are defined simply as human rights and are adapted to children, especially their vulnerability, specificities and age-appropriate needs.¹³⁶ Children have two types of rights. The first relate to general human rights which are also conferred on adults, such as the right to non-discrimination,¹³⁷ expression,¹³⁸ health,¹³⁹ education,¹⁴⁰ as well as civil,¹⁴¹ social,¹⁴² cultural¹⁴³ and economic rights.¹⁴⁴ The second type includes special rights to protect children,¹⁴⁵ including from violence¹⁴⁶ and exploitation¹⁴⁷ and sexual abuse during their childhood, as well as their evolving capacities,¹⁴⁸ capabilities¹⁴⁹ and special needs¹⁵⁰. Children require such specific

¹³⁶ UNICEF, 'Protecting Children's Rights' (2014) <http://www.unicef.org/crc/index_protecting.html> accessed 9 October 2016.

¹³⁷ Elspeth Webb, 'An Exploration of the Discrimination-Rights Dynamic in Relation to Children' in Antonella Invernizzi (ed), *The Human Rights of Children: From Visions to Implementation* (Routledge 2011) 287.

¹³⁸ Sylvie Langlaude, 'On How to Build a Positive Understanding of the Child's Right to Freedom of Expression' (2010) 10 Human Rights Law Review 33, 33.

¹³⁹ Tony Waterston and Gonca Yilmaz, 'Child Rights and Health Care' (2013) 1 Child: Care, Health and Development 1, 3.

¹⁴⁰ Nancy Clair, Shirley Miske and Deepa Patel, 'Child Rights and Quality Education: Child-Friendly Schools in Central and Eastern Europe (CEE)' (2012) 44 European Education 5, 6.

¹⁴¹ Tom Humphries and others, 'The Right to Language' (2013) 41 The Journal of Law, Medicine & Ethics 872, 872.

¹⁴² Mildred E Warner and Susan Prentice, 'Regional Economic Development and Child Care: Toward Social Rights' (2013) 35 Journal of Urban Affairs 195, 196.

¹⁴³ Valerie Fronczek, 'Article 31: A "Forgotten Right of the UNCRC"' (November 2009) Early Childhood Matters 24, 24.

¹⁴⁴ Aoife Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21 The International Journal of Children's Rights 248, 248.

¹⁴⁵ See more Shelley Watson and Dorothy Griffiths, 'Right to Life' in Frances Owen and Dorothy Griffin (eds), *Challenges to the Human Rights of People with Intellectual Disabilities* (Jessica Kingsley 2009) 76; Karen R Fisher and Xiaoyuan Shang, 'Protecting the Right to Life of Children with Disabilities in China' (2014) 40 Journal of Social Service Research 560.

¹⁴⁶ Ibtisam Khalid Kamil, 'The Impact of Violence upon Children' (2014) 5 Academic Research International 341, 341.

¹⁴⁷ Jane V Appleton, 'Child Sexual Exploitation, Victimisation and Vulnerability' (2014) 23 Child Abuse Review 155, 155.

¹⁴⁸ Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF 2005) 3.

¹⁴⁹ Daniel Stoecklin and Jean-Michel Bonvin, *Children's Rights and the Capability Approach* (Springer 2014) 1-2.

safeguards since they are dependent individuals. They are not the possessions of their parents or the state. Their views are rarely heard and they suffer disproportionately more from social and economic changes.¹⁵¹ Moreover, the future well-being of a society depends on the healthy development of its children, both mentally and physically, and it is important that they grow up without fear.¹⁵²

The UN General Assembly unanimously adopted the CRC on 20 November 1989.¹⁵³ There are fifty-four articles in the CRC, of which forty-one spell out child rights, including survival rights, development rights, protection rights and participation rights.¹⁵⁴ UNICEF explains that:

The Convention on the Rights of the Child is an international treaty that recognizes the human rights of children, defined as persons up to the age of 18 years. The Convention establishes in international law that States Parties must ensure that all children - without discrimination in any form - benefit from special protection measures and assistance; have access to services such as education and health care; can develop their personalities, abilities and talents to the fullest potential; grow up in an environment of happiness, love and understanding; and are informed about and participate in, achieving their rights in an accessible and active manner.¹⁵⁵

Although the CRC has been ratified by 196 states,¹⁵⁶ it is important to understand the contextual variables. This is because these variables may influence the meaning of concepts, as well as the implementation of laws which relate to these concepts.¹⁵⁷ Despite being one of the most universally ratified human right treaties,¹⁵⁸ drafted by a diverse international group and reflecting international views and consensus, varied understandings of the CRC have resulted in a large number of reservations and interpretative declarations.¹⁵⁹ Some examples

¹⁵⁰ Karen Bretherton and others, 'Child Sexual, Physical and Emotional Abuse and Intellectual Disability' (2016) 9 International Journal of Culture and Mental Health 438, 438; Sarah Mepham, 'Disabled Children: The Right to Feel Safe' (2010) 16 Child Care in Practice 19, 19.

¹⁵¹ Humanium, 'Children's Rights History: Historical Overview of the Children's Rights Evolution (2011) <<http://www.humanium.org/en/childrens-rights-history/>> accessed 9 October 2016.

¹⁵² UNICEF, 'Addressing the Needs of Children' <http://www.unicef.org/crc/index_30167.html> accessed 9 October 2016.

¹⁵³ CRC (n 21).

¹⁵⁴ *ibid.*

¹⁵⁵ UNICEF, 'Frequently Asked Questions: What is the Convention on the Rights of the Child?' <http://www.unicef.org/crc/index_30229.html> accessed 9 October 2016.

¹⁵⁶ United Nations Treaty Collection, 'Chapter IV Human Rights, Convention on the Rights of the Child' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en> accessed 2 February 2018.

¹⁵⁷ Gokce Tekin and Ali Kemal Tekin, 'Meanings of Child's Play According to Turkish Early Childhood Educators: A Phenomenological Study' (2007) 34 Journal of Instructional Psychology 207, 208.

¹⁵⁸ Jaap E Doek, 'The CRC 20 Years: An Overview of Some of the Major Achievements and Remaining Challenges' (2009) 33 Child Abuse & Neglect 771.

¹⁵⁹ William A Schabas, 'Reservations to the Convention on the Rights of the Child' (1996) 18 Human Rights Quarterly 472.

of these were those made on the basis that states would interpret the CRC ‘in light of the principles of Islamic laws’ (Pakistan), would not be ‘bound by any provisions or Articles that are incompatible with its religion and its traditional values’ (Djibouti), and would reserve ‘the right not to apply any provisions or Articles of the Convention that are incompatible with Islamic laws and the internal legislation in effect’ (Iran).¹⁶⁰ There were a large number of reservations to Article 21 which affected its adoption by Argentina, Bangladesh, Canada, Egypt, Indonesia, Jordan, Kuwait, Maldives, Republic of Korea, Spain, Syrian Arab Republic and Venezuela.¹⁶¹ In addition, there were some highly controversial reservations and interpretative declarations, such as those made by the Bahamas and Belgium (respectively) concerning Article 2 and non-discrimination, as well as a reservation by France to Article 30 which concerns rights for children who belong to minority or indigenous groups – both of these articles could be considered fundamental principles of *jus cogens*.¹⁶² Notwithstanding, there were affirmative declarations that went beyond the obligatory scope of the CRC; an example of these concerns the minimum age of military service in Article 38 which Uruguay, Argentina, Austria, Colombia and Spain preferred to be set at eighteen rather than fifteen years of age.¹⁶³ What all of this demonstrates is that reservations can facilitate the negotiation of treaties and encourage their widespread ratification. However, they can also limit the obligations of state parties to them, which in the case of the CRC means undermining and weakening the overall purpose and effectiveness of protecting children worldwide.¹⁶⁴

The CRC could be called revolutionary since it is a striking statement of values about children, families and their role in society.¹⁶⁵ Several state party reservations and debates about the CRC are emblematic of cultural variability and the fact that different family patterns can carry different meanings across cultures.¹⁶⁶ Studies have shown that a key cultural variable within families and societies is independence (autonomy, self-sufficiency, and others) versus interdependence (compliance, cooperation, and others).¹⁶⁷ This cultural dichotomy is one which is intrinsic to how children’s rights are understood and whether they are viewed as appropriate, valuable or problematic. By emphasising the rights of the

¹⁶⁰ *ibid* 478.

¹⁶¹ *ibid*.

¹⁶² *ibid*.

¹⁶³ *ibid*.

¹⁶⁴ *ibid*.

¹⁶⁵ Virginia Murphy-Berman and others, ‘UN Convention on the Rights of the Child: A Cross-cultural View’ (1996) 51(12) *American Psychologist* 1257.

¹⁶⁶ *ibid*.

¹⁶⁷ *ibid*.

individual child rather than the rights of the child within a group or a family, the Convention is in many ways a *Magna Carta* for children's rights.¹⁶⁸ The child is no longer enmeshed within the family but is delineated as a distinct identity.¹⁶⁹ This is a very controversial belief which may also represent a clash of cultures between those who promote growth and development via the fulfilment of prescribed roles and obligation, and those who maintain that growth emerges through exercising individual and personal choice.¹⁷⁰ The Convention also implies that children can have rights that are apart from their parents,¹⁷¹ which is a concept that may be very difficult for some cultures to conceptualise.

This chapter seeks to analyse how different jurisdictions have approached the topic of defining who should be considered a child. For this purpose, the relevant literature is firstly critically analysed and laws which deal with the definition of who is a child are studied, before investigating how the UAE, as well as other Arab states, define a child. It is argued that the CRC cannot definitively determine the age of the child since domestic law suggests otherwise and this limits international law. The findings also reveal that in Arab states, including the UAE, religion has played a decisive role in defining the social construct of a child, which has limited the way in which international norms can be applied.

2.1 Definition of a child and the international perspective

In order to examine the substantive issues of the limitations of international law in protecting the rights of the child, it is important to conceptualise the meaning and the contents of the term 'child' since it has many connotations. The rights of the child function in two complementary ways, though are occasionally mutually exclusive. Most measures for the protection of children have a protectionist character, ie different age limits are stipulated to protect children who might not fully understand the complexity of the world. At the same time, children also need to be empowered and thus limits are imposed by laws. Wall argues that children's rights help to only adequately transform societies when the very concept of 'human rights' is reconceptualised in light of the concept of childhood.¹⁷² The rights of the child have many layers and objectives.¹⁷³ Ideally, these child rights should ensure the interests and rights of children. They should also guarantee the future interests of children.

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

¹⁷² Wall (n 125) 523.

¹⁷³ Michael DA Freeman and André Alen, *Article 3: The Best Interests of the Child* (Martinus Nijhoff 2007) 2-4.

There exists a possible tension between the individual rights of the child, the rights and needs of the family and the rights of other children in the family, as well as the rights of the responsible parents (together and separately) in relation to the child.¹⁷⁴ Accordingly, implementation of child rights requires a delicate balancing act where all these considerations must be weighed and evaluated.

It is possible to use different typologies for the conceptualisation of the rights of a child. Firstly, a tripartite division consisting of 'respect, protect and provide' can be employed. The CRC Committee frequently uses this typology in its General Comments.¹⁷⁵ Secondly, the rights of the child can be divided into general human rights (eg, the right to life and the right to work) and child-specific rights.¹⁷⁶ Most often, children's rights are divided into three groups, also known as the 'three P's', which stand for provision, protection and participation.¹⁷⁷ The basic needs of children, namely to survive and develop, should be provided for. Children should be protected from a range of harmful and abusive acts and processes, especially abuse and exploitation. They should also be able to participate in decisions which affect them individually and collectively.¹⁷⁸

The term 'child' in international law appears to have a generally agreed meaning. The legal definition of who should be considered a 'child' is uncontroversial and is used in a large number of international legal instruments. While there is a broad understanding, there also continues to be disagreement on the definition of child.

The precise textual legal definition of a 'child' can vary slightly depending on the instrument and there are differences in the understanding of the definition of child:

- i. 1989: Article 1 of the CRC sets out that: '[f]or the purposes of the present Convention, a child means every human being below the age of eighteen

¹⁷⁴ Karl Hanson, Olga Nieuwenhuys and Eva Brems, *Inclusive Universality and the Child-Caretaker Dynamic* (Cambridge University Press 2010) 11.

¹⁷⁵ For example, CRC Committee, 'General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights' (17 April 2013) UN Doc CRC/C/GC/16, para 4 at 3.

¹⁷⁶ Michael Freeman, *The Future of Children's Rights* (Hotei 2014) 111.

¹⁷⁷ Ann Quennerstedt, 'Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the "3 p's"' (2010) 18 *The International Journal of Children's Rights* 619, 619.

¹⁷⁸ Phil Jones and Sue Welch, *Rethinking Children's Rights: Attitudes in Contemporary Society* (A&C Black 2010) 46.

years unless under the law applicable to the child, majority is attained earlier'.¹⁷⁹

- ii. 1990: Article 2 of the African Charter on the Rights and Welfare of the Child (ACRWC) states that: '[f]or the purposes of this Charter, a child means every human being below the age of 18 years'.¹⁸⁰
- iii. 1999: Article 2 of International Labour Organization (ILO) Convention No. 182 on the Worst Forms of Child Labour (WFCL) (ILO C182) sets out that the term 'child' shall apply to 'all persons under the age of 18'.¹⁸¹
- iv. 2000: The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC) refers explicitly in its preamble to Article 1 of the CRC.
- v. 2000: Article 3(d) of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (the 'Palermo Protocol') defines a child as 'any person under 18 years of age'.¹⁸²
- vi. 2001: The Council of Europe Convention on Cybercrime (the 'Budapest Convention') uses the term 'minor' in Article 9, which deals with child pornography and states that it includes all persons under 18 years of age. However, a state party may impose a lower age limit but it shall not be less than 16 years.¹⁸³
- vii. 2007: The Lanzarote Convention establishes in Article 3(a) that a child is 'any person under the age of 18 years'.¹⁸⁴

The above demonstrates that the majority of international legal instruments, as well as international practice and participating organisations, stress that the term 'child' should be understood to include any person who is under the age of 18 years. They do not necessarily define who is a child but rather the scope of their applicability under international law:

¹⁷⁹ CRC (n 21).

¹⁸⁰ African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) (ACRWC).

¹⁸¹ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) (Worst Forms of Child Labour Convention C182).

¹⁸² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 December 2000, entered into force 29 September 2003) 2225 UNTS 209.

¹⁸³ Convention on Cybercrime (23 November 2001) CETS 185.

¹⁸⁴ *ibid.*

provisions that are applicable to all persons who are below the age of 18, with or without exceptions. Article 1 of the CRC makes an exception to its applicability, mentioning the possibility that the age of majority is attained before the age of 18 under national law. This is also the case for the OPSC, which explicitly refers back to Article 1 of the CRC and thus adopts the same approach towards its applicability. The ACRWC, on the other hand, does not allow for any such exceptions. Regardless of the domestic provisions on the age of majority, the provisions of the Charter apply to all persons below the age of 18. The same is the case in relation to ILO C182.

2.1.1 The CRC

The CRC was adopted by the General Assembly of the United Nations on 20 November 1989 and entered into force on 2 September 1990. In comparison with other international human rights treaties, it entered into force shortly after its adoption. The CRC has been ratified by a very large number of states parties in a relatively short period of time.¹⁸⁵

There are three optional protocols to the CRC. The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict was adopted in New York on 25 May 2000 and entered into force on 12 February 2002. As of 1 January 2018, 165 state parties had ratified it.¹⁸⁶ The Optional Protocol requires that states make a binding declaration when they ratify it and specify the age of voluntary recruitment into their national armed forces, as well as describing what safeguards they have employed to that recruits are not coerced.¹⁸⁷ The Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography was adopted in New York on 25 May 2000 and entered into force on 18 January 2002. As of 1 January 2018, 173 states parties had ratified it.¹⁸⁸ The Optional Protocol to the CRC on a Communications Procedure was adopted in New York on 19 December 2011 and entered into force on 14 April 2014. This Protocol allows children, groups of children and/or their representatives to bring complaints ('communications') against their state for any violation of their rights as specified and guaranteed by the CRC and the Optional Protocols,

¹⁸⁵ Office of the High Commissioner of Human Rights (OHCHR), 'Status of Ratification Interactive Dashboard' <<http://indicators.ohchr.org/>> accessed 15 January 2018.

¹⁸⁶ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000, 12 February 2002) 2173 UNTS 222.

¹⁸⁷ *ibid.*

¹⁸⁸ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227.

providing that their state has ratified these treaties.¹⁸⁹ As of 1 January 2018, 29 state parties had ratified it.¹⁹⁰

The obligations in the CRC are clarified by the CRC Committee. In its General Comment No. 5,¹⁹¹ the Committee defined the general obligations under the CRC and stated that the first and foremost obligation is contained in Article 4 of the CRC, namely to ensure that domestic legislation is fully compatible with the provisions of the CRC and that the Convention's principles and provisions can be directly applied and appropriately enforced. The CRC thus includes mainly goal-oriented obligations and foresees certain results. The CRC Committee has also identified a wide range of measures that are relevant to the full transposition of the CRC. Further, it views the provisions of the CRC as general rules.

Article 41 of the CRC makes clear that the provisions of the CRC should be regarded as minimum standards and member states are free to adopt measures which are more conducive to realising the rights of the child. These provisions can derive either from national legislation or from international obligations that grant children stronger protection.

By ratifying the CRC as a legally binding instrument, states parties assume under conditions of normalcy full responsibility for giving effect to the Convention's provisions.¹⁹² However, Articles 43 to 45 emphasise that implementation of its standards is not solely a national concern but also implies international scrutiny.¹⁹³ Reports must be submitted to the CRC Committee and these reports must detail the measures which states parties have adopted to give effect to the obligations under the treaty and to detail progress in realising the rights guaranteed therein. However, in comparison to other core instruments of the UN, the CRC system is lacking a follow-up mechanism. As a result, the concluding observations have no immediate effect. Instead, national implementation practice, as well as statements made by

¹⁸⁹ Together, Scottish Alliance for Children's Rights, 'Optional Protocol 3 to the UNCRC: A Communications Procedure' <<http://www.togetherscotland.org.uk/about-childrens-rights/optional-protocol-3-to-the-uncrc/>> accessed 25 January 2018.

¹⁹⁰ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) UN Doc A/RES/66/138.

¹⁹¹ CRC Committee (n 175).

¹⁹² For a general analysis of the national implementation of international human rights, see Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2014) ch 10.

¹⁹³ For more details, see Mieke Verheyde and Geert Goedertier, *Articles 43-45: The UN Committee on the Rights of the Child* (Martinus Nijhoff 2006).

states during the reporting cycles, must be analysed in order to ascertain whether a constructive dialogue has been created.

2.1.2 The concept of a child under the European Convention on Human Rights

The European Court of Human Rights (ECtHR) is the permanent judicial body of the Council of Europe.¹⁹⁴ The Council of Europe has adopted a number of specific treaties to protect children's rights and to challenge breaches of them based on the CRC, the European Convention of Human Rights (ECHR) and other legal standards. These include:

- The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse;¹⁹⁵
- The European Convention on the Exercise of Children's Rights;¹⁹⁶
- The European Convention on the Legal Status of Children born out of Wedlock;¹⁹⁷
- The European Convention on the Adoption of Children;¹⁹⁸
- The European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;¹⁹⁹
- The European Convention on the Repatriation of Minors.²⁰⁰

However, the scope of the ECHR for enforcing and protecting the rights of children is not immediately evident, given that it contains few specific references to the rights of the child. Instead, Article 1 of the ECHR states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention'. Children are thus included. The ECtHR has also not specified when childhood begins or from when protection commences.²⁰¹ For instance, Article 12 of the ECHR which deals with the right to marry does not specify the age when persons can marry. Instead, it states that

¹⁹⁴ Council of Europe, 'Structure' <<https://www.coe.int/en/web/about-us/structure>> accessed 4 February 2018.

¹⁹⁵ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (25 October 2007) CETS 201.

¹⁹⁶ European Convention on the Exercise of Children's Rights (25 January 1996) CETS 160.

¹⁹⁷ European Convention on the Legal Status of Children Born out of Wedlock (15 October 1975) CETS 085.

¹⁹⁸ European Convention on the Adoption of Children (24 April 1967) CETS 058.

¹⁹⁹ Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (20 May 1980) CETS 105.

²⁰⁰ European Convention on the Repatriation of Minors (28 May 1970) CETS 071.

²⁰¹ *ibid.*

‘men and women of full age’ can marry. Whilst this proscribes child marriage, it confers flexibility to permit different ages.²⁰² However, it also means that there exist definitional problems within the European context. It would have been better if the ECHR had clearly defined who should be considered a child. Nevertheless, the European Commission on Human Rights and the ECtHR have made a considerable contribution to European law and practice in the areas of private and public family law, the protection of children from abuse and neglect and, most recently, juvenile justice and detention.

The ECHR and the practice of the ECtHR are relevant for the current research only insofar as their implementation practice takes inspiration from the CRC and draws standards from the provisions of the CRC.²⁰³ This is illustrated in the case of *A v United Kingdom*²⁰⁴ in which the ECtHR found that there was a breach of Article 3 of the CRC which proscribes inhuman and degrading treatment or punishment. This was because UK law allowed reasonable punishment as a defence to a charge of assault causing actual bodily harm, and therefore acquitted a stepfather who had caned a nine-year old child. Further, in determining whether the domestic legal system had failed to protect the child, Article 19 of the CRC was referenced which delineates that states take all appropriate measure to protect the child from ‘all forms of physical or mental violence, injury or abuse’.²⁰⁵ However, whilst the children's rights jurisprudence of the ECtHR is based on the CRC, the culture and morality of the particular country is also taken into account.²⁰⁶ Decisions are also reached which reflect contemporary standards.²⁰⁷ In some areas, the ECHR might grant children more rights or more protection. While it is not apparent that the ECtHR has followed a consistent strategy to refer to the CRC in all children's cases, it has referred increasingly to it in order to ensure that its judgments are aligned with current international standards on children's rights.²⁰⁸ The ECtHR's approach to the specific rights of children is analysed when necessary in the second part of the work under the appropriate provisions of the CRC.

²⁰² Carmen Draghici, *Legitimacy of Family Rights in Strasbourg Case Law: Living Instrument or Extinguished Sovereignty?* (Hart 2017) 47.

²⁰³ Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 *Human Rights Quarterly* 308, 309.

²⁰⁴ *A v United Kingdom* App No 25599/94 (23 September 1998).

²⁰⁵ Kilkelly (n 203) 309.

²⁰⁶ Nick Axford, *Exploring Concepts of Child Well-Being: Implications for Children's Services* (Policy Press 2008) 38.

²⁰⁷ *ibid.*

²⁰⁸ Ursula Kilkelly, 'Protecting Children's Rights under the ECHR: The Role of Positive Obligations' (2010) 61 *Northern Ireland Legal Quarterly* 245, 245.

Fundamentally, the ECHR is not a treaty which was specifically designed for children's rights.²⁰⁹ It only contains a few norms which directly refer to the rights of children (Article 6 deals with the right to fair trial; Article 5(1)(d) refers to the detention of a minor; and Article 3 has been used in cases of violence against children). The ECtHR has dealt with the rights of the child mainly under Article 8 of the Convention which requires respect for private and family lives. This provision includes a variety of different types of obligations, including negative obligations of respect and positive obligations to protect and fulfil. It also covers a whole range of rights protected by the CRC. Yet the failure to comprehensively spell out children's rights does not mean that children do not enjoy protection because many of the human rights provisions are broadly worded. This makes it possible to construe them in a creative manner also in relation to children in appropriate cases.²¹⁰ The dynamic approach towards the interpretation of these broad human rights provisions makes it possible to safeguard the rights and needs of children.²¹¹ Children can also invoke the ECHR, as 'everyone' is entitled to human rights.²¹² Furthermore, children are equally entitled to the Convention rights as a result of Article 14. This article proscribes discrimination including on the basis of age.²¹³ Moreover, as the ECHR is considered a 'living instrument' it must develop in accordance with changing social and legal conditions.²¹⁴ States are therefore afforded less discretion when their actions contravene generally accepted norms, especially the rights in the CRC and other relevant international instruments.²¹⁵

2.1.3 The European Social Charter and the word 'child'

The European revised Social Charter²¹⁶ does not focus per se on the rights of children. However, it deals with important children rights in several of its articles. It is a major regional treaty which secures children's rights as it guarantees the rights of the child in many circumstances from birth to adulthood and in two different manners. Firstly, many of the

²⁰⁹ Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore, *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart 2017) 513.

²¹⁰ Mark Ensalaco and Linda C Majka (eds), *Children's Human Rights: Progress and Challenges for Children Worldwide* (Rowman & Littlefield 2005) 56.

²¹¹ *ibid.*

²¹² See Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art 1.

²¹³ Ensalaco and Majka (n 210) 56.

²¹⁴ *ibid* 57.

²¹⁵ *ibid* 57.

²¹⁶ European Social Charter (adopted 3 May 1996, entered into force 1 July 1999) ETS 163.

rights guaranteed by the Charter have specific relevance to children. For example, Article 16, which guarantees the right of the family to social, legal and economic protection, states:

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.²¹⁷

This article therefore protects the rights of children as family members, whilst Article 11 confirms the right to protection of health.²¹⁸ Secondly, the Charter contains specific rights which relate exclusively to children, namely Article 7 which guarantees the right of children and young persons to protection,²¹⁹ as well as Article 17 which confirms the right of children and young persons to social, legal and economic protection.²²⁰

²¹⁷ *ibid* art 16.

²¹⁸ Article 11 states: 'With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: 1) to remove as far as possible the causes of ill-health; 2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.'

²¹⁹ Article 7 states: 'With a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake: 1 to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education; 2 to provide that the minimum age of admission to employment shall be 18 years with respect to prescribed occupations regarded as dangerous or unhealthy; 3 to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education; 4 to provide that the working hours of persons under 18 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training; 5 to recognise the right of young workers and apprentices to a fair wage or other appropriate allowances; 6 to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day; to provide that employed persons of under 18 years of age shall be entitled to a minimum of four weeks' annual holiday with pay; 8 to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations; 9 to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control; 10 to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.'

²²⁰ Article 17 states: 'With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organizations, to take all appropriate and necessary measures designed: 1 a) to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose; b) to protect children and young persons against negligence, violence or exploitation; c) to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support; 2 to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.'

The function of the European Committee of Social Rights (ECSR) is to evaluate the conformity of national laws and practice with the Charter.²²¹ States are mandated to submit periodic reports to the ECSR in order to provide information about their implementation measures. Compared to the CRC Committee, the conclusions of the ECSR analyse the implementation of the Charter article by article and are very detailed. They also include a conclusion on whether or not the practice of a state is in conformity with the Charter.

2.1.4 EU law and child protection

The EU does not disregard the rights of children. On the contrary, there is considerable interest in the protection of such rights. Article 2(5) of the Lisbon Treaty²²² states that the EU will contribute to the protection of human rights and, in particular, the rights of the child. The minimum core of the rights of the child is stipulated in Article 24 of the Charter of Fundamental Rights which provides that:

1. Children shall have the right to such protection and care as is necessary for their wellbeing. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with either his or her parents, unless that is contrary to his or her interest.²²³

The EU uses the CRC as a policy document²²⁴ and in recent years the protection of the procedural rights of children has been emphasised.²²⁵

2.2 Definition of a child in the CRC and its underpinnings

According to Article 1 of the CRC, a child is defined as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.²²⁶ Consequently, young children are holders of all the rights enshrined in the Convention. The upper childhood age limit of 18 years may however not apply in states where children attain

²²¹ David Harris and others, *Law of the European Convention on Human Rights* (Oxford University Press 2014).

²²² Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community.

²²³ Charter of Fundamental Rights of the European Union.

²²⁴ For more details, see Helen Stalford and Eleanor Drywood, 'Using the CRC to Inform EU Law and Policy-making' in Invernizzi (n 137) 199.

²²⁵ FRA – European Union Agency for Fundamental Rights, 'Justice Needs to Be More Child-Friendly, Finds FRA' (Press Release, 5 May 2015) <<http://fra.europa.eu/en/press-release/2015/justice-needs-be-more-child-friendly-finds-fra>> accessed 21 November 2017.

²²⁶ CRC Committee, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (1 November 2005) UN Doc CRC/C/GC/7, para 3.

maturity at an earlier age.²²⁷ Almost all of the 196 member states have adopted this definition of a child. As a rule, children have fewer rights compared to adults. This implies that children are expected to remain under the care of their parents or any other responsible adults or guardians who are supposed to help them reach important decisions which affect their lives.

In cases where the national legislation sets an age of majority that is lower than 18, the implication is that the age group that is older than the set age of majority will not be regarded as children and thus will not be covered by the Convention. It is interesting to compare the choice of the CRC drafters with the completely closed definition of childhood contained in Article 1 of the ACRWC and which states that:²²⁸ '[A] child means every human being below the age of 18 years.' This offers more protection to young people than the global standard established by the CRC.²²⁹ As is the case with all attempts to accommodate diversity, the CRC's more open definition of childhood provides space for local interpretation and adjustment. However, it also allows the triggering and the legitimising of seriously divergent state practice on this key definitional issue. States may invoke this clause in order to minimise and/or escape their obligations under the treaty. The clear advantage of the ACRWC's definition of childhood is that it is crystal clear and cannot easily be subjected to different interpretations. A clear disadvantage is that the ACRWC's definition is completely inflexible. It might therefore be difficult for certain states to commit themselves to this norm, let alone implement it.

Despite the exception set out by the CRC, it is noteworthy that the CRC Committee has consistently recommended that all states extend the scope of the CRC to all persons under the age of 18 years.²³⁰ Nevertheless, the failure to adopt a clear definition by allowing states to have a lower age for a child constitutes a problem for the protection of the rights of the child. Under Islamic law childhood is not strictly defined by age but by puberty – referred to as maturity – with many jurists setting a minimum age of 9 for girls and 15 for boys.²³¹ What this means in practice is that in several Islamic states children under 18 years of age are

²²⁷ Buck (n 132) 126.

²²⁸ ACRWC (n 180).

²²⁹ Amanda Lloyd, 'A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 African Human Rights Law Journal 11, 20.

²³⁰ CRC Committee, 'General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (27 November 2003) UN Doc CRC/GC/2003/5, para 23 at 7.

²³¹ Zainah Almihtar, 'Human Rights of Women and Children under the Islamic Law of Personal Status and its Application in Saudi Arabia' (2008) 1 Muslim World Journal of Human Rights 5.

subject to the legal rights and duties of an adult²³² which is a cause for serious concern with respect to domestic laws on child marriage and criminal responsibility.²³³

Essentially, the CRC's failure to delineate a minimum age limit in Article 1 does not protect children living under Islamic jurisprudence – where a child's age is undefined²³⁴ – and serves to perpetuate dangerous and/or life-threatening trends. In Syria, Sudan, Pakistan and Iran, a child is regarded as having reached the age of criminal responsibility at 15 years of age.²³⁵ In Nigeria, some Sharia implementing states regularly sentence 15 year olds to amputation for stealing.²³⁶ In Islam, girls and boys may be married when they reach puberty,²³⁷ and somewhat alarmingly in Saudi Arabia there is no set age limit for marriage. Early marriage frequently leads to death in pregnancy or childbirth, with figures reporting maternal mortality to be five times higher for girls between 10 and 14 years of age than for those aged 20 to 24.²³⁸ This indicates that whilst the maximum age of 18 in Article 1 should have ensured that children enjoy a longer period of protection and assisted them with completing their education, in actuality compromising with the definition of 'child' has in fact failed to protect many children from abuse, violence and death due to the domestic laws of their countries which undermine it. McGoldrick therefore suggests that member states should declare a minimum age limit for the age of majority so that the special protection afforded in Article 1 of the CRC genuinely covers and is applicable to all children under 18 years of age.²³⁹

2.2.1 Special Report from the UN on child age

The Population and Development Report of the UN 2013 has categorised the population into five broad age groups. The first group is the one below age 5; the 5-14 years age group represents childhood; the 15-24 age group represents youth; the 25-64 age group represents working adults; and finally, the 65+ age group represents old people. Based on data from 2010, the population in the Arab world is mostly youthful, even though a decrease in fertility

²³² *ibid.*

²³³ Javaid Rehman, 'Religion, Human Rights Law and the Rights of the Child: Complexities in Applying the Sharia in Modern State Practices' (2011) 62 Northern Ireland Legal Quarterly 153, 158.

²³⁴ *ibid.*

²³⁵ *ibid.*

²³⁶ Iyabode Ogunniran, 'The Child Rights Act versus Sharia Law in Nigeria: Issues, Challenges & a Way Forward' (Spring 2010) 30 Children's Legal Rights Journal 62.

²³⁷ Almihdar (n 231).

²³⁸ *ibid.*

²³⁹ Dominic McGoldrick, 'The United Nations Convention on the Rights of the Child' (1991) 5 International Journal of Law, Policy and the Family 132, 150.

has resulted in a decrease in the proportion of children in the population from 40.2% in 1950 to 33.3% in 2010.²⁴⁰

Although the CRC expresses its definition of a child as any person under the age of 18 years, it also provides legitimacy to national laws setting a lower age of obtaining majority which raises problematic issues. The range of ages for the lower limit has been examined in legal jurisprudence. For instance, it has been debated what the correct lower age limit ought to be, especially in light of the fact that unborn children also require that their parents and the law protect them.²⁴¹ The upper limit also suffers from similar uncertainties. For example, the 1973 ILO Minimum Age Convention gives an individual member country the right to set its own age of maturity in which a person can enter the labour force. Some states set this at 14 while others put it at 15. The 1956 Supplementary Convention on Slavery sets the upper limit at 18 years.²⁴² With these ambiguities in respect of the lower and upper age limits for a child, each member country of the UN has been given the liberty to decide and set its own reasonable age limits.

2.2.2 The CRC within the framework of the UDHR

The adoption of an international convention which proscribes violations of human rights gained importance after the large-scale atrocities which were perpetrated against civilians during the Second World War. A new universal understanding of human rights emerged after the war, which advocated legal protection for human beings, irrespective of their caste, creed, religion, language, race, skin, colour, sex, nationality or social origin.²⁴³

The UDHR was an effort on the part of the global community to develop ‘a common standard of achievement for all peoples and all nations’.²⁴⁴ Member States promised to take steps to realise that human rights and freedoms are guaranteed for all and also agreed to cooperate with UN agencies, such as the then-called United Nations International Children’s

²⁴⁰ Economic and Social Commission for Western Asia, 'Population and Development Report: Issue No 6, Development Policy Implications Of Age-Structural Transitions In Arab States' (*United Nations*, 29 October 2013) 7 <https://www.unescwa.org/sites/www.unescwa.org/files/publications/files/e_escwa_sdd_13_2_e.pdf> accessed 8 October 2016.

²⁴¹ Kevin Bales, *Understanding Global Slavery: A Reader* (University of California Press 2005) 21-22.

²⁴² *ibid* 47.

²⁴³ Masoud Rajabi-Ardeshiri, 'The Rights of the Child in the Islamic Context: The Challenges of the Local and the Global' (2009) 17 *The International Journal of Children's Rights* 475, 475.

²⁴⁴ See Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Preamble.

Emergency Fund (UNICEF).²⁴⁵ Within this human rights discourse emerged the topic of protecting the rights of children. The internationally accepted definition of a child is found in the CRC. Article 1 of the Convention states that ‘a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’.²⁴⁶ By extension, this means that infants are children and are covered by this document.²⁴⁷ The Convention, however, does not define the beginning of childhood; there is no clarity as to whether this begins at birth or from the moment of conception.²⁴⁸ Rehman argues that Article 1 uses the term ‘human being’ to refer to a child so a foetus cannot have any rights under the Convention. Yet, the Convention also speaks in its preamble of adopting ‘special safeguards and care, including appropriate legal protection, before as well as after birth’.²⁴⁹ The situation of the foetus remains vague and many regional and international instruments have also failed to clarify this issue.²⁵⁰ In case law, in *Paton v United Kingdom*²⁵¹ the husband-applicant asserted that the foetus should have the right to life under Article 2 of the ECHR. This complaint was dismissed by the European Commission under the grounds that this did not outweigh the interests of the pregnant wife.²⁵² When asked outright for the first time in *Vo v France*²⁵³ whether foetuses are in fact included in Article 2, the ECtHR reaffirmed its jurisprudence on abortion laws by stating that that this right is demarcated by the mother’s rights and interests, and in what some have interpreted as avoidance of the issue, the ECtHR added that there is as yet no European consensus on the scientific and legal definition of the beginning of life.²⁵⁴

The international convention regards a child as any person with specific needs and rights which need to be protected by relevant individuals and concerned authorities. In line with international law, the Convention considers that any person of less than 18 years of age or any human being who has not attained the age of maturity as detailed in his/her country’s

²⁴⁵ Van Bueren (n 13) 17.

²⁴⁶ CRC (n 21).

²⁴⁷ Robin S Mama, 'Needs, Rights, and the Human Family: The Practicality of the Convention on the Rights of the Child' (2010) 89 Child Welfare 177, 183.

²⁴⁸ OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (UN 2003) 401.

²⁴⁹ CRC (n 21) Preamble.

²⁵⁰ Javaid Rehman, *International Human Rights Law* (Pearson Education 2010) 560.

²⁵¹ *Paton v United Kingdom* (1981) 3 EHRR 408.

²⁵² Christina Zampas and Jaime M Gher, ‘Abortion as a Human Right—International and Regional Standards’ (2008) 8(2) Human Rights Law Review 249.

²⁵³ *Vo v France* (2004) EHRR 12.

²⁵⁴ Zampas and Gher (n 252).

domestic legislation is a child.²⁵⁵ The CRC's major objective is to ensure that children are not deprived of their civil, economic, political, health, social or cultural rights. The Convention provides important guidance for domestic legislation in individual UN member states and helps to ensure that the objectives for the protection of children are adequately met.²⁵⁶

2.3 Definition of a child under Islamic jurisprudence

This study highlights the limitations of international law in protecting children from sexual abuse through a case study of the UAE. Keeping in mind its status as a Muslim majority state, it is essential to explore the concept of child in *Sharia* law to come-up with a solid definition of a child to be used to pin-down the issue of child sexual abuse. Proceeding further, this section of the chapter also aims to understand the various definitions of the child mentioned by different Muslim sects.

In 2004, the Organization of the Islamic Conference (OIC) (now organisation of Islamic Cooperation) adopted the Covenant on the Rights of the Child in Islam. Article 1 of this covenant defines a child as 'every human being who according to the law applicable to him/her, has not attained the age of maturity'.²⁵⁷ This covenant seeks to ensure that children have a balanced and safe childhood so that they believe in their creator, adhere to the Muslim faith and are committed to the principles of truth and good deeds. However, this covenant fails to explicitly define who should be considered a child. Nonetheless, it fills a major lacuna since *Sharia* law fails to directly discuss the topic of child rights, which is not to say that *Sharia* law does not require that a child is considered a human being who needs care and protection from another person.

2.3.1 Understanding the concept of *Sharia* law

Sharia plays a central role in Islamic societies. *Sharia* or Islamic law is derived from two primary sources – the *Quran* and the *Sunnah* – as well as two secondary sources – *qiyas* and *ijma*. The *Quran*, the literal word of Almighty Allah, is believed to contain purely what God

²⁵⁵ Lee Swepston, *A Commentary on the United Nations Convention on the Rights of the Child, Article 32: Protection from Economic Exploitation* (Brill 2012) 3.

²⁵⁶ Jonathan Todres, Mark E Wojcik and Cris Revaz, *The United Nations Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of US Ratification* (Martinus Nijhoff 2006) 5; Rhona Smith, *Textbook on International Human Rights* (Oxford University Press 2013) 380.

²⁵⁷ OIC, 'Covenant on the Rights of the Child in Islam' (June 2005) OIC/9-IGGE/HRI/2004/Rep.Final, art 1.

expects from every human being.²⁵⁸ The *Sunnah* is the words and actions of the Holy Prophet (pbuh). *Qiyas* and *ijma* are the analogies drawn by Muslim scholars and the respective consensus which has been reached by them. *Sharia* spells out the rules and regulations which govern the life of Muslims. *Sharia* law imposes strict orders and standards for every aspect of life, including in respect of manners, customs and rituals.

The *Quran* overemphasises the protection of children. It proscribes that children cannot be killed irrespective of any reason. It states: ‘and do not kill your children for fear of poverty. We provide for them and for you. Indeed, their killing is ever a great sin.’²⁵⁹ In another *surah* (chapter), the *Quran* rebukes the common practice which exists in some Arab tribes of burying alive female children.²⁶⁰

Islam has also promoted equality amongst children by conferring equal rights to them irrespective of their age or sex. The Quranic verses which provide for this are: ‘And when one of them is informed of [the birth of] a female, his face becomes dark, and he suppresses grief. He hides himself from the people because of the ill of which he has been informed. Should he keep it in humiliation or bury it in the ground? Unquestionably, evil is what they decide.’²⁶¹

Sharia and Islamic laws have certainly ensured that the rights of children are promoted and protected in the Islamic world. The *Quran* makes the parents and family responsible for looking after their children and provide for their necessities. Islamic law also alludes to the prohibition of child labour.²⁶² Before the introduction of *Sharia* and Islamic laws, children in Arab states had not been entitled to any rights. Many new-born babies never lived as they were buried alive because of minor reasons.²⁶³ Instead, Islamic laws encourage Muslims not

²⁵⁸ Farkhanda Zia Mansoor, *Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective* (BIICL 2010) 45.

²⁵⁹ See Surat Al-Isra (The Night Journey) (17:31). Translated by Sahih International <<https://quran.com/17>> accessed 13 January 2017.

²⁶⁰ See Surat At-Takwir (The Overthrowing) (81:8-81:9). Translated by Sahih International <<https://quran.com/81>> accessed 13 January 2017.

²⁶¹ See Surat An-Nahl (The Bee) (16:58-16:59). Translated by Sahih International <<https://quran.com/16>> accessed 13 January 2017.

²⁶² Mansoor (n 258) 47.

²⁶³ Benedikt Koehler, ‘Female Entrepreneurship in Early Islam’ (2011) 31(2) *Economic Affairs* 93, 93.

to kill babies because of poverty or gender.²⁶⁴ As a result, many Muslims today take care of their children, irrespective of their gender or situation in life.²⁶⁵

The Islamic discourse seeks to protect the rights of the child even before the child is born. The *Quran* considers female infanticide a grave sin and thereby challenges the patriarchal nature of the ancient Arab society.²⁶⁶ There are special provisions which deal with the protection of the rights of the child in Islam. Islam requires its followers to perform religious rituals if a child dies prematurely. Pregnant Muslim women or those who breastfeed their children are allowed not to fast during Ramadan. Moreover, the Islamic laws which prohibit extra-marital affairs and which impose restrictions on one's sexual life are meant to ensure that children grow up in a family environment.²⁶⁷

As well as discouraging the killing of new-born babies, *Sharia* also encourages a good upbringing for children. It is emphasised that the main purpose of marriage according to God's wish is procreation. The birth of a child should therefore be seen as a blessing and a necessity for strengthening the marriage bond and promoting the continuity of a family, as well as the community at large. Families and societies are expected to take good care of their children to continue receiving God's blessings. A failure to fulfil the basic needs, whether mentally or physically, is considered child maltreatment.²⁶⁸ The most common form of child maltreatment is child neglect. Maltreatment of children is detrimental to the healthy development of a society in the long run. The healthy development of children is essential for the future of a nation.²⁶⁹

Islamic law considers that children are people but also vulnerable and dependent on other human beings. Islamic law therefore spells out diverse rules and standards for protecting the child's body and belongings. For instance, the roles and duties of both parents in ensuring that their children are protected and can fully develop until they reach the age of maturity are detailed. In particular, this means that their basic needs are met, namely that they have food,

²⁶⁴ Avner Giladi, 'Some Observations on Infanticide in Medieval Muslim Society' (1990) 2 *International Journal of Middle East Studies* 185,186.

²⁶⁵ Corinna Standke, *Sharia: The Islamic Law* (GRIN 2008) 4.

²⁶⁶ Rajabi-Ardeshiri (n 243) 478.

²⁶⁷ *ibid* 479.

²⁶⁸ Lawrence M Berger and Jane Waldfogel, 'Economic Determinants and Consequences of Child Maltreatment' (OECD Social, Employment, and Migration Working Papers 111, 2011) 8.

²⁶⁹ Mohammad Mafizur Rahman and Rasheda Khanam, 'Child Labour: The Effects of Globalisation' (2012) 13 *The Journal of Applied Business and Economics* 59, 59.

shelter and clothing. The mother must care for her children and ensure their well-being and protect their interests. The child's father is expected to provide the mother with the necessities so that the baby does not lack anything. Any child born out of wedlock is supposed to receive help from other Muslims, who are expected to treat the child as their brother or sister.²⁷⁰

As noted above, the age of puberty plays an important role in Islamic law. The Abu Dhabi Court of Cassation clarified that the age of puberty/maturity determines whether a person is a child. In one case, the mother applied to have the custody period extended for her son. The court ruled that puberty meant being under 18 years of age.²⁷¹ This complies with Article 30 of the 2005 Code of Personal Status which establishes 18 (lunar) years as the age at which puberty can be assumed, which is also a prerequisite to enter into marriage.²⁷²

Moreover, Islamic law differentiates between the major (*baligh*) adult, who is required to fulfil his religious duties and who is fully responsible under criminal law, and the minor (*saghir*) child, who is subject to legal restrictions and guardianship.²⁷³ During the period of minority, scholars consider that there exist several time spans which affect the status of the child. The child is considered a 'discerning minor' (*mumayyiz*) once s/he is able to differentiate between right and wrong, and for example, a discerning minor can enter into beneficial contracts. This point of *tamyiz* is set between three and ten years.²⁷⁴

Another feature of Islamic law which is distinct is that *Sharia* establishes a dual relationship of rights between parents and children. *Sharia* not only stipulates the rights of children which the parents must discharge but children also have responsibilities towards their parents. Such an approach is missing in almost all the universal instruments which detail the rights of the child. Instead, these international instruments only focus on children's rights. In Islam, children who are born within a marriage are required to be given a good name, educated,

²⁷⁰ *ibid* 40.

²⁷¹ *Judgment of 10/6/30 (Appeal No 424/2010)* Abu Dhabi Court of Cassation (Personal Status Chamber).

²⁷² Federal Law No 28 2005 on Personal Status, art 30: 'Capacity to marriage is completed by reason and maturity. The age of maturity is 18 years, completed unless the person concerned matures earlier in conformity with the law'.

²⁷³ Konrad Hirschler, "'He is a Child and this Land is a Borderland of Islam": Under-age Rule and the Quest for Political Stability in the Ayyūbid Period' (2007) 19 *Al-Masāq* 29, 34.

²⁷⁴ Muhammad Idris and Abd Mukti, 'Children Education in The Islamic Family A Study of Tuhfah Al Maudud Bi Ahkam Al Mauludby Ibn Qayyim Al Jauziyyah' (2017) 1 *International Journal on Language, Research and Education Studies* 67, 74.

protected and provided for with care and should also be treated equally within the family unit. This implies that they should not be discriminated on the basis of sex – the most common kind of discrimination that is attributed to Muslim families. The *Quran* and the *Sunnah* also require that children respect their parents, as well as family elders. By acknowledging the hardships that parents go through during a child’s upbringing, the *Quran* asks children in return to be grateful to their parents.²⁷⁵

The above discussion establishes the humanitarian notions of the *Quran* and the *Sunnah*. It also affirms that the primary sources of Islamic law are principally supportive of children and their rights. That said, within the positive law as established by *Sharia*-compliant states, there are no specific legal rights which children can invoke as such as the religious duties are basic and vague. No steps have been taken to develop the jurisprudence of children’s rights. There exists no equivalent to the ECHR which can be invoked when children’s rights are being breached. It is also not ensured that children rights are being incrementally developed in accordance with changing living standards. For example, whilst the *Sharia* requirement to cater for basic needs, such as food, shelter and clothing, is certainly important, it must be identified and concretely laid out in the constitutional mechanisms as to what this should mean in the 21st century. The topic of child sexual abuse has also not been specifically addressed. Although Islamic law as religious law (or religious morality) may reflect perfection, in reality there are considerable limitations. The reason for this is that Islamic law is best described as moral or natural law.²⁷⁶ Positive state law that has been adopted by the UAE often reflects and identifies with the limitations of international and comparative law. In other words, as the CRC fails to determine the age of the child, domestic law prevails. As this has been shaped by *Sharia*, child protection has not been sufficiently realised in many Muslim States, as further explored next.

2.4 Definition of a ‘child’ in the Gulf States (GCC)²⁷⁷

As the UAE is part of the Gulf area and influenced by local Arab customs and traditions, it is obligatory to explore Gulf States and their positive and customary law in relation to the

²⁷⁵ Rajabi-Ardeshiri (n 243) 479.

²⁷⁶ See more Rudolph Peters and Peri Bearman, ‘Introduction: The Nature of the Sharia’ in Peri Bearman, *The Ashgate Research Companion to Islamic Law* (Routledge 2016) 5-6.

²⁷⁷ The Gulf Cooperation Council or the Cooperation Council for the Arab States of the Gulf is an intergovernmental and regional body with permanent observer status at the United Nations. The six member states of the GCC, formed in 1981, include Bahrain, Kuwait, the Sultanate of Oman, Qatar, the KSA, and the United Arab Emirates. See The Charter of the Cooperation Council for the Arab States of the Gulf.

definition of child. In Arabic, the 'child' is defined by terms, such as 'tender' and 'soft body'. In another definition, a boy is considered a child from the moment he is born until he ejaculates.²⁷⁸ Presently, Arab states generally consider that a child is any person who is under the age of 18 years old. This implies that the age of 18 years is the upper limit of childhood and the lower limit of adulthood.

According to Muslim legal traditions, the age of adulthood depends on the concept of attaining maturity. In many Muslim majority states, adulthood is not defined merely by the age of a person but by a child's maturity (*boulough*). A child, upon reaching the stage of maturity, is entitled to all the rights, duties and responsibilities of an adult. These rights and responsibilities include the right to make decisions in respect of marriage and possessing or disposing of property, as well as criminal responsibility.²⁷⁹ The problem of defining the age of a child becomes more compounded because of differences among the different sects of Muslims. There therefore exist different criteria to determine the age of maturity. Both Sunni and Shiite sects have set the age limits for the age of maturity lower for girls than for boys. Consequently, girls are eligible to marry earlier than boys. In most Muslim majority states, the age of maturity for boys is fixed at fifteen years of age. Muslim states, such as Syria, Pakistan, Sudan and Iran, also consider that fifteen is the age for criminal responsibility. Moreover, many Muslim states follow policies that differ widely from the CRC, especially in relation to the age of marriage.²⁸⁰

Initial attempts by Islamic inter-governmental bodies to address issues of human rights, including those relating to the rights of the child, date back to the 1980s. The Universal Islamic Declaration of Human Rights 1981 (UIDHR), the Cairo Declaration on Human Rights in Islam 1990 (CDHRI), the Declaration on the Rights and Care of the Child in Islam 1994 and the Rabat Declaration on Child's Issues 2005 were adopted by Islamic bodies. These declarations contain the basic Islamic laws, alongside provisions which are similar to Western declarations.²⁸¹ The Declaration on the Rights and Care of the Child in Islam 1994 was the first major document adopted by Islamic nations on the rights of the child. This

²⁷⁸ Francis Joseph Steingass, *A Comprehensive Persian-English Dictionary: Including the Arabic Words and Phrases to be Met with in Persian Literature, Being, Johnson and Richardson's Persian, Arabic, and English Dictionary, Revised, Enlarged, and Entirely Reconstructed* (Asian Educational Services 1992) 816.

²⁷⁹ Kamran Hashemi, 'Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation' (2007) 29 Human Rights Quarterly 194, 196.

²⁸⁰ *ibid* 201.

²⁸¹ Rajabi-Ardeshiri (n 243) 477.

declaration was passed at the Seventh Islamic Summit Conference, which was held at Casablanca. This declaration calls on member states to sign and ratify the CRC and to align existing national laws, constitutions and practices with the provisions of the CRC. It focuses on rights that are directly related to the welfare of the child, such as the right to lineage, social health, psychological and cultural care, ownership and education.²⁸²

2.4.1 United Arab Emirates

Legislation in the UAE is largely compliant with the definition in the CRC. UAE Federal Act No. 9 of 1976 that concerns Juvenile Delinquents and Vagrants defines a ‘juvenile (child) as being below the age of 18 at the time of the child’s commission of a liable act’.²⁸³ Article 63 of Federal Act No. 9 of 1976 concerning Juvenile Delinquents and Vagrants states that ‘[t]he provisions stipulated ... shall apply on the person that completed seven years of age and does not complete eighteen years’. Article 9 of the Delinquent and Vagabond Juveniles Law also provides that a person is a juvenile who can be punished by the provisions of this law if he ‘is not over eighteen years of age at the time of committing the action under question ...’. Article 1 of the Social Security Law also defines a child as follows: ‘The definition of the family shall include: a son up to the age of 18.’²⁸⁴ However, a son above this age shall be regarded as being under the aegis of the family if it is established that he is continuing his education until he completes his education or is employed, and a daughter shall be regarded as being under the aegis of the family until she completes her education, as long as she remains unmarried or unemployed. Yet the latter approach, ie to consider a girl only as a child insofar as she remains in education and is not employed or married, has been criticised by the CRC Committee²⁸⁵ as it does not comply with Article 1 of the CRC.²⁸⁶

Federal Act No. 51 of 2006 on combating human trafficking defines a child as ‘every human being below the age of 18 years’.²⁸⁷ Article 30 of the Personal Status Act No. 28 of 2005 sets the age of eligibility to marry at 18 years of age.²⁸⁸ Under the Wadeema Law, the term child

²⁸² *ibid* 484.

²⁸³ Mansoor (n 258) 306-307.

²⁸⁴ Federal Law No 13 issued on 21 July 1981 (UAE).

²⁸⁵ OHCHR, ‘Committee on the Rights of the Child Examines Report of the United Arab Emirates’, 15 September 2015
<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16428&LangID=E>> accessed 1 August 2017.

²⁸⁶ *ibid*.

²⁸⁷ Federal Law No 51 2006 on Combating Human Trafficking Crimes (UAE).

²⁸⁸ Federal Law No 28 issued on 19 November 2005 (UAE).

is defined as ‘every human being below the age of eighteen years unless the age of majority is attained [earlier] under special provisions’. It is clear that the definition of a child in the CRC is consistent with the definition of a child under Emirati laws before and after the UAE signed the Convention.²⁸⁹

An analysis of relevant laws and regulations which were in place prior to the adoption of the Wadeema Law shows that the UAE rarely referred to any child-specific laws. Some of the articles, for instance, Articles 62 and 63 of Wadeema Law, specify the age of discretion as anyone who shall have reached and completed the age of seven years but who has not reached the age of eighteen years. Federal Law No. 9, which was passed in 1976, states that anyone who shall not have reached the age of eighteen is a child or juvenile.²⁹⁰

The Wadeema Law defines a child in Article 1 as: ‘Each person who has not yet reached and completed the eighteen years of age.’ The adoption of this law removes the uncertainties that existed before in defining the age of a child. As mentioned above, the age of a child was not appropriately defined prior to the adoption of the Wadeema Law. As a result, UAE law enforcement agencies faced difficulties when they applied laws in cases which involved children.

Nonetheless, the issue is that the definition of a child in the Wadeema Law does not overrule the power conferred by virtue of Article 7 of Federal Act No. 9 of 1976 concerning juvenile delinquents and vagrants. This provision allows judges to punish those who are below 18 years as if they are adults. It states that ‘[i]f the juvenile that completed seven years of age and does not complete sixteen years of age, commits a crime that is punishable under the penal law or any other law, the Judge shall rule by whatever he measures’. Hence, judges are conferred very wide discretionary powers. This is also illustrated by a 2016 UAE Federal Supreme Court case.²⁹¹ In this case, it was found that a crime which had been committed by a juvenile who had completed seven years of age but who had not reached sixteen years of age was punishable.

²⁸⁹ CRC Committee, ‘Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Second periodic Reports of States Parties Due in 2004: United Arab Emirates’ (3 November 2014) CRC/C/ARE/2, 25-26, para 78.

²⁹⁰ Rashed Abdel-Rahman Bin Thabwy, *Child Protection Against IT and Communication Crimes* (Dubai Police Academy 2013) 79.

²⁹¹ *Cassation No 90* Penal, UAE Federal Supreme Court 2016.

The fact that those aged under 18 can be charged just like adults for crimes and be punished in the same manner has also been criticised by the CRC Committee.²⁹²

Yet, as demonstrated by a 2015 UAE Federal Supreme Court case,²⁹³ judges must consider the age of a defendant. In this case, the Federal Supreme Court overruled the decision of a trial court since the trial judge had punished the defendant without considering that he was still a juvenile on the basis that he was judged mature in law. In order to further explore the complexities within the definitional aspects, related legislative enactments and their application in GCC states is examined.

2.4.2 Saudi Arabia

In the case of Saudi Arabia, there exists considerable ambiguity when it comes to defining a ‘child’. Article 1 of the Social Care Institutions Law states that a child shall not be less than seven years old and shall not exceed the age of eighteen years. This law makes clear that the aim of social care institutions is to provide care and support to children who are not less than seven years old and not eighteen years old or older.²⁹⁴ The Child Protection System Draft also mentions in its second article that ‘[a] child is every person who has not yet exceeded eighteen years of age’. However, as this is a draft law, it does not protect children.

A juvenile is defined under the Detention Regulation and the Juvenile Homes’ Regulation of A.H. 1395 (1975) as every human being below the age of 18. The age of legal capacity and legal responsibility is raised to 20, except in respect of disciplinary measures which are taken against drug users.²⁹⁵ Yet the relevant age for criminal responsibility has not been defined. Instead, broad discretionary powers have been conferred on judges who determine this based on *Sharia*. A child can be held criminally responsible by a judge even if he/she may not have attained the age of eighteen years. This is because in some Islamic schools, such as the *Shafi’i* and *Hanbali* schools, the age of puberty and criminal responsibility is set at fifteen years. As a result, children have even been convicted to death and executed.²⁹⁶ This is despite the fact

²⁹² OHCHR (n 285).

²⁹³ *Cassation No 165* Penal, UAE Federal Supreme Court 2015.

²⁹⁴ Social Care Institutions Law issued via Council Resolution No 611 dated 13 May 1396 H (KSA).

²⁹⁵ CRC Committee, ‘UN Committee on the Rights of the Child: Second Periodic Reports of States Parties Due in 2003, Saudi Arabia’ (21 April 2005) CRC/C/136/Add.1, para 34.

²⁹⁶ CRC Committee, ‘UN Committee on the Rights of the Child: State Party Report: Saudi Arabia’ (25 October 2016) CRC/C/SAU/CO/3-4.

that the Consultative Council (the Shura Council) has ruled that the age of puberty shall be eighteen years.²⁹⁷

The legislation in Saudi Arabia which defines a child provides that:

- (i) From birth to 7 years of age, no responsibility or duty of any kind is imposed on the child.
- (ii) From 7 to 10 years of age, the child is considered a rational person and starts to learn and be trained in religious observances.
- (iii) From 10 to 15 years of age, the child shoulders some responsibility and the legal guardian provides guidance and discipline without harming the child.
- (iv) From 15 to 18 years of age, the child is answerable, in respect of any wrongdoing, in an appropriate place and manner, in order to protect the child and safeguard his or her interests as an extension of the child's care and upbringing. In order to protect the child and others, any punishment that may be required takes the form of discipline, guidance, and admonishment. If necessary, the child is placed in a social rehabilitation centre, as an alternative environment, for an appropriate period of time in order to ensure an improvement in his or her conduct and behaviour.²⁹⁸

Whilst this is a useful description of children, it does not address some of the fundamental problems which still exist in conferring the necessary safeguards on children. This is because judges have discretionary power to decide that a child has reached majority at an earlier age than the age of majority, which is set at 18 years. For instance, in December 2014, one of the highest-standing religious figures ruled that girls who are aged 9 years could be married.²⁹⁹ There also exists a judicial practice to authorise marriages when girls have reached puberty on the basis that this is considered to be in the child's best interests.³⁰⁰ It is for this reason that the CRC Committee recommended that Saudi Arabia takes the necessary legislative and other measures to unequivocally set the age of majority at 18 with no exceptions for specific cases, including in juvenile justice cases. The Committee further recommended that Saudi Arabia amend its law so that the minimum age for marriage is aligned with the internationally acceptable age for boys and girls.³⁰¹ However, the problem within international law is that the CRC cannot definitively determine the age of the child when Saudi domestic law suggests otherwise.

²⁹⁷ Consultative Council (Shura) Resolution No 74/145 on 13 February 1432 H, in its fifth session – second year.

²⁹⁸ CRC Committee, 'UN Committee on the Rights of the Child: State Party Report: Saudi Arabia' (29 March 2000) CRC/C/61/Add.2, para 31.

²⁹⁹ *ibid.*

³⁰⁰ *ibid.*

³⁰¹ CRC Committee on the Rights of the Child, UN Committee on the Rights of the Child: Concluding Observations, Saudi Arabia' (17 March 2006) CRC/C/SAU/CO/2, para 25-26 at 6.

2.4.3 Bahrain

The situation for children in Bahrain is – as described by Amnesty International – ‘a maze of injustice’.³⁰² Article 4 of the Child Law 2012 defines a child as ‘someone not exceeding the age of 18 years’.³⁰³ Article 32 of the Penal Code provides that children must be 15 years of age in order to be held criminally responsible.³⁰⁴ Article 6 of the Juvenile Law of 1976 also provides that children who are below 15 years cannot be sentenced to imprisonment if they perpetrated a crime.³⁰⁵ However, the issue is that *Sharia* law frequently overrules this legislation, as highlighted in the cases of two teenagers by the name of Jihad Sadeq Aziz Salman, Ebrahim Ahmed Radi al-Moqdad who were tried and sentenced as adults.³⁰⁶ They were prosecuted in front of the Manama High Criminal Court where numerous children – some as young as seven – have been criminally prosecuted under the Anti-Terrorism Law 2006 and the Penal Code.³⁰⁷ In 2013, as part of efforts to suppress political dissent and protest, a number of decrees were introduced by Bahrain’s parliament into the Anti-Terrorism Law 2006. They consist of several provisions that erode the rights of children including those which authorise that anyone ‘of any age’ can be charged in connection with anti-government protests.³⁰⁸ Bahrain ought to at least ensure that criminal responsibility is not imposed on those who are under 12 years of age.³⁰⁹ Also, it should be made clear that only those who are 18 years old can be held fully responsible when they perpetrate crimes. The failure to set a minimum age for marriage and to ensure that it is the same for males and females is another problem.³¹⁰ This is because it gives rise to gender-discrimination, as observed by the CRC Committee.³¹¹

2.4.4 Kuwait

In Kuwait, Article 1 of the Child Protection Law No. 21 of 2015 defines a child as ‘[e]ach person who has not yet reached and completed eighteen years of age’.³¹² The Family

³⁰² Amnesty International, ‘Bahrain: Children in a Maze of Injustice’ (16 December 2013) 4.

³⁰³ Decree No 23 (2013), Official Gazette No 3117, 15 August 2013.

³⁰⁴ Amnesty International (n 302).

³⁰⁵ *ibid* 4.

³⁰⁶ *ibid*.

³⁰⁷ Amnesty International, ‘Background Information: The Trial of Jihad Sadeq Aziz Salman, Ebrahim Ahmed Radi al-Moqdad’ (2012).

³⁰⁸ *ibid*.

³⁰⁹ *ibid* 15.

³¹⁰ Amnesty International (n 302).

³¹¹ *ibid*.

³¹² Ministerial Decision No 21 (2015) (Kuwait) art 1.

Fostering Act No. 82 of 1977 adopts the same definition.³¹³ The Juveniles Act No. 3 of 1983 also states that a juvenile is a female or male who is below the age of 18 years.³¹⁴ Article 1(b) further explains that '[a] juvenile delinquent is any juvenile over 7 but under 18 years of age who has committed a legally punishable offence'. Yet Article 18 of the Penal Code provides that criminal responsibility can only be imposed on those who are at least seven years old. Hence, a too low age has been set for criminal responsibility. Furthermore, Article 208 of the Personal Status Act No. 51 of 1984 addresses the topic of minimum age. It provides that '[a] child shall be subject to guardianship of his or her person until attaining legal majority or reaching the age of 15 years'. Again, this is a lower minimum age than the stipulated 18 years in the Child Protection Law No. 21 of 2015. Article 26 of the Personal Status Act No. 51 of 1984 proscribes that a marriage contract can be certified or notarised when a girl is below 15 years or a man is below 17 years at the time. The CRC Committee expressed its serious concern about this provision and recommended as on previous occasions that Kuwait raises the minimum age of marriage.

The Committee was also deeply concerned that according to Article 24 of the Personal Status Act (Act No. 51 of 1984) a marriage is considered legitimate when parties have reached the age of puberty and are of sound mind.³¹⁵ This highlights that there still exist problems with providing a minimum age which complies with international standards.

2.4.5 Qatar

The applicable legislation defines a child as 'any person below the age of 18 years'. This definition is consistent with the one adopted by the CRC. Article 49 of the Civil Code defines the age of majority as 18 full years and Article 1 of the Trusteeship of Minors' Assets Act defines a minor as a child who has not reached his or her majority (majority being reached at the age of 18 full years). Article 189 of the Family Act also defines a person with full capacity as 'any person who has reached the age of majority of 18 full years and does not have a mental impairment'.³¹⁶ The draft Act on the Rights of the Child also states that a child

³¹³ CRC Committee, 'Consideration of Reports submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: 2nd periodic reports of States Parties Due in 1998: Kuwait' (12 May 2012) CRC/C/KWT/2, 17.

³¹⁴ *ibid.*

³¹⁵ CRC Committee, 'Concluding Observations, Kuwait' (28 October 2013) CRC/C/KWT/CO/2, para 25-26 at 5.

³¹⁶ CRC Committee, 'UN Committee on the Rights of the Child: State Party Report: Qatar' (16 December 2008) CRC/C/QAT/2, para 44 at 17.

is ‘any person who has not reached the age of 18’.³¹⁷ However, despite these laws, the CRC Committee was still concerned about the disparity in the minimum age of marriage for boys and girls, particularly that the age for girls is set at 16 years. This is because the Family Act has not been changed.³¹⁸ The Committee therefore recommended that Qatar rectifies the disparity in the minimum age of marriage for boys and girls by raising the minimum age of marriage for girls to 18 years.³¹⁹ Another issue is that children can still be held criminally responsible from the age of seven onwards.³²⁰ Those who are aged 16 to 18 can also be convicted as if they were adults and flogged.³²¹ Such an approach contravenes the spirit of the CRC.

2.4.6 Oman

Article 140 of the Omani Personal Status Act speaks of a ‘minor’ and defines it as ‘a person who has not reached the age of majority, including: (a) the foetus ...’.³²² Article 143 of the Personal Status Law speaks of a youngster and describes this as ‘a person who has not reached the age of majority and who may or may not have rational faculties’.³²³ Article 7 of the Personal Law makes clear that the minimum age is 18 years for both females and males. However, Article 10(c) allows a judge to consent to a marriage if it is shown to be in the best interest of the minor. Hence, the law does not distinguish between boys and girls in respect of the age when they can marry.

Article 1(c) of the Juvenile Accountability Act also implicitly defines who should be considered a child. It provides that ‘a juvenile is any male or female under the age of 18’.³²⁴ Moreover, Article 104 of the Penal Code makes clear that children can be criminally prosecuted once they are nine years old. However, Article 104 of the Penal Code also provides that those aged 9 to 13 years cannot be imprisoned, though they can be required to

³¹⁷ CRC Committee, ‘State Party Report: Qatar’ (24 June 2016) 38.

³¹⁸ *ibid.*

³¹⁹ CRC Committee, ‘Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Convention on the Rights of the Child: concluding observations: Qatar’ (14 October 2009) CRC/C/QAT/CO/2, para 23-24 at 5.

³²⁰ Humanium, ‘Children of Qatar, Realizing Children's Rights in Qatar’ (22 August 2012) <<http://www.humanium.org/en/middle-east-north-africa/qatar/>> accessed 1 August 2017.

³²¹ *ibid.*

³²² UN Committee on the Rights of the Child, ‘Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Combined Third and Fourth Periodic Reports of States Parties due in 2012: Oman’ (28 January 2015) CRC/C/OMN/3-4, 17.

³²³ *ibid.*

³²⁴ *ibid.*

be in a penitentiary until they are 18 years old. Pursuant to Article 105, a judge can determine whether a minor should receive a sentence to attend a penitentiary.

The Trafficking in Persons Act also states that a juvenile is ‘any male or female under the age of 18’.³²⁵ The definition of a child is contained in the Child Law which was adopted by Royal Decree No. 22/2014 on 19 May 2014. This law was adopted to prevent any confusion which may arise because Islamic states and societies may refer to a person who has not reached maturity.³²⁶ The definition in the new Child Law complies with that in the CRC as a child is defined as ‘a person who has not completed 18 years of age’.³²⁷ Also, a disabled child is defined as one ‘who suffers from limited sensory, physical, or mental abilities caused by congenital or hereditary factors or as a result of illness or accident, or which limit his/her ability to perform his/her role in normal life and participate fully and effectively in society at an equal level with others’.³²⁸ Oman has thus adopted a progressive approach which appears to be in compliance with the CRC.

2.6 Conclusion

The definition of a child in the CRC, namely to consider those who are not yet aged 18 as children, has been adopted in many different international instruments. Yet the caveat that a lower age is permissible if the national law of a state party provides for this is problematic. This, coupled with the fact that there is no follow-up mechanism when reports are submitted to the CRC Committee, means that the international safety net for children is not as strong as it could be. State parties can avoid their respective duties under the CRC by simply enacting domestic laws which stipulate a lower age than 18 years in certain fields.

However, whilst it would have been desirable for the definition not to permit state parties this leeway, it arguably has at least ensured that a great amount of states have ratified the CRC. The fact that the definition of a child has been adopted is better than the approach taken by the ECHR where no such definition can be found in the ECHR. Yet the fact that various regional instruments, as well as the Lisbon Treaty, have been adopted in Europe, heightens protection for children. This has also ensured that the topic of child protection is firmly embedded within the policy agenda of the legislator.

³²⁵ *ibid* 18.

³²⁶ OIC (n 257) art 1.

³²⁷ Child Law 2014 (Oman).

³²⁸ *ibid* art 1(H).

In states where *Sharia* law applies, children have also been protected. This benefits children who prior to this were often killed when they were born. A moral framework has been created which imposes duties on parents to provide for their children. Children also have responsibilities to their parents, namely to respect them. Yet the issue with *Sharia* is that the obligations are rather rudimentary and not as detailed. The precise age limit up to which a person should be considered a child is also not defined. However, the adoption of various Islamic declarations has also promoted child rights and has encouraged Muslim states to ratify the CRC and bring their laws into alliance with the CRC.

Nonetheless, analysis of the laws of various Gulf states shows that various different age limits have been adopted, especially in respect of marriage and criminal responsibility. These are generally below the international threshold of 18 years. As examined, this lower threshold of the definition of the 'child' has been legitimised by the CRC. The failings within international law to adopt a consensus view on the definition of a child suggests the weaknesses of this law and consequent limitations in according adequate protection. As a result, children are not adequately protected (including against child sexual abuse) in the UAE and other Middle Eastern states.

Female children have been particularly disadvantaged since it has often been permitted for them to marry at a lower age than boys. Hence, many of the Gulf laws have not adopted a gender-neutral approach towards the age limit. This gives rise to discrimination of female children. The age of criminal responsibility has also frequently been set at a very low age and as low as seven years in some Gulf states. In some cases, children are also charged and sentenced as if they were adults. This is because judges have been granted broad discretionary powers. This indicates that despite the ratification of the CRC by these states, the caveat that states can adopt national laws which deviate from the 18-year threshold has been over utilised. As a result, children are inadequately protected. In the future, it is therefore crucial that their domestic laws are amended. A definition of a child as being all those aged under 18 years must therefore not only be adopted through a child law, for example, but also it must be ensured that conflicting laws, particularly personal status and family laws which deal with the age of marriage, as well as penal codes and relevant laws which deal with juveniles, are amended. Fundamentally, children must be treated as such and no other approach should be tolerated, whether in respect of girls who are meant to marry or

children accused of crimes. A definition as found in Article 2 of the ACRWC, namely that ‘a child means every human being below the age of 18 years’, should therefore be adopted by these states. It appears important to also add to such a definition that this is the case irrespective of gender and applies to any field, including marriage and criminal punishment. It is also desirable to spell out the consequences which flow from such a definition, ie that it means that all those under 18 years can enjoy their rights under the CRC as well as under other relevant child-related international instruments.

Otherwise, the risk is that children are not adequately protected against child abuse. This is especially the case in Muslim states where having an extra-marital affair is considered a crime. As a result, abused children are considered perpetrators of crime. As criminal responsibility is imposed on children who are as young as seven years old in some Gulf states, they are therefore extremely vulnerable to child sexual abuse. Also, children who are married under the age of 18 will find it difficult to complain about child sexual abuse. It is against this background that the next chapter discusses the topic of child sexual abuse.

Chapter Three: The Crime of Child Sexual Abuse and its Ramifications

3.0 Introduction

This chapter is significant as it endeavours to tackle a very serious problem in society which is child sexual abuse. The definition of sexual abuse is controversial and scholars define the term differently. Also, no statutory or globally recognised definition of child sexual abuse exists. Van Dokkum explains child sexual abuse as a category of child abuse and defines it as ‘the involvement of dependent, developmentally immature children in sexual activities that they do not fully comprehend, or to which they are unable to give informed consent, and that violate social taboos concerning family roles’.³²⁹ He further asserts that it should be examined in its cultural context, since the definition provided is only a social definition.³³⁰

The World Health Organization’s (WHO) definition of sexual abuse is:

Child sexual abuse is 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 violate the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person.³³¹

The above definitions of sexual abuse indicate that although the term is widely used, there is no universally accepted definition. There is disagreement on whether standards of risk or harm should be employed as a frame of reference for defining the sexual abuse of children. Some definitions of sexual abuse include ‘age’ as the basic criterion. For some, the age difference between victims and abusers should be used as a criterion to define sexual abuse.³³² It is submitted that no clearly established norms have been promulgated by international law on this.

³²⁹ Neil Van Dokkum, 'The Statutory Obligation to Report Child Abuse and Neglect' (1996) *Acta Juridica* 163, 164.

³³⁰ *ibid.*

³³¹ World Health Organization, 'Report of the Consultation on Child Abuse Prevention' (29-31 March 1999) 15.

³³² Gail Elizabeth Wyatt and Stefanie Doyle Peters, 'Issues in the Definition of Child Sexual Abuse in Prevalence Research' (1986) 10 *Child Abuse & Neglect* 231, 232; David Finkelhor, 'Current Information on the Scope and Nature of Child Sexual Abuse' (1994) *The Future of Children* 31, 32.

3.1 Child sexual abuse under international law

As mentioned, there exist different definitions for child sexual abuse. This is also illustrated by the following legally binding instruments:

1. 1989: The CRC refers to ‘all forms of sexual exploitation and sexual abuse’ in Article 34 and which further requires state parties to protect children from sexual exploitation and abuse through the adoption of ‘all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.’
2. 1999: The ACRWC refers in Article 27 to ‘all forms of sexual exploitation and sexual abuse’.³³³
3. 2007: The Lanzarote Convention refers to both the ‘sexual exploitation and [the] sexual abuse of children’. The Preamble sets out that ‘[a]ll forms of sexual abuse of children, including acts which are committed abroad, are destructive to children’s health and psycho-social development’. The Convention further states in Article 3(b) that ‘[s]exual exploitation and sexual abuse of children shall include the behaviour as referred to in Articles 18 to 23 of this Convention’. This includes sexual abuse, offences concerning child prostitution, child pornography, the participation of a child in pornographic performances, corruption of children, and solicitation of children for sexual purposes. Article 18(1) refers specifically to the following types of ‘sexual abuse’, which are criminalized: ‘(a) engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities’ and ‘(b) engaging in sexual activities with a child where: use is made of coercion, force or threats; or abuse is made of a recognized position of trust, authority or influence over the child, including within the family; or abuse is made of

³³³ ACRWC (n 180).

a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence'.³³⁴

3. 2011: Article 3 of EU Directive 2011/93 provides a thorough definition of the offences which involve sexual abuse, which includes causing a child to witness sexual activities or sexual abuse, engaging in sexual activities with a child, and coercing, forcing or threatening a child into sexual activities with a third party.³³⁵

Non-binding instruments, such as UNGA resolutions, Human Rights Council (HRC) resolutions on the rights of the child³³⁶ (also known as omnibus resolutions), and resolutions issued by other non-binding international or regional bodies, such as the Council of Europe,³³⁷ also refer to the term child abuse. However, the CRC does not specify how child sexual abuse can be distinguished from child sexual exploitation. Sexual abuse of children requires no element of exchange and can take place merely for the sexual gratification of the person who is committing the act. In contrast, sexual exploitation of children requires some form of exchange. The distinction between exploitation and abuse of children is further discussed below. A recurrent feature of child sexual abuse is that it is committed by someone who is not a stranger to the victim and who exercises some form of authority or power over the child, though this is not a requirement. Such authority may arise because of family ties, eg, because the abuser is a relative or due to a position of authority or control, eg, because the person is a teacher or coach or because of other factors. A person may also be in a position of power because there is a relationship of trust or dependency which is being used to manipulate the child so that s/he engages in sexual activities.³³⁸ Most dictionaries describe abuse as cruel or violent, including sexual behaviour, mistreatment of someone which takes place regularly or repeatedly. The fact that a person who sexually abuses a child frequently is known to the child further facilitates the repetition of the abuse.

³³⁴ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (n 195).

³³⁵ Directive 2011/92/EU of the European Parliament and of the Council, on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA [2011] OJ L335/1.

³³⁶ UNGA Res 62/141 (18 December 2007) A/RES/62/141, para 52.

³³⁷ The protection of minors against excesses of sects on 10 April 2014, Resolution 1992 (2014).

³³⁸ Paulo Sérgio Pinheiro, 'World Report On Violence Against Children' (*United Nations*, 2006) ch 3 at 55 <[https://www.unicef.org/lac/full_tex\(3\).pdf](https://www.unicef.org/lac/full_tex(3).pdf)> accessed 3 May 2017.

The UN Secretary-General defines sexual abuse in general and very broad terms without reference to children in particular as:

The actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions³³⁹ [and] any sexual activity between a child and closely related family member (incest) or between a child and an adult or older child from outside the family. It involves either explicit force or coercion or, in cases where consent cannot be given by the victim because of his or her young age, implied force.³⁴⁰

While most forms of child sexual abuse are contact abuse, child sexual abuse can also be committed without physical contact. Common examples of ‘non-contact sexual abuse’ are sexual harassment of children, including verbal harassment such as unwanted sexual comments.³⁴¹ With the surge of online child sexual abuse, it has become increasingly necessary to also include these non-contact forms of abuse due to the grave consequences which these types of abuse can have for young victims.

Hence, sexual abuse of children does not require an element of exchange and can occur merely for the purpose of sexually gratifying the perpetrator. Such abuse can be committed without explicit force, with other elements being present, such as authority, power or manipulation. Moreover, when a child has not reached the age of sexual consent, there is no legal requirement to establish any of these elements. The mere fact that sexual activity has taken place is sufficient to constitute abuse. Furthermore, because child sexual abuse can consist of contact or non-contact abuse, it therefore includes a broad category of acts. At its core is that it causes harm to children since they are either forced or coerced into sexual activity, whether they are aware of this or not. It is therefore an appropriate umbrella term for many different types of conduct. The terms ‘child sexual abuse’ and ‘sexual abuse of children’ can be used interchangeably. Linguistically speaking, ‘abuse’ implies the mistreatment *of someone else*, and appears sufficiently clear on its own to prevent any confusion. Both ‘child sexual abuse’ and ‘sexual abuse of children’ thus clearly denote that someone else is subjecting a child to abuse.

³³⁹ UNSG, ‘Secretary-General’s Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse’ (9 October 2003) ST/SGB/2003/13, s 1 at 1.

³⁴⁰ Renee Z Dominguez, Connie F Nelke and Bruce D Perry, ‘Sexual Abuse of Children: Its Psychosomatic Consequences’ (The M+G+R Foundation, 2 May 2002) <<http://www.mgrfoundation.org/SexabuseConsequences-1.html>> accessed 10 October 2016.

³⁴¹ Susanna Greijer and Jaap Doek, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse* (ECPAT International 2016).

The CRC requires that a minimum age is set below which children are judged incapable of consenting to any form of sexual activity with others. The definition of sexual abuse and exploitation includes not only conduct involving violence or other forms of coercion but also all sexual conduct with a child below a certain age, even when it was or appeared to be consensual.³⁴² Consequently sexual intercourse with a child below the age of consent involves criminal responsibility and renders the perpetrator automatically liable to a charge of rape.³⁴³

The CRC Committee has emphasised the importance of setting a minimum age below which a child's consent is not to be considered valid. The Committee has proposed to various states that the age set for sexual consent should be raised but has not proposed that it should be raised to 18. In this context, the CRC Committee refers to the need to set a minimum age for sexual consent and marriage (see below) and has stated:

These minimum ages should be the same for boys and girls (Article 2 of the Convention) and closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity (Arts. 5 and 12–17).³⁴⁴

It may be assumed that the status of marriage implies an ability to consent to sex with one's partner. The age of sexual consent is closely connected with the right to non-discrimination. First and foremost, the age for sexual consent by boys and girls should be the same. Furthermore, no difference should be made because of sexual orientation. The guidelines for the periodic reports queried whether the non-discrimination requirements spelt out in Article 2 of the Convention have been given ample consideration 'in cases where there is a difference in the legislation between girls and boys, including in relation to marriage and sexual consent',³⁴⁵ The CRC Committee guidelines advised them to unify this.

³⁴² Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF 1998). See discussion on art 19 at 257 and on art 34 at 523.

³⁴³ It has to be noted that sexual consent is also connected to possible sexual exploitation of children prohibited in the Optional Protocol and the legal consent of a child is not a valid basis for such activities. Optional Protocol on the Sale of Children (n 188).

³⁴⁴ CRC Committee, 'General Comment No 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (1 July 2003) CRC/GC/2003/4, para 9.

³⁴⁵ CRC Committee, 'General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties Under Article 44, Paragraph 1(B), of the Convention' (20 November 1996) CRC/C/58, para 24 at 9.

The Committee also expressed concern about the disparities which exist between the ages of consent for heterosexual and homosexual activities as these amount to discrimination on the grounds of sexual orientation:

Concern is expressed at the insufficient efforts made to provide against discrimination based on sexual orientation. While the Committee notes the Isle of Man's intention to reduce the legal age for consent to homosexual relations from 21 to 18 years, it remains concerned about the disparity that continues to exist between the ages for consent to heterosexual (16 years) and homosexual relations. It is recommended that the Isle of Man take all appropriate measures, including of a legislative nature, to prevent discrimination based on the grounds of sexual orientation and to fully comply with article 2 of the Convention.³⁴⁶

This time-limit does not apply to the right of a child to receive sexual education, and reproductive information and services:

All policies and programmes affecting children's health should be grounded in a broad approach to gender equality that ensures young women's full political participation; social and economic empowerment; recognition of equal rights related to sexual and reproductive health; and equal access to information, education, justice and security, including the elimination of all forms of sexual and gender-based violence.³⁴⁷

Consequently, the minimum requirements of the CRC concerning sexual consent are firstly that the age of sexual consent is set and sexual intercourse with a child below that age is criminalised. Secondly, the age of sexual consent cannot have a discriminatory effect on boys or girls or in relation to a person's sexual orientation. Thirdly, the age of sexual consent must correspond with the age at which one can marry.

3.1.1 Child sexual exploitation

Child sexual exploitation has received significant attention worldwide. However, it must be distinguished from child sexual abuse. Not all acts constitute child sexual abuse, whilst some acts do not amount to child sexual exploitation. It is therefore essential to analyse the concept of child sexual exploitation by making recourse to different legal frameworks.

³⁴⁶ CRC Committee, 'Concluding Observations: United Kingdom of Great Britain and Northern Ireland - Overseas Territories' (16 October 2000) CRC/C/15/Add.135, paras 25-26; CRC Committee, 'Concluding Observations: Isle of Man' (16 October 2000) CRC/C/15/Add.134, paras 22-23.

³⁴⁷ CRC Committee, 'General Comment No 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art 24)' (17 April 2013) CRC/C/GC/15, para 10.

3.1.2 Definitions in legally binding instruments

1. 1989: As mentioned earlier, Article 34 of the CRC refers to ‘all forms of sexual exploitation and sexual abuse’ and explicitly mentions ‘(b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials’.
2. 1999: The ACRWC refers to all forms of sexual exploitation and sexual abuse, and specifically mentions in Article 27, ‘(a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; (c) the use of children in pornographic activities, performances and materials’.
3. 2000: The OPSC refers to sexual exploitation in Article 3, in which it requires the state parties to criminalize the sexual exploitation of the child in the context of what the OPSC defines as the sale of children (Article 3.1(a)(i)(a)).
4. 2007: The Lanzarote Convention refers to behaviour constituting the offences of child sexual exploitation and child sexual abuse as detailed in Articles 18 to 23. The preamble describes exploitation as ‘the sexual exploitation of children, in particular child pornography and prostitution’.
5. 2011: Article 3 of the EU Directive 2011/93 spells out the offences for sexual exploitation and makes clear that this includes the following acts: making a child participate in pornographic performances, knowingly attending pornographic performances that include children, making a child participate in child prostitution, and engaging in sexual activities with a child where recourse is made to prostitution.

Instruments that are non-binding per se but can carry significant persuasive authority such as UNGA resolutions and HRC omnibus resolutions,³⁴⁸ as well as other non-binding international or regional documents (eg, of the Council of Europe)³⁴⁹ employ the term ‘child sexual exploitation’. A child is a victim of sexual exploitation when s/he takes part in a sexual activity in exchange for something (eg, gain or benefit, or even the promise of such). In legal language, this notion of exchange is well covered by the term ‘consideration’, which refers to ‘anything given or promised or forborne by one party in exchange for the promise or undertaking of another’.³⁵⁰ In other words, a third party, the perpetrator, or the child her/himself, must give consideration. A child may be coerced into a situation of sexual exploitation through physical force or threats. However, s/he may also be persuaded to engage in sexual activity due to more complex and nuanced factors, which are either human or situational and, for example, arise because of a power imbalance between the victim and the perpetrator.³⁵¹

While any child may be sexually exploited, children may also find themselves in a situation that makes them particularly vulnerable to such exploitation (eg, poverty, abuse/neglect, unaccompanied/homeless). The age of a child can increase their vulnerability to sexual exploitation, with older children often mistakenly assumed to be either consenting to their own abuse or not being in need of protection. This is a dangerous societal myth that deliberately overlooks the ‘dynamics of victimization’³⁵² which comprise sexual exploitation. These complex and subtle dynamics are precisely what has constituted it as ‘a hidden crime’.³⁵³ Young people in exploitative sexual situations and relationships are usually naïve about matters related to sex and sexuality.³⁵⁴ They are unprepared for dealing with deceptive

³⁴⁸ UNGA Res A/51/615 (20 February 1977) UN Doc A/RES/51/77; UNGA, ‘Promotion and Protection of the Rights of Children (5 December 2014) UN Doc A/69/484.

³⁴⁹ Council of Europe, Committee of Ministers, ‘Recommendation No R(91)11 Concerning Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults’ (9 September 1991); Council of Europe, Committee of Ministers, ‘Recommendation Rec(2001)16 on the Protection of Children Against Sexual Exploitation’.

³⁵⁰ James Edward Clapp, *1001 Legal Words You Need to Know* (Oxford University Press 2005) 32.

³⁵¹ See Barnardos, ‘Sexual Exploitation’ <http://www.barnardos.org.uk/what_we_do/our_work/sexual_exploitation/about-cse.htm> and NSPCC, ‘Child Sexual Exploitation: What is Child Sexual Exploitation’ <<https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/child-sexual-exploitation/>> accessed 10 October 2016.

³⁵² Seth L Goldstein, ‘Investigating Child Sexual Exploitation: Law Enforcement’s Role’ (1984) FBI Law Enforcement Bulletin 78.

³⁵³ NSPCC, Child Sexual Exploitation, What is Child Sexual Exploitation? <<https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/child-sexual-exploitation/>> accessed 27 January 2018.

³⁵⁴ Goldstein (n 352).

and coercive sexual abusers and are initially given gifts, money, attention and/or approval by their abusers in exchange for performing sexual acts, or allowing sexual acts to be performed upon them.³⁵⁵ These young victims may be invited to parties where they are given free alcohol and drugs³⁵⁶ and, as a result, they and others around them can interpret this behaviour by the abusers (which frequently descends into threats and other forms of violence) as affection.³⁵⁷

‘Exploitation’ in this context is thus a key term but must be distinguished from sexual violence and sexual abuse of children. The main distinction lies in the notion of exchange which exists when there is exploitation, which is lacking from the concepts of abuse and/or violence. Major dictionaries also state that ‘exploitation’ is the use of something or someone else (unfairly) for one’s own advantage,³⁵⁸ the action of taking advantage of a person or situation, especially unethically or unjustly for one’s own ends,³⁵⁹ or treating others unfairly in order to gain an advantage or benefit.³⁶⁰ The UN General Assembly has defined ‘sexual exploitation’ (not necessarily related to children) as ‘any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another’.³⁶¹ Thus, this idea of extracting or incurring a benefit, advantage or gain from the sexual act does not necessarily have anything to do with monetary gain but, as already described, can be ‘any type of benefit, advantage or gain which happens when a child is performing, and/or another or others are performing, on the child sexual activities in exchange for food, accommodation, drugs, alcohol, cigarettes, affection or gifts’.³⁶²

It should be noted that children can be the perpetrators as well as the victims of child sexual exploitation. The former is also referred to as ‘peer-on-peer’ sexual exploitation.³⁶³ Hence,

³⁵⁵ NSPCC (n 353)

³⁵⁶ *ibid.*

³⁵⁷ Goldstein (n 352).

³⁵⁸ *Cambridge English Dictionary* <<http://dictionary.cambridge.org/dictionary/english/exploitation>> accessed 11 October 2016.

³⁵⁹ *Collins English Dictionary* <<http://www.collinsdictionary.com/dictionary/english/exploit>> accessed 11 October 2016.

³⁶⁰ *Oxford Advanced Learner’s Dictionary* <<https://en.oxforddictionaries.com/definition/exploitation>> accessed 11 October 2016.

³⁶¹ UNGA, ‘Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the Secretary-General’ (18 February 2010) UN Doc A/64/669, para 1 at 2.

³⁶² NSPCC (n 353) 37.

³⁶³ Sue Jago and others, ‘What’s Going on to Safeguard Children and Young People From Sexual Exploitation? How Local Partnerships Respond to Child Sexual Exploitation’ (University of Bedfordshire, October 2011) 5.

the distinguishing feature of the concept of child sexual exploitation is the underlying notion of exchange. While child sexual abuse and child sexual exploitation must be distinguished, it is important to acknowledge that there exists a considerable overlap between the two concepts and that, semantically, the distinction will probably never be completely clear. For example, many cases of child sexual abuse also involve some kind of benefit to the child or exchange – abusers often win trust or ensure silence especially through non-tangible benefits, such as small gifts, attention and affection. Similarly, the idea of exploitation is arguably applicable to all victims of abuse since a child’s vulnerability is being exploited.

3.2 Difference between child sexual abuse and exploitation offences

The difference between what amounts to child sexual abuse and what constitutes child sexual exploitation must be explored. For this purpose, it is first discussed what actions amount to child sexual abuse.

3.2.1 Types of child sexual abuse

The paradigm of child sexual abuse can be further classified into the categories set out below.

3.2.1.1 Incest amounting to child sexual abuse

‘Incest’ refers to ‘sexual intercourse between persons who are so closely related that their marriage is illegal or forbidden by custom’³⁶⁴ or sexual activity between two people who are very closely related in a family, for example, between siblings or a parent and a child. Incest involving a child constitutes sexual abuse. While some domestic legal systems require blood ties for a sexual activity to constitute incest, others have broadened the notion to include family members who are not blood-related but who are still considered too close to engage in sexual activities (eg step-parents). Other jurisdictions only recognize ‘vertical’ incest, ie the law does not outlaw sexual relations between siblings. Various dictionaries define ‘incest’ as ‘sexual relations between people classed as being too closely related to marry each other’.³⁶⁵ Incest is also sometimes defined as ‘the crime of having sexual intercourse with a parent, child, sibling, or grandchild’.³⁶⁶

³⁶⁴ Donalee Brown and others, ‘The Effectiveness of Group Treatment for Female Adult Incest Survivors’ (2013) 22 *Journal of Child Sexual Abuse* 143, 144.

³⁶⁵ *Oxford Dictionary of English* (Oxford University Press 2010) 883.

³⁶⁶ *ibid.*

3.2.1.2 Rape of a ‘child’

Rape is the crime of forcing someone (in this case a child) to have sex against her or his will and often involves the use of physical force or violence.³⁶⁷ In some states, the domestic law only recognises the rape of a child when the victim is a female and thus considers this to be a gender-based crime.³⁶⁸ However, such an approach should be avoided and a gender-neutral approach should be adopted. Furthermore, whilst the crime of rape typically requires some form of penetration, the Federal Bureau of Investigation Uniform Crime Reporting (UCR) system defines rape as ‘[p]enetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim’.³⁶⁹ Some states’ criminal laws have moved away from the term ‘rape’ and instead speak of ‘sexual assault’. This broadens the scope of the crime to include also sexual acts which do not involve penetration, as is, for example, the case in Canada where Article 264(1) of the Criminal Code of Canada states that:

No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

Prohibited conduct

(2) The conduct mentioned in subsection (1) consists of

- (a) repeatedly following from place to place the other person or anyone known to them;
- (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
- (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
- (d) engaging in threatening conduct directed at the other person or any member of their family.³⁷⁰

3.2.1.3 Child sexual molestation

Molestation refers to the act of touching or attacking someone, especially a child, in a sexual way.³⁷¹ The word ‘molest’ derives from the Latin words *molestare* (‘to annoy’) and *molestus*

³⁶⁷ *Cambridge Essential English Dictionary* <<http://dictionary.cambridge.org/dictionary/english/rape?q=Rape>>; *Oxford Advanced Learner’s Dictionary* <<https://en.oxforddictionaries.com/definition/rape>> accessed 11 October 2016.

³⁶⁸ In Russia, for example, the crime of rape does not exist when the victim is a boy, which instead is labelled as ‘violent acts of a sexual character’, see Criminal Code of the Russian Federation No 63-FZ (13 June 1996, last amended 29 June 2009).

³⁶⁹ Federal Bureau of Investigation, ‘Reporting Rape in 2013: Summary Reporting System’ (9 April 2014) <<https://ucr.fbi.gov/recent-program-updates/reporting-rape-in-2013-revised>> accessed 20 October 2016.

³⁷⁰ Criminal Code of Canada, arts 264 et seq <<http://laws-lois.justice.gc.ca/eng/acts/C-46/page-61.html#h-83>> accessed 10 October 2016.

³⁷¹ *Oxford Advanced Learner’s Dictionary* <<https://en.oxforddictionaries.com/definition/molestation>> accessed 11 October 2016.

(‘troublesome’).³⁷² The term ‘molestation’ is widely used in the family law context, where it usually relates to spousal/parental relations (eg, ‘non-molestation clauses’ in the context of matrimonial proceedings/spousal separation/domestic violence are often employed in common law states).³⁷³

3.2.1.4 Sexual touching of children

There is no internationally agreed (legal) definition for the sexual touching of children. Nevertheless, ‘to touch’ means to physically put one’s hands on something or someone, and the term ‘sexual touching of children’ mainly refers to the act of touching the private parts of a child’s body and/or making the child touch his/her own private parts, for the purpose of one’s own sexual arousal/gratification. Touching is widely defined and includes with any part of the body, or with anything else, and can be through clothing. In *R v H (Karl Anthony)*,³⁷⁴ the Court of Appeal held that the touching of an individual’s clothing was sufficient to amount to ‘touching’. Where the touching is not automatically sexual in nature, it is necessary to ascertain whether the touching could be considered sexual, as well as whether in the circumstances the purpose had in fact been sexual.³⁷⁵ Sexual touching often marks, along with sexual comments, the beginning of a gradually increasing process of sexual abuse of a child by an adult or by another child. This type of sexual abuse of children frequently occurs during repeated episodes, which become more invasive with time. Perpetrators usually engage the child in a gradual process of sexualising the relationship.³⁷⁶ It is therefore crucial to intervene at this stage in order to avoid further, and more serious, sexual abuse of a child. Sexual touching of a child is a form of sexual abuse. While the term ‘sexual touching’ can of course have positive connotations when referring to adult consensual sexual relationships, it refers to abusive acts when committed on children, except where both parties are children over the age of sexual consent and the touching is consensual.

³⁷² *Merriam-Webster's Learner's Dictionary* <<http://www.merriam-webster.com/dictionary/Molestation>> accessed 11 October 2016.

³⁷³ Family Law Act 1996 (UK).

³⁷⁴ *R v H (Karl Anthony)* [2005] EWCA Crim 732.

³⁷⁵ UNICEF, 'Frequently Asked Questions, What is the Convention on the Rights of the Child?' (*UNICEF*, 2005) <https://www.unicef.org/crc/index_30229.html> accessed 27 November 2016.

³⁷⁶ WHO, *Guidelines for Medico-legal Care of Victims of Sexual Violence* (WHO 2003) 75-76.

3.2.1.5 Sexual harassment of a ‘child’

‘Harassment’ refers to the act of ‘annoying or worrying somebody by putting pressure on them or saying or doing unpleasant things to them’.³⁷⁷ Article 40 of the Istanbul Convention defines ‘sexual harassment’ as ‘any form of unwanted verbal, non-verbal, or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating, or offensive environment’.³⁷⁸ The Istanbul Convention³⁷⁹ currently provides the only international legal definition of this although such acts are commonly recognized as a form of gender-based violence.³⁸⁰ ‘Unwanted sexual comments’ can also be a form of sexual harassment. The process of sexual abuse may include or even start with unwanted sexual comments about, for instance, the way in which a child is dressed or is using make-up or his/her physical beauty in order to embarrass the child. While such comments do not always lead to sexually abusive activities, they may still cause harm to the child and may be considered a form of non-contact abuse. Child sexual abuse is often divided into contact and non-contact sexual abuse. The latter includes acts where the abuser does not touch the child.³⁸¹ The notion of sexual harassment is used more often in respect of adults than for children and frequently in relation to incidents at the workplace or elsewhere outside the home. However, it can also take place within the home/family setting. Children can be sexually harassed at school and in other places. This type of offence can be committed by, for instance, teachers, coaches and other staff who are supposed to care for the child.³⁸²

Hence, ‘sexual harassment’ refers not only to sexual conduct with the explicit intention to violate the dignity of another person (ie purpose) but also to conduct of a sexual nature which

³⁷⁷ *Merriam-Webster's Learner's Dictionary* <<http://www.learnersdictionary.com/definition/harass>> accessed 25 October 2016.

³⁷⁸ Convention on Preventing and Combating Violence Against Women and Domestic Violence (11 May 2011) CETS 210.

³⁷⁹ Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (November 2014).

³⁸⁰ See WAVE (Women Against Violence Europe) and UN Population Fund (UNFPA) Regional Office for Eastern Europe and Central Asia, ‘Strengthening Health System Responses to Gender-based Violence in Eastern Europe and Central Asia – A Resource Package: Defining Gender-Based Violence’ <<http://www.health-genderviolence.org/training-programme-for-health-care-providers/facts-on-gbv/defining-gender-based-violence/21>> accessed 10 October 2016.

³⁸¹ See more, RAINN, ‘Sexual Harassment’ <<https://www.rainn.org/articles/sexual-harassment>> accessed 10 October 2016.

³⁸² Catharine A MacKinnon, ‘In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education’ (2016) 125 *Yale Law Journal* 2045.

a person experiences as offensive or intimidating (ie effect).³⁸³ It therefore relates clearly to what is also sometimes called sexual bullying. While bullying is not necessarily related to sexual abuse or exploitation, it can also contain such elements and can be linked to sexting, grooming and sexual extortion. Sexual bullying is sometimes used to refer to coercion, intimidation enticement or unwanted pressure from peers and is initiated by them since they want to have sex with the victim.³⁸⁴ ‘Unwanted sexual comments’ can also constitute sexual harassment due to the effect they may have on the victim, even if the person who makes the comments does not necessarily intend that they violate the dignity of the person.

3.2.1.6 Online child sexual abuse

As explained above, sexual exploitation and sexual abuse of children increasingly take place through the medium of the Internet or because of some connection to the online environment. Online sexual abuse can take many different forms. For instance, a child might be sexually molested and/or harassed through social media or other online channels. Child sexual abuse also has an online dimension when, for instance, acts of sexual abuse are photographed or video-/audio-recorded and then uploaded and made available online, whether for personal use or shared with others. Each repeated viewing and/or sharing of such recorded material constitutes a new violation of the rights of the child. More details on different forms of online sexual abuse are discussed in the sections below. It is important to note, however, that online child sexual abuse is not by itself a new and distinct form of sexual abuse. Rather, different manifestations of child sexual abuse are facilitated by the Internet. In other words, the Internet is another medium which a perpetrator can use to sexually abuse a child. ‘Virtual child sexual abuse’ is a term which is sometimes used as a synonym for ‘online child sexual abuse’. Care should be taken not to confuse these two terms, which have very different meanings. ‘Virtual’ relates to online artificially or digitally created images of children who are involved in sexual activities. The realism of such images creates the illusion that children are actually involved, although this is not the case. More details on virtual child sexual abuse can be found in the section below, which discusses ‘computer/digitally generated child sexual abuse material’.

³⁸³ Council of Europe, ‘Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence’ (11 May 2011) para 208 <<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>> accessed 10 October 2016.

³⁸⁴ Department for Children, Schools and Families, ‘Child Sexual Exploitation’ (2009) <<https://www.gov.uk/government/publications/child-sexual-exploitation-definition-and-guide-for-practitioners>> accessed 10 October 2016, para 3.5 at 17.

‘Online child sexual abuse’ has become a widely used term which refers to both child sexual abuse and child exploitation. It is facilitated by information and communication technologies (ICTs) (eg, online grooming) and is committed elsewhere and then repeated through online sharing of images and videos (which is where it becomes exploitation, as further discussed in the section which deals with ‘online child sexual exploitation’). The preferred term is ‘technology-facilitated child sexual abuse’.³⁸⁵

3.3 Sexual exploitation of children

International law – the meaning and content of which has been presented in Chapter One – does not define the term ‘commercial sexual exploitation of children’ (CSEC). The term has also been increasingly used interchangeably with the term ‘child sexual exploitation’. This is evident, for example, from the outcome documents adopted by the three World Congresses against the Sexual Exploitation of Children. The outcome document of the first World Congress against Commercial Sexual Exploitation of Children held in Stockholm in 1996, the so-called Stockholm Declaration and Agenda for Action, refers to CSEC. It defines this phenomenon as follows:

It comprises sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and violence against children, and amounts to forced labour and a contemporary form of slavery.³⁸⁶

The second World Congress against Commercial Sexual Exploitation of Children was held in Yokohama in 2001. However, its outcome document, the Yokohama Commitment, moved away from the term ‘commercial’ since it spoke of the protection of children from all forms of sexual exploitation.³⁸⁷ Nevertheless, the term was still included in the framework for criminal responsibility and accountability and for the purpose of ‘fighting’ or ‘combating’ CSEC.³⁸⁸

³⁸⁵ NSPCC, ‘Impact of Online and Offline Child Sexual Abuse: "Everyone Deserves to be Happy and Safe"’ <<https://www.nspcc.org.uk/services-and-resources/research-and-resources/2017/impact-online-offline-child-sexual-abuse/>> accessed 2 February 2018.

³⁸⁶ Stockholm Declaration and Agenda for Action (adopted 31 August 1996) para 5 <http://www.unicef.org/lac/spbarbados/Planning/Global/Child%20protection/The%20Stockholm%20Declaration%20and%20Agenda%20for%20Action_1996.doc> accessed 8 October 2016.

³⁸⁷ Yokohama Global Commitment 2001 (20 December 2001) para 5 <<http://www.unicef.org/events/yokohama/outcome.html>> accessed 9 October 2016.

³⁸⁸ *ibid.*

At the third World Congress in Rio de Janeiro in 2008, the term ‘commercial’ was dropped from the title, which was changed to World Congress against the Sexual Exploitation of Children and Adolescents. This decision came after discussions between various participating organisations and Congress organisers, who concluded that the term ‘commercial’ in the context of sexual exploitation of children did not add anything to this notion and was therefore redundant. The outcome document of the third World Congress did not mention the term ‘commercial’ except in paragraph 59, which urges states to: ‘Undertake national and international coordinated measures to curb and stop the involvement of organised crime in commercial sexual exploitation of children and bring persons and/or legal entities responsible for this form of organized crime to justice.’³⁸⁹

The term ‘commercial’ thus only appears within the context of imposing criminal responsibility and accountability on members of organised crime. In contrast, EU Directive 2011/93 appears to include commercial aspects into the definition of the term ‘sexual exploitation’. It provides that states should make full use of ‘existing instruments on the seizure and confiscation of the proceeds of crime’ in the fight against sexual exploitation of children.³⁹⁰ Moreover, Article 7 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography requires state parties to take measures to seize and confiscate goods which have been used to commit or facilitate offences under the OPSC and proceeds derived from such offences. It reads:

States Parties shall, subject to the provisions of their national law:

(a) Take measures to provide for the seizure and confiscation, as appropriate, of:

(i) Goods, such as materials, assets and other instrumentalities used to commit or facilitate offences under the present protocol;

(ii) Proceeds derived from such offences;

(b) Execute requests from another State Party for seizure or confiscation of goods or proceeds referred to in subparagraph (a);

(c) Take measures aimed at closing, on a temporary or definitive basis, premises used to commit such offences.³⁹¹

There are arguments in favour of maintaining the term ‘commercial’ in the context of (organised) criminality and financial transactions. For instance, the Financial Coalitions³⁹²

³⁸⁹ Rio de Janeiro Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents (28 November 2008) <http://www.unicef.org/protection/Rio_Declaration_and_Call_for_Action.pdf> accessed 10 October 2016.

³⁹⁰ Directive 2011/92/EU (n 335) para 23.

³⁹¹ Optional Protocol on the Sale of Children (n 188).

emphasise the commercial nature of certain financial transactions and websites that provide access to children for sexual exploitation and abuse, as well as to child sexual abuse material. They therefore advocate that the use of the word ‘commercial’ is important to distinguish this particular form of exploitation and to hold payment and money transfer providers accountable.³⁹³ This term also conveys that criminals and criminal networks profit from the sexual commodification and objectification of children. As such, CSEC can be understood as a subset of ‘sexual exploitation of children’.

From a linguistic point of view, various English dictionaries explain that the term ‘commercial’ refers to something/someone ‘concerned with or engaged in commerce’, ‘making or intended to make a profit’, or ‘having profit rather than another value as a primary aim’.³⁹⁴ It also involves ‘buying and selling’ things, goods or services that have ‘been produced with the aim of making money’.³⁹⁵ As explained above, the term ‘exploitation’ refers to the unfair use of something/someone for one’s own advantage or benefit, which includes both monetary and non-monetary exchanges. For the reasons set out in this section, a distinction can thus be made between ‘sexual exploitation’ and ‘commercial sexual exploitation’. The latter is a form of sexual exploitation in which the focus is on gaining monetary benefits and the primary driver is that organised criminals seek economic gain.

3.3.1 Child sexual exploitation online

As previously explained, sexual abuse and sexual exploitation of children increasingly take place on or through the Internet, or with some connection to the online environment. Just as child sexual abuse and exploitation offline can take a variety of forms, so can online abuse and exploitation. The term ‘online child sexual exploitation’ refers to the use of the Internet as a *means* to exploit children sexually. Indeed, the terms ‘ICT-facilitated’³⁹⁶ and ‘cyber-

³⁹² See the European Financial Coalition <<http://www.europeanfinancialcoalition.eu/>> accessed 10 October 2016.

³⁹³ The Financial Coalitions work to enhance ‘collaboration across sectors ... to better understand the commercial business models of illegal merchants involved in the sale, access and distribution of child sexual abuse images in order to develop tools towards their prevention’ see <<https://www.itu.int/en/cop/case-studies/Documents/FCACP.PDF>> accessed 10 October 2016.

³⁹⁴ *English Oxford Dictionary* <<https://en.oxforddictionaries.com/definition/commercial>> accessed 11 October 2016.

³⁹⁵ *Merriam-Webster English Dictionary* <<http://www.merriam-webster.com/dictionary/commercial>> accessed 11 October 2016.

³⁹⁶ UN Office on Drugs and Crime (UNODC), ‘Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children’ (May 2015) 2-3 <https://www.unodc.org/documents/organized-crime/cybercrime/Study_on_the_Effects.pdf> accessed 10 October 2016.

enabled',³⁹⁷ child sexual exploitation are sometimes used as alternatives to define these practices. The reference to 'online child sexual exploitation' includes all acts of a sexually exploitative nature carried out against a child who has, at some stage, a connection to the online environment. It includes any use of ICT which results in sexual exploitation or causes a child to be sexually exploited or which results in or causes images or other material documenting such sexual exploitation to be produced, bought, sold, possessed, distributed or transmitted. This notion can thus encompass, but is not limited to:

- sexual exploitation that is carried out while the victim is online (such as enticing/manipulating/threatening a child into performing sexual acts in front of a webcam);
- identifying and/or grooming potential child victims online with a view to exploiting them sexually (whether the acts that follow are then carried out online or offline); and
- the distribution, dissemination, importing, exporting, offering, selling, possession of, or knowingly obtaining access to child sexual exploitation material online (even if the sexual abuse that is depicted in the material was carried out offline).

Hence, the demarcation line between child sexual exploitation online and offline is often blurred and, with the rapid evolution of ICTs, child sexual exploitation with some online component is increasingly common. Whilst the term 'online child sexual exploitation' can be used as an umbrella-term to include such forms of sexual exploitation that have an online component or a relation to the Internet, it should be recalled that the Internet is only a means, albeit a very potent one, for exploiting children sexually. Yet it is not, in and of itself, a distinct type of sexual exploitation.

3.4 United Nations organizations' efforts to address child sexual abuse

Article 34 of the CRC deals with sexual exploitation of children and affirms the rights of children to be protected against sexual activities which are forced upon them, such as prostitution and pornographic activities and exposure to them. According to the CRC Committee, sexual abuse and exploitation includes:

³⁹⁷ Mike McGuire and Samantha Dowling, 'Cyber Crime: A Review of the Evidence: Summary of Key Findings and Implications' (Home Office, Research Report 75) 4.

- (a) The inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity;³⁹⁸
- (b) The use of children for commercial sexual exploitation; and
- (c) Audio or visual images of child sexual abuse;
- (d) Child prostitution, sexual slavery, sexual exploitation within the travel and tourism sector, trafficking (within and between States) and the sale of children for sexual purposes and forced marriage.³⁹⁹

Many children experience sexual victimisation which is not accompanied by physical force or restraint but which is nonetheless psychologically intrusive, exploitative and traumatic. The CRC Committee's recommendations to state parties are that all forms of child sexual abusers are penalised and that domestic legislation is adopted so that offenders are treated as criminals. The offenders are to be punished irrespective of their residential status and within this process child victims should be protected. The sexual trafficking of children, including 'ritual prostitution' (*Devdasi*) in India,⁴⁰⁰ must be prohibited. The recommendations also emphasise that child victims should not be discriminated against because of their gender and that these incidents should be reported. Both the child and the reporter should be adequately protected. The domestic law should establish simple and prompt procedures which are 'child-friendly' and attentive to the sensitivity of child victims. The Committee also urges state parties to enforce such laws.⁴⁰¹

In General Comment 13, the Committee recognises that state parties and child protection professionals require clearer, more detailed, as well as evidence-based technical information and assistance in order to strengthen their understanding of Article 19 of the CRC and to fully transpose this provision.⁴⁰² General comments, involving interpretations of what CRC legal obligations are required in terms of policy direction and actual state practice, offer guidance to states parties on how to implement the CRC.⁴⁰³ General Comment 13 requires states parties to address and report all specified issues of violence in their reports. However,

³⁹⁸ Sexual abuse comprises any sexual activities imposed by an adult on a child, against which the child is entitled to protection by criminal law. Sexual activities are also considered as abuse when committed against a child by another child, if the child offender is significantly older than the child victim or uses power, threat or other means of pressure. Sexual activities between children are not considered as sexual abuse if the children are older than the age limit defined by the State party for consensual sexual activities.

³⁹⁹ CRC Committee, 'General Comment No 13: The Right of the Child to Freedom from All Forms of Violence (18 April 2011) CRC/C/GC/13, para 25.

⁴⁰⁰ Prachi Patil, 'Understanding Sexual Violence as a Form of Caste Violence' (2016) 7 *Journal of Social Inclusion* 59, 62.

⁴⁰¹ Mantāphōn (n 49).

⁴⁰² CRC Committee (n 399).

⁴⁰³ Susan Bennett, Stuart N Hart and Kimberly Ann Svevo-Cianci, 'The Need for a General Comment for Article 19 of the UN Convention on the Rights of the Child: Toward Enlightenment and Progress for Child Protection' (2009) 33 *Child Abuse & Neglect* 783, 788.

perhaps the most important contribution of the CRC system are the rich intellectual discussions and outcomes of disputes and consultations which take place when general comments are being prepared. General comments also spell out methodological frameworks, especially for states where other materials are unavailable as a basis to discuss issues and to develop educational material. The Committee's Concluding Observations to state parties progress reports also make recourse to General Comment 13. They thus offer guidance so that states understand to what extent they comply and clear up technical and other issues, which are not elaborated on in the Convention.⁴⁰⁴ General Comment 13 was formulated after a consultation process which included professionals, governments and NGO representatives from all world regions. The results of this consultation process demonstrated that there was a strong need to prevent violence through government assistance and support for families so that they have the capacity to provide care (preamble and Articles 3, 18 and 19), can enjoy an adequate standard of living (Article 27) and can protect their children (Article 18). Whilst respondents also stressed that families should be responsible for the care of their children, including their protection, they considered that the state should be accountable at an even higher level in cases where the family is unable to care for and protect their children (Article 18).⁴⁰⁵

Yet, whilst the CRC guarantees that children up to 18 years of age have the right to special provision, protection and participation, millions of children today lack such protection. A 2009 study estimated that globally around 19.7% of females and 7.9% of boys who were under 18 years (and who were thus children) were subjected to different types of sexual violence.⁴⁰⁶ All sexual abuse of children by adults can be termed violent; it comprises a wide range of sexual coercion from child prostitution, child pornography, sex trafficking and sex tourism, to sexual abuse by relatives (and others known by the victim) and child marriage.⁴⁰⁷ This highlights that state practice is ineffective and lacks a united response to providing adequate protection to children. This is not to say that the Committee, as well as the Special

⁴⁰⁴ Kimberly A Svevo-Cianci and others, 'The New UN CRC General Comment 13: "The Right of the Child to Freedom From All Forms Of Violence"—Changing How The World Conceptualizes Child Protection' (2011) 35 *Child Abuse & Neglect* 979, 980.

⁴⁰⁵ *ibid.*

⁴⁰⁶ J Wihbey, 'Global Prevalence of Child Sexual Abuse' (*Harvard Kennedy School*, 15 November 2011) <<https://journalistsresource.org/studies/government/criminal-justice/global-prevalence-child-sexual-abuse>> accessed 1 August 2017.

⁴⁰⁷ Pernilla Ouis, 'Honourable traditions? Honour violence, early marriage and sexual abuse of teenage girls in Lebanon, the occupied Palestinian territories and Yemen' (2009) *The International Journal of Children's Rights* 17 no. 3: 445-474.

Representative of the UN, the Secretary General on Violence against Children Marta Santos Pais, have not tried to strengthen the protection of these children. For instance, the Committee's General Comment 13 discussions identified that the marital or emancipated status is merely a social construction which should not overshadow a child's need for the protections which the CRC affords. However, as long as international law is weak and affords discretion to state parties to determine the age of the child, it is unlikely that it will result in these social constructions being entirely abandoned by all state parties. This unfortunately has negative ramifications for millions of children and adolescents who are deprived of their rights,⁴⁰⁸ especially Article 34 and Article 39. Article 34 renders it obligatory for state parties to prevent child sexual exploitation and abuse, economic exploitation, their sale and trafficking, and requires that they are rehabilitated and receive the necessary support and care from the state parties and NGOs.⁴⁰⁹

Whilst the Committee has urged state parties to conduct surveys and studies in order to develop and execute proper policies and laws in order to prevent children becoming victims of such crimes, such requirements appear ineffective due to the failure of the CRC to determine the age of the child and not to allow state parties to decide this.⁴¹⁰

Although the CRC is certainly a milestone in the protection of children against child sexual abuse and exploitation, there still exist loopholes which result in the CRC Committee being unable to effectively prevent this crime. In other words, despite the various commitments in the CRC, including to combat child sexual abuse and exploitation, problems still exist, especially at the domestic level.⁴¹¹ One of the main obstacles is that certain states do not properly implement the CRC. They may fail to amend their laws and to adopt new laws which are fully aligned with the requirements of the CRC. States may also fail create the domestic 'child rights monitoring bodies', eg, an ombudsperson or children's commissioner, and equip them with far-reaching powers to investigate children complaints, including child sexual abuse and exploitation cases.⁴¹² Those who are more privileged within society may

⁴⁰⁸ Svevo-Cianci and others (n 321) 981.

⁴⁰⁹ Mantāphōn (n 49) 37.

⁴¹⁰ *ibid* 39.

⁴¹¹ Julia Sloth-Nielsen and Ton Liefwaard, *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill Nijhoff 2017) 22-23.

⁴¹² Laura Lundy and others, 'The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 States' (UNICEF, 2012) 5 <<https://www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Filetoupload,368351,en.pdf>> accessed 1 August 2017.

also be exempted from being punished for child sexual abuse and there may be insufficient accountability. States may also only pay lip-service to their CRC commitments, ie they may adopt provisions which outlaw child sexual abuse and exploitation, but they do not enforce these laws. Lack of enforceable rights may also be attributable to an insufficient ‘child-rights culture’.⁴¹³

Another reason why the crime of child sexual abuse is not being effectively prevented is that state parties have entered reservations, including in order to uphold *Sharia*. As discussed in the next section, a strict application of *Sharia* can make it difficult for victims of child sexual abuse and exploitation to receive justice. Discrimination, poverty and inequality also hinder the full transposition of the CRC commitments. For instance, non-domestic children from poorer backgrounds may not receive the same level of protection as locals. They may be at a higher risk of falling prey to child sexual exploitation. Another particular pressing issue which has failed to prevent this crime is that victimisation may take place. Put differently, those children who disclose child sexual abuse may be subjected to punishment, especially in Muslim states, and are therefore at risk because they complain. ICT can also heighten the risk of online child sexual exploitation.

Arguably, the core reason why this crime has not been effectively prevented is that at the international level states have been afforded too much leeway. This is because the mechanism to deal with government failures to transpose the commitments are weak, with poor enforcement and monitoring. Individuals cannot lodge complaints against a state party as, for example, is the case with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴¹⁴ However, the CRC Optional Protocol allows for this, though few states have ratified it.⁴¹⁵

This is not to say that institutions have not made efforts to stop this crime so far. For instance, in 2012 the US together with the European Commission created the Global Alliance Against Child Sexual Abuse Online. Fifty-four states have joined this alliance in order to adopt specific measures to heighten protection for children, to bring offenders to justice, to raise more awareness about the topic, and to ensure that there is less child pornography available

⁴¹³ *ibid* 8.

⁴¹⁴ *ibid*.

⁴¹⁵ *ibid*.

online.⁴¹⁶ For this purpose, shared operational goals and policy targets have been set.⁴¹⁷ The International Criminal Police Organisation (INTERPOL) and the European Police Office (Europol) have created several databases so that child sexual abuse victims can be identified.⁴¹⁸ Awareness raising campaigns which target parents, guardians and children have been pursued at the international, regional and national level.⁴¹⁹

Civil society activism, including through NGOs, has also been promoted in the West. For instance, a World Day for the Prevention of Child Abuse was launched by the Women's World Summit Foundation.⁴²⁰ A model national response has been developed with the help of the WePROTECT Global Alliance.⁴²¹ Organisations and governments have pledged their support at the Abu-Dhabi Summit 2015 to adopt such a structured domestic approach to build their capabilities in this regard.⁴²²

3.5 Child sexual abuse under Islamic law

It is believed that Islam's strictures on sexual relationships and its prohibition of extra-marital sex guarantee children's rights, especially in terms of receiving care and protection within a family environment.⁴²³ There are a number of rights provided by Islam to humans, by virtue of being human, like the right to life and the right to be protected from physical harm.⁴²⁴ Parents are not permitted to neglect the child's needs nor to abuse them.⁴²⁵ Islamic law

⁴¹⁶ European Commission, 'We Protect Global Alliance to End Child Sexual Exploitation Online' (2017) <https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/global-alliance-against-child-abuse_en> accessed 1 August 2017.

⁴¹⁷ European Commission, 'European Commission Declaration on the Launch of the Global Alliance Against Child Sexual Abuse Online' (5 December 2012) <http://europa.eu/rapid/press-release_MEMO-12-944_en.htm> accessed 1 August 2017.

⁴¹⁸ Jovan Kurbalija, *An Introduction to Internet Governance* (7th edn, Diplo Foundation 2016) 111.

⁴¹⁹ *ibid.*

⁴²⁰ American Psychological Association, 'World Day for the Prevention of Child Abuse' (2017) <<http://www.apa.org/pi/prevent-violence/programs/international-day.aspx>> accessed 1 August 2017.

⁴²¹ WePROTECT Global Alliance, 'Preventing and Tackling Child Sexual Exploitation and Abuse (CSEA): A Model National Response' (November 2016) 1 <<https://static1.squarespace.com/static/5630f48de4b00a75476ecf0a/t/582ba50bc534a51764e8a4ec/1479255310190/WePROTECT+Global+Alliance+Model+National+Response+Guidance.pdf>> accessed 1 August 2017.

⁴²² *ibid.* 5.

⁴²³ Rajabi-Ardeshiri (n 243) 479.

⁴²⁴ Musab Hayatli, 'Islam, Human Rights and Displacement' (2009) Refugee Studies Centre, University of Oxford <<http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/Human-Rights/islam-human-rights.pdf>> accessed 1 August 2016.

⁴²⁵ UN, 'Combating Trafficking in Persons in Accordance with the Principles of Islamic Law' (2010) 37 <https://www.unodc.org/documents/human-trafficking/islamic_law_TIP_E_ebook_18_March_2010_V0985841.pdf> accessed 10 August 2017.

proscribes any kind of abuse – sexual, physical or emotional abuse – and considers it a sin to perpetrate sexual abuse.⁴²⁶

Amongst all relationships within human society, the ‘parent-child’ relationship is considered the most important in Islam and one which requires mutual affection and respect. Islam has established clear rules which protect children from being mistreated and abused. For instance, Islam recommends that children who are aged six and older should sleep in their own beds.⁴²⁷ They are also meant to dress modestly.⁴²⁸ Child trafficking, which mostly takes place due to insufficient parental care, is prevented when these Islamic guidelines are properly followed. Some therefore argue that child sexual abuse laws and policies are unnecessary if society adheres to these strict values.⁴²⁹ However, the issue is that these are religious and moral obligations which do not result in legal action being taken against perpetrators without the requisite laws and public bodies responsible for their enforcement. Moreover, Muslim societies are often reluctant to recognise child sexual abuse. This is attributable to the Islamic concepts of upholding *izzat* (honour/respect), showing *haya* (modesty) and not causing *sharam* (shame/embarrassment).⁴³⁰ As a result of these religious values, it has become a cultural taboo to speak of sexual matters and this also makes disclosure extremely difficult.⁴³¹ Hence, there is no open discourse about sexuality, which in turn creates feelings of discomfort in victims and a reluctance to speak up.⁴³² Child sexual abuse is therefore often shrouded in secrecy as it brings shame not only on the victim but also his/her family.⁴³³ Disclosure can also result in the child being subjected to honour violence.⁴³⁴

Moreover, Muslim majority states are still very patriarchal.⁴³⁵ Men may perceive this as giving them the right to sexually abuse women, including girls, as they think that they can

⁴²⁶ Tracy J Trothen, *Shattering the Illusion: Child Sexual Abuse and Canadian Religious Institutions* (Wilfrid Laurier University Press 2012) 125.

⁴²⁷ *ibid.*

⁴²⁸ *ibid.*

⁴²⁹ *ibid.*

⁴³⁰ Philip Gilligan and Shamim Akhtar, 'Cultural Barriers to the Disclosure of Child Sexual Abuse in Asian Communities: Listening to What Women Say' (2006) 36 *British Journal of Social Work* 1368.

⁴³¹ Trothen (n 426) 125.

⁴³² *ibid.*

⁴³³ Paris Goodyear-Brown, *Handbook of Child Sexual Abuse: Identification, Assessment, and Treatment* (Wiley & Sons 2011) ch 22.

⁴³⁴ Ouis (n 407) 445.

⁴³⁵ Paris Goodyear-Brown (ed), *Handbook of Child Sexual Abuse: Identification, Assessment, and Treatment* (Wiley & Sons 2011) ch 22.

control them.⁴³⁶ As a result, girls are particularly at risk of gender-based sexual violence in the form of sexual abuse, also because of the custom of early marriage.⁴³⁷ The most fundamental issue is arguably that children who complain about sexual abuse outside the institution of marriage can be charged with extra-marital sexual affairs.⁴³⁸ This is because Islam proscribes extra-marital affairs and any sexual relations outside marriage and imposes very strict sanctions for these so-called *zina* offences, which can be found in the penal codes of most Muslim states. Instead of enquiring whether the sexual acts were consensual or not, it is therefore asked whether or not sexual acts occurred between married individuals.⁴³⁹ Child sexual abuse victims who have been sexually abused must also have four eyewitnesses who witness the act as otherwise an allegation of sexual abuse by a victim is not considered a *hudud* crime (for which the victim must be punished).

Another obstacle to combat child sexual abuse in Muslim majority states is that girls often have to seek permission from their male guardian before they can complain.⁴⁴⁰ For example, in order to file a court case in Saudi Arabia without the presence of a male guardian, a woman or girl has to have a national ID card, which many of them do not have as some male guardians make it very difficult for them to obtain one.⁴⁴¹ In cases where they do have a national ID card and have filed a complaint, some judges have arbitrarily refused to accept it without the presence of their male guardians who might also be their abuser.⁴⁴² The male guardianship system has meant that abused women and girls have been charged with disobeying their male guardians rather than their guardians being charged with sexually and/or violently abusing them.⁴⁴³ Perpetrators may also invoke legal, religious and cultural justifications.⁴⁴⁴ For instance, a man who marries an underage girl and rapes her is likely to escape any punishment on the basis that his country permits that she can marry and does not outlaw marital rape.⁴⁴⁵

⁴³⁶ *ibid.*

⁴³⁷ Ouis (n 407) 445.

⁴³⁸ CRC Committee, 'List of Issues in Relation to the Combined Third and Fourth Periodic Reports of Saudi Arabia' (14 March 2016) CRC/C/SAU/Q/3-4, 1-4, 2.

⁴³⁹ Essam Al-Shail and others, *The Cultural Reinforcers of Child Abuse: Child Abuse and Neglect-A Multidimensional Approach* (Intech Open Access 2012) 28.

⁴⁴⁰ *ibid.*

⁴⁴¹ Liv Tønnessen, *Women's Activism in Saudi Arabia: Male Guardianship and Sexual Violence* (Chr. Michelsen Institute CMI 2016).

⁴⁴² *ibid.*

⁴⁴³ *ibid.*

⁴⁴⁴ Celia Doyle, *Child Sexual Abuse: A Guide for Health Professionals* (Springer Science and Business Media 1994) 49.

⁴⁴⁵ *ibid.*

A cross-cultural review of child abuse concepts demonstrates that religion and societal norms still play an important role in Muslim states. This has made it difficult to adequately protect children against child sexual abuse and exploitation.

3.6 Regional Islamic instruments for protecting children from sexual abuse

Muslim states have increasingly recognised the importance of protecting children from sexual abuse and exploitation. Regional instruments have therefore been adopted which safeguard the rights of children. One such instrument is the CDHRI which was adopted in 1990 and issued to serve as a set of non-binding guiding principles with respect to human rights.⁴⁴⁶ It consists of a preamble and 25 articles.⁴⁴⁷ Article 5(a) of the Cairo Declaration provides that ‘the family is the foundation of society and marriage is the basis of its formation’, and Article 5(b) further commands that it is for this reason that state parties ‘shall ensure family protection and welfare’. Hence, child protection is promoted by protecting the family unit and ensuring its welfare. Gender-based discrimination is also combated to a certain extent since it is affirmed that ‘women are equal to man in human dignity’.⁴⁴⁸ Article 11 is also relevant in the context of child sexual abuse since this provision stresses that ‘human beings are born free’ and that ‘no one has the right to enslave, humiliate, oppress or exploit them’. It is also declared that ‘everyone shall have the right to live in security’, which includes children.

Nevertheless, a problem with the Cairo Declaration is that it only spells out broad guidelines for OIC member states.⁴⁴⁹ There is no committee or body which scrutinises whether the proclaimed human rights are also facilitated and enforced by Muslim states.⁴⁵⁰ This arguably renders these rights rather illusory. The other issue with the Cairo Declaration is that various articles emphasise the importance of *Sharia* compliance⁴⁵¹ which, as has already been shown in this study, can be at variance with genuine children’s rights. This is demonstrated in Article 7 which elucidates that ‘[a]s of the moment of birth, every child has rights due from the parents, the society and the state to be accorded proper nursing, education and material,

⁴⁴⁶ Rehman (n 250) 368.

⁴⁴⁷ *ibid.*

⁴⁴⁸ Cairo Declaration (n 119) art 6.

⁴⁴⁹ Mansoor (n 258) 54.

⁴⁵⁰ *ibid.*

⁴⁵¹ Turan Kayaoğlu, 'It's Time to Revise The Cairo Declaration of Human Rights in Islam' (23 April 2012) <<https://www.brookings.edu/opinions/its-time-to-revise-the-cairo-declaration-of-human-rights-in-islam/>> accessed 1 August 2017.

hygienic and moral care'. Yet, all of the rights enshrined therein are circumscribed by *Sharia* values and principles⁴⁵² which if the child is a girl will be severely blighted by gender inequality and patriarchal discrimination from her parents, society and the state. Correspondingly, Article 2 is ostensibly for the protection of the right to life but the reality is that certain *Sharia* prescribed offences can warrant the death penalty which pubertal adolescents under 18 years of age can legitimately receive. However, depending on the particular interpretation of *Sharia*, this can cause problems for protecting children against child sexual abuse and exploitation. As discussed in the previous section, the way in which the topic of sexual relations is viewed in Islam means that it makes it very difficult to permit victims to come forward. This is because they are not just viewed as victims but also as criminals because of the illegal sexual abuse which they were forced to engage in.

Child protection is also promoted through the Arab Charter on Human Rights (ACHR) which was adopted in Cairo in 1994. Similar to the Cairo Declaration, Article 38(a) of the ACHR confirms that 'the family is the basic unit of society whose protection it shall enjoy'. It therefore requires 'the state ... to provide outstanding care and special protection for the family', including children. It also contains a child specific provision which affirms that 'young persons have the right to be afforded the most ample opportunities for physical and mental development'. However, the Arab Charter also permits children to receive capital punishment, which clearly breaches the CRC.⁴⁵³ This is extremely worrying in light of the fact that sexual relations outside marriage fall within the *zina* offence category for which a death sentence can be imposed.⁴⁵⁴

In 2005, the Organisation of the Islamic Conference/cooperation (OIC) adopted the Covenant on the Rights of the Child in Islam. Like the Arab Charter and the Cairo Declaration, this Covenant emphasises the importance of the family unit.⁴⁵⁵ It spells out various objectives, including to promote the family unit and to create a safe childhood.⁴⁵⁶ However, whilst states parties are required to respect and observe *Sharia*,⁴⁵⁷ the Covenant also provides a caveat to

⁴⁵² Rehman (n 250) 369.

⁴⁵³ Ton Liefaard, *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (BRILL 2016) 22.

⁴⁵⁴ Nathan Clemens, *The Changing Face of Religion and Human Rights: A Personal Reflection* (Martinus Nijhoff 2009) 135.

⁴⁵⁵ See OIC (n 257) Preamble.

⁴⁵⁶ *ibid* art 2(1)-(2).

⁴⁵⁷ *ibid* art 3(1).

this by requiring state parties to ‘end action based on customs, traditions or practices that are in conflict with the rights and duties stipulated in this Covenant’.⁴⁵⁸ This arguably could be used as a basis by Islamic scholars to develop an Islamic jurisprudence which distinguishes between child sexual abuse and child sexual exploitation and *zina* and *hudud* offences. Hence, child sexual abuse and child sexual exploitation could be identified as an exception to these Islamic offences on the basis that this is not what *Sharia* commands. This is also made clear by virtue of Article 6(2) which specifically deals with the prevention of violence, abuse and exploitation, and requires state parties to protect children against these types of harm. However, the terms violence, abuse and exploitation have not been further clarified nor how they are meant to be achieved.

Another regional Islamic instrument which was adopted in order to strengthen the rights of children is the Rabat Declaration on Child Issues. This was done at the First Islamic Ministerial Conference on Children’s Rights in Rabat in 2005. Unlike the other Islamic instruments, the Rabat Declaration contains a specific section entitled ‘Child Protection against Violence, Exploitation and Abuse’. It calls on ‘member states to take all appropriate measures to prevent and protect children from all forms and exploitation, abuse, torture and violence, including physical, mental, sexual and domestic violence’.⁴⁵⁹ However, what this specifically means has been left undefined. Nonetheless, it encourages member states to ‘take the necessary measures to eliminate all forms of discrimination against girls and all harmful traditional or customary practices, such as child marriage’. It also calls on member states to ‘enact and implement proper legislations and formulate, where appropriate, national plans, programmes and strategies protecting girls’. This is a more progressive approach than the one taken by the earlier Islamic instruments. However, it would have been better if a gender-neutral perspective had been included. In other words, state parties ought to have been encouraged to adopt legislation, plans and programmes for boys and girls alike and not just for girls, even though girls are often more disadvantaged. An analysis of the regional Islamic instruments reveals that the topic of child sexual abuse and exploitation has increasingly received attention by the Muslim community. Steps are being taken incrementally to overcome harmful traditional and customary practices which have become wrongly interwoven with *Sharia*.

⁴⁵⁸ *ibid* art 4(3).

⁴⁵⁹ Rabat Declaration (n 121) para 9.

3.7 Conclusion

Steps have been taken at the international level to combat child sexual abuse and child sexual exploitation. For this purpose, various legally binding instruments, as well as non-binding resolutions, have been adopted. This has allowed for various definitional attempts by a number of bodies. Guidance has also been provided by the CRC Committee on the different forms of child sexual abuse and child sexual exploitation. Certain factors, which may result in these crimes not being detected and effectively prosecuted, have been identified by the CRC Committee. This assists state parties with the adoption of laws and policies which are in compliance with their CRC commitments. However, the issue is that the CRC's mechanism to address failures by states is not very strong. As a result, it is still more of an aspiration to combat child sexual abuse and child sexual exploitation effectively. Furthermore, state parties may not feel sufficiently compelled to step up their efforts to create the necessary domestic framework to stop these crimes, especially in light of the fact that this is not an easy task.

The topic of child sexual abuse and exploitation is particularly marginalised in Muslim states. The emphasis on religious duties in Islam means that it is assumed that this is sufficient to prevent this pernicious form of harm against one of the most vulnerable groups of society. It is also a social taboo to openly debate this pressing social issue because it brings shame to those who disclose it, as well as to their families. In other words, it does not form part of the public discourse. The secrecy which surrounds the topic of child sexual abuse and exploitation means that there is insufficient awareness. This is arguably attributable to the fact that complaints about these crimes may result in victims being criminally prosecuted.

It is highly concerning that children who complain of sexual abuse can be charged with extra-marital sexual affairs.⁴⁶⁰ This is because Islam proscribes sexual relations outside marriage and imposes very strict sanctions for these so-called *zina* offences, which can be found in the penal codes of most Muslim states (this will be discussed in more detail in Chapter Eight). Instead of enquiring whether the sexual acts were consensual or not, they are questioned as to whether sexual acts occurred between un/married individuals.⁴⁶¹ Child sexual abuse victims who have been sexually abused must also have four eyewitnesses who witnessed the act as otherwise an allegation of sexual abuse by a victim is not considered a *hudud* crime and the

⁴⁶⁰ CRC Committee, 'List of Issues in Relation to the Combined Third and Fourth Periodic Reports of Saudi Arabia' (14 March 2016) CRC/C/SAU/Q/3-4, 1-4, 2.

⁴⁶¹ Essam Al-Shail and others, *The Cultural Reinforcers of Child Abuse: Child Abuse and Neglect-A Multidimensional Approach* (Intech Open Access 2012) 28.

victim will be punished instead. The way in which *Sharia* has been interpreted means that an insufficient distinction has been drawn between those who engage in extra-marital affairs and children who are being sexually abused and exploited. Child victims may therefore not feel very confident in the domestic machinery which should be available to help them. Neither might they feel encouraged or supported by their families. On the contrary, they may fear that a disclosure will result in honour violence.

Regional efforts by Muslim states are also arguably insufficient since they fail to temper the patriarchal interpretation of *Sharia*. No specific provision has been adopted which directly defines child sexual abuse and exploitation. It has also not been sufficiently clarified how the tensions which exist between upholding *Sharia* in respect of *zina* and *hudud* offences and effectively combating child sexual abuse can be overcome. It is against this background that the subsequent chapter further investigates the various international instruments which have been adopted in order to protect children against child sexual abuse and exploitation, particularly the CRC.

Part III: Substantive Rights

Chapter Four: A Contextual Analysis of the CRC and Relevant International Law to Deal with Child Sexual Abuse

4.0 Introduction

Child sexual abuse is undoubtedly a global concern. It is therefore important to contextually analyse the CRC in order to identify flaws within the Convention. Little has been done to identify effective response mechanisms which help prevent or even stop child sexual abuse. Limited resources have been made available to effectively protect adolescents from sexual misuse. The objective of this chapter is therefore to analyse international instruments which deal with child sexual abuse so that better deterrent strategies can be promulgated. The chapter analyses to what extent child rights are dealt with in different conventions, particularly the CRC.

The chapter opens with an examination of how child rights came to increasingly be part of international discourse and gradually moved into the international legislative arena. To do so, it traces the emergence and development of some key international instruments, including UNICEF, the UDHR and the Declaration of the Rights of the Child, and more, and how these set the stage for the adoption of the CRC. Next, the chapter considers some of the key features of the CRC by analysing some of its articles and one of its Optional Protocols in detail. Finally, the chapter scrutinises the complex issue of implementation and interrogates whether the minimal impact of the CRC upon the domestic legislation of some state parties is an inevitable corollary of inadequate international enforcement mechanisms overall.

4.1 Charter of the United Nations and the Universal Declaration of Human Rights 1948

In 1945, the Charter of the United Nations was adopted which created the United Nations. Whilst the Charter does not spell out human rights, some of its articles are nonetheless important for the realisation of international human rights. As Subedi stated in one of his books:

Although the Charter of the UN nowhere explicitly provides authorization for the political organs of the UN to assume monitoring powers, let alone enforcement powers, in the field of human rights, it does lay down certain values and principles of the international community, including respect for human rights.⁴⁶²

Article 55(c) states that one of the aims is to ensure the ‘observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’. This is not an expansive list of types of discrimination. It therefore does not, for instance, proscribe discrimination on the grounds of minority or age so as to also cover children.⁴⁶³ Member states commit themselves to take steps to realise the aim of observing human rights and fundamental freedoms.⁴⁶⁴ For this purpose, Article 55 of the Charter creates specialised agencies, such as the WHO.⁴⁶⁵ However, the task of protecting children was not entrusted to any of the specialised agencies.⁴⁶⁶ Instead, the responsibility was conferred on what was initially a temporary body, UNICEF, which was created to assist children in states ravaged by war.⁴⁶⁷ Whilst UNICEF was initially established with a rather narrow mandate to deal with children in areas where there had been armed conflict, this was later expanded.⁴⁶⁸ It was also renamed United Nations Children Fund (UNICEF) and made a permanent agency.⁴⁶⁹ This highlights that the topic of child rights was not prioritised initially and accorded as much weight following the Second World War.

Such an approach is also reflected in the UDHR which was adopted by the United Nations General Assembly on 10 December 1948. The UDHR states that human rights which are therein proclaimed apply to ‘all human beings’ and thus indirectly includes children.⁴⁷⁰ However, no specific reference is made to children. Article 25(2) only states that both motherhood and childhood require special care and that social protection should be afforded to all children, whether they are born in or out of wedlock.⁴⁷¹ Article 26 confirms the right to education and paragraph 3 provides that ‘[p]arents have a prior right to choose the kind of education that shall be given to their children’. However, these are very general provisions

⁴⁶² Subedi (n 4) 16.

⁴⁶³ Van Bueren (n 13) 16.

⁴⁶⁴ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) arts 55-56.

⁴⁶⁵ Van Bueren (n 13) 16.

⁴⁶⁶ *ibid.*

⁴⁶⁷ *ibid* 17.

⁴⁶⁸ *ibid.*

⁴⁶⁹ *ibid.*

⁴⁷⁰ T Mamatha and Devireddy Sarada, *Child Rights: Integrated Child Development Services Programme* (Discovery Publishing House 2009) 44.

⁴⁷¹ UDHR (n 244).

which must be elaborated on in order to spell out duties for states.⁴⁷² In other words, the UDHR fails to detail children rights as it does not explain what rights to ‘special care and help’ children have.⁴⁷³ The basic nature of the provisions insufficiently addresses the special needs which children have.⁴⁷⁴ Consequently, the Declaration fails to provide a comprehensive framework specifically for safeguarding the privileges of the child.

However, what is apparent from the two articles is that the focus is on affording social rights to children, rather than to also affirm civil and political rights.⁴⁷⁵ This reflects a social welfare approach which tries to achieve a certain standard of security and economic welfare through the provision of social services and the education system.⁴⁷⁶ Whilst this is certainly a stepping stone to protect children, the thorny issue is whether these provisions constitute legally binding norms.⁴⁷⁷ Undoubtedly, the UDHR is a primary UN document which establishes important human right standards and norms. Whilst some of the provisions of the Declaration are widely recognised around the world, it is unclear what the exact normative status is of the UDHR in general and in particular in respect of the provisions dealing with children. Those who favour a minimalist approach argue that the UDHR is not a binding resolution, whereas others argue that the UDHR constitutes customary international law.⁴⁷⁸ Some even go further and consider that the provisions have *jus cogens* status, though this position is difficult to maintain.⁴⁷⁹ The issue is that the disagreement about the precise normative status of the UDHR in general and also in respect of Articles 25 to 26, the very broadly phrased child rights are further undermined.⁴⁸⁰

4.2 Declaration of the Rights of the Child 1959

On 20 November 1959, the United Nations General Assembly adopted the Declaration of the Rights of the Child. This Declaration, whilst non-binding in nature per se, has expanded and amplified the rights of the child which are mentioned in Article 25(2) of the UDHR. It calls upon local and national authorities to take measures in compliance with the ten principles

⁴⁷² Ensalaco and Majka (n 210) 11.

⁴⁷³ *ibid.*

⁴⁷⁴ Mamatha and Sarada (n 470) 44.

⁴⁷⁵ Lourdes Gaitan Munoz, 'Childhood Welfare and the Rights of Children' in Sabine Andresen and others (eds), *Children and the Good Life: New Challenges for Research on Children* (Springer 2010) 42.

⁴⁷⁶ *ibid.*

⁴⁷⁷ Van Bueren (n 13) 18.

⁴⁷⁸ *ibid.*

⁴⁷⁹ *ibid.*

⁴⁸⁰ *ibid.*

which it enunciates to protect the privileges of children. These principles require that the privileges of children are protected, irrespective of their race, colour, sex and religion. It is affirmed that a child has the right to an identity and nationality from birth and must enjoy social security. Special care should be provided to physically, mentally or socially handicapped children. Every child must be provided with education until s/he reaches the elementary stages. The last two principles – 9 and 10 – are even more relevant for the present context. They aim to shield children against all types of neglect and cruelty and from practices that foster racial, religious or any other methods of prejudice. Hence, the primary aim of the Declaration is to provide a happy childhood to every child, which s/he can enjoy for his/her own good and for the good of society.⁴⁸¹

However, the Geneva Declaration of the Rights of the Child 1924 and the Declaration of the Rights of the Child 1959 impose no legal obligations upon states. Critics therefore consider them outdated, also because they include vague or idealistic aspirations, for instance, that children should experience ‘love and understanding’ and should not be separated from their mother.⁴⁸² They also fail to give first generation rights to children and thus do not recognise children as active rights-bearers.⁴⁸³

4.3 ICCPR

This international Covenant⁴⁸⁴ was adopted by the United Nations General Assembly on 16 December 1966.⁴⁸⁵ The ICCPR entered into force 23 March 1976 and has a mandate to commit state parties to respect the civil and political rights of individuals, including the rights to life, freedom of religion, freedom of speech and freedom of assembly. This commitment was reaffirmed in a recent meeting by the states parties to the Covenant.⁴⁸⁶ The Covenant contains provisions that strive to protect the rights of the child. Article 24⁴⁸⁷ makes clear that every child has to be afforded special protection, irrespective of his/her caste, creed, colour, sex, religion, social origin or birth. During the drafting of this article, the parties were in

⁴⁸¹ Declaration of the Rights of the Child (20 November 1959, entered into force 2 September 1990).

⁴⁸² Fortin (n 9) 36.

⁴⁸³ Invernizzi (n 137) 2.

⁴⁸⁴ ICCPR (n 116).

⁴⁸⁵ *ibid.*

⁴⁸⁶ UN, ‘The 2014 Meeting of States Parties to International Covenant on Civil and Political Rights’ <<http://www.un.org/press/en/2014/hr5199.doc.htm>> accessed 12 February 2017.

⁴⁸⁷ Article 24 states: ‘1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.’

consensus that children are entitled to special protection.⁴⁸⁸ Articles 7, 9 and 24 imply that a child has the right to the security of his body, freedom from torture and cruel and degrading treatment, and thus confer special protection. Article 18 provides that everyone should have the freedom to choose his or her religion. This means that a child is free to adopt any religion of his choice that may or may not be same as that of his parents.⁴⁸⁹

Moreover, in the ordinary course of life and in certain circumstances, young persons are given special treatment in comparison to adults. This is emphasised in Article 10(2)(b) of the Covenant. Article 10(2)(b) stipulates that '[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication'. Furthermore, Article 10(3) states that juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and status. Most significantly, Article 24 of the Covenant explicitly names the family, the state and society as custodians of child rights protection. Article 24 also promotes the right of the child to be registered at birth and the right to have a nationality. Overall, the ICCPR underscores an important set of rights that should be enjoyed by both the child and adults but pays special attention to the treatment of children. The articles which protect the rights of the child are in line with the principles set out in the Declaration of Rights of the Child 1959. However, one serious weakness of the ICCPR is that there exists no specific provision which deals with sexual abuse, including child sexual abuse and exploitation. The reason for this is that the ICCPR is a first-generation human rights treaty which was particularly designed to protect individuals against arbitrary and abusive state intrusion by affording basic security.⁴⁹⁰

State parties are also not compelled to take action against child sexual abuse because the Human Right Committee, which otherwise supervises the implementation of the Covenant,

⁴⁸⁸ Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 1999) 3.

⁴⁸⁹ Article 18 states: '1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.'

⁴⁹⁰ Roger J Levesque, *Sexual Abuse of Children: A Human Rights Perspective* (Indiana University Press 1999) 15.

has no mandate.⁴⁹¹ This highlights that one of the major ‘international bills of rights’ is limited in according children adequate protection against sexual abuse.⁴⁹²

4.4 ICESCR

The ICESCR was accepted by the United Nations General Assembly on 16 December 1966 and entered into force on 3 January 1976.⁴⁹³ It has a mandate to commit its parties to work towards granting social, economic and cultural rights to individuals. This includes the right to labour, health and education. This Covenant is equally significant for protecting the privileges of people, especially the rights of children. The enshrining of child rights in international legal instruments is without doubt evidence of a shift in mankind’s perception of the status of children. The UDHR has clearly set the framework to improve the life of every human being. Although this international instrument does not specifically spell out the rights of the child, it perceives children as human beings who ought to enjoy their dignity and the right to life, as well as other substantive rights. In that respect, adults owe a ‘duty of care’ to children. Hart and Pavlovic emphasise that, ‘as to children, rights have developed differently than for adults in regard to civil and political rights that have been recognised to children recently, and after the social rights’.⁴⁹⁴

Article 10(1) of the Covenant requires state parties to ensure that the family takes responsibility for caring and educating their dependent children. Article 10(3) demands that state parties take special measures to protect and assist all children and young children against economic and social exploitation. If children are employed in occupations which are hazardous to their physical health or which endanger their life or hinder their development, then such employers should be punished by law. The state should set minimum age limits for children to work and should make child labour a punishable offence when this age limit is not adhered to. The ICESCR thus spells out so-called second-generation rights, ie social and economic rights.⁴⁹⁵ Yet, these are ‘progressive rights’ and states are not expected to fully comply but only do so in accordance with their level of development.⁴⁹⁶ However, the

⁴⁹¹ Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 4.

⁴⁹² Levesque (n 490) 15.

⁴⁹³ ICESCR (n 116).

⁴⁹⁴ Stuart N Hart and Zoran Pavlović, 'Children's Rights in Education: An Historical Perspective' (1991) 20 *School Psychology Review* 345.

⁴⁹⁵ Levesque (n 490) 16.

⁴⁹⁶ Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Martinus Nijhoff 2004) 52.

problem that the rights are thereby rendered vague is only one issue. In the context of child sexual abuse, the problem is that the ICESCR also makes no reference to sexual abuse, including child sexual abuse, just like the ICCPR. This also means that the Committee on Economic, Social and Cultural Rights (CESCR) cannot supervise any implementation of any provision⁴⁹⁷ addressed to combat child sexual abuse. This other major ‘international bill of rights’ therefore also fails to accord children protection against sexual abuse.⁴⁹⁸

4.5 Convention 138 on the Minimum Age for Admission to Employment 1973

The ILO adopted the Minimum Age Convention on 26 June 1973. Article 1 of Convention 138 calls upon all member states to take policy measures to abolish child labour and to raise the minimum age when a child can be employed. The Convention sets the age below which children should not work at 15. However, children can be engaged in ‘light work’ before they reach this minimum age.⁴⁹⁹ Convention 138 replaced previous conventions on the minimum employment age which applied to limited economic sectors. The aim of Convention 138 is to entirely abolish child labour. Despite its unique character of applying to all industries, Myers (2001) states that the Convention was not only adopted to protect the needs of the child but also to limit children’s ability to take jobs for fear that this may reduce available jobs for adults and undermine their income.⁵⁰⁰ However, this Convention is only concerned with employment and does not as such deal with child sexual abuse. Whilst Article 3 stipulates that the minimum age for work which ‘is likely to jeopardise the health, safety or morals of young persons’ is 18 years, this provision appears inadequate to protect children against ‘commercial sexual exploitation’.⁵⁰¹

4.6 Adoption of the CRC and its underpinnings

The CRC⁵⁰² was the first international treaty with a specific focus upon children. The CRC recognises that children are not possessions but human beings who have their own independent rights. It was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, and entered into force on 2

⁴⁹⁷ Saul, Kinley and Mowbray (n 491) 4.

⁴⁹⁸ Levesque (n 490) 15.

⁴⁹⁹ June Kane, 'What the Economic Crisis Means for Child Labour' (2009) 9 *Global Social Policy* 175, 186.

⁵⁰⁰ William E Myers, 'The Right Rights? Child Labor in a Globalizing World' (2001) 575 *The Annals of the American Academy of Political and Social Science* 38, 45.

⁵⁰¹ Franziska Humbert, *The Challenge of Child Labour in International Law* (Cambridge University Press 2009) 95.

⁵⁰² CRC (n 21).

September 1990.⁵⁰³ The Convention affirms the importance of parents and families in providing the best possible education to their children in order to promote their growth and development. The CRC is now one of the most widely accepted treaties, with 196 nation states having ratified it, except for Somalia and the US.⁵⁰⁴ Somalia did not ratify it mainly because over the last couple of decades it has lacked a functioning central authority.⁵⁰⁵ Although the US provided commendable input during its drafting, it nevertheless failed to ratify it.⁵⁰⁶ This failure may be because various aspects which are highlighted in the document are dealt with by individual state governments within the country and so would be outside the purview of the federal government of the US.⁵⁰⁷ Another reason may be that it gradually erodes parental rights.⁵⁰⁸ This is because it enables children to sue their parents in court and, for instance, it could impede parents from teaching religious values to their children or choosing educational pathways for them. Ratification would also prevent the US from allowing corporal punishment.⁵⁰⁹

The four basic principles enunciated in the CRC are: (1) children should be free from discrimination; (2) government policies should support the best interests of the child; (3) children should survive and develop to their full potential; and (4) children's views and perspectives are important and need to be heard.⁵¹⁰ There were long drawn out deliberations for over a decade about the privileges of the child. This delay was roundly criticised.⁵¹¹

⁵⁰³ *ibid.*

⁵⁰⁴ Leif Holmström, *Concluding Observations of the UN Committee on the Rights of the Child: Third to Seventeenth Session, 1993-1998*, vol 1 (Martinus Nijhoff 2000) xiii; Ilene Cohn, 'The Protection of Child Soldiers During the Liberian Peace Process' (1998) 6 *International Journal of Children's Rights* 179, 179; Pia Rebello Britto and Nurper Ulkuer, 'Child Development in Developing States: Child Rights and Policy Implications' (2012) 83 *Child Development* 92, 92; See more Richard G Wilkins and others, 'Why the United States Should not Ratify the Convention on the Rights of the Child' (2003) 22 *Saint Louis University Public Law Review* 411; Jaap E Doek, 'The UN Convention on the Rights of the Child: Some Observations on the Monitoring and Social Context of Its Implementation' (2002) 14 *University of Florida Journal of Law and Public Policy* 125.

⁵⁰⁵ Susan Kilbourne, 'Placing the Convention on the Rights of the Child in an American Context' (1999) 26 *Human Rights* 27, 27; Constance de la Vega, Kokeb Zeleke and Esther Wilch, 'The Promotion of Economic, Social and Cultural Rights of Vulnerable Groups in Africa Pursuant to Treaty Obligations: CRC, CEDAW, CERD & CRPD' (2014) 14 *Washington University Global Studies Law Review* 213, 215.

⁵⁰⁶ Chandrika Kaul, *Statistical Handbook on the World's Children* (Greenwood 2002) 512; Don S Browning, 'The United Nations Convention on the Rights of the Child: Should it be Ratified and Why' (2006) 20 *Emory International Law Review* 157, 157.

⁵⁰⁷ Kerri Ann Law, 'Hope for the Future: Overcoming Jurisdictional Concerns to Achieve United States Ratification of the Convention on the Rights of the Child' (1993) 62 *Fordham Law Review* 1851, 1853.

⁵⁰⁸ Browning (n 506) 158.

⁵⁰⁹ Melissa J Doak, *Child Abuse and Domestic Violence*, vol 7 (Information Plus 2007) 846.

⁵¹⁰ Todres, Wojcik and Revaz (n 256) 9.

⁵¹¹ Michael Jupp, 'The United Nations Convention on the Rights of the Child: An Opportunity for Advocates' (1991) 34 *Howard Law Journal* 15, 20.

Nevertheless, the CRC has profound implications in the context of policy and practices⁵¹² and encourages children to be treated uniformly and as individuals with respect.⁵¹³ The initial deliberations resulted in the adoption of 42 articles, covering public, political, social, economic and cultural interests of children. The final document enshrined three different rights, including their protecting, their participation, as well as other provisions related to the child.⁵¹⁴ Lopatka observes that all the delegates unanimously agreed during the session and set seemingly realistic objectives to protect the rights of the child as opposed to impractical and fantastic goals.⁵¹⁵ These objectives were intended to motivate member states to do more to ensure that the rights of the child are protected and also served to set higher global standards in the future.⁵¹⁶ The overall format of the concluding document built upon earlier meetings and discussions held in this regard.⁵¹⁷

The CRC contains 54 articles which cover various aspects of child rights. Article 1 defines the meaning of the term 'child'. Article 2 requires non-discrimination and the other provisions detail the privileges which children require and the steps which have to be taken for this purpose. The CRC recalls in its preamble the core idea that 'childhood should be allowed special care and assistance'.⁵¹⁸ More significantly, the CRC promotes the family unit. It emphasises that the family plays a primary role in the provision of care for children and their protection. It therefore advocates that the strengthening of the family unit and urges the competent authorities to provide security and support so that the family can carry out its responsibilities within the community.⁵¹⁹ Put differently, the CRC emphasises that a partnership should be established between the state and families so that vulnerable children are supported and protected.⁵²⁰ Hence, it reaffirms that because of their vulnerability, children need special care and protection.

⁵¹² Mama (n 247) 177.

⁵¹³ Michael DA Freeman, 'Taking Children's Rights More Seriously' (1992) 6 *International Journal of Law, Policy and the Family* 52, 52.

⁵¹⁴ Elspeth Webb and others, 'Using the UN Convention on the Rights of Children to Improve the Health of Children' (2009) 19 *Paediatrics and Child Health* 430, 430.

⁵¹⁵ Adam Lopatka, 'The Rights of the Child are Universal: The Perspective of the UN Convention on the Rights of the Child' (1992) *The Ideologies of Children's Rights* 47, 51.

⁵¹⁶ *ibid.*

⁵¹⁷ Karen A McSweeney, 'The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base' (1993) 16 *Boston College International and Comparative Law Review* 467, 469.

⁵¹⁸ CRC (n 21) Preamble.

⁵¹⁹ Andrew Bainham, 'Contact as a Right and Obligation' (2003) *Children and their Families: Contact, Rights and Welfare* 61.

⁵²⁰ Todres, Wojcik and Revaz (n 256) 46.

For this purpose, children are afforded positive and negative rights.⁵²¹ Negative rights are those which guarantee against state interference, whereas positive rights require state support and protection.⁵²² This is premised on the idea that children are owed a duty to have their essential needs met.⁵²³ The CRC therefore affords not only important human rights to security, autonomy and expression but also specific rights, eg, not to be sexually abused or exploited.⁵²⁴

Articles 19, 34 and 35 of the CRC are important in the context of the present study. Article 19 states that:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 19 directly deals with the topic of violence and requires state parties to adopt various measures to stop violence.⁵²⁵ No exceptions are permitted and ‘all forms of ... sexual abuse’ must be proscribed.⁵²⁶ State parties cannot adopt legal criteria which require that a certain threshold level of harm is present or that intent must be established.⁵²⁷ This is essential to guarantee the human dignity of children as the latter is an absolute right.⁵²⁸ Hence, definitions of child sexual abuse and exploitation cannot allow certain socially and/or legally tolerated forms of abuse.⁵²⁹ Instead, legal definitions must be adopted which clearly set out the different types of sexual abuse and exploitation in light of the guidance provided by the CRC Committee in General Comment 13. The guidance notes that:

Sexual abuse and exploitation includes (a) The inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity; (b) The use of children in commercial sexual exploitation; and (c) The use of children in audio or visual images of child sexual abuse; (d) Child

⁵²¹ *ibid.*

⁵²² *ibid.*

⁵²³ *ibid.*

⁵²⁴ McGillivray (n 59) 127.

⁵²⁵ Julia Sloth-Nielsen, *Children's Rights in Africa: A Legal Perspective* (Routledge 2008) 168.

⁵²⁶ CRC Committee (n 399) para 17.

⁵²⁷ *ibid.*

⁵²⁸ *ibid.*

⁵²⁹ *ibid.*

prostitution, sexual slavery, sexual exploitation in travel and tourism, trafficking ... and sale of children for sexual purposes and forced marriage.⁵³⁰

It also includes cases where no physical force is employed but a child is subjected to sexual victimisation.⁵³¹ Further, the guidance emphasises that children can be subjected to sexual abuse through ICT and details different, though overlapping, instances which legislators must address in order to protect children adequately against online sexual abuse.⁵³² For instance, children must be protected against the risks which arise from the production of audio and visual child abuse images; indecent photographs or pseudo-photographs; being groomed online for sexual activities; or being stalked, bullied, harassed, tricked, coerced or persuaded to meet strangers offline.⁵³³ The CRC Committee also explains that Article 19 must be understood in light of Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, as well as the Optional Protocol on the Involvement of Children in Armed Conflict.⁵³⁴

Transposition of Article 19 therefore necessitates that the domestic law is scrutinised in order to identify any shortcomings.⁵³⁵ If these are identified, then the state must amend or revise the respective legal provision or law in order to align it with the CRC.⁵³⁶ Laws must also be adequately implemented and if necessary regulations must be adopted to facilitate this.⁵³⁷ Additionally, technical support and material, capacities and human resources must be made available in order to identify, combat and respond to child sexual abuse.⁵³⁸ Instances of child sexual abuse must be identified, reported, referred, investigated and followed-up.⁵³⁹ Those who deal with children who have been abused must also not disregard what is in the best interests of the child, must respect the opinion of the child, and must consider the developmental stage of the child.⁵⁴⁰ It must also be evaluated, monitored and determined whether progress is made and which shortcomings still exist with the programmes and measures.⁵⁴¹ In other words, state parties are required to adopt comprehensive protective

⁵³⁰ *ibid* 10, para 25.

⁵³¹ *ibid*.

⁵³² *ibid* 11-12, para 31.

⁵³³ *ibid* 11-12, para 31.

⁵³⁴ CRC Committee (n 399) 5, para 7.

⁵³⁵ Sloth-Nielsen (n 525) 168.

⁵³⁶ *ibid*.

⁵³⁷ CRC Committee (n 399) 12, para 32.

⁵³⁸ *ibid*.

⁵³⁹ *ibid*.

⁵⁴⁰ CRC Committee (n 399) 12, para 32.

⁵⁴¹ Sloth-Nielsen (n 525) 168.

tools, such as social programmes, so that children and their guardians are protected and receive support.⁵⁴² Other types of preventative strategies must also be adopted.⁵⁴³ Failure and omissions to do so constitute ‘[i]nstitutional and system violations of child rights’.⁵⁴⁴ Moreover, international, regional and domestic human rights bodies must work together and must particularly cooperate with the Special Representative of the Secretary-General on Violence against Children.⁵⁴⁵

It is not only Article 19 which discusses abuse. Article 34 specifically requires state parties to protect children from ‘all forms of sexual exploitation and sexual abuse’, such as unlawful sexual activity, prostitution and participation in pornography’. Hence, the main emphasis of Article 34 is to deal with the issue of sexual exploitation in respect of the three different situations which are listed.⁵⁴⁶ For this purpose, state parties should ‘take all appropriate national, bilateral and multilateral measures’. Furthermore, Article 35 explains that it is the duty of the state to prevent all forms of sale, trafficking and abduction of children.⁵⁴⁷ There is therefore an overlap between Article 19 and Article 34.⁵⁴⁸ This also highlights that it is no easy task to define child sexual abuse and exploitation, as also discussed in Chapter Three. Yet, an analysis of the two articles shows that Article 34 is narrower than Article 35 since it focuses on the sexual perspective of trafficking, eg, child prostitution.⁵⁴⁹ In contrast, Article 35 includes, apart from trafficking for sex, other forms of trafficking, eg, labour trafficking, and is therefore wider.⁵⁵⁰ Articles 19, 34 and 35 should be interpreted holistically and in light of other CRC provisions, such as Article 39 which emphasises the right of child victims to rehabilitation.⁵⁵¹

As will be critiqued in more detail in the coming chapters, the CRC provisions have received a lot of criticism due to their politically compromising definitions.⁵⁵² It has been remarked how the CRC does not fully delineate the terms ‘sexual abuse’ and ‘sexual exploitation’. There has also been a concern that the growing emphasis on sex trafficking is overshadowing

⁵⁴² *ibid.*

⁵⁴³ *ibid.*

⁵⁴⁴ *ibid* 12, para 32.

⁵⁴⁵ CRC Committee (n 399) 5, para 7.

⁵⁴⁶ Mantāphōn (n 49) 2.

⁵⁴⁷ Bainham (n 519) 7.

⁵⁴⁸ McGillivray (n 59) 127.

⁵⁴⁹ Mantāphōn (n 49) 2.

⁵⁵⁰ *ibid.*

⁵⁵¹ *ibid* 3.

⁵⁵² Mantāphōn (n 49).

the pervasiveness of sexual abuse within the family, schools and institutions. In addition, the CRC has been accused of being gender-blind, race-blind and blind to systemic structures of power by its refusal to explicitly outline how these three factors can exacerbate the abuse and violence for some children more than others.⁵⁵³ This is evident when its provisions deal with the topic of child military service but are silent on the subject of child marriage. The latter could be said to be a convergence of all three aspects – gender, race and patriarchal dominance in the family or culture – in some states of the world.⁵⁵⁴ In response to these criticisms, the Committee has turned its focus onto ‘the girl child, adolescents, street children and refugee children’.⁵⁵⁵ It has recognised a need for preventative public education campaigns; child-sensitive procedures to receive, monitor and investigate complaints; and importantly for addressing the socio-cultural barriers that impede child victims disclosing their experience of abuse.⁵⁵⁶

However, whilst the CRC achieves a breakthrough in terms of detailing provisions designed to combat child sexual abuse and exploitation, the fundamental problem is that ‘it has no enforcement teeth’.⁵⁵⁷ The CRC focuses on government duties and is not a criminal law which can be used for enforcement purposes.⁵⁵⁸ It only details a legal framework which can be adopted to reform domestic laws.⁵⁵⁹ There exists no stringent monitoring, as is the case with other international human rights instruments. Instead, Article 44 only demands that state parties ‘submit to the Committee ... reports on the measures they have adopted’. The reason for this is that it was never intended to develop a reprimanding control system but a monitoring system based ‘on the idea of mutual help, support and co-operation’.⁵⁶⁰ Basically, the Convention follows the standard UN human rights treaty practice of requiring states parties to submit to a committee of experts periodic reports outlining the progress that the nation has made toward implementation of the Convention.⁵⁶¹ It should be noted that the

⁵⁵³ Frances Olsen, ‘Children’s Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child’ (1992) 6(1) *International Journal of Law, Policy and the Family* 192.

⁵⁵⁴ Almihdar (n 231).

⁵⁵⁵ Mantāphōn (n 49).

⁵⁵⁶ *ibid.*

⁵⁵⁷ Howard Davidson, ‘Does the U.N. Convention on the Rights of the Child Make a Difference?’ (2014) 22 *Michigan State International Law Review* 497, 522.

⁵⁵⁸ *ibid* 522.

⁵⁵⁹ *ibid* 522-523.

⁵⁶⁰ Johan Vande Lanotte and Geert Goedertier, ‘Monitoring Human Rights: Formal and Procedural Aspects’ (1996) *Monitoring Children’s Rights* 73, 81-82.

⁵⁶¹ See CRC (n 21) arts 42-45; Cynthia Price Cohen, Stuart N Hart and Susan M Kosloske, ‘Monitoring the United Nations Convention on the Rights of the Child: The Challenge of Information Management’ (1996) 18 *Human Rights Quarterly* 439, 441.

obligation to inform in Article 42 is essential for the Convention's monitoring system. According to Article 42, state parties are required to take measures to make the principles of the Convention known. Article 42 provides that states parties ensure that the principles of the provisions are recognised by both adults and children. This is important as the exercise of rights by children themselves presupposes that they are aware of their rights.

Article 43 explains the composition of the Commission and its functions and the latter are outlined in Articles 44 and 45. Article 44 deals with the reporting procedure. This provision requires state parties to report regularly about the measures which they have taken to give effect to the rights in the Convention and to comment on how they have improved the privileges.⁵⁶² The reporting system is intended to be a continuing reaffirmation of the commitment of state parties to respect the rights established in the Convention and to create an ongoing re-evaluation mechanism to achieve national law harmonisation with the Convention.⁵⁶³ The initial report must be submitted two years after a state party has ratified the Convention and thereafter every five years. The Committee may request information from state parties about the implementation of the Convention. The Commission must submit reports every two years to the UN General Assembly in order to update it and its members about the progress which has been made.⁵⁶⁴

Article 44 reports must explain which factors may affect the extent to which obligations are fulfilled and should provide sufficient information to provide the Committee with 'an understanding of the implementation of the Convention in the area targeted'.⁵⁶⁵ The Committee has published general guidelines for state parties on what the reports should contain.⁵⁶⁶ Nonetheless, there is the risk that country reports focus on reporting about legislative, judicial and administrative measures and fail to include social and economic

⁵⁶² CRC Committee, 'General Guidelines Regarding the Form and Content of Initial Reports to be submitted by States Parties under Article 44' (30 October 1991) UN Doc CRC/C/5, 3 paras 9, 10, 11.

⁵⁶³ Alfred Glenn Mower, *The Convention on the Rights of the Child: International Law Support for Children* (Greenwood 1997) 101.

⁵⁶⁴ CRC (n 21) art 44(5).

⁵⁶⁵ *ibid* art 44(2).

⁵⁶⁶ UNSG, 'Compilation of Guidelines on the Form and Content of Reports to be Submitted By States Parties to the International Human Rights Treaties' (3 June 2009) UN Doc HRI/GEN/2/Rev.6, ch VII at 83; CRC Committee, 'General Guidelines Regarding the Form and Content of Initial Reports to be submitted by States Parties under Article 44' (11 October 1996) UN Doc CRC/C/58.

data.⁵⁶⁷ Such reports are insufficient since they do not fully explain the particular problems which a country faces.

When the CRC Committee examines a party report, the following procedure applies. A pre-sessional working group identifies important issues in the report and gathers additional information from the state party or other agencies in order to facilitate the review work of the Committee. The report is then discussed by the Committee in an open, public meeting in the presence of representatives from the state party in question and from NGOs. The aim is to establish a constructive dialogue about the information presented in the report. After this open discussion, the Committee prepares its Concluding Observations based upon all accessible information. In these observations, the Committee comments on what it considers to be the 'principal objects of concern'. These observations are intended to stimulate actions to bring about improvements in the country concerned and are therefore an essential part of the Committee's work. Another aspect of the obligation to inform is found in Article 44(6) which requires state parties to widely make available their reports in order to promote public awareness about the rights of children.

Article 45 sets out the framework for how international cooperation can assist with the enforcement of the principles in the Convention. The role which NGOs play in terms of monitoring is unique and is the result of their involvement at the time when the Convention was drafted. Their involvement was coordinated by the NGO Ad Hoc Group, which was formed in order to communicate the concerns of various organisations. Through this cooperation, considerable influence was exercised by NGOs, which shaped the final text of the Convention. The ability of NGOs to submit information to the Commission on the Rights of the Child has resulted in a number of so-called 'alternative reports' or 'shadow reports' and which have thus contributed to the Committee's work.⁵⁶⁸ Yet in the UAE there exist no

⁵⁶⁷ For example: CRC Committee, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Syrian Arab Republic' (10 July 2003) CRC/C/15/Add.212, paras 17, 18 at 5; CRC Committee, 'Concluding Observations, Lebanon' (8 June 2006) CRC/C/LBN/CO/3, para 20 at 4; CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations, Bangladesh' (26 June 2009) CRC/C/BGD/CO/4, paras 24, 25 at 6; CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations on the Second Periodic Report of the United Arab Emirates' (30 October 2015) CRC/C/ARE/CO/2, paras 17, 18 at 4.

⁵⁶⁸ Judith Ennew, 'Has Research Improved the Human Rights of Children? Or Have the Information Needs of the CRC Improved Data about Children' in Invernizzi (n 137) 141; Commission on Human Rights, 'Sixtieth Session Summary Record of the 47th Meeting' (20 April 2004) UN Doc E/CN.4/2004/SR.47, 7 para 28; Claire

independent NGOs, which thereby deprives the Committee of an important source of information.⁵⁶⁹

Aside from the press, an absence of NGOs to report, document, advocate for and champion human rights when government protection is lacking creates a situation where human rights abuses can thrive and inevitably it is society's most vulnerable who suffer. In June 2002, the CRC Committee which monitors its implementation recommended that the UAE 'consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Their Families'.⁵⁷⁰ Four years later, in November 2006, the organisation Human Rights Watch documented its concerns on this matter as follows:

The lack of a broad civil society sector in the UAE is a major impediment to bringing to light the true extent of abuses. The official climate is obstructive toward civil society organizations (for example, without explanation the government has withheld permits from two out of three human rights organizations that have requested them, and the government has repeatedly threatened with prosecution a women's rights group that is operating a shelter for abused women in Dubai). The government should permit the establishment of nongovernmental organizations that can routinely monitor the human rights conditions in the country, report and document abuses, and provide advocacy on behalf of migrant workers.⁵⁷¹

The above statement was made as part of recommendations to the government of the UAE regarding the systemic abuse of migrant workers. The report appealed to the UAE's obligations and commitments under international law, specifically its membership of the ILO. Notwithstanding, the situation has deteriorated. As part of a campaign of widespread suppression of political dissent, since 2012 there has been an escalation of mass arrests and imprisonments of human rights activists, lawyers, online bloggers and academics critical of the government and its policies, as well as the expulsion of NGOs working for the betterment of civil society.⁵⁷² NGOs play a critical role in ensuring a state which has ratified the CRC does everything in its power to comply with the convention's requirements and that domestic

Breen, 'Rationalising the Work of UN Human Rights Bodies or Reducing the Input of NGOs? The Changing Role of Human Rights NGOs at the United Nations' (2005) 5 *Non-State Actors and International Law* 101, 119.

⁵⁶⁹ Freedom House, 'United Arab Emirates' (2013) <<https://freedomhouse.org/report/freedom-world/2013/united-arab-emirates>> accessed 1 November 2017.

⁵⁷⁰ David Keane and Nicholas McGeehan, 'Enforcing Migrant Workers' Rights in the United Arab Emirates' (2008) 15(1) *International Journal on Minority and Group Rights* 81.

⁵⁷¹ Human Rights Watch, 'Building Towers, Cheating Workers: Exploitation of Migrant Construction Workers in the United Arab Emirates' (November 2006) 18(8) (E) 17 <<https://www.hrw.org/reports/2006/uae1106/uae1106web.pdf>> accessed 27 January 2018.

⁵⁷² Freedom House, 'United Arab Emirates' (2013) <<https://freedomhouse.org/report/freedom-world/2013/united-arab-emirates>> accessed 27 January 2018.

legislation for children's rights are created, strengthened and carried out.⁵⁷³ Thus, these actions by the government of the UAE demonstrate the ineffectiveness of international treaties and laws in forcing states to take measures to implement meaningful change.

The effectiveness of the monitoring mechanism of the CRC is also undermined because the CRC Committee only issues non-binding recommendations and observations in order to assist states to improve their legislation and policies.⁵⁷⁴ Hence, the Committee only comments upon receipt of a report from a state party. It thus does not involve itself with national monitoring. Its task is to 'monitor the monitoring', ie to monitor the measures which various state parties have taken to ensure that the provisions of the Convention are implemented. No state-to-state complaints can be brought as is the case under the ICCPR.⁵⁷⁵ Individuals can also not complain about a state party, as is the case with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵⁷⁶ This further confirms the research hypothesis since the key document for child rights which addresses child sexual abuse is severely limited when it comes to adequately protecting children against sexual abuse.

4.6.1 Optional Protocol Concerning the Sale of Children, Prostitution and Child Pornography 2000

The Optional Protocol on the Convention on the Privileges of Children Concerned the Sale of Children, Prostitution and Child Pornography was adopted by the General Assembly of the United Nations on 25 May 2000 and entered into force on 18 January 2002. The Protocol was enacted in response to the increasing number of cases of internationally trafficked children who are forced into child prostitution. Sexual exploitation of children is a result of economic disparities between home and destination states, inequitable socio-economic structures, dysfunctional consumerism, gender prejudice, reckless adult sexual behaviour, child sex tourism and trafficking of children.⁵⁷⁷ Victims of child sexual abuse suffer physical, mental, psychological, moral and social problems which often affect their lives permanently. The Optional Protocol offers a comprehensive framework which covers all aspects of sexual exploitation of children. However, like the CRC, the problem is that there is no real

⁵⁷³ Cynthia Price Cohen and Per Miljeteig-Olssen, 'Status Report: United Nations Convention on the Rights of the Child' (1990) 8 New York Law School Journal of Human Rights 367.

⁵⁷⁴ Davidson (n 557) 525.

⁵⁷⁵ *ibid.*

⁵⁷⁶ *ibid.*

⁵⁷⁷ UNICEF, 'Common Procedures' <<http://www.unicef.org/rosa/InfoKit.pdf>> accessed 12 February 2017.

enforcement mechanism. Instead, the same approach is taken as under the CRC, namely to submit a report to the CRC Committee which details the measures which have been taken to transpose the provisions of the Protocol.⁵⁷⁸ The Optional Protocol therefore does not remedy the enforcement issues which exist in respect of the CRC, despite the fact that this makes it more likely that child sexual exploitation will continue to exist. The Optional Protocol is another example of a weak international instrument which does not significantly advance the protection of children who are subjected to sexual exploitation.

4.8 The CRC and its subsequent development in the framework of national and international law

4.6.2 The need for a binding instrument to protect children's rights

The shortcomings of instruments which affirmed children's privileges prior to the CRC resulted in the need to adopt a binding instrument. However, when it came to the enactment of this specific instrument, concerns were raised that standards would be duplicated because of the numerous other binding international law instruments, such as the ICCPR and the ICESCR, which already contain provisions which apply to children.⁵⁷⁹ Hence, it was thought that resources would be wasted if a separate instrument was adopted to protect the interests of children. Yet states which supported the adoption of a Convention to protect children rights dominated these discussions. They argued that otherwise children's rights were considered as mere charity, rather than legal entitlements. It was also argued that the instruments which predated the Convention lacked a comprehensive approach to the problems which affect children.⁵⁸⁰ Consequently, in 1978, almost twenty years after the adoption of the 1959 affirmation of the privileges of the child, a proposal was submitted by Poland to the United Nations urging it to accept a 'Convention on the Rights of the Child'.⁵⁸¹

The Polish proposal was, to a large extent, modelled closely on the 1959 Declaration. Poland expected that there would be little debate if the proposal was in line with the Declaration and that this would ensure that the Convention was adopted before the end of 1979, the

⁵⁷⁸ Optional Protocol on the Sale of Children (n 188).

⁵⁷⁹ Sharon Detrick, Jakob Egbert Doek and Nigel Cantwell (eds), *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (Martinus Nijhoff 1992) 4.

⁵⁸⁰ *ibid* 19-29.

⁵⁸¹ Gareth A Jones, 'Children and Development: Rights, Globalization and Poverty' (2005) 5 *Progress in Development Studies* 336, 337.

International Year of the Child.⁵⁸² It was thus intended to celebrate the adoption of the Convention in the same year.

The *travaux préparatoires* establish that the United Nations General Assembly took the Polish proposal seriously. As cited in Janoff, the UN Secretary General ‘circulated the proposal to governments and international organizations for their “views, observations and suggestions”’.⁵⁸³ Although both Poland and the UN had hoped the proposal would be adopted in 1979, the responses received brought the realisation that the draft convention should not be rushed for adoption but closely reviewed and carefully modified.⁵⁸⁴ The United Nations Commission on Human Rights (UNCHR) established an open-ended working group comprising volunteer representatives from many of the 43 member states who met annually to work on the draft.⁵⁸⁵ Invitations were also extended to inter-governmental organisations (IGOs), UN member states and NGOs.⁵⁸⁶ Decisions were made by consensus.⁵⁸⁷ It took ten years until a draft was submitted to the General Assembly for its adoption. On 20 November 1989, the Convention was enacted and entered into force on 2 September 1990.

The main reason behind the adoption of the CRC in 1989 was thus to guarantee that children’s rights are implemented by nation states through binding international law norms.⁵⁸⁸ In this regard, the Convention added two elements to the scope of the earlier adopted instruments. Firstly, it made it mandatory for groups to implement rights recognised in the Convention. To this end, the CRC was conceived as a binding document. Many years after the Convention was accepted, the obligation to implement its standards was acknowledged by the CRC Committee in General Comment No. 5, which provides guidance for states on how to fulfil their duties under the Convention.⁵⁸⁹ Secondly, the comprehensive approach to children’s rights in the CRC filled the gaps and shortcomings of earlier instruments, as discussed above.

⁵⁸² Detrick, Doek and Cantwell (n 579) 20-21.

⁵⁸³ Abby F Janoff, ‘Rights of the Pregnant Child vs. Rights of the Unborn under the Convention on the Rights of the Child’ (2004) 22 Boston University International Law Journal 170.

⁵⁸⁴ *ibid.*

⁵⁸⁵ *ibid.*

⁵⁸⁶ *ibid.*

⁵⁸⁷ *ibid.*

⁵⁸⁸ Thoko Kaime, ‘Vernacularising the Convention on the Rights of the Child: Rights and Culture as Analytic Tools’ (2010) 18 The International Journal of Children’s Rights 637, 638.

⁵⁸⁹ CRC Committee (n 230).

Consequently, the Convention occupies an important position for all states, particularly the UAE, in terms of guarding and endorsing children's rights and serves as a yardstick for domestic standard-setting on matters concerning the subject. Accordingly, states which envisage realising children's rights must comply with the standards set out in the CRC, and thus have to address barriers which obstruct the realisation of these rights.

A large number of states adopted and ratified the CRC within the first two years of the adoption of this international instrument.⁵⁹⁰ The adoption of the Convention marked the beginning of a second and third stage of development of the international law which governs children's rights and which is distinct from the first stage when the 1924 and the 1959 Declarations were adopted. In the first phase, children were seen as objects needing protection; during the second and third phase, they were granted substantive rights and entrusted with procedural rights to exercise these.⁵⁹¹ Arguably, the second and third stages are not complete but continue to develop, especially in light of the fact that new mechanisms for the promotion and protection of children's privileges, including the Protocol to the Convention on the Privileges of the Child on a Communications Procedure (OPIC),⁵⁹² are still being adopted. Some of these mechanisms are briefly discussed in the next section in order to provide an overview of the CRC but a full analysis falls outside the scope of this study.

4.6.3 Synopsis of the CRC

The CRC represents the most comprehensive attempt to date to universalise the dominant contemporary discourse on childhood.⁵⁹³ The preamble of the CRC sets out the aspirations of the Convention. It refers to the UDHR and alludes to the fact that in the Declaration childhood means being given access to particular care and support. Furthermore, the preamble to the Convention explicitly recognises that the child requires legal protection in a free and secure environment which promotes his/her dignity and equality. More importantly, the Convention recognises that children have special needs and that they are vulnerable and need to be raised in a family environment where there is happiness, love and understanding.⁵⁹⁴ The Convention has fifty-four provisions which address a variety of child-

⁵⁹⁰ Jaap E Doek, 'What Does the Children's Convention Require' (2006) 20 *Emory International Law Review* 199, 208.

⁵⁹¹ Van Bueren (n 13) 1.

⁵⁹² Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (n 190).

⁵⁹³ Ramesh Abhinaya, 'UN Convention on Rights of the Child: Inherent Weaknesses' (2001) 36 *Economic and Political Weekly* 1948, 1948.

⁵⁹⁴ CRC (n 21) Preamble.

related issues, including the right to life and development, and the child's ability to be heard in all matters that affect him/her. It also covers the right to an identity and nationality, freedom of expression and religion, the right to health and the right to education. The CRC embodies the four core principles of being unbiased, providing the best for the child, ensuring the child's right to life and a correct upbringing and the privilege to be heard when matters affect the child. These principles inform the CRC's provisions.

The CRC also succeeds in establishing binding mechanisms for the review of its enforcement.⁵⁹⁵ To this end, Article 43 of the CRC creates a Committee which is tasked with monitoring the implementation of the Convention and mandates it to examine the progress which states make in realising their duties under the Convention. Periodically, state parties are required to submit reports to the CRC Committee with details of the actions which they have taken to give effect to the rights spelled out in the Convention.

4.6.4 Implementation of the Convention

The scope and ambit of the duty to implement the CRC is defined in the Convention itself and the CRC Committee has also published various authoritative views in its general comments which monitor the implementation of the Convention,⁵⁹⁶ such as '[w]hile the mandate of the Committee is confined to its supervisory function in relation to the Convention, its interpretation efforts must be conducted in the context of the entirety of applicable international human rights norms and, therefore, the general comment adopts a holistic approach'.⁵⁹⁷ It is possible to distinguish two elements, namely the 'jurisdictional' component which deals with the obligation to give effect to the Convention and the 'substantive' or 'material' aspect which relates to the scope, content or subject matters in the Convention which must be transposed. The next sections discuss these matters.

4.6.5 Defining the ambit of implementation of the CRC

The CRC requires states to implement the Convention within their jurisdictions. This is evident in Articles 2(1) (outlawing non-discrimination), 30 (speaking to minority and indigenous groups) and 38 (child recruitment in armed conflict) of the Convention. The CRC

⁵⁹⁵ Doek (n 590) 127.

⁵⁹⁶ David Weissbrodt, Joseph C Hansen and Nathaniel H Nesbitt, 'The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law' (2011) 24 Harvard Human Rights Journal 115, 119.

⁵⁹⁷ CRC Committee, 'General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) CRC/GC/2005/6, 6, para 6.

Committee notes with respect to measures which have to be taken for implementation that ‘when States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation’.⁵⁹⁸

The above expressly demonstrates that parties of the CRC also have a duty to ensure that the implementation of children’s rights contained in the Convention occurs in the jurisdictions of other participating states. Yet this raises issues in relation to state sovereignty as it may be difficult for any state willing to assist another sovereign state to act without impinging on the sovereignty of the benefiting state. However, the CRC makes it possible for sovereign states to assist each other in fulfilling their obligations under the Convention through international cooperation. To this end, Article 4 of the CRC unequivocally states:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.⁵⁹⁹

This means that transposition of the Convention is required on an international scale. Yet poor States often fail to fulfil their obligations under the Convention. This is often the result of insufficient resources but challenges also arise when international cooperation has strings attached. It is therefore important that cooperation is done open-heartedly and without burdening states.⁶⁰⁰ States which render assistance must therefore help other states to fulfil their duties under the Convention.⁶⁰¹ Moreover, states in need of assistance must be bold enough to request assistance from other states. This is mainly because the CRC enjoins state parties to demonstrate that they have implemented the rights contained in the Convention ‘to the maximum degree of their obtainable resources’⁶⁰² and, where essential, they must seek international aid to fulfil their obligations.⁶⁰³

⁵⁹⁸ CRC Committee (n 230) para 7 at 3.

⁵⁹⁹ CRC (n 21) art 4.

⁶⁰⁰ Aquinaldo Célio Tomás Samissonne Mandlate, 'Assessing the Implementation of the Convention on the Rights of the Child in Lusophone Africa (Angola and Mozambique)' (PhD thesis, University of the Western Cape, 2012) 62.

⁶⁰¹ Michael Nyongesa Wabwile, 'Legal Protection of Social and Economic Rights of Children in Developing States: Reassessing International Cooperation and Responsibility' (PhD thesis, University of Leicester, 2010) 45.

⁶⁰² CRC (n 21) art 4.

⁶⁰³ CRC Committee (n 230) para 7 at 3.

4.6.6 Delineating the scope of the duty to implement the Convention

The CRC defines the material content or substantive limits which define the scope of the duty to implement the Convention. Articles 4 and 41 of the CRC are the central provisions which need to be addressed. Article 4 states that parties must ‘undertake appropriate measures to implement the rights’ in the Convention. This means that states must implement all rights contained in the Convention unless they have entered reservations.

According to Article 41 of the CRC, states are required to implement the rights incorporated in other provisions contained in instruments which are more conducive to the realisation of children’s rights, including statutes and treaties alike:

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State.⁶⁰⁴

This provision is critically important for two reasons. Firstly, it widens the material limit of the duty of states to implement children’s rights. This is because the scope of this duty is expanded to include transposition of provisions in other instruments which are more conducive for the realisation of children’s rights. Evidently, this helps to further children’s right, for instance, in Africa where children’s privileges are not fully regulated in the CRC but are dealt with in other instruments, such as the ACRWC. This strengthens the normativity of relevant child-related instruments, such as the ACRWC, which address certain elements of children’s rights which are not addressed in the Convention.⁶⁰⁵ Consequently, it is not surprising that the CRC Committee encourages state parties to the CRC to ratify other treaties, such as the Convention on the Rights of Persons with Disabilities (CRPD),⁶⁰⁶ the ICCPR⁶⁰⁷ and the ICESCR,⁶⁰⁸ in order to ensure that the progressive standards contained in

⁶⁰⁴ CRC (n 21) 41.

⁶⁰⁵ Article 30 of the African Children’s Charter: ‘States should provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of breaking the law and shall in particular: (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers; (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers; (c) establish special alternative institutions for holding such mothers; (d) ensure that a mother shall not be imprisoned with her child; (e) ensure that a death sentence shall not be imposed on such mothers; (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation’ African Charter on the Rights and Welfare of the Child (11 July 1990) CAB/LEG/24.9/49.

⁶⁰⁶ Convention on the Rights of Persons with Disabilities (CRPD) (adopted 30 January 2007, entered into force 3 May 2008).

⁶⁰⁷ ICCPR (n 115).

⁶⁰⁸ ICESCR (n 116).

these instruments are also used to advance the children's rights protected by the Convention.⁶⁰⁹

Secondly, Article 41 is important to identify the nature of child-related instruments or provisions, other than those found in the CRC, which states can employ in their respective jurisdictions to enforce the provisions of the Convention. The provision makes clear that states can implement other instruments, whether domestic laws or treaties alike, as long as these contain standards that are more in favour of children's privileges than the Convention itself. This requirement relates to the fact that the CRC sets out minimum standards for the promotion and protection of children's rights. It also implies that giving effect to less protective standards found in other child-related instruments amounts to a breach of the principles embodied in the Convention. This means that states parties are not allowed to implement or to give effect to any instruments containing standards that are less protective to children in relation to those found in the Convention. The next section gives examples of the standard of transposition at the domestic level.

4.6.7 The position of the Convention in domestic law

As mentioned in the previous section, the CRC Committee in its General Comment on implementation states that it is of particular importance to 'clarify the extent of applicability of the Convention in States where the principle of "self-execution" applies'.⁶¹⁰ The term 'self-executing' describes a provision that does not require incorporation to have internal effect. It is also a way of describing the nature of the provisions themselves.⁶¹¹ A self-executing treaty provision can be invoked by an individual in a municipal court and thus provides the individual with additional protection. This is because it allows the person to obtain rights which are validated as legal norms at the international level. A self-executing provision can be applied by a magistrate in an individual case without having to refer to domestic law.⁶¹²

⁶⁰⁹ CRC Committee (n 230) para 17 at 6.

⁶¹⁰ *ibid* para 19 at 6; UN Human Rights Committee, 'CCPR General Comment No. 3: Article 2 (Implementation at the National Level)' (29 July 1981).

⁶¹¹ Ian Brownlie and James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 48.

⁶¹² Eugeen Verhellen, *Convention on the Rights of the Child: Background, Motivation, Strategies, Main Themes* (3rd edn, Coronet 2000) 84-86.

It has been suggested that Article 4 could be argued as proof that the CRC is intended to be non-self-executing as it indicates that the onus is on state parties to facilitate legislative implementation of the CRC.⁶¹³ This serves to significantly reduce its impact and legal authority because even though it does not absolve states of their obligations with respect to the Convention, its value and function is profoundly impeded without the force of domestic legislation.⁶¹⁴ In each individual case, it is the judge who has the final say on whether or not the treaty provisions are effective. The judge decides if a case can be solved directly on the basis of an international treaty or whether other solutions are better suited. The conclusion depends on the legal tradition of the particular state party and the clarity and comprehensibility of both the treaty and the provision in question, a less than satisfying situation which plunges child rights and the protection of children into a quandary. An alternative approach could be the one encouraged by the ECtHR which holds an annual seminar entitled 'Dialogue between Judges', with the express aim of stimulating communication between national judges to address the 'fragmentation of human rights norms'.⁶¹⁵ In practice, this dialogue involves citing judicial statements from international jurisdictions and exploring arguments developed in comparable situations by a foreign or international court.⁶¹⁶ It is felt that these actions are important when a national judge seeks to apply ratified or domesticated international human rights norms, whilst simultaneously building a minimum degree of transnational consensus.⁶¹⁷ This is a laudable example of judicial cooperation across borders which is vital within the context of the CRC and child rights and could prove to be an invaluable means of overcoming domestic implementation concerns.

This is also evidenced by the *travaux préparatoires*⁶¹⁸ of the Convention which do not provide much guidance. When interpreting the Convention, it is thus essential to consider the

⁶¹³ Jonathan Todres, 'Emerging Limitations on the Rights of the Child: The UN Convention on the Rights of the Child and its Early Case Law' (1998) 30 Columbia Human Rights Law Review 159.

⁶¹⁴ *ibid.*

⁶¹⁵ Vivianne Yen-Ching and Yao-ming Hsu, 'Domestication of International Human Rights Norms in Taiwan: A Dialogue through Conventionality Review Under Construction' in Rehman, Shahid and Dickinson (n 615) 166.

⁶¹⁶ *ibid.*

⁶¹⁷ *ibid.*

⁶¹⁸ According to the Oxford English Dictionary '*travaux préparatoires*' means 'materials used in the preparation of, and having formative effect on, the ultimately adopted form of an agreement, or legislation, or an international treaty. Such materials include, in the domestic sphere, reports, proposals and technical advice, in the legislative sphere, Select Committee or Royal Commission or other reports, academic studies, Green Papers, White Papers, and the like, and in the international sphere reports of expert committees, discussions and proposals, drafts, and the like'

object and context of the treaty and pay due attention to the principle of effectiveness. As emphasised above, the self-executing character of a treaty depends on the particular legal system and also on the material rights involved. Some rights also require that national authorities take further action. According to Verhellen, at least part of the Convention is of a self-executing character which means that a number of provisions are legally binding and can be directly invoked in the courts in states which recognise that the Convention has direct effect.⁶¹⁹

When provisions which are contained in an international treaty are adjusted and rewritten in order to be transposed into the domestic law of a state, the original meaning may be misinterpreted and changed and the intentions underlying the provisions may get lost. This is precisely what the monitoring bodies of a treaty wish to avoid when they emphasise the importance of incorporating the treaty itself into the domestic legal system. The most effective starting point for the Convention to be realistically implemented at the national level and to thereby recognise its principles and provisions is therefore to incorporate it through domestic legislation. The CRC Committee has accordingly welcomed all steps which state parties have taken to attain this goal.⁶²⁰ From a Convention point of view, the easier it is to implement and apply its articles at the domestic level, the better it is since it makes it more difficult to misinterpret it. It also heightens the status of the Convention as the articles are considered on a par with the domestic law of the state. On the other hand, many of the articles are vaguely formulated and it is therefore rather difficult to invoke these provisions directly in court. This may result in the Convention being considered a rather toothless instrument.

4.6.8 Measures of implementation: Article 4

The CRC focuses on the rights of the child and is considered an innovative international human rights instrument. One reason for this is that it emphasises that the child is a rights holder and not merely an object of protection who has no right or possibility of exercising influence over his or her own life. Some of the Convention's articles are considered radical and are therefore perhaps more difficult to implement, not least in societies where a traditional view of the child and children's rights prevail. These possible difficulties,

<<http://www.oed.com/view/Entry/205265?redirectedFrom=Travaux+preparatoires+#eid>> accessed 14 February 2017.

⁶¹⁹ Verhellen (n 612) 84-86.

⁶²⁰ The CRC Committee in its Concluding Observations to the state party report makes a point of complimenting states that have incorporated the Convention into their domestic legislation.

however, do not seem to have been subject to any serious debate during the drafting process even though, for example, the inclusion of the right to participation is considered to be one of the most radical and progressive innovations of the Convention. The drafters of the Convention do not seem to have paid any particular attention to the possibility of a gap between the objectives of the Convention and their implementation in practice.

Another difficulty with certain of the articles of the Convention is that they are formulated in a manner that allows that the right is differently interpreted, rendering it difficult to know what the obligation is which the state has to fulfil. The mechanisms which help with the implementation of the treaty should provide clear guidelines on how to implement it. It can be debated whether this is the case or not. Another way to look at the matter is to acknowledge that guidelines exist but to recognise that the problem lies with ensuring that state parties do not simply pay lip-service. However, because of the radical and progressive rights, this may unfortunately happen, especially due to the weak enforcement mechanism of the CRC. This in turn limits the effectiveness of the CRC in protecting children, including against child sexual abuse.

When ratifying a treaty, a state enters into an agreement with the other contracting parties and accepts the obligation to implement the treaty.⁶²¹ A state which is party to a treaty is obliged to adhere to it⁶²² as long as it has ratified it and not entered reservations⁶²³ to the treaty which are incompatible with its object and purpose. In the Convention, the framework for the implementation of the treaty is set out in Article 4:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 4 is of fundamental importance for the Convention because, together with Articles 42 and 44(6), it spells out the general legal obligations of state parties in respect of its

⁶²¹ The principle of *pacta sunt servanda* applies to these kinds of agreement as to any other kind. See Article 26 of the Vienna Convention on the Law of Treaties 1969 (VCLT), which states '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith': Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁶²² *ibid* 31(1); see also the following paragraphs of Article 31 as well as Articles 32 and 33 on interpretation.

⁶²³ CRC (n 21) art 51(2): 'A reservation incompatible with the object and purpose of the present Convention shall not be permitted', see also VCLT (n 621) art 19(3): 'in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty'.

implementation. Although CRC Article 4 states that ‘there is no favoured legislative or administrative model for implementation’, the CRC Committee, which is responsible for monitoring states parties’ CRC implementation, supports ‘a wide range of strategies to ensure Governments give appropriate priority and attention to children’.⁶²⁴ The Committee⁶²⁵ has arranged the provisions of the Convention in clusters, grouping these rights together as ‘general measures of implementation’ which the Committee particularly considers.⁶²⁶ These general measures of implementation are intended to promote children’s enjoyment of all the rights of the Convention through legislation; the establishment of coordinating and monitoring bodies on several levels across society; through data collection, awareness-raising and training; as well as through the development of suitable policies, services and programmes.⁶²⁷ In addition to the above-mentioned provisions, Articles 2 and 3(2) also establish general implementation obligations.⁶²⁸

The Convention makes no distinction between different rights so that specific articles are not afforded a different status.⁶²⁹ Neither the Convention itself nor the Committee outlines which provisions include civil or political rights. Also, the Convention fails to mention which provisions deal with economic or social rights. However, the holistic nature of the Convention results in most of its articles containing an element which can be either linked to civil or political rights. The Committee issued a general comment on implementation in order to underline the mutual dependency of rights and in which it emphasised that the ‘[e]njoyment of economic rights is inextricably intertwined with the enjoyment of civil and political rights’.⁶³⁰ It also explained that ‘[t]here is no authoritative division of human rights in the two categories’.⁶³¹

The distinction is not relevant in terms of value but is important for the purpose of implementation. The wording of Article 4 is the result of a compromise which seeks to accommodate differing demands in respect of different types of rights but without making clear the finer distinctions. During the drafting process, developing states particularly argued

⁶²⁴ Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF 2007) 47.

⁶²⁵ CRC Committee (n 566).

⁶²⁶ CRC Committee (n 230) para 2 at 2.

⁶²⁷ *ibid* para 9 at 3.

⁶²⁸ Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF 2002) 1, 53; see also CRC Committee (n 230) paras 3-4 at 2.

⁶²⁹ *ibid* para 6 at 2.

⁶³⁰ *ibid*.

⁶³¹ *ibid*.

that the fulfilment of economic and social rights should be made conditional on the availability of assets. They feared that their efforts to fulfil the rights of the Convention may otherwise not be properly appreciated and that unrealistic demands would be made.⁶³²

The question which ‘norm of implementation’ is applicable to which article can be somewhat difficult to determine as some of the articles in the Convention arguably contain elements of both ‘sets’ of rights – the right to education in Articles 28 and 29 and protection for refugee children in Article 22 are two examples. Another example is Article 19, with its right to protection from all sorts of violence, injury or abuse and the establishment of social programmes for the necessary support of the child and those caring for the child. Articles similar to Article 4 can be found in Article 2 of the ICCPR⁶³³ and in Article 2 of the ICESCR.⁶³⁴ Both set out the general implementation measures which state parties have to observe in their respective treaties, and most likely the drafting of Article 4 was inspired by both. However, the articles are worded somewhat differently. Article 2 of the ICCPR does not contain any references to circumstances which justify exceptions to a state party’s obligation to give immediate effect to the rights established by the Covenant.⁶³⁵ On the other hand, Article 2 of the ICESCR allows that the rights in the Covenant can be realised progressively and makes reference to ‘available resources’.⁶³⁶ In General Comment 3 of the

⁶³² See more ‘The Drafting History of Article 4 of the CRC’ in Mervat Rishmawi, *Article 4: The Nature of States Parties’ Obligations*, vol 4 (Martinus Nijhoff 2006) 18.

⁶³³ ICCPR (n 115).

⁶³⁴ ICESCR (n 116).

⁶³⁵ Article 2 states: ‘1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.’

⁶³⁶ Article 2 states: ‘1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 3. Developing States, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-national.’

CESCR, the concept of ‘progressive realisation’ is described as recognising that the instant realisation of certain rights might not be possible due to economic reasons and that this can be therefore done successively.⁶³⁷ This argument also features in the discussion on how to phrase Article 4 of the CRC.

A state that has ratified the Convention is required to ensure that its domestic legislation is compatible with it. According to Article 4, the legislative measures should be taken immediately when the state becomes a party to the Convention. The CRC Committee emphasises in Comment 5 on the implementation of the Convention that it:

... believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation. Its experience in examining not only initial but now second and third periodic reports under the Convention suggests that the review process at the national level has, in most cases, been started, but needs to be more rigorous. The review needs to consider the Convention not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights. The review needs to be continuous rather than one-off, reviewing proposed as well as existing legislation.⁶³⁸

A thorough review of the domestic legislation may require that old laws are revised or that new laws or codes are adopted. In this context, the Committee observes that:

[I]n the context of the Convention, States must see their role as fulfilling clear legal obligations to each and every child. Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children.⁶³⁹

The extent to which domestic courts apply the rules of international law can be used as a touchstone to gauge the effectiveness of international legislation and enforcement.⁶⁴⁰ A 2004 UNICEF study reviewed the implementation of the Convention in twelve state parties.⁶⁴¹ It was found that the way in which the Convention had been transposed into the domestic law of the state parties differed greatly. This is despite the Committee constantly encouraging states, both in its concluding observations to state reports and in its General Comment on implementation, to implement the Convention as part of domestic laws to ensure it can be directly invoked before municipal courts and applied by national authorities.⁶⁴² It has also

⁶³⁷ CESCR, ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)’ (14 December 1990) E/1991/23, para 9 at 3.

⁶³⁸ CRC Committee (n 230) para 18 at 6.

⁶³⁹ *ibid* para 11 at 3.

⁶⁴⁰ Shaw (n 84) 178.

⁶⁴¹ Lundy and others (n 412).

⁶⁴² CRC Committee (n 230) para 20 at 6, which refers to the VCLT, art 27 which states: ‘[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’

recommended that ‘where there is conflict with domestic legislation the convention will prevail’.⁶⁴³ Implementation of the CRC is a highly complex issue. In many ways, it is inevitable that its enforcement would collide with the existing ideas and practices of state parties. There are sound theoretical reasons for this at both a macro- and micro-level. At a macro-level, it is highly significant that four legal systems have evolved out of a context of denial of the rights of women and children.⁶⁴⁴ They are the civil, common, Islamic and plural (customary) systems.⁶⁴⁵ Subsequently, the continued existence of these legal systems serves to firmly entrench the denial of rights for these demographics over time.⁶⁴⁶ At a micro-level, within particular cultures persons who hold discriminatory views towards women and children are predisposed to supporting inequality which in turn greatly increases the likelihood of violence and abuse within their family home.⁶⁴⁷ Accordingly, a combination of these macro- and micro- aspects means that if a person with discriminatory views resides in a state which has one of the four legal frameworks mentioned above in place, it would facilitate and legitimise their violence and abuse without fear of censure and/or legal repercussions. Overall, when analysed from an international vantage-point, at the heart of this issue is inadequate enforcement mechanisms at the disposal of international law.⁶⁴⁸ On this matter, Shaw notes that ‘the consequent supremacy of municipal legal systems over international law in the domestic sphere is not exclusive, but it does exist as an undeniable general principle’.⁶⁴⁹

Moreover, the reference to ‘administrative and other measures’ in Article 4 does not imply that the CRC Committee can prescribe in detail the most effective way for each state to implement the Convention. However, the Committee does offer advice to states through its comments on measures of implementation.⁶⁵⁰ Initially, the Committee emphasised that it:

... believes that effective implementation of the Convention requires visible cross sectoral coordination to recognize and realize children’s rights across Government, between different levels of government and between Government and civil society including in particular children and young people themselves.⁶⁵¹

⁶⁴³ *ibid* 6, para 20.

⁶⁴⁴ Karen Polonko et al., ‘Law Reform, Child Maltreatment and the UN Convention on the Rights of the Child’ (2016) 24(1) *The International Journal of Children’s Rights* 29.

⁶⁴⁵ *ibid* 59.

⁶⁴⁶ *ibid* 59.

⁶⁴⁷ *ibid* 59.

⁶⁴⁸ Shaw (n 84) 178.

⁶⁴⁹ Shaw (n 84) 178.

⁶⁵⁰ *ibid* paras 26-73.

⁶⁵¹ *ibid* para 27.

Examples of key measures which states should take include establishing a comprehensive national strategy rooted in the Convention. Other important measures are to ensure cross-sectoral coordination in order for the government and civil society to recognise the rights of children, data collection, training and capacity building and, most importantly, making adults and children aware of the Convention. These are the kinds of measures which are required to initiate attitude changes, not only at the state level but also throughout society. Rigorous monitoring has to take place for the Convention to be fully implemented.⁶⁵² This should be built into the governance processes at all levels and should include independent monitoring by national human rights institutions, NGOs and others. However, the extent to which state parties adopt these measures is unclear, especially in the absence of an enforcement mechanism. This highlights that the recommendations by the Committee, whilst important, are not a strong mechanism to ensure full compliance with the CRC.

4.6.9 Conclusion

This chapter has highlighted that international law is limited in according adequate protection to the rights of children. This limitation is particularly evident from the lack of protection of children from sexual abuse. The UDHR fails to spell out children rights and its reference to special care and help for children is insufficient to confer adequate protection on children. It is also unclear what normative status the UDHR has. Children rights are therefore effectively non-existent in the UDHR. Moreover, the Declaration of the Rights of the Child 1959 fails to impose any legal duties on states, does not confer rights on children and is only largely aspirational. Both the ICCPR and the ICESCR do not address the issue of child sexual abuse. As a result, the supervision exercised by the HRC and the CESCR is non-existent. As such, Subedi is correct in stating that the HRC is ‘a tiger without teeth’.⁶⁵³ These two important international bills of rights therefore fail to offer any direct protection to child sexual abuse victims. Convention 138 on the Minimum Age for Admission to Employment 1973 also fails to directly confront the issue of child commercial sexual exploitation.

Whilst it is laudable that the CRC contains two specific provisions which address child sexual abuse and exploitation, it fails to cover all aspects of child sexual abuse. The other fundamental issue is that this pivotal child rights instrument lacks an effective enforcement

⁶⁵² *ibid* para 27.

⁶⁵³ Subedi (n 4) 100.

mechanism. The reporting mechanism is too weak to pressurise states into full compliance. The Optional Protocol Concerning the Sale of Children, Prostitution and Child Pornography 2000 suffers from the same defect as it also only relies on ensuring compliance by requiring state parties to furnish a report to the CRC Committee. As a result, state parties only need to pay lip-service to their obligations.

The failure to clearly stipulate which rights constitute progressive rights also undermines the effectiveness of the CRC. States may not adopt the far-reaching measures which are required to combat child sexual abuse on the basis that they consider this to overburden their resources. International law is also failing since it is unclear which provisions are self-executing. However, children rights are also promoted through the UN UPR mechanism, as discussed next.

Chapter Five: Monitoring the Implementation of the CRC

5.0 Introduction

Analysis of the international instruments shows that there exists certain problems with according adequate protection to the rights of children, including against sexual abuse. Only the CRC addresses the issue of child sexual abuse. However, the CRC cannot definitively determine the age of the child since domestic law suggests otherwise. Hence, states are given too much leeway in respect of defining who should be considered a child. However, the United Nations has also created the UPR mechanism to assess whether UN member states generally adhere to human rights, including child rights. The UNHRC:

... undertake[s] a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies.⁶⁵⁴

This chapter analyses the UPR in order to ascertain how child rights have been dealt with, particularly in respect of child sexual abuse and exploitation. The final section of this chapter is a literature review which analyses important sources which deal with the implementation of child rights. Indeed, the mechanisms to implement a human rights treaty are the watchdogs of the treaty. Without them, these instruments are nothing more than ‘paper tigers’. The most serious problem often arises when a treaty is implemented at the domestic level. In reality, many states are not completely dedicated to implementing the treaty, especially when treaty articles are the result of compromises. In these cases, implementation will often be unsatisfactory. The gap between law and practice is often vast. This is particularly visible in respect of child sexual abuse which is still rife around the world, including in the UAE.⁶⁵⁵ The UPR mechanism helps to monitor whether state parties implement their treaty obligations and transpose the rights into their domestic legal framework.

Monitoring is a concept which in some aspects is indistinguishable from implementation, depending on what is intended. It can consist of social planning, ie monitoring can mean measuring and evaluating what has been achieved up to a certain time. Monitoring can denote

⁶⁵⁴ UNGA Res 60/251 (3 April 2006).

⁶⁵⁵ MM Singh, SS Parsekar, SN Nair, 'An Epidemiological Overview of Child Sexual Abuse' (2014) 3(4) *Journal of Family Medicine and Primary Care* 430, 430.

undertaking a watchdog function, ie it can mean warning or even policing. In the latter context, information is gathered about the rights which a certain treaty requires to be respected. It is scrutinised whether or not an acceptable standard has been attained and responsible agents have to answer for any failures. This latter interpretation of monitoring corresponds with the purpose which the examining treaty bodies, such as the Commission on the Rights of the Child, fulfil.⁶⁵⁶ Another goal of monitoring is to improve the situation of the child in general and to create a debate not only about legal but also social issues.

There are different approaches to applying international human rights instruments most effectively. They can be used as a political, promotional and/or advocacy tool or as an aid for policy planning and programme development, as well as an instrument for legal action. Utilising human rights instruments for all these purposes does not constitute a problem. Yet it may risk that advancing all these objectives results in some aspects of the treaty being prioritised over others. It has also been pointed out that a treaty may be used as a judicial tool which imposes binding commitments on state parties and that this may risk political and social mobilisation aspects being neglected.⁶⁵⁷ One reason for assuming that other aspects may be neglected is scepticism about the efficacy of enforcing human rights commitments at the international level. Concern has also been expressed at the national and municipal level about the acceptable limits of legal intervention in respect of delicate issues, such as the family and its relationship with society.⁶⁵⁸ A global treaty monitoring body does not seek to determine and interfere with the everyday aspects of a state party's implementation of the treaty. It seeks to achieve results rather than conformity with procedures. It is against this background that the following sections evaluate whether the UPR is limited in according adequate protection to the rights of children, especially in respect of child sexual abuse.

5.1 The UPR process and its embedded universalism

The UPR is a mechanism which was created by the decree that established the HRC.⁶⁵⁹ Its primary purpose is to analyse the human rights situation in each member state. This is done in an 'objective manner'.⁶⁶⁰ The state reviews which are commenced through the UPR process

⁶⁵⁶ CRC (n 21).

⁶⁵⁷ James R Himes, 'Monitoring Children's Rights: Cutting Through the Confusion and Planning for Effective Action' in Eugene Verhellen (ed), *Monitoring Children's Rights* (Martinus Nijhoff 1994) 113, 118.

⁶⁵⁸ *ibid* 122.

⁶⁵⁹ UNGA (n 654) para 5(e) at 3.

⁶⁶⁰ HRC, 'Institution-building of the United Nations Human Rights Council' (18 June 2007) UN Doc A/HRC/RES/5/1, para 3(g) at 2.

are based on national reports. These reports are submitted by states who are under review and information is furnished to the UN's treaty bodies. These reports allow all UN members to scrutinise the records of the state which is under review. Ramcharan states that the review process has been portrayed as a largely positive continuation of the UN's reformist agenda to promote human rights whilst avoiding a naming and shaming approach.⁶⁶¹ As a capacity building and technical support mechanism, the UPR process was explicitly intended to avoid politicisation and confrontation in an effort to promote dialogue and cooperation as part of a global push to improve human rights.

The UPR process has been depicted as an innovative tool to develop human rights, including children rights, because of its universal nature. It has two important characteristics. Firstly, it is a universally applicable process. It is the first mechanism which reviews all 193 members periodically through a uniform process.⁶⁶² Each state under review is required to abide by the strict formality requirements throughout the review procedure. This is done to 'maintain equality amongst all members'.⁶⁶³ Secondly, the UPR process is based on the concept of universalism. This is clear in the way the review mechanism is operated and handled. The review is based on identifying disobedient conduct, ie conduct contrary to the Charter of the United Nations;⁶⁶⁴ the UDHR;⁶⁶⁵ any voluntary pledges; principles of international humanitarian law; and any other international human rights instruments, such as the CRC, ratified by the state under review.⁶⁶⁶ The process uses a set of obligations as standards and benchmarks against which states are analysed. Yet some states under review have lower ratification rates and have therefore not assumed as many international human rights obligations. This is also the case in respect of the UAE, which is not a party to the ICCPR, the ICESCR or the Optional Protocol to the Convention on the Rights of the Child.⁶⁶⁷

⁶⁶¹ Bertrand G Ramcharan, *The UN Human Rights Council* (Routledge 2013) 46.

⁶⁶² UNGA (n 654) para 5(e) at 3; 149 States were reviewed at the pre-sessions in 2012-2016, See more: UPR Info, 'Pre-sessions: Empowering Human Rights Voices from the Ground' (2016) 14 <https://www.upr-info.org/sites/default/files/general-document/pdf/2016_pre-sessions_empowering_human_rights_voices_from_the_ground.pdf> accessed 19 February 2017.

⁶⁶³ *ibid.*

⁶⁶⁴ Charter of the United Nations (n 464).

⁶⁶⁵ UDHR (n 244).

⁶⁶⁶ HRC (n 660) para 1-2 at 1-2.

⁶⁶⁷ OHCHR, 'Ratification Status for United Arab Emirates' (2017) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Treaty.aspx?CountryID=184&Lang=en> accessed 1 November 2017.

Nonetheless, the process provides an opportunity to confront those states which are reluctant to accept worldwide human rights treaties. States undergoing reviews through the UPR process can make recommendations on how to improve human rights which states have accepted.⁶⁶⁸ Under the Charter of the United Nations, states can be held responsible ‘for the maintenance of international peace and security under the Charter’.⁶⁶⁹ International human rights treaties also apply to a certain extent during armed conflicts and thus impact international humanitarian law.⁶⁷⁰ The founding resolution also explains that the main objective of the UPR process is to ‘promote the universality of all human rights’.⁶⁷¹ This is done by using a set of human rights, including child rights, as the base of the review process. Analysing whether human rights standards are adhered to is thus part of the review process. Human rights can be invoked by all persons, including children, across all nations and cultural boundaries.⁶⁷² The UPR process is thus underpinned by international human rights. Human rights have therefore been universalised, ie a system of standardization has been created by the United Nations through ... the Universal Declaration of Human Rights which has spread through hundreds of international treaties, declarations and resolutions.⁶⁷³ The member states negotiate and implement human rights instruments which have been accepted by many international human rights fora.⁶⁷⁴ Lindholt refers to this as ‘factual universalism’⁶⁷⁵ as human rights instruments have achieved support across states. Human rights principles are thereby embedded within international instruments and are applied to states worldwide.⁶⁷⁶ Equally, Donnelly labels this form of universalism ‘international legal universality’ since it promotes the universality of international human rights which have been accepted globally as binding obligations under international law.⁶⁷⁷ The UPR thus aims to promote the universality of human rights norms, including child rights norms.⁶⁷⁸ It assesses whether the member states comply with the international human rights principles. Through participation in the review process, member states are enabled to further implement human rights.

⁶⁶⁸ Hilary Charlesworth and Emma Larking, *Human Rights and the Universal Periodic Review* (Cambridge University Press 2015) 13.

⁶⁶⁹ Boutros Boutros-Ghali, 'An Agenda for Peace' (1992) 11 *International Relations* 201, 203, para 16.

⁶⁷⁰ Eric Draluck, 'Law, Politics and Obligations in the Universal Periodic Review' (Master thesis, University of Oslo, 2010) 24-25.

⁶⁷¹ HRC (n 660) para 3(a) at 2.

⁶⁷² Michael K Addo, 'Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights' (2010) 32 *Human Rights Quarterly* 601, 660.

⁶⁷³ *ibid.*

⁶⁷⁴ *ibid.*

⁶⁷⁵ Lone Lindholt, 'The African Charter: Contextual Universality' in Kirsten Hastrup (ed), *Human Rights on Common Grounds: The Quest for Universality* (Kluwer Law 2001) 117, 118.

⁶⁷⁶ *ibid.* 123.

⁶⁷⁷ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013) 94.

⁶⁷⁸ HRC (n 660) para 3(a) at 2.

Whilst it is certainly beneficially that the UPR mechanism analyses the conduct of all states, the issue is that it has been observed that at times council members have not assessed states based on the same standards for political reasons or to retaliate against states.⁶⁷⁹ The reason why the UPR may not always be as objective as intended is that human rights compliance is monitored by state delegations and not by neutral experts who are unconnected to a particular state.⁶⁸⁰ A state delegation may avoid strong criticism in order not to be criticised in return.⁶⁸¹ In other words, states may not put pressure on other states in respect of controversial matters. Also, as the UAE is an economically important player, it may not be criticised to the full extent for political reasons.⁶⁸² This highlights another limitation of international law in ensuring that human rights, including children rights, are adequately protected.

Another reason why the UPR mechanism is not very effective, especially in the case of the UAE, is that it requires full participation by civil society actors.⁶⁸³ However, in the UAE there exist no independent NGOs and so criticism has been levied, including because civil society actors have been arrested and expelled.⁶⁸⁴ In this context, the CRC Committee in its Concluding Observations on the second periodic report of the United Arab Emirates has expressed 'its concern about the very limited number of independent non-governmental organizations (NGOs) working specifically in the field of children's rights'.⁶⁸⁵ This highlights another flaw within international law, namely relying on input by NGOs for the purpose of the UPR when in reality NGOs are severely curtailed in collecting relevant stakeholder information and raising issues. It is against this criticism that the aims and objectives of the UPR process must be understood, as discussed next.

5.1.1 Aims and objectives of the UPR process

The members of the HRC agreed on an 'institution building package' and explained the aims and objectives of the UPR mechanism in HRC Resolution 5/1 as follows:

⁶⁷⁹ Foreign Affairs Committee, *Human Rights Annual Report 2007: Ninth Report* (HC 2007-08) 109.

⁶⁸⁰ Hans-Joachim Heintze and Pierre Thielbörger, *International Humanitarian Action: NOHA Textbook* (Springer 2018) 151.

⁶⁸¹ *ibid.*

⁶⁸² Child Rights Information Network (CRIN), *Universal Periodic Review: The Status of Children's Rights, An Analysis of Trends/Review of NGO Participation* (CRIN 2010) 16.

⁶⁸³ Heintze and Thielbörger (n 680) 151.

⁶⁸⁴ Freedom House, 'United Arab Emirates' (2013) <<https://freedomhouse.org/report/freedom-world/2013/united-arab-emirates>> accessed 1 November 2017.

⁶⁸⁵ CRC Committee (n 567) 4.

The objectives of the review are: (a) The improvement of the human rights situation on the ground; (b) The fulfilment of the State's human rights obligations and commitments and assessment of positive developments and challenges faced by the State; (c) The enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned; (d) The sharing of best practice among States and other stakeholders; (e) Support for cooperation in the promotion and protection of human rights; (f) The encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.⁶⁸⁶

The resolution explains that all reviews should consist of an interactive dialogue, which is undertaken in a 'non-selective' manner.⁶⁸⁷ This gives member states the opportunity to share the best techniques to promote and protect human rights.⁶⁸⁸

During the interactive dialogue stage, all the 193 member states of the UN have the right to engage in the discussion.⁶⁸⁹ The review is ignited by the state under review presenting its national report to the Working Group. Members of the troika pose questions to the state under review. The state is given the opportunity to address these questions. After the national presentation has been completed, the interactive dialogue session is opened. The observer states take the floor in order to make recommendations about any human rights matters. The state under review is obliged to respond to any recommendations made by the observer states.⁶⁹⁰

The interactive dialogue lasts three and a half hours. During that time, 70 minutes of speaking time is allocated to the state under review. The remaining 140 minutes are left for the observer member states.⁶⁹¹ The interactive dialogue session of the UPR system is known to be the 'core element of the entire procedure'.⁶⁹² The UPR process facilitates a discourse about human rights issues amongst states.⁶⁹³ It is the first forum that allows interactive dialogue sessions to be commenced between states in a format that allows for responses and

⁶⁸⁶ HRC (n 660) para 4 at 2-4.

⁶⁸⁷ *ibid* para 3(g) at 2.

⁶⁸⁸ *ibid* para 4(d-e) at 3.

⁶⁸⁹ *ibid* para 18(b-c) at 4.

⁶⁹⁰ HRC, 'Review of the Work and Functioning of the Human Rights Council: Resolution adopted by the Human Rights Council' (12 April 2011) UN Doc A/HRC/RES/16/21, para 16 at 4.

⁶⁹¹ HRC (n 660) para 21 at 4. Changes made by UNHRC, 'Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review'; UN Human Rights Council, 'Report of the Human Rights Council on its 17th Session' (24 May 2012) UN Doc A/HRC/17/2.

⁶⁹² Björn Arp, 'Lessons Learned from Spain's Practice before the United Nations Human Rights Reporting Mechanisms: Treaty Bodies and Universal Periodic Review' (2009) 15 Spanish Yearbook of International Law Online 1, 13.

⁶⁹³ *ibid*.

feedback.⁶⁹⁴ These interactive discussion sessions make it possible to explore many different human rights issues, including controversial topics, eg, those with a cultural dimension.⁶⁹⁵ This makes the sessions of the UPR process a productive platform on which to discuss the aims and objectives of the investigation.

Members of the troika prepare an ‘outcome report’ which details the discussions.⁶⁹⁶ This report is then adopted at the Working Group Session which takes place after the interactive dialogue session. A few months later, this report is then considered at the plenary session of the HRC, which lasts for one hour. Time is allocated so that states or civil society bodies can make further comments.⁶⁹⁷ A final outcome report is issued for the state under review. This outline contains all the comments and recommendations which were made by the state under review and the observer states.⁶⁹⁸ Those recommendations which have not been answered during the oral review must be responded to in the form of an ‘addendum’.⁶⁹⁹ Recommendations which have been turned down will be ‘noted’.⁷⁰⁰

According to De la Vega and Lewis, the UPR process does not create the ‘traditional legal atmosphere’ associated with binding obligations.⁷⁰¹ Jonas also states that reviews are ‘conducted on a non-adversarial basis and are predicated on the mutual trust and good faith of those involved in the process’.⁷⁰² Whilst some may consider that the realisation of human rights through such positive encouragement is beneficial,⁷⁰³ the issue in the context of the CRC and child sexual abuse is that state parties are already afforded a lot of discretion due to the flexible definition of childhood, as discussed in Chapter Two. The question therefore

⁶⁹⁴ Rhona KM Smith, 'Equality of Nations Large and Small: Testing the Theory of the Universal Periodic Review in the Asia-Pacific' (2011) 12 Asia-Pacific Journal on Human Rights & Law 36, 41.

⁶⁹⁵ Frederick Cowell and Angelina Milon, 'Decriminalisation of Sexual Orientation through the Universal Periodic Review' (2012) 12 Human Rights Law Review 341, 346.

⁶⁹⁶ HRC (n 660) para 26 at 5; See also HRC (n 690) s I at 3.

⁶⁹⁷ *ibid* para 31 at 5.

⁶⁹⁸ *ibid* para 27 at 5.

⁶⁹⁹ HRC (n 690) paras 15-16 at 4.

⁷⁰⁰ HRC (n 660) para 33 at 5.

⁷⁰¹ M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 362 and Tamara Lewis and Constance de la Vega, 'Peer Review in the Mix: How the UPR Transforms Human Rights Discourse' in *ibid* 353.

⁷⁰² Obonye Jonas, 'Reflections on the Practices and Experiences of African States in the African Peer Review Mechanism (APRM) and the Universal Periodic Review Mechanism (UPR): A Human Rights Perspective' (2012) 45 Comparative and International Law Journal of Southern Africa 428, 431.

⁷⁰³ Elvira Dominguez-Redondo, 'The Universal Periodic Review—Is There Life Beyond Naming and Shaming in Human Rights Implementation?' (2012) *New Zealand Law Review* 673, 682.

arises to what extent do the UPR related reports deal with children rights, including child sexual abuse. The next section seeks to explore this.

5.1.2 The UPR and children's rights

There are three documents that are used to review member states. The first is the national report, which is a 20-page document which outlines any problems which the country has with implementing human rights. It is drafted and submitted by the state under review.⁷⁰⁴ The second report is prepared by the Office of the High Commissioner on Human Rights (OHCHR).⁷⁰⁵ The final document is a summary of the information which civil society and NGOs have submitted. Save the Children uses the opportunity to directly report, advocate and support child rights coalitions.⁷⁰⁶ A report is then prepared by the OHCHR.⁷⁰⁷ However, there is a time gap of four and a half years between reviews which is a long time of inaction to progress child rights matters further.⁷⁰⁸

Vega and Lewis explain that the reports are comprehensive and 'that this is the first time that the human rights picture on the ground for all nations will be formally documented for all to see'.⁷⁰⁹ However, only around 23 of the issues raised in the UPR mention children rights.⁷¹⁰ States refer to children rights very little in their national reports and even NGOs only highlight matters slightly more than states.⁷¹¹ The focus is mostly on education. States focus on 'safer' topics and thus not child sexual abuse, whereas NGOs and UN bodies discuss a wider array of matters.⁷¹² One limitation of the UPR is that controversial topics, such as child sexual abuse, do not receive sufficient attention in the UPR.⁷¹³ For instance, the topic of how old a person should be to enter into marriage is hardly mentioned.⁷¹⁴ Another problem with

⁷⁰⁴ *ibid* para 15(a) at 3.

⁷⁰⁵ *ibid* para 15(b) at 3.

⁷⁰⁶ A total of 31 UPR submissions were submitted or supported by Save the Children in the first cycle (2008-2011) and this number has already been surpassed for the second cycle that began in 2012 and ended in 2016: Diarra Diop, 'Child Rights Governance Universal Periodic Review: Successful Examples of Child Rights Advocacy' (Save The Children, 2014) 6.

⁷⁰⁷ *ibid* para 15(c) at 3.

⁷⁰⁸ Eugeen Verhellen, 'The Convention on the Rights of the Child: Reflections From a Historical, Social Policy and Educational Perspective' in W Vandenhoe and others (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015) 54.

⁷⁰⁹ Tamara Lewis and Constance de la Vega, 'Peer Review in the Mix: How the UPR Transforms Human Rights Discourse' in Bassiouni and Schabas (n 701) 568.

⁷¹⁰ CRIN (n 682) 16.

⁷¹¹ *ibid* 16.

⁷¹² *ibid* 17

⁷¹³ *ibid*.

⁷¹⁴ *ibid*.

the UPR is that only around 13 of the roughly 69 recommendations are child-specific.⁷¹⁵ Nevertheless, the topic of children rights was one of the main issues raised in the 2008 UPR of the UAE.⁷¹⁶

Furthermore, during the first cycle of the UPR the UAE only received four ‘children’s rights recommendations’ of which it accepted three and rejected one, namely, ‘[t]o consider legislative changes to repeal corporal punishment and bring legislation into line with international human rights obligations’.⁷¹⁷ The issue with the UPR is that controversial matters are often rejected.⁷¹⁸ In other words, international law is limited since states can opt to reject recommendations generated through the UPR process. Indeed, it is rather common for states to officially refuse recommendations.⁷¹⁹ Equally, a broadly worded recommendation such as the one above is likely to be rejected.⁷²⁰ However, the UPR does not generate ‘specific, expertise-based recommendations’ like a treaty body, such as the Committee of the CRC.⁷²¹ Also, a vague recommendation is more difficult to follow up.⁷²²

The Submission by Human Rights Watch for the UAE UPR for the 29th session scheduled to take place in January 2018 highlights that the UAE still fails to guarantee various important human rights, including children rights.⁷²³ The fundamental issue is that there still exists sex discrimination. Law No. 2 of 2015 against Discrimination and Hatred does not include sex in its list of protected characteristics. As a result, discriminatory conduct against female children is not promoted. However, sexual abuse is most frequently perpetrated against female children.⁷²⁴ The failure to outlaw sex discrimination contradicts the recommendation in the 2012 UPR to ‘[f]ully incorporate in the Constitution or other national legislation the principle of equality between men and women’. The UAE agreed to accept this recommendation but had still not done so in 2017. This highlights that international law is limited in according adequate protection because the UPR is premised on mutual trust and good faith. Yet this can

⁷¹⁵ *ibid* 20.

⁷¹⁶ UPR Monitor, ‘Universal Periodic Review, 3rd Session United Arab Emirates (Final) Reviewed on 4 December 2008’ 2.

⁷¹⁷ CRIN (n 682) 6 & 69.

⁷¹⁸ *ibid* 25.

⁷¹⁹ Charlesworth and Larking (n 668) 137.

⁷²⁰ CRIN (n 682) 25.

⁷²¹ Charlesworth and Larking (n 668) 137.

⁷²² Verhellen (n 612) 54.

⁷²³ HRW, ‘Submission for the Universal Periodic Review of the United Arab Emirates’ (29th session of the Universal Periodic Review, January 2018) <<https://www.hrw.org/news/2017/06/29/submission-universal-periodic-review-united-arab-emirates>> accessed 1 November 2018.

⁷²⁴ David Cheal, *Families in Today’s World: A Comparative Approach* (Routledge 2008) 78.

be abused by states, especially in respect of matters which are considered controversial or an interference with fundamental cultural and religious beliefs. For instance, in 2010 the Federal Supreme Court ruled that children can be beaten as long as no mark is left on them.⁷²⁵ Wives and children can also be chastised as long as the acceptable threshold required by *Sharia* is not exceeded.⁷²⁶ Raping one's wife has also not been criminalised. This is concerning in light of the fact that child marriages have not been eradicated despite stipulating 18 years as the legal age for marriage.⁷²⁷ Children can therefore be legally subjected to violence, including sexual abuse, if married under the legal age. International law therefore has not acted as a strong tool to prevent child sexual abuse, especially of female children. Female children are also discriminated against since women are not given a defence of lawful chastisement like men.

The UPR mechanism has also not ensured that the law stringently differentiates sexual abuse cases from acts of indecency which are criminalized by virtue of Article 356 of the Penal Code.⁷²⁸ Child victims may therefore be afraid to come forward since they are not assured that they will not be accused of *zina* offences and charged for the indecency offence. Male child sexual abuse victims may also fear reporting crimes since they may be accused of having committed the serious offence of unnatural sex with another person which attracts a prison sentence of a maximum term of 14 years.⁷²⁹

Accordingly, the UPR mechanism has not succeeded in adequately outlawing gender discrimination in the UAE. Whilst gender discrimination does not necessarily imply sexual abuse, both result in oppression.⁷³⁰ As female children are often more frequently sexually abused,⁷³¹ international law will only be effective in affording children adequate protection against child sexual abuse if female victims in particular are legally and practically empowered. Moreover, as children are predominantly sexually abused by family members, the fact that there exist defences of discipline and indecency, as well as *zina* offences, may

⁷²⁵ Francesca A Brava, 'It Dawned on Me, "It's OK to Beat Your Wife or Children in UAE - Just Don't Leave a Mark"' (2010) <<https://itdawnedonme.wordpress.com/2010/10/26/its-ok-to-beat-your-wife-or-children-in-uae-just-dont-leave-a-mark/>> accessed 1 November 2017; HRW (n 723).

⁷²⁶ Penal Code (UAE) art 53.

⁷²⁷ Humanium, 'Children of United Arab Emirates, Realizing Children's Rights in United Arab Emirates' (2017) <<https://www.humanium.org/en/united-arab-emirates/>> accessed 1 November 2017.

⁷²⁸ HRW (n 723).

⁷²⁹ *ibid.*

⁷³⁰ Andrew Durham, *Young Men Surviving Child Sexual Abuse: Research Stories and Lessons for Therapeutic Practice* (John Wiley & Sons 2003) 34.

⁷³¹ Samia Abul, *Professionals' Perceptions of Child Sexual Abuse: A Cultural Difference* (Xlibris 2015) 4.3.

discourage children from reporting child sexual abuse. Child victims instead opt to remain silent rather than disclose that they were subjected to sexual relations outside marriage which is considered illegal. Perpetrators may therefore be shielded. The aforementioned examples illustrate that this international mechanism has not resulted in protecting children from sexual abuse. Primarily, the UPR mechanism is limited due to its ‘essentially diplomatic or political ... nature’.⁷³²

Furthermore, the work conducted through the UPR could be improved through cooperation with the CRC Committee.⁷³³ For instance, compliance with CRC Committee recommendations, discussed in the next section, could be considered through the UPR mechanism. Without this, the important Articles 19 and 34 of the CRC may also not be as strongly promoted as they could be.

5.2 Articles 19 and 34: Protection from all forms of sexual exploitation and abuse

The protection of children from sexual abuse and exploitation is a multi-faceted problem. Fundamentally, it requires that children are protected against harm. For this reason, the CRC proscribes ‘societal abuse’, such as child prostitution, child marriage and child labour.⁷³⁴ The CRC also prohibits ‘physical maltreatment’, such as neglect and abuse,⁷³⁵ as well as ‘nonphysical maltreatment’, eg, fostering delinquency, substance abuse by parents and emotional mistreatment.⁷³⁶ Child sexual abuse and exploitation can only be combated successfully if these different strands are addressed holistically. The CRC considers parents and the state responsible for guaranteeing the rights of the child.⁷³⁷ However, a treaty only creates an obligation with the state party it is entered into and not private parties, such as parents. This illustrates one of the main disadvantages of international law. It follows that protection can only be heightened if responsibility is imposed by the state adopting the necessary laws and policies, ideally in respect of these different matters which harm children. Even an omission of one matter can significantly erode the effectiveness of the entire CRC. For example, a lenient approach towards child marriage coupled with gender discrimination

⁷³² Charlesworth and Larking (n 668) 137.

⁷³³ UNICEF, *Machel Study 10-year Strategic Review: Children and Conflict in a Changing World* (UNICEF 2009) 52.

⁷³⁴ David Androff, *Practising Rights: Human Rights-based Approaches to Social Work Practice* (Routledge 2015) 54.

⁷³⁵ *ibid.*

⁷³⁶ *ibid.*

⁷³⁷ CRC (n 21) arts 4 and 5.

may raise the risk of child sexual abuse, even if a law is in place which on the face of it proscribes child sexual abuse and exploitation.

As discussed in Chapter Two, the CRC cannot definitively determine the age of the child since domestic law suggests otherwise. As a result, the various rights contained in the CRC which are necessary to create a bulwark of protection for children are weakened. The CRC is for this reason not a strong international law instrument, such as United Nations Security Council Resolution 1373 (2001).⁷³⁸ This resolution binds all UN member states since terrorism is considered a ‘threat to international peace and security’.⁷³⁹ In contrast, the CRC has no such absolute character in international law. Hence, despite the *pacta sunt servanda* principle which applies to treaties, as discussed in Chapter One, states can derogate from their obligations due to the discretion in respect of the determination of the age of a child. These problems must be taken into account when analysing the two articles – Articles 19 and 34 of the CRC – which deal with child sexual abuse and exploitation.

Article 19 of the CRC provides that states should adopt legislative and legal measures to safeguard children from ‘all forms of physical or mental violence, injury or abuse ... maltreatment or exploitation, including sexual abuse’. In other words, Article 19 of the CRC mandates that states safeguard children against all types of abuse and violence.⁷⁴⁰ Accordingly, ‘no violence against children is justifiable; all violence against children is preventable’.⁷⁴¹ Children must be given rights in order to be cared for and to be protected.⁷⁴² They thus must be treated as right holders. Prevention means that different initiatives must be adopted, eg, through public health, to combat child abuse.⁷⁴³ Families must be at the core of such approaches.⁷⁴⁴ A state party must enact a national plan which details social programmes designed to prevent, identify, report and refer child abuse incidents.⁷⁴⁵ Legislative, administrative, social and educational measures must be adopted.⁷⁴⁶ Put differently, state

⁷³⁸ VV Ramraj, M Hor and K Roach, *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005) 267.

⁷³⁹ *ibid.*

⁷⁴⁰ Jones and others (n 66) 186.

⁷⁴¹ CRC Committee, ‘General Comment No. 13, Article 19: The Right of the Child to Protection from all Forms of Violence and Maltreatment’ (1 May 2010) 1.

⁷⁴² *ibid.* 2.

⁷⁴³ *ibid.*

⁷⁴⁴ *ibid.*

⁷⁴⁵ *ibid.*

⁷⁴⁶ CRC (n 21) art 19(1).

parties must create a comprehensive child protection system.⁷⁴⁷ Such a national plan and system must be promulgated collaboratively and must be coordinated at the local and central level of government.⁷⁴⁸ Sufficient resources must be made available.⁷⁴⁹

The issue of gender discrimination must be addressed.⁷⁵⁰ There must be a strategy on how prevention is primarily facilitated.⁷⁵¹ Resilience must therefore be built.⁷⁵² Risk factors must be reduced, including in particular by protecting vulnerable children.⁷⁵³ Public accountability must be realised.⁷⁵⁴ For instance, maladministration which undermines the rights of children and which results in a lack of protection should ideally result in the imposition of legal liability.

Moreover, state parties must define what constitutes violence, as well as maltreatment mentioned in Article 19.⁷⁵⁵ Legal definitions can also not depend on establishing that the violence occurred a certain amount of times or was of a certain severity or there was an intent to harm.⁷⁵⁶ Article 19 mentions, ‘while in the care of’. The concept of caregivers must therefore also be addressed, including when in some instances the state acts as the caregiver.⁷⁵⁷

Additionally, standards must be developed to ensure that children are well, healthy and can develop positively.⁷⁵⁸ It is not sufficient to prevent violence and maltreatment.⁷⁵⁹ Additionally, state parties must categorically deny any exceptions which permit violence and maltreatment.⁷⁶⁰ However, as highlighted in the 2015 Concluding Observations on the second periodic report of the UAE of the CRC Committee, the problem in the UAE is not only that violence may be permitted because of an exception.⁷⁶¹ Additionally, a child victim ‘runs the risk of being charged with having committed a sexual crime and even being sentenced to

⁷⁴⁷ CRC Committee (n 741) 5.

⁷⁴⁸ *ibid* 2.

⁷⁴⁹ *ibid*.

⁷⁵⁰ *ibid*.

⁷⁵¹ *ibid*.

⁷⁵² *ibid*.

⁷⁵³ *ibid*.

⁷⁵⁴ *ibid*.

⁷⁵⁵ *ibid* 4.

⁷⁵⁶ *ibid*.

⁷⁵⁷ *ibid* 5.

⁷⁵⁸ *ibid*.

⁷⁵⁹ *ibid*.

⁷⁶⁰ *ibid*.

⁷⁶¹ CRC Committee (n 567) 8.

flogging pursuant to Federal Act No. 9 of 1976, concerning juvenile delinquents and vagrants'.⁷⁶² For the same reasons, children are also insufficiently protected against prostitution and pornography.⁷⁶³ Yet clearly victims must not be treated as offenders. In other words, child sexual exploitation is not properly combated due to an unsophisticated legal approach which fails to distinguish between child victims of sexual abuse and exploitation and Islamic indecency.

The CRC has therefore not properly combated child sexual abuse, even though this is also mandated in Article 34 of the CRC. Article 34 is the core provision which deals with child sexual abuse and exploitation. It spells out the mechanisms to prevent sexual exploitation and abuse. The provision is more relevant for adolescents than children. However, children can also be sexually exploited and this is also a recognised global problem. Yet it is difficult to pinpoint exactly at which age or which groups are most vulnerable. The Committee recommends using data collection systems to ensure that all persons under the age of 18 are covered by the Convention.⁷⁶⁴ The greatest challenge is to ensure that sexual abuse of children and adolescents is monitored.⁷⁶⁵ Similar to Article 19, Article 34 of the CRC obliges states parties to adopt comprehensive measures to stop sexual exploitation and sexual abuse of children. Hence, the aim of Article 34 is for states to enact different interdisciplinary measures against child sexual exploitation. The term 'abuse' is exhaustively defined in many international instruments and equally many national laws have defined the term.⁷⁶⁶ Sexual abuse of children implies that some form of sexual violence has been committed against the child. This is different to sexual exploitation. Sexual abuse can also constitute sexual exploitation in commercial settings, for instance, using children for sex in a brothel or using children in pornography. Accordingly, child victims must be protected against prostitution and pornography and cannot be treated as offenders. Yet, as pointed out by the CRC Committee, this risk still exists in the UAE.⁷⁶⁷ There has been a failure to adopt laws which increase the safety of children. Also, the article mentions different stages of action, ie national, bilateral and multilateral action. While the term 'regional' is not explicitly

⁷⁶² HRC, 'Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography' (18 November 2010) UN Doc A/HRC/16/57/Add.2, para 103.

⁷⁶³ *ibid.*

⁷⁶⁴ CRC Committee (n 567) para 17 at 4.

⁷⁶⁵ John Frederick, *Sexual Abuse and Exploitation of Boys in South Asia: A Review of Research Findings, Legislation, Policy and Programme Responses* (Citeseer 2010) 28.

⁷⁶⁶ Mantāphōn (n 49) 2.

⁷⁶⁷ CRC Committee (n 567) 8.

mentioned, it is indisputable that regional initiatives play an important role in ensuring the safety of children. Yet in the case of the UAE and the Middle East, child protection awareness is still in its infancy. The reason for this is that ‘children's rights and needs [are] compounded by cultural meanings, and related religious imperatives’.⁷⁶⁸ International law cannot necessarily undo these historical preferences, albeit it helps to whilst promoting awareness.

Further child protection is achieved through the three optional protocols to the CRC.⁷⁶⁹ However, as these protocols are optional, states are not compelled to fulfil these complementary duties. As a result, further matters which are inadequately addressed in the CRC are not strengthened through the legal mechanism contained in the optional protocols.

Arguably, legislative problems still exist because the CRC Committee’s recommendations do not constitute legally binding law. There is no sanction, apart from reputational damage caused by negative Concluding Observations and recommendations or also the UPR mechanism mentioned above. Yet even if the law complies, the other issue is that when a state does not commit adequate resources and/or fails to develop and operate an effective child protection system, children continue to lack protection from sexual abuse. This further illustrates that despite the ratification of the CRC, international law is limited in according adequate protection to the rights of children, in particular in terms of protecting them against child sexual abuse.

5.3 United Nations’ institutions in the framework of the CRC

General human rights treaties lack a child rights approach and child rights-specific monitoring is plagued with difficulties, including capacity and limited resources. While reporting is valuable, it is insufficient in itself because reports usually contain generalised data. It is for this reason very important that additional communications procedures or other monitoring mechanisms are established. At present, the mechanisms have little practical relevance for children, which highlights that this is an area which requires reform. Most major UN human rights treaties are not child-specific, except for the CRC but they do contain some specific child-related provisions. However, the following discussion focuses on treaty

⁷⁶⁸ John Dixon and Penelope Welbourne, *Child Protection and Child Welfare: A Global Appraisal of Cultures, Policy and Practice* (Jessica Kingsley Publishers 2013) 212.

⁷⁶⁹ Jones and others (n 66) 186.

bodies which are particularly important for international child rights law: The CESCR and, in particular, the CRC Committee.

The CRC Committee has referred to both binding and non-binding instruments without firmly distinguishing between them. For example, it acknowledges the relevance of the Beijing principles for upholding the Rules for the Protection of Juveniles⁷⁷⁰ in order to implement the CRC provisions which deal with juvenile justice.⁷⁷¹ However, the Rules for the Protection of Juveniles consider a juvenile to be any person under the age of 18 years, while Article 1 of the CRC defines a child as every human being up to 18 ‘unless, under the law applicable to the child, majority is attained earlier’. There thus exists a gap which the Committee has closed by expanding the definition of who should be considered a child in juvenile justice cases. Although it is problematic for the CRC Committee to have expanded its authority in such a way, no state has objected to this development. For instance, despite the Article 1 qualification, the Committee stated in a recent General Comment that state parties are reminded ‘that data collection needs to be widened to include the whole phase of childhood, up to 18 years’.⁷⁷²

Due to monitoring challenges, various efforts have been made to enhance the Committee’s capacity. Since 1997, the Committee has been given more resources, including a support team.⁷⁷³ Monitoring involves broad participation, as made clear by CRC Article 45. Each state party which reports to the UN Committee has to provide data from at least five or six sources, including ombudspersons or national human rights institutions, UN agencies, national and international NGOs, individual experts or children. However, the views of children within the monitoring process are marginalised, for example, because of limited experience and appreciation, attitudinal impediments and overreliance on meetings. Whilst some may be interested in child participation, this practice is often limited to a small minority within institutions and is not a concern for key decision-makers. The United Nations

⁷⁷⁰ UNGA, ‘United Nations Standard Minimum Rules for the Administration of Juvenile Justice’ (adopted 29 November 1985) UN Doc A/RES/40/33 (The Beijing Rules); UNGA, ‘United Nations Guidelines for the Prevention of Juvenile Delinquency’ (adopted 14 December 1990) UN Doc A/RES/45/112 (The Riyadh Guidelines); UNGA Res 45/113 on Rules for the Protection of Juveniles Deprived of their Liberty (14 December 1990).

⁷⁷¹ CRC Committee, ‘Recommendation Adopted by the Committee on the Administration of Juvenile Justice’ (1999) UN Doc CRC/C/90.

⁷⁷² *ibid* para 48.

⁷⁷³ For details, see UN, ‘Plan of Action to Strengthen the Implementation of the Convention on the Rights of the Child’ (1999) UN Doc CRC/SP/26, para 4 at 2.

Environment Programme (UNEP),⁷⁷⁴ Save the Children UK, UNICEF and UNHCR all do not institutionally prioritise child participation, despite engaging in a participatory process. Despite verbal commitments, a dichotomy exists between the importance of child participation and its irrelevance or lack of priority within the overall institutional set up or mechanism. For example, the CRC Committee's first General Comment was developed through 'participatory' means but despite the Committee's commitment to participation it did not involve children, which is ironic given that Article 29 aims to inter alia evaluate educational objectives from the child's point of view.⁷⁷⁵

While the government is responsible for CRC progress, children can fulfil important roles as delegates and can provide valuable insight and ideas about the reality of rights in their country. As delegation members, they should have their expenses covered and should be respected and receive privileges. It is clearly valuable for children to contribute, learn and share their experiences, whether through government or NGO support. This would broaden the reporting process and may improve the follow-up process in the home country. While states parties or other actors might be apprehensive about greater child involvement, there is no justification for their exclusion.

Monitors, including the UNCRC, UNEP,⁷⁷⁶ FAO,⁷⁷⁷ UNESCO⁷⁷⁸ and ILO-IPEC,⁷⁷⁹ tend to overemphasise conferences and meetings to facilitate child participation. While they can be important, these events are often ad-hoc and unique and are insufficient to ensure full participation. While emphasis is placed on involving children in events or in interviews in order to include their voices and to raise awareness, their engagement usually has a limited impact on the institution or the actor's processes and results. On Hart's ladder of participation, such events rank on the lowest rungs of manipulation, are mere decoration and tokens, and are therefore examples of non-participation which only slightly enhance

⁷⁷⁴ CRIN, 'International Children's Conference - United Nations Environment Program (Unep)' (*CRIN*, 2002) <<https://www.crin.org/en/library/events/international-childrens-conference-united-nations-environment-program-unep>> accessed 1 August 2017.

⁷⁷⁵ CRC Committee, 'General Comment No. 1 (2001), Article 29 (1): The Aims of Education' (17 April 2001) CRC/GC/2001/1, para 6 at 3.

⁷⁷⁶ United Nations Environment Programme (UNEP) <<https://www.unenvironment.org/>> accessed 10 January 2018.

⁷⁷⁷ Food and Agriculture Organization (FAO) <<http://www.fao.org/home/en/>> accessed 10 January 2018.

⁷⁷⁸ United Nations Educational, Scientific and Cultural Organization (UNESCO) <<https://en.unesco.org/>> accessed 10 January 2018.

⁷⁷⁹ International Programme on the Elimination of Child Labour (IPEC) <<http://www.ilo.org/ipeclang-en/index.htm>> accessed 10 January 2018.

participation.⁷⁸⁰ Even though these efforts may hover on the lower ladder levels, they continue to be heralded as successful participation examples. If children were provided the space and support to articulate their situations, a much better understanding would be obtained, which in turn would benefit monitoring and promote respect for child rights.

Despite the fact that Article 12 of the CRC provides for participation and a wealth of resources explain the role and value of child participation,⁷⁸¹ attitudinal impediments continue to restrain the monitoring process. Whilst the international community acknowledges children and their rights, many representatives appear to prefer to talk about children, rather than with children, as highlighted by the lack of involvement of children in processes and organisations. For example, the OHCHR and the CRC Committee convened an event in 1999 to commemorate the CRC's tenth anniversary, assess its impact and develop recommendations to improve implementation, involving UN and government officials, independent experts and children.⁷⁸²

Among other proposals, the children stressed the importance of international agencies and governments actively consulting and involving children in their decision-making, and requested that children be included as UNCRC members. They complained about inaccessible language use during the event and the absence of some of their important proposals in the results. Some adult delegates criticised the children, contending that they lacked legitimacy as representatives.⁷⁸³ While the adults should have prepared for the children's participation, the more fundamental issue remains: Adults questioned the role and presence of children, even at an event examining the CRC's impact. This incident reflects a common lack of respect for child engagement and room for improvement. While lack of personnel, policies, procedures and tools were cited as impediments to child participation, these findings reflect not only a lack of resources but also an attitudinal impediment.

⁷⁸⁰ Roger A Hart, *Children's Participation: From Tokenism to Citizenship* (UNICEF 1992) 9-10.

⁷⁸¹ Gerison Lansdown, *Promoting Children's Participation in Democratic Decision-Making* (UNICEF 2001) 1-2.

⁷⁸² OHCHR, 'Tenth Anniversary of the CRC Commemorative Meeting: Achievements and Challenge' (1999) para W at 16 <<http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations1999.pdf>> accessed 12 February 2017; Rébecca Steward, *Independent Human Rights Institutions for Children and the Committee on the Rights of the Child Reporting Process* (UNICEF 2009) 3.

⁷⁸³ *ibid* para 22 at 11.

Little consideration is paid to child engagement because most monitors only consider children as ‘objects of measurement’. This has a negative effect on the understanding of children's rights and their results. Whilst the human rights system broadens the available avenues for adults to complain about violations,⁷⁸⁴ the principle of equality requires that the same is done for children. Furthermore, as bearers of human rights, children should be entitled to have their complaints heard and to access the processes which give them effective remedies.⁷⁸⁵ The rights-based approach has advanced as it has been recognised that children can bring claims on their own behalf to monitors. More child engagement will benefit monitoring since reports ‘probably tell us much more about childhood policies than about the situation of children’.⁷⁸⁶ Verhellen states that monitoring children’s rights should mean hearing the ‘authentic voice of the children and not just a voice speaking for children’.⁷⁸⁷

Engagement could be enhanced at general discussion days, for instance, children could be included as advisors or as members of the Committee. Other child rights monitors could also involve children since children can make valuable contributions. Research focus groups highlight that children of different ages have the capacity and the interest to participate in the monitoring process.⁷⁸⁸ However, their involvement should not simply be ad-hoc and isolated as this only has a limited impact on the processes and participants. Instead, a formal selection mechanism ought to be created at the national and international level so that children can be identified who can inform about various issues. These children should not merely be chosen on the basis of their geographic location, but a diverse range of children should partake ie abled and disabled ones, younger and older ones, children from rural and urban areas and from developed and developing states, etc. Hence, the principle of non-discrimination, as recognised in Article 2 of the CRC, should be respected and over time children from all walks of life should be fairly and evenly represented. Formal mechanisms to select and involve children could be created. These could be modelled on established procedures and timeframes in order to meet expectations and to ensure credibility. Practical support should

⁷⁸⁴ An example is the CEDAW Communications Procedure.

⁷⁸⁵ Marta Santos Pais, 'The Convention on the Rights of the Child: Manual on Human Rights Reporting under Six Major International Human Rights Instruments, United Nations' (UN, 1997) 427.

⁷⁸⁶ Ferran Casas, 'Monitoring Children's Rights and Monitoring Childhood: Different Tasks?' (1996) *Monitoring Children's Rights* 49, 49.

⁷⁸⁷ Eugeen Verhellen, 'The Search for the Achilles Heel: Monitoring of the UN-Convention on the Rights of the Child and its Implications for the States Parties' in Eugeen Verhellen and Frans Spiesschaert, *Children's Rights, Monitoring Issues* (Mys en Breesch 1994) 7.

⁷⁸⁸ Louise Chawla, 'Evaluating Children's Participation: Seeking Areas of Consensus' (2001) 42 *PLA Notes* 9; Nadia Auriat, Per Miljeteig and Louise Chawla, 'Overview—Identifying Best Practices in Children's Participation' (2001) 42 *PLA Notes* 5.

be made available, including liaison officers who cater for the specific needs of the children. Child-friendly language should be used and resources should be dedicated to prepare them for their roles. Mechanisms could also incorporate a mentoring element, ie children with national and international experience could mentor younger children and educate them about the processes and share lessons. A guideline ought to be promulgated which details the role which children should play and which should emphasise that their views should be included as part of an effective monitoring system which embraces a child rights-based approach. This is also possible since the CRC does not include an age criterion for Committee participation.⁷⁸⁹

5.4 A commentary on the implementation of the rights of the child under the CRC

Among the various studies dealing with the human rights of children, five works were singled out by this study as being particularly helpful in understanding and improving the implementation of the CRC. These studies have been conducted by scholars working in the field and most of them have been supported by UNICEF.

5.4.1 The best interests of the child: Reconciling culture and human rights⁷⁹⁰

Article 3 of the CRC⁷⁹¹ refers to '[t]he best interests of the child' and states: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

This is a crucial principle which serves to illuminate various provisions of the CRC, as well as activities which affect children.⁷⁹² However, at times, this principle can be vague in practice because different nations interpret its meaning differently in accordance with their respective cultures. Alston explains that this principle must be interpreted in line with the fundamental children's rights set out in the CRC and in accordance with 'the broader

⁷⁸⁹ Anne B Smith, 'Interpreting and Supporting Participation Rights: Contributions from Sociocultural Theory' (2002) 10 *The International Journal of Children's Rights* 75.

⁷⁹⁰ Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 *International Journal of Law, Policy and the Family* 1.

⁷⁹¹ See UN, 'Status of Treaties: Convention on the Rights of the Child' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en> accessed 20 January 2017.

⁷⁹² Laura Camfield, Natalia Streuli and Martin Woodhead, 'What's the Use of 'Well-Being' in Contexts of Child Poverty? Approaches to Research, Monitoring and Children's Participation' (2009) 17 *The International Journal of Children's Rights* 65, 66.

relationship between culture and human rights'.⁷⁹³ Hence, the 'best interests of the child' principle needs to be applied, 'not only in the context of legal and administrative proceedings, or in other narrowly defined contexts, but in relation to all actions concerning children'.⁷⁹⁴ However, the way in which this principle is interpreted and applied depends on the particular culture, religion and other traditions, which is a common problem for human rights.⁷⁹⁵ An Na'im argues that cultural relativity arguments should not be permitted to undermine and violate the rights of the child. Yet, as explained in Alston's book, which refers to seven case studies which look at children rights within different domestic settings, including 'The Best Interests of the Child: A South Asian Perspective',⁷⁹⁶ and 'The Best Interests Principle in French Law and Practice',⁷⁹⁷ each case study illustrates how specific history and social circumstances have influenced children rights. For instance, in the case of the Middle East, including the UAE, Islamic *zina* offences coupled with a cultural taboo to openly discuss topics concerning sexuality, including child sexual abuse and exploitation, have stymied the advancement of children's rights, despite the CRC ratification, as also further discussed in Chapter Six.

As observed by Himes, the director of UNICEF's International Child Development Centre who wrote the foreword to Alston's book, '[n]ational and international human rights communities will have to continue struggling with social and legal issues relating to evolving cultural values, many of which are as ancient as the process of change in human societies', and that no one study 'could hope to grapple with all the issues'.⁷⁹⁸ Since this work was published 21 years ago, culture and economics have probably changed in every country. Yet there still exist differences between states and each country has its own unique cultural foundations. It is therefore suggested that more attention should be paid to harmonising the CRC or international law in general in such a way which does not entirely ignore the particular features of each country. However, in the context of child sexual abuse, it is certainly a challenging task to change the moral outlook of a conservative Islamic society which inherently associates guilt and shame with disclosing child sexual abuse offences. In

⁷⁹³ Alston (n 790) 1.

⁷⁹⁴ *ibid* 4.

⁷⁹⁵ Abdullahi An Na'im, 'Cultural Transformation and Normative Consensus on the Best Interests of the Child' (1994) 8 *International Journal of Law, Policy and the Family* 62, 79.

⁷⁹⁶ Savitri Goonesekere, 'The Best Interests of the Child: A South Asian Perspective' (1994) 8 *International Journal of Law, Policy and the Family* 117.

⁷⁹⁷ Jacqueline Rubellin-Devichi, 'The Best Interests Principle in French Law and Practice' (1994) 8 *International Journal of Law, Policy and the Family* 259.

⁷⁹⁸ Alston (n 790) 15-16.

this sense, international law can only act as a catalyst for change; as well as legislative, administrative, educational and other measures, it may simply require time for firmly entrenched social values to become replaced in line with the CRC.

5.4.2 Implementing the CRC: Resource mobilisation in low-income states⁷⁹⁹

In the 1995 volume of Himes' book, he discusses key concepts and surveys the obligations of states parties in the CRC. He particularly focuses on how states parties can maximise 'available resources' as mandated by Article 4 which states:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Himes analyses the government obligations and looks at the nature of the obligation and the level of governmental authority.⁸⁰⁰ There are four levels of governmental authority: community/district, metropolitan/provincial/state, national and international levels. CRC members must respect, protect, facilitate and fulfil the rights of the child at these different levels. For example, communities must respect participation and other rights of children, while national bodies must protect all citizens from human rights abuse in an indiscriminate manner and facilitate the welfare of children by planning, organising and implementing policies, laws and regulations which increase and equalise opportunities for education, employment, and so on. The author also suggests that a four-step strategy is adopted to enforce the CRC, which consists of a 'situation analysis', 'goal and standard setting', 'plans and programs of action' and 'monitoring compliance and enforcement'.⁸⁰¹

Himes and Saltarelli⁸⁰² opine that the 'available resources' to implement child rights need to be maximised and that the following economic, human and organisational resources have to be committed:

(a) Economic resources include financial resources, natural resources, a physical infrastructure, technology and information;

⁷⁹⁹ James R Himes, *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low-Income States* (Martinus Nijhoff 1995).

⁸⁰⁰ *ibid* 1.

⁸⁰¹ *ibid* 21.

⁸⁰² James R Himes and Diana Saltarelli, *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low-income States. Summary* (UNICEF 1996) 41-42.

- (b) Human resources include people, their knowledge, experience, skills, motivation, aspirations, a vision, commitment and energy; and
- (c) Organisational resources include promoting the family structure, making available extended family support and childcare services, arranging for education, health, housing and juvenile justice at the municipal level, enacting national laws and regulations and creating an international monitoring system.

Himes and Saltarelli's study also specifically discusses the rights of children to survival, health and education and the right to be protected from economic exploitation. Each nation needs to mobilise various resources and apply different methods, measures and programmes simultaneously in order to realise the goals of the CRC. This includes law reform, data collection about children's situations, education and training of persons working with children, recognition of difficulties and allocation of duties. Himes and Saltarelli's volume was published around 20 years ago but the basic content remains a valuable reference for designing programmes to support and implement the CRC in developing states, including the UAE. The work emphasises the importance of committing different types of resources. As discussed above, in the context of child sexual abuse and exploitation, public health services play a particularly critical role, together with other stakeholders, such as teachers who have access to children. However, the CRC Committee has noted that the UAE still fails in making available resources available and collecting data.⁸⁰³ International law does not ensure that resources are made available to state parties but relies on the state party; in that respect, its effectiveness is further curtailed.

5.4.3 A commentary on the CRC⁸⁰⁴

Detrick's book has two parts: the first part introduces the CRC and its history and the mission of the CRC Committee; the second part is a commentary on the CRC's substantive Articles 1 to 41. Each provision is analysed as a relatively independent topic, comprising the text, the purpose of the article and its contents, including in relation to other relevant instruments. For instance, the commentary on Article 1 on the definition of the child informs that the ICCPR⁸⁰⁵ and the ICESCR⁸⁰⁶ stipulate special regulations for 'children', the 'child', 'juvenile persons' or 'young persons' but that these terms are not defined. Detrick observes that those

⁸⁰³ CRC Committee (n 567) 3-4.

⁸⁰⁴ Detrick (n 488).

⁸⁰⁵ ICCPR (n 115).

⁸⁰⁶ ICESCR (n 116).

who drafted the CRC defined a ‘child’ as any person under the age of 18 years. However, the present provision bestows some flexibility in the way state parties can apply it.⁸⁰⁷ For instance, the CRC Committee has observed that the UAE has not yet ensured that ‘early and forced marriage among girls’ is entirely prevented.⁸⁰⁸ This in turn can increase the risk of child sexual abuse.

This work is a reference material which clearly explains the meaning of each article, the original intention and the spirit of the entire Convention. Yet, since this book was written, international law has substantially changed together with economic and social conditions, eg, three optional protocols to the CRC have been adopted, general comments have been published by the CRC Committee and several other related instruments have been enacted. It is therefore necessary to update the information.

5.4.4 Implementing the rights of the child: Six reasons why the realisation of human rights of children remains a constant challenge⁸⁰⁹

David argues that there are ‘at least 6 over-reaching challenges relating to the implementation of the CRC’. These can be summarised as follows:

- (a) A new approach is required to solve child issues, ie the traditional welfare approach has to be replaced by a human rights approach. This requires something short of a revolution in each state and reform of the law, changes within institutions and in belief.
- (b) Strong interaction is required between various state bodies, eg, ministries of social welfare, health and justice, and this cooperation has to be supported through related measures.
- (c) The CRC’s provisions which deal with civil rights, especially the right to participation when discussing matters in relation to children, are often overlooked or misunderstood. Addressing this requires ‘deep social changes in attitudes, behaviour and values’.⁸¹⁰

⁸⁰⁷ CRC (n 21) art 1: ‘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.’

⁸⁰⁸ CRC Committee (n 567) 9.

⁸⁰⁹ Paulo David, ‘Implementing the Rights of the Child: Six Reasons Why the Human Rights of Children Remain a Constant Challenge’ (2002) 48 *International Review of Education* 259.

⁸¹⁰ *ibid* 260.

- (d) There still exist difficulties with understanding how to implement typical child related matters and tradition, particularly in relation to health and education.
- (e) Affording children their human rights still creates ‘hysterical debates’ as many groups sense that this ‘will infringe on their own rights’.⁸¹¹
- (f) ‘69 states have made reservations or declarations when ratifying the Convention’⁸¹² so that the overall impact of the CRC is limited.⁸¹³ This also includes the UAE which has entered reservations in respect of Articles 7, 14, 17 and 21.⁸¹⁴ Despite being urged, for example, in 2002 to withdraw these, this has not been done.⁸¹⁵

This research was conducted over ten years ago and the situation relating to children has noticeably changed since then. Nevertheless, implementation of the CRC has not been as effective as hoped. Persons who are responsible for taking care of children, whilst acknowledging that some progress has been done, still complain about challenges, including guaranteeing the right to be protected.⁸¹⁶ Researchers also point out that despite the achievements, ‘very few cases of an integral or holistic application of the CRC to national law can be found even today’, and there still exist problems with the implementation of the CRC.⁸¹⁷ Without a holistic approach towards combating child sexual abuse, it is unlikely that this very private crime will be uprooted. Yet a consensus must first be reached on how to bridge the various debates. David’s work may remain valuable when seeking solutions for a better implementation of the CRC.

5.4.5 The implementation handbook for the CRC⁸¹⁸

This work is supported by UNICEF and three versions have been published. Executive Director Veneman of UNICEF states that the handbook has ‘become a well-known practical

⁸¹¹ *ibid* 261.

⁸¹² *ibid* 262.

⁸¹³ See United Nations (n 791).

⁸¹⁴ CRC Committee (n 567) 2.

⁸¹⁵ CRC Committee, ‘Concluding Observations of the Committee on the Rights of the Child: United Arab Emirates’ (13 June 2002) CRC/C/15/Add.183, 1-12, 2-3.

⁸¹⁶ Dan Seymour, ‘1989-2009: Convention Brings Progress on Child Rights, but Challenges Remain’ (*UNICEF*, 2009) <<https://www.unicef.org/rightsite/237.htm>> accessed 26 January 2017; Yanghee Lee and Kimberly A Svevo-Cianci, ‘Twenty Years of the Convention on the Rights of the Child: Achievements and Challenges for Child Protection’ (2009) 33 *Child Abuse & Neglect* 767.

⁸¹⁷ Marta Mauras, ‘Public Policies and Child Rights: Entering the Third Decade of the Convention on the Rights of the Child’ (2011) 633 *The Annals of the American Academy of Political and Social Science* 52, 53.

⁸¹⁸ Hodgkin and Newell (n 628).

tool for guiding states', UNICEF, organisations and academics for the implementation of the CRC.⁸¹⁹ It discusses the underlying concepts and content of all the 54 articles of the Convention and analyses their complex relations to normative legal documents, such as the first two optional protocols to the CRC, the ICCPR and ICESCR, and general comments and recommendations from the CRC Committee and other UN bodies. Additionally, numerous examples are extracted from state parties' reports in order to explain or illustrate issues. For example, when analysing Article 37 which deals with the child's right to be protected from torture, degrading treatment and deprivation of liberty, states parties' reports and relevant laws which have been enacted are examined. The handbook also includes many recommendations from the CRC Committee which were made to developed and developing states (such as Canada, the United Kingdom, Australia, China, Singapore and the UAE).

These recommendations encourage member states to judicially protect children. The commentary clearly spells out the matters which affect children rights, as well as respective state obligations. The handbook is a valuable source to understand the human rights of children and is most useful for realising and implementing the CRC. However, since the book was published, more child-related documents have been adopted, including the CRC Committee's General Comments 11–18.⁸²⁰ As Comment No. 13 (2011) states: 'The right of the child to freedom from all forms of violence was not published, it is still necessary to read it with the awareness that the comments, recommendations and regulations are not up to date, especially in the context of child sexual abuse and exploitation'.

These studies show that there exist various reference documents which promote a greater understanding of the CRC and encourage its application. Yet they also highlight that there are still problems and challenges which make realisation of this goal difficult, especially in developing states or states with different customs and traditions. Effective implementation of the CRC means recognising not only the CRC provisions but also a number of relevant treaties, guidelines, standard rules and recommendations. Furthermore, local and national contextual factors should be considered but without this resulting in child rights violations. Each nation should try and improve its legal system, social attitudes and provide financial and human resources for child issues. When studying and applying the CRC, actors might

⁸¹⁹ *ibid* xi.

⁸²⁰ See more, UNICEF, *General Comments of the Committee on the Rights of the Child* (UNICEF 2006).

consult these studies whilst remembering to update relevant documents and carefully place them in their particular cultural and socio-economic context.

5.5 Criticism of the CRC and its underpinnings

The CRC lacks the system of enforcement needed to make it more than just a twenty-five year-long suggestion; it needs to be enforced to allow for the adjudication of complaints of individual children.⁸²¹ Currently, there is very little case law to be found which applies the Convention's standards to cases, giving it insufficient foundation and thus making it difficult to determine the ways in which it is to be implemented and enforced.⁸²² Instead, the implementation of the CRC is monitored by a committee of international experts whose 'primary responsibility is to monitor reports submitted by States Parties on national implementation of CRC'.⁸²³ Essentially, the Committee makes criticisms and recommendations which the majority of member states do not qualify as mandatory or necessary.⁸²⁴

States that are party to the CRC agree to take 'all appropriate legislative, administrative, and other measures' to ensure that all children in their jurisdiction have their rights set out in the Convention.⁸²⁵ The 'CRC calls for the protection of children from economic, sexual, and other forms of exploitation; torture; and capital punishment for offenses committed before the age of 18. However, the prevalent lack of enforcement in certain states is largely due to the flaws in the document itself,⁸²⁶ as well as cultural mores and norms that cause these member states to interpret the CRC differently.⁸²⁷ Often, member states are not honest with the CRC Committee about their degree of enforcement and even more often the states lack the infrastructure required to implement and enforce the rules of the CRC.⁸²⁸ Furthermore, 'because enforcement mechanisms are almost entirely internal, other problems such as

⁸²¹ Subedi (n 4) 87.

⁸²² Stefanie Grant, 'Functional Distinction or Bilingualism? Human Rights and Trade: The UN Human Rights System' in Frederick M Abbott, Christine Breining-Kaufmann and Thomas Cottier (eds), *International Trade and Human Rights: Foundations and Conceptual Issues* (University of Michigan Press 2006) 133, 138.

⁸²³ Luisa Blanchfield, 'The United Nations Convention on the Rights of the Child' (Congressional Research Service, 1 April 2013) 3 <<https://pdfs.semanticscholar.org/ac65/fa4fb19f492fe1f5d3090b58c3d8a429e4cd.pdf>> accessed 4 September 2017.

⁸²⁴ Todres, Wojcik and Revaz (n 256) 28.

⁸²⁵ CRC (n 21) art 4.

⁸²⁶ Sherilyn C Baxter, 'The Suggestions on the Rights of the Child: Why the United Nations' Convention on the Rights of the Child is a Twenty-Five Year Failure' (2015) 2 *Journal of Global Justice & Public Policy* 89, 98.

⁸²⁷ Sonia Harris-Short, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' (2003) 25 *Human Rights Quarterly* 130, 166.

⁸²⁸ Baxter (n 826) 91.

honesty in enforcement and lack of infrastructure for enforcement in State Parties can be troubling'.⁸²⁹ Additionally, the UN's jurisdiction has very little enforcement of law behind it, often making its regulations rather idealistic and ineffective.⁸³⁰

Although the treaty has been ratified by 196 states, there are still many gaps and inequalities that exist for children.⁸³¹ Problems with enforcement and funding are major issues that need to be addressed in order for the CRC to be more effective.⁸³² Until the adoption and ratification of the CRC, children's rights were not explicitly recognised by any treaty, nor was there any legally binding international authority.⁸³³ For the first time, children would possess 'innate rights, equal to those of adults: rights to health, to education, to protection and to equal opportunity'.⁸³⁴ The CRC inspired changes in laws to protect children and policies to help them reach their full potential, and more broadly, 'it has provided a clear mandate to translate the right of every child to health, protection and hope into practical programmes and services'.⁸³⁵ It is difficult for any treaty to have widely effective enforcement and compliance for an array of reasons so '[t]he strength of the Convention cannot be measured in ratifications, national laws or government declarations. Ultimately, the real test is whether or not its provisions make a difference in the lives of children.'⁸³⁶ The CRC has yet to draw in strong advocacy worldwide. There is little debate about its importance on the international stage but the CRC lacks the media coverage that other treaties and policy implications have in today's society.⁸³⁷

States that are parties to the CRC either refuse to be serious about their intent in adopting the amendments of the CRC or they fail to pass legislation that has the necessary enforcement mechanisms to be effective.⁸³⁸ Parties pass the CRC but make numerous reservations or

⁸²⁹ Lynne Marie Kohm, 'A Brief Assessment of the 25-Year Effect of the Convention on the Rights of the Child' (2014) 23 *Cardozo Journal of International & Comparative Law* 323, 345.

⁸³⁰ *ibid* 345.

⁸³¹ UNICEF, 'Progress for Children Rights in South Asia, but Inequalities Exist' (*UN News Centre*, 2014) <<http://www.un.org/apps/news/story.asp?NewsID=48689#.WOi0Cojys2w>> accessed 8 April 2017.

⁸³² Kathleen Boumans, 'Filling the Gaps: New Proposals for the Convention on the Rights of the Child' (2015) 43 *Syracuse Journal of International Law and Commerce* 191, 195.

⁸³³ Anthony Lake, 'Children's Rights, Equity and our Common Future' in Ton Liefaard and JE Doek, *25 Years of the Convention on the Rights of the Child: Is the World a Better Place for Children?* (UNICEF 2015) 3.

⁸³⁴ *ibid*.

⁸³⁵ *ibid* 4.

⁸³⁶ Kevin Watkins, 'The Convention on the Rights of the Child: Delivery on the Promise for Children is Long Overdue' in Liefaard and Doek (n 833) 69, 71.

⁸³⁷ Boumans (n 832) 199.

⁸³⁸ Watkins (n 836) 70.

objections, thus watering down the effect it was intended to have.⁸³⁹ The states pass laws but the laws do not provide for enforcement, monitoring or funding for resources. The author believes that ambiguities in interpretation of its text are another problem that undermines the spirit of the CRC. Methods of enforcement need to change and avenues for turning the principles of the CRC into practical policy need to be scrutinised closer. The CRC as a whole needs to be renewed and reformed to adjust for the continuing injustices to which children are subjected because, '[i]n a world where more than 6 million children die before their fifth birthday, where 161 million are stunted, and where more than 250 million are denied even the most basic opportunities for learning, business as usual is unacceptable'.⁸⁴⁰ Lack of funding is a major problem when it comes to international treaties. Without funding, it is difficult for many states to provide the necessary reform, afford to maintain the reform, and meet compliance standards. Without wider resource availability and awareness, it is unrealistic that all states will be able to comply with the CRC. It is often difficult for formal legal reforms to keep pace with the substantive activities which support developing states.

5.6 Conclusion

Monitoring is increasingly relevant for the international child rights system. Attention is no longer focused on developing instruments but on applying them and measuring progress. Although there exist shortcomings and procedural and substantive improvements could be made, the wealth of legal instruments and mechanisms at different levels provide formal legal protection for children's rights. However, most monitors rely on assumptions about children and their needs, and therefore do not effectively monitor their rights. This does not represent a child rights approach.

International law has 'established primary rules of obligation, that is, commitments to eliminate discrimination against women, but has yet to sufficiently develop or use sufficiently the secondary rules of process and enforcement, by which to interpret and apply legal commitments'.⁸⁴¹ Similarly, the international legal system includes child rights but has not fully adapted itself to meet their demands and requirements. Monitors generally follow a traditional research approach which considers the child an object of observation rather than a

⁸³⁹ William A Schabas, 'Reservations to the Convention on the Rights of the Child' (1996) 18 *Human Rights Quarterly* 472, 473.

⁸⁴⁰ Watkins (n 836) 73.

⁸⁴¹ Rebecca J Cook, 'Effectiveness of the Beijing Conference in Fostering Compliance with International Law Regarding Women' in Michael G Schechter, *United Nations-Sponsored World Conferences: Focus on Impact and Follow-up* (United Nations University Press 2001) 65.

subject. Consequently, a system has been created of formal international legal obligations which monitors children's rights, though with the same structural mechanisms in place as for adults. However, this is an unsuitable system for children since it is less committed to understanding and comprehending the needs to realise children's liberties. The present system has several interconnected challenges which obstruct the development of a child rights-based approach, including structural obstacles, procedural barriers, lack of resources and attitudinal impediments. The political monitoring process diminishes the legal effect of the CRC as there exists no body which provides definitive decisions to enforce child rights.

Furthermore, the overwhelming emphasis on the CRC Committee's role may restrict discussion about monitoring or other actors' monitoring responsibility. Monitoring should result in effective child rights and it is insufficient to simply consider whether the strict procedural requirements have been met. Attention must now focus on improving the processes and mechanisms so that monitoring reaps better results. While many obstacles exist and errors have been made, they can serve as learning opportunities to serve future processes and inform monitors to create a system which is truly suitable for children.

It is argued that children are prone to sexual abuse because of the global lack of understanding of children's rights. The research suggests that child sexual abuse is a serious issue. Abuse can take place in many different forms. The focus has been on combating child prostitution and trading children. Both of these activities involve third parties who engage in this activity for financial gain. The Internet is a popular platform to promote child pornography and trafficking. However, this form of child sexual abuse occurs less frequently than other forms. The majority of perpetrators are adult males although adult females are also responsible for abuse. Both male and female adolescents are more vulnerable to sexual abuse. This form of abuse is a challenging issue to address. Young people do not view themselves as victims and may feel embarrassed and therefore fail to disclose their experiences. Many children often keep returning to their abusers for various reasons. This makes it difficult to prevent children being subjected to sexual abuse. Whilst much progress has been made, much more is needed to stop sexual abuse of children. A multi-agency response is needed to deal with the problem. International, regional and domestic co-operation is required and all parties must work together to create new methods to eradicate the child sexual abuse crisis. The next chapter now presents the case study of the UAE in order to ascertain whether international

law has been limited in according adequate protection to the rights of children and whether this is particularly evident from the lack of protection of children from sexual abuse.

Part IV: The Limitations of International and Comparative Law: Case Study of the UAE

Chapter Six: Child Sexual Abuse in the Legal Framework of the UAE

6.0 Introduction

As examined in the previous part, international law provides weak mechanisms for preventing and combating child sexual abuse. It is against this background that this chapter focuses on the UAE and illustrates the limitations of the CRC and international and regional conventions in preventing child sexual abuse. Definitional and other conceptual limitations are highlighted which render the law ineffective, as well as legal, cultural and political problems. Hence, this chapter seeks to analyse how the UAE has tried to address this issue. For this purpose, it is important to analyse the legal framework of the UAE. Hence, at the beginning of the chapter the legal history and the sources of legislation are addressed. The UAE is still a very conservative society and this has an influence on the way in which child sexual abuse is combated. The UAE is an Islamic state and this part also examines how Islam has influenced Muslim society in relation to the treatment of children. Then, an effort is made to look at municipal laws and identify gaps in the penal code and its implementation mechanism. Hence, possible loopholes, which can be exploited by perpetrators of child sexual abuse, are explained. Lastly, the focus is turned on the new Child Protection Law 2016 (the Wadeema Law). This law is analysed, in particular the shortcomings which result in children not being adequately protected against child sexual abuse. It is also discussed how human rights institutions, NGOs and civil society activism are important to further protect children. It is argued that more needs to be done to curb child sexual abuse in the UAE. The economic development and accompanying child sexual abuse require that the regulatory environment is substantially improved. Although the UAE has ratified international conventions on human rights and child rights, including the CRC, much more must be done to change the realities on the ground.

On 2 December 1971, the UAE was established as a result of the unification of seven Emirates: Umm al-Quwain, Al Fujairah, Abu Dhabi, Ajman, Dubai, Ras al-Khaimah and Sharjah.⁸⁴² The ruler of Abu Dhabi, Sheikh Zayed Bin Sultan Al-Nahyan,⁸⁴³ was chosen by the other six rulers as president since he was the architect of this union.⁸⁴⁴ The UAE was accepted as a UN member⁸⁴⁵ and Arab League member. It formed a structured political entity which is internationally recognised. Prior to 1971, the Emirates were known by several names that had been given to it by foreigners, such as the Sheikhdome of the Omani Coast, the Trucial States and the Trucial Emirates.⁸⁴⁶

6.1 Legal history of the regime and the legal system

International law does not set out a system of governance and the UAE is a civil law jurisdiction rooted in Roman but also in religious law. A civil law jurisdiction is strictly defined as a legal tradition which has its origin in Roman law, as arranged in the *Corpus Juris Civilis of Justinian*, and which has consequently developed around the world, especially in continental Europe. Civil law employs broad declarations and general principles but often ignores the finer details. Civil law is highly systemised and structured.⁸⁴⁷ The key source in jurisdictions which are civil law states is codified law.⁸⁴⁸ As a country which uses civil law, the role of the highest federal court in the UAE is to interpret the provisions of the constitution when requested by the government of any Emirate or by any Union authority. Any such interpretation is deemed binding on all. In contrast, in common law states, court decisions are a very important source.⁸⁴⁹ For instance, the Egyptian legal system assigns weight to court decisions despite the fact that it is also influenced by French and Roman civil

⁸⁴² See more Simon C Smith, *Britain's Revival and Fall in the Gulf: Kuwait, Bahrain, Qatar, and the Trucial States, 1950-71* (Routledge 2004) 78; Uzi Rabi, 'Oil Politics and Tribal Rulers in Eastern Arabia: The Reign of Shakhbut (1928–1966)' (2006) 33 *British Journal of Middle Eastern Studies* 37, 47. See map of UAE in Appendices.

⁸⁴³ Sheikh Zayed Bin Sultan died in 2003 and his son Sheikh Khalifa replaced him.

⁸⁴⁴ According to the Constitution, the Federal Supreme Council should hold a meeting every five years to elect a new president. However, Sheikh Zayed was always re-elected as president of the federation without any dispute.

⁸⁴⁵ According to UNSC Res 304 (8 December 1971).

⁸⁴⁶ See Alexander Melamid, 'Political Geography of Trucial Oman and Qatar' (1953) 43 *Geographical Review* 194.

⁸⁴⁷ William Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (1999) 60 *Louisiana Law Review* 677, 683.

⁸⁴⁸ See Dominik Lengeling, 'Common Law and Civil Law—Differences, Reciprocal Influences and Points of Intersection' (2008).

⁸⁴⁹ Constitution of the UAE, art 99(4).

law.⁸⁵⁰ Many Muslim states, such as the UAE, Bahrain, Kuwait, Yemen and Saudi Arabia have adopted constitutions which entrench Islam or Islamic law (*Sharia*) as ‘a source’ or ‘a primary source’ for legislation. This arguably creates greater ambiguity since two different conceptualisations of legal models are merged, ie civil with religious law. Laws in civil law states are written down and clearly stipulate particular rules. In contrast, *Sharia* is uncodified and many different interpretations exist around the world. For example, since 1980, the Egyptian Constitution has stated that the main source of legislation are Islamic *Sharia* principles.⁸⁵¹ Similarly, Article 7 of the UAE Constitution states that: ‘Islam is the official religion of the Federation.’ This means that the UAE is an Islamic as opposed to a secular state.⁸⁵² As such, Islamic religious values govern the public and private domain.⁸⁵³ Accordingly, the UAE is an Islamic state and cannot adopt rules which contradict *Sharia*. Otherwise, this would be considered unconstitutional. Article 7 of the constitution also affirms such an approach since it states that ‘[t]he Islamic Shari’ah shall be a main source of legislation in the Federation’.⁸⁵⁴ Yet international law does not expressly elude to religious values or *Sharia* in particular. A friction exists as a result of this which is often used as a reason to contend that it is difficult to bring domestic law into line with international law. It is another limitation of international law which undermines its effectiveness, including in respect of the prevention of child sexual abuse.

6.2 UAE as a state party to a number of international conventions

The UAE has tried to address the crime of child sexual abuse, including through acceding to a number of international conventions⁸⁵⁵ that deal with child sexual abuse directly or indirectly. In 1972, the UAE ratified the four Geneva Conventions of 1949 and their two Additional Protocols of 1977,⁸⁵⁶ as well as nine ILO Conventions, including on the subjects

⁸⁵⁰ Christian Ule and K Florian Buchler, 'United Arab Emirates' (2006) MENA Legal, dispute resolution 186, 186.

⁸⁵¹ Constitution of the Arab Republic of Egypt (18 January 2014) art 2.

⁸⁵² Constitution of the United Arab Emirates (2 December 1971) art 7.

⁸⁵³ Ibrahim Abed and Peter Hellyer, *United Arab Emirates: A New Perspective* (Trident Press 2001) 152.

⁸⁵⁴ *ibid* 152.

⁸⁵⁵ Ministry of Foreign Affairs and International Cooperation, 'Human Rights and UPR' (2017) <<https://www.mofa.gov.ae/EN/TheMinistry/UAEForeignPolicy/Pages/Human-Rights-and-UPR.aspx>> accessed 17 February 2017.

⁸⁵⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (12 August 1949) 75 UNTS 31. The UAE ratified this Convention on 10 May 1972; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (12 August 1949) 75 UNTS 85. The UAE ratified this convention on 10 May 1972; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (12 August 1949) 75 UNTS 135. The UAE ratified this convention on 10 May 1972; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12

of working hours, forced labour, labour inspections, night work for women, equal pay, the minimum age for employment and the worst forms of child labour.⁸⁵⁷ In 2012, the UAE ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁸⁵⁸ In 2007, the UAE ratified the Convention against Transnational Organized Crime and its Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol).⁸⁵⁹ In 2004, the UAE ratified the Convention on the Elimination of All Forms of Discrimination against Women.⁸⁶⁰ In 1974, the UAE ratified the International Convention on the Elimination of All Forms of Racial Discrimination.⁸⁶¹ In 1972, the UAE ratified the Arab Charter of Human Rights.⁸⁶² In 1997, the UAE ratified the Convention on the Rights of the Child.⁸⁶³ In 2005, the UAE ratified the Convention on the Prevention and Punishment of the Crime of Genocide.⁸⁶⁴ In 2010, the UAE ratified the Convention on the Rights of Persons with Disabilities⁸⁶⁵ and became a signatory to the Rome Statute of the International Criminal Court.⁸⁶⁶ Finally, in 2016 the UAE ratified Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.⁸⁶⁷ However, to date the UAE has not become a party to the ICCPR and the ICESCR. In light of the fact that these two international instruments are the core international human rights treaties, together with the UDHR, there therefore still exists a significant gap within the protective coverage of international human rights, including children rights. On this basis, the UAE should be urgently compelled to enter into these two international agreements which provide a more comprehensive and

August 1949) 75 UNTS 287. The UAE ratified this convention on 10 May 1972; Protocol I (n 27). The UAE ratified this protocol on 9 March 1983; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609. The UAE ratified this protocol on 9 March 1983.

⁸⁵⁷ International Labour Organization, 'Ratifications for United Arab Emirates' (2017) <http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103495> accessed 17 February 2017.

⁸⁵⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85. The UAE ratified this convention on 19 July 2012.

⁸⁵⁹ Convention against Transnational Organized Crime (adopted 8 January 2001). The UAE ratified this convention on 7 May 2007; Protocol to UNTOC (n 182).

⁸⁶⁰ Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) 1249 UNTS 13, 13. The UAE ratified this convention on 6 October 2004.

⁸⁶¹ International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) 660 UNTS 195, 195. The UAE ratified this Convention on 20 June 1974.

⁸⁶² Arab Charter on Human Rights (15 September 1994). The UAE ratified this charter on 29 November 2007.

⁸⁶³ CRC (n 21). The UAE ratified this Convention on 3 January 1997.

⁸⁶⁴ Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277. The UAE ratified this convention on 11 November 2005.

⁸⁶⁵ CRPD (n 606). The UAE ratified this convention on 19 March 2010.

⁸⁶⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90. The UAE signed this statute on 27 November 2000.

⁸⁶⁷ Optional Protocol on the Sale of Children (n 188). The UAE ratified this protocol on 2 March 2016.

robust protection for children. Moreover, the regional human rights treaty – the ACHR – applicable to the Middle East is not as effective in ensuring human rights in the UAE as the ECHR together with the ECtHR since it is overwhelmingly influenced by an archaic and patriarchal interpretation of *Sharia* which, as analysed in this study, is frequently at variance with human rights for the most vulnerable members of society.

Furthermore, children can only be adequately protected against child sexual abuse and exploitation if a holistic approach is adopted, as also called for by the CRC Committee. The CRC also requires that legal, administrative, educational and other measures must be taken. Yet the base of all these measures should be rooted in a firm commitment to human rights. Human rights encapsulate core values of humanity as also conveyed in the UDHR, but which are also contained in the holy *Quran*. Without the ratification of these seminal international human rights instruments, international law is not as strong. The monitoring which is carried out by the treaty bodies of these instruments is not conducted. As discussed in the previous chapter, the monitoring carried out by the CRC Committee and through the UPR mechanism is not necessarily the strongest means, thereby limiting international law. As a result, it is easier to pay lip-service to the obligations in the CRC. Without ratification of the ICCPR and ICESCR, it does not appear that there exists a serious commitment to the full transposition of child rights. Child rights are inextricably interwoven with human rights and it appears easier to combat child sexual abuse in an environment where human rights are firmly guaranteed. Islamic scholarship is needed to explore the relationship between the fundamental *Sharia* values and core human rights norms. The perceived gap between Islamic and Western values which still hinders progress in combating child sexual abuse could thereby be easily overcome.

6.3 The rule of law and the paradigm of child sexual abuse

A related concept to governance is the rule of law.⁸⁶⁸ The importance of the rule of law is universally acknowledged.⁸⁶⁹ One of the crucial basics of good governance is known to be the rule of law.⁸⁷⁰ Weingast states that ‘the emergence of the rule of law coincides with the

⁸⁶⁸ Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *The University of Chicago Law Review* 1175, 1176.

⁸⁶⁹ John V Orth, 'The Rule of Law' (2016) 19 *Green Bag* 175.

⁸⁷⁰ Guillermo A O'Donnell, 'Why the Rule of Law Matters' (2004) 15 *Journal of Democracy* 32.

transition from the natural state to the open access order'.⁸⁷¹ He reasons that natural states only have a limited ability to grant the rule of law; they cannot make both extensive, credible commitments to institutions and rules that provide for certainty, expectation or impersonal rule that treat a broad class of citizens equally. Although the rule of law views citizens in an impersonal way, natural law treats people personally and hence differentially.⁸⁷² Weingast has also studied why developing states are so resistant to the rule of law.⁸⁷³

This question suggests that there is an issue with how the rule of law is exercised in developing states. Undoubtedly, there is a flawed notion that the rule of law exists in a society where basic human rights are neglected. However, the idea is aimed at protecting against arbitrary governance. Another significant rule of governance is that accountability may be effective once the rule of law is established. The establishment of the rule of law will guarantee that the well-known duty-bearers are held accountable if any discrepancies exist in the completion of legally binding norms giving individuals their human rights. More importantly, the rule of law permits the ones who hold rights to claim their infringed rights and alleviate difficulties caused by infringements committed through established institutions such as courts. The rule of law is the notion that governmental authority is legally exercised only in agreement with written, openly disclosed laws adopted and promoted in accord with established procedure. Comprehending some practice needs several factors to be combined. Every element is considered when assessing the claim that the rule of law is successful in society. If the rule of law has passed the test for the effective exercise, the next question raised is whether no bad practices exist like corruption and nepotism and if the principle of accountability is efficiently applied in the process of governance. Furthermore, it is vital to certify that in a context where international laws have to be followed, the sovereignty narrative is not misused or serves as an excuse for a country which has an absolute indifference for fundamental human rights. The rule of law is also an underlying element to an efficient working of institutions that harbour and endorse human rights. Since child sexual abuse raises questions on child rights, it is imperative that from a universal approach the rule of law works well in the UAE. However, failings of the rule of law cannot be managed by international law which demonstrates another limitation in this respect. The efficiency of the exercise of the rule of law in the UAE is essential. A lack thereof generates a variety of

⁸⁷¹ Barry Weingast, 'Why Developing States Prove so Resistant to the Rule of Law?' in James J Heckman, Robert L Nelson and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law* (Routledge 2013) 40.

⁸⁷² *ibid.*

⁸⁷³ *ibid.*

abuses. As preventing and combating child sexual abuse is already shrouded in difficulties resulting from societal differences, it is more difficult to adhere to fundamental rule of law tenets based on international law.

The Declaration adopted on 24 September 2012 by the United Nations General Assembly at the High-level Meeting on the Rule of Law at the National and International Levels reaffirmed that ‘human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations’.⁸⁷⁴

In order to get the adequate results in combating the child sexual abuse, human rights should be given more strength, more respect and more deference in international law.

6.4 Provisions in the UAE’s Constitution related to international law

The constitution of the UAE provides that the Federal Supreme Council is responsible for ‘the ratification of treaties and international agreements. Such ratification shall be accomplished by decree’.⁸⁷⁵ It goes on to state that:

The Governments of the Emirates shall undertake the appropriate measures to implement the laws promulgated by the Union and the treaties and international agreements concluded by the Union, including the promulgation of the local laws, regulations, decisions and orders necessary for such implementation. The Union authorities shall supervise the implementation by Emirate's Governments of the Union laws, decisions, treaties, agreements and Union judgements. The competent administrative and judicial authorities in the Emirates should forward to the Union authorities all possible assistance in this connection⁸⁷⁶ ... Foreigners shall enjoy, within the Union, the rights and freedom stipulated in international charters which are in force or in treaties and agreements to which the Union is party. They shall be subject to the corresponding obligations.⁸⁷⁷

Article 60 of the Constitution also states that the cabinet is responsible for ‘6. [s]upervising the implementation of Union laws, decrees, decisions and regulations by all the concerned authorities in the Union or in the Emirates, 7. Supervising the execution of judgements rendered by Union Law Courts and the implementation of international treaties and agreements concluded by the Union.’ It further provides that ‘[n]othing in the application of this Constitution shall affect treaties or agreements concluded by member Emirates with

⁸⁷⁴ UNGA, ‘Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels’ (adopted 30 November 2012) UN Doc A/RES/67/1, para 5 at 2.

⁸⁷⁵ Constitution of the UAE (2 December 1971).

⁸⁷⁶ *ibid* art 125.

⁸⁷⁷ *ibid* art 40.

states or international organisations unless such treaties or agreements are amended or abrogated by agreement between the parties concerned'.⁸⁷⁸ An analysis of these provisions shows that the UAE Constitution distinguishes international treaties and agreements which were entered into before the creation of the federation from those which were adopted subsequently. The former prevail, whereas in respect of more recent ones Article 147 requires that their application does not prejudice the member Emirates. In case an international treaty or agreement conflicts with a provision in the Constitution, then the provision in the international treaty or agreement prevails and the provisions in the Constitution cannot prejudice its application.

The second type of international treaties and agreements are those which the UAE has entered into after its establishment by way of ratification or other act, as set out in the Vienna Accord, but which does not affect the Constitution. Article 40 ensures that international human rights treaties have the same weight as the Constitution. Accordingly, any citizen or person resident in the UAE can enjoy the rights and freedoms set out in the international instrument which the UAE has ratified. In practice, this means that individuals can directly invoke the provisions of an international treaty in front of a national judge, and if this is the case and even if the domestic legislation is issued in breach of the provisions of the international treaty or agreement, then the provisions in the treaty prevail over the domestic legislation.

Article 115⁸⁷⁹ of the Constitution affords great importance to international treaties because they prevail over the ordinary domestic laws. Whilst the president of the federation can issue jointly together with the cabinet decrees which the Supreme Council then authenticates, this delegation does not apply to international treaties and agreements. Article 60 ensures that the provisions in international treaties and agreements are interpreted by the federal courts instead of federal laws. Yet the Cabinet is nonetheless responsible for '6. Supervising the implementation of Union laws, decrees, decisions and regulations by all the concerned authorities in the Union or in the Emirates, 7. Supervising the execution of judgements

⁸⁷⁸ *ibid* art 147.

⁸⁷⁹ Article 115 states that: 'While the Supreme Council is out of session and if necessity arises, it may authorise the President of the Union and the Council of Ministers collectively to promulgate decrees whose ratification is within the power of the Supreme Council, provided that such authority shall not include ratification of international agreements and treaties or declaration or remission of martial law or declaration of a defensive war or appointment of the President or Judges of the Union Supreme Court.'

rendered by Union law courts and the implementation of international treaties and agreements concluded by the Union’.⁸⁸⁰

Whilst the Constitution does not expressly state that an international treaty prevails over national law and does not prevail over ordinary legislations, it can have the same effect. This is the case when a decree has been adopted and published in the official gazette. In such instances, it can then be treated as a law.

The Dubai Cassation Court has stated on several occasions that:

If the article which is due applicable for determining the competent court specialized in perusing a lawsuit onto the responsibility of an air carrier in the case of international air transport - before having the United Arab Emirates joined to the Montreal Convention, of the year 1999, acceded to it in 2000 – shall be the Article 28 of the Warsaw International Treaty for the Unification of Certain Air Transport Rules for the year 1929 which has become the internal legislation with the UAE accession to it pursuant to the Federal Decree No. 13 of 1986.⁸⁸¹

In another judgment, it explained that:

[I]t is determined that the international agreements which shall have become a valid legislation in the United Arab Emirates by attesting so, shall become an internal law due applicable in the State; hence the national judge shall abide by the effectiveness of its provisions on what shall have been presented of disputes, even if litigants have not presented a copy of the provisions of the agreements relating to the dispute brought forward, whereas what is attributed to shall be the validation of provisions of laws in effect in the State.⁸⁸²

6.4.1 Position of an Emirates judge in case of conflict between a text in a local law and a provision in an international treaty

Three options exist for a UAE judge on hearing a case in which a domestic legal provision conflicts with a provision in an international treaty.

One option is to apply domestic law although this risks the UAE incurring international liability for not honouring its international commitments. However, as discussed in the case of the CRC, there is no penalty for not complying. As emphasised in the preamble of the United Nations Charter: ‘We the peoples of the United Nations determined to establish

⁸⁸⁰ UAE Constitution, art 60.

⁸⁸¹ Dubai Cassation Court, ‘A Group of Provisions and Legal Principles Issued in the Civil, Commercial, Labour Articles and the Civil Status, Year 2004 (Rights)’ (1st portion, January-September 2004, 15th volume) 561.

⁸⁸² Dubai Cassation Court, ‘A Group of Provisions and Legal Principles Issued in the Civil, Commercial, Labour Articles and the Civil Status, Year 2004 (Rights)’ (2nd portion, September-December 2005, 16th volume) 205.

conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.’⁸⁸³ Equally, the Vienna Convention on the Law of Treaties affirms the principle of *pacta sunt servanda* in Article 26 which states that: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’⁸⁸⁴ Article 27 further provides that ‘[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. This ‘constitutionalist’ position gives priority to the UAE’s domestic laws so that acts that are not legally valid under domestic law are ineffective, irrespective of international law.⁸⁸⁵ Such an approach should no longer be acceptable. Nevertheless, in the absence of ratification of the ICCPR and the ICESCR and enhanced monitoring through their treaty bodies, weaker CRC monitoring, as well as the CRC age of a child caveat allowed for state parties, the provisions governing child sexual abuse and exploitation are of limited effect in the UAE. In sum, good faith – as is inhered in the principle of *pacta sunt servanda* – is overruled by mechanisms within international treaties that essentially allow escape routes for state parties such as the UAE which, by applying a rigid application of *Sharia* negate the provisions of the CRC,⁸⁸⁶ thereby leaving vulnerable children who reside in their state exposed.

The second option is for the judge to treat domestic law and the international treaty as equal in rank. In such an instance, the rule that ‘subsequent law trumps previous law’ applies. Such an approach accords with Article 47 of the Constitution which confirms that a treaty which has been approved by decree has the power of law and can therefore be relied upon. Yet, when an international treaty has not been approved by decree, then this is difficult. In the context of the CRC, no such decree has been issued. Consequently, judges may not treat the CRC as having the same status as domestic law. As a result, domestic provisions which still conflict with Articles 19, 34 and 35 of the CRC (eg, the Islamic *zina* and *hudud* offences which still permit violence against children contrary to Article 19(1) of the CRC) are applied.

The third option is for a judge to apply the international law insofar as possible in light of the domestic law. Hence, judges can use their power to interpret legislation, especially since it is not intended that domestic law violates any provision which the UAE has ratified through an

⁸⁸³ Charter of the United Nations (n 464).

⁸⁸⁴ VCLT (n 621).

⁸⁸⁵ Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing 2005) 375-376.

⁸⁸⁶ Rehman (n 233) 160.

international agreement. Such an approach is also employed by the US where international treaties have the same status as federal law, as is also confirmed in the sixth Article of the American Constitution. This approach has also been explained by Judge Marshall in *Charming Betsy*⁸⁸⁷ in which he stated that '[i]t has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains'.⁸⁸⁸ The principle is also known as the 'Charming Betsy rule'.⁸⁸⁹

This approach was recently affirmed by the South New York Court in respect of an anti-terrorism law which Congress had passed on the closure of the office of the Palestinian Liberation Organization (PLO).⁸⁹⁰ This breached the Headquarters Agreement which had been entered into with the UN. The court therefore ruled that:

'Congress thereby swept away any inconsistent international obligations of the United States. In effect, the government urges literal application of the maxim that in the event of conflict between two laws, the one of later date will prevail: *leges posteriores priores contrarias abrogant*.'⁸⁹¹

Whilst this approach is arguably the best one to realise the rights in the CRC, it may nonetheless pose problems when it is difficult to interpret national law in such a way that the rights of the CRC are guaranteed. As discussed earlier, transposition of Articles 19, 34 and 35 of the CRC require a host of measures and such a strained approach towards the construction of the rights arguably amounts to an institutional and system violation.⁸⁹²

6.4.2 The constitutional structure of the UAE and its subsequent development

The constitutional structure of the UAE Constitution is influenced by the Egyptian Constitution.⁸⁹³ The UAE Constitution states in Article 7 that Islam is the main source but does not state that Islam is the only source for legislation.⁸⁹⁴ In 1978, when the government still exercised cassation jurisdiction over court decisions, it approved legislation and

⁸⁸⁷ *Murray v Schooner Charming Betsy* 6 US 64 (1804).

⁸⁸⁸ *ibid* 118.

⁸⁸⁹ Frederick C Leiner, 'The Charming Betsy and the Marshall Court' (2001) 45 *The American Journal of Legal History* 1, 1.

⁸⁹⁰ See more Beth DeBernardi, 'Congressional Intent and Conflicting Treaty Obligations: United States v. Palestine Liberation Organization' (1990) 23 *Cornell International Law Journal* 83.

⁸⁹¹ *US v Palestine Liberation Organization* 695 F Supp 1456, 1469.

⁸⁹² CRC Committee (n 399) 12, para 32.

⁸⁹³ Butti Sultan Butti Ali Al-Muhairi, 'The Position of Shari'a within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause concerning Shari'a' (1996) 11 *Arab Law Quarterly* 219, 220.

⁸⁹⁴ Richard T de Belder, 'Drafting Legal Opinions in the UAE' (1989) 8 *International Financial Law Review* 29, 30.

instructed the Supreme Court to treat as void any legislation which did not 'conform to the Islamic *Sharia*'.⁸⁹⁵ From the early 1980s, a series of Supreme Court cases applied Article 75 of Law No. 10/1973 in a way which ensures that Article 7 results in Islam being recognised as the principal source of legislation, and therefore has supremacy over other sources of law.⁸⁹⁶ The court explained in its judgment that Article 75 of Federal Law 10/1973 requires UAE courts to apply Islamic *Sharia* as the dominant law and to abstain from applying any law in a way which is inconsistent with the rules of Islam. The UAE legislature clearly revealed its intention in Federal Law No. 80 which spells out the power and jurisdiction of the highest court in the land, the Federal Supreme Court. It mandates the court to apply Islamic law as the principal supreme source of legislation. This indicates that *Sharia* is given precedence over all other sources.⁸⁹⁷ Hence, *Sharia* is the main source of law and applies to all family and criminal law matters. Also, in criminal cases the penal code is applied if the evidentiary standard which *Sharia* imposes is insufficient.⁸⁹⁸

In a criminal case which was published in the UAE Gazette 135/1984, the Constitutional Division of the Supreme Court referred explicitly to Article 7 of the Constitution and addressed the following important question: Is *Sharia* the sole source of law and superior to other legislation or should other sources be used? The court referred to Article 75 of Federal Law 10/1973 and stated that the intention of the state was clearly expressed in the Constitution, namely that its legislation should be Islamic. Hence, the legislator had chosen that *Sharia* should be the principal source for all legislation as no one can be better than God when it comes to law-making. Ballantyne argues that this case is an important precedent to which weight must be assigned in criminal, civil and commercial matters. The judgment in Case No. 14, Year 9, which had awarded interest, was therefore not in accordance with Article 7 of the Constitution.⁸⁹⁹

⁸⁹⁵ Clark B Lombardi, 'Constitutional Provisions Making *Sharia* "A" or "The" Chief Source of Legislation: Where Did they Come from? What Do they Mean? Do they Matter?' (2013) 28 American University International Law Review 733, 760.

⁸⁹⁶ *Case No 1* (1982) published in 100 UAE Official Gazette 45 (1982); *Case No 1* (1983) published in 129 UAE Official Gazette 102 (1984); and *Case No 4* (1984) published in 135 UAE Official Gazette 83 (1984).

⁸⁹⁷ Al-Muhairi (n 893) 232.

⁸⁹⁸ Graeme R Newman, *Crime and Punishment Around the World* (ABC-CLIO 2010) 382.

⁸⁹⁹ Ahmed Al-Suwaidi, 'Developments of the Legal Systems of the Gulf Arab States' (1993) 8 Arab Law Quarterly 289, 294; William Morris Ballantyne, *Commercial Law in the Arab Middle East: The Gulf States*, vol 30 (JSTOR 1986) 59.

This demonstrates that the UAE legal system consists of a mix of both Islamic and European concepts of civil law.⁹⁰⁰ Generally, ‘social laws such as family law, divorce or succession’ are taken directly from *Sharia*, while criminal and civil laws are influenced by some principles of *Sharia* even though they are written by the legislative authority.⁹⁰¹ In the context of child sexual abuse, this is problematic since Islamic jurists have to date not drawn a clear distinction between child sexual abuse and exploitation, *zina* and *hudud* offences, and the intertwined notion of Islamic indecency.

Under Islamic jurisprudence, a rape victim can be charged with *zina* if the court concludes that the allegation of rape is in fact an admission of consensual sexual intercourse.⁹⁰² In such instances, an equally disturbing outcome has been that the rape victim is then subsequently charged with the *hadd* crime of *qadhf* which refers to slandering a person’s reputation or position for personal reasons or publicity; a charge that can result in the penalty of 80 lashes (*zina* and *qadhf* are discussed in more detail in Chapter Eight).⁹⁰³ Furthermore, in some Islamic states child victims in cases of sexual abuse that have become public knowledge have even been placed in reform institutes for delinquent juveniles to protect them from relatives who – under the influence of the honour ideology – blame child victims for their abuse and urge family members to take action against them for the shame and dishonour they are believed to have brought to the family name and reputation.⁹⁰⁴

Moreover, human rights are guaranteed by the federal Constitution.⁹⁰⁵ The protections are addressed in Articles 26, 27 and 28 which confirm the right to liberty and the rights of the accused. No one shall be arrested, detained or imprisoned except where this accords with the law, as made clear in Article 26. This also demonstrates that everyone has the right to liberty. Moreover, no one can be subjected to torture or degrading treatment. Article 27 provides that crimes and punishments must be defined by law. Any penalty which is imposed before the relevant law has been adopted is invalid. Article 28 confirms the presumption of innocence as well as the right to have a lawyer, and prohibits an accused being subjected to physical or

⁹⁰⁰ Ahmed Aly Khedr and Bassam Alnuaimi, 'A Guide to United Arab Emirates Legal System' (*GlobaLex*, 2010) <http://www.nyulawglobal.org/Globalex/United_Arab_Emirates.html> accessed 22 February 2017.

⁹⁰¹ *ibid.*

⁹⁰² Azman Mohd Noor, 'A Victim's Claim of Being Raped is Neither a Confession to Zina nor Committing Qadhf (Making False Accusation of Zina)' (2011) 8(1) *Muslim World Journal of Human Rights* 1.

⁹⁰³ *ibid.*

⁹⁰⁴ Ouis (n 407).

⁹⁰⁵ Constitution of the UAE, arts 25-44.

moral harm. However, the ICCPR and the ICESCR contain far more detailed rights which are arguably necessary to create the necessary human rights climate to heighten protection for child abuse and exploitation victims and to realise the rights contained in the CRC. Without more detailed human rights as stipulated in these seminal international human rights treaties, it is difficult to see how international law can accord adequate protection to the rights of the children and particularly protect children from sexual abuse.

This is not to say that no steps have been taken to protect children. Article 16 of the Constitution deals with child rights and child protection which falls under the heading of social security. This also accords with the right of everyone to social security, as confirmed in Article 9 of ICESCR. *Sharia* also contains the concept of social security. Consequently, it is the duty of the state to ensure the basic well-being of every member of society, including children. Article 16 of the UAE Constitution thus affirms this Islamic principle. It states that:

[S]ociety shall be responsible for protecting children and mothers and shall work to protect minors. This includes members of society who are unable to look after themselves due to their incapacity. The state is accountable for assisting those individuals who suffer from an illness, old age or disability to live a stable life.

Hence, the federal laws of the state must protect mothers, children and those of old age. Federal Law No. 13 of 1972 concerning social subsidy has therefore been enacted, as well as Law No. 3 of 1982 relating to social security and Law No. 9 of 1982 concerning emergency assistance in the event of private or public disasters.⁹⁰⁶ However, as discussed in Chapter Five, Articles 19 and 34 of the CRC require a comprehensive child protection system to be created and arguably these two older laws are insufficient to meet the specific requirements recommended by the CRC Committee. It further illustrates that the CRC has not yet been very effective in according adequate protection to children at risk of sexual abuse. It is essential to also understand how the Constitution allocates power and jurisdiction between the federal and local government to explore whether international law is limited in according adequate protection to children rights. This is discussed in the next section.

⁹⁰⁶ Ziad Mohammed Jaffal, *The Constitutional Organization of the United Arab Emirates in the Light of the General Constitutional Principles* (2nd edn, Brighter Horizon 2014) 353-354.

6.5 The distribution of jurisdiction and power between federal and local institutions in the UAE Constitution

This section discusses the various constitutional institutions and their effect on the UAE constitutional system. The federal system of governance can limit the state's political power and its scope of authority. Some authors describe this limitation as a vertical form of the separation of powers doctrine.⁹⁰⁷ The UAE, as a federal state, embraces a clear political identity which clearly divides powers between its federal and local authorities. This forms the foundation for limited and responsible government. This is further discussed below by way of an examination of the UAE Constitution. The rulers of the seven Emirates who form the Federal Supreme Council passed two amendments to the provisional Constitution and agreed to make it permanent.⁹⁰⁸ This readiness of the UAE Constitution to give preference to the local governments of the Emirates may have been due to the rulers' concern about losing their authority to the federal government.⁹⁰⁹ The exceptions which permit this are listed in Articles 123, 124 and 149 of the Constitution. These make it possible for the federal government to grant jurisdiction to the individual Emirates. The reason behind the insertion of these articles is to preserve as much as possible the power of the rulers of the Emirates. However, Articles 120 and 121 are extremely comprehensive and contain most essential matters. This therefore leaves little to the jurisdiction of the Emirates. Moreover, these exceptions, particularly those in Article 120(1), must first be approved by the Federal Supreme Council according to Article 123.⁹¹⁰ Once this has been done, they are effective immediately.⁹¹¹ As a result, it is also essential that each Emirate pays attention to the issue of child sexual abuse and exploitation in order to ensure that initiatives are started to prevent their occurrence at the local level. However, this is not a matter with which international law is particularly concerned. The next section discusses the federal institutions which are

⁹⁰⁷ Ahmed Mohamed Elhawary, 'Regulation of Conflict of Laws in the United Arab Emirates' (2013) 27 Arab Law Quarterly 2.

⁹⁰⁸ *ibid.*

⁹⁰⁹ Ashraf Hussein Atwa, *The Principles of Constitutional Law, Political Systems, and the Constitutional Organization of the United Arab Emirates, According to the Latest Constitutional Amendments* (1st edn, Aflah Library for Publishing and Distribution 2015) 274-275.

⁹¹⁰ Article 123 states: 'As an exception to paragraph 1 of Article 120 concerning the exclusive jurisdiction of the Union in matters of foreign policy and international relations, the member Emirates of the Union may conclude limited agreements of a local and administrative nature with the neighboring state or regions, provided that such agreements are not inconsistent with the interests of the Union or with Union laws and provided that the Supreme Council of the Union is informed in advance. If the Council objects to the ratification of such agreements it shall be obligatory to suspend the matter until the Supreme Court of the Union has ruled on the objections as quickly as possible. The Emirates may retain their membership in the OPEC organization and the Organization of Arab Petroleum Exporting States and may join them.'

⁹¹¹ Atwa (n 909) 276.

recognised by the UAE Constitution in order to give an overview of the constitutional structure.

6.5.1 The federal institutions in the UAE Constitution

As discussed in this section, the UAE is an Islamic state which has taken on the formal structures of a modern state. However, arguably in the 21st century a modern state should embrace human rights, the rule of law and democracy.⁹¹² Child rights depend on human rights and it is not an obstacle for an Islamic state, such as the UAE, to embrace modern values characteristic of a constitutional state. The UAE Islamic Constitution also demonstrates this since it recognises the main formal structures of a modern state. The below examination of the various constitutional institutions and the respective roles which they play in the UAE constitutional system show that the Islamic character of the UAE Constitution does not pose any difficulties to the exercise of the constitutional functions. Article 45 specifies that the federal authorities of the UAE consist of:

1. The Federal Supreme Council,
2. The president of the federation and his deputy,
3. The Federal Council of Ministers,
4. The Federal National Council,
5. The judiciary of the federation.

6.5.1.1 The Federal Supreme Council

As stated previously, the rulers of the seven Emirates form the Federal Supreme Council, except when the ruler is absent or unavailable and in this case the deputies participate. Article 46 states that the Federal Supreme Council is the highest authority in the federation and consists of the rulers of the Emirates. Each of the seven Emirates has a single vote in the deliberations of the Federal Supreme Council. Although Article 46 seems to indicate that the Constitution has adopted an equal votes rule for the Federal Supreme Council to reach decisions, Article 49 makes clear that voting depends on whether substantive or procedural matters are being decided upon. A significant characteristic of the Federal Supreme Council is that decisions in respect of procedural matters are reached by a simple majority vote whereas substantive matters require a majority vote of five, which includes the votes from the

⁹¹² UNGA (n 874) para 5 at 2.

rulers of Abu Dhabi and Dubai.⁹¹³ This is because Abu Dhabi and Dubai are the biggest and richest Emirates in the federation.⁹¹⁴ Decisions on procedural matters are made by a majority vote but it is not required that any particular Emirate votes in favour. The Federal Supreme Council is responsible for approving federal laws, the annual union budget, the appointment of the Prime Minister, the appointment and the resignation of the president of the Federal Supreme Council, as well as judges, the ratification of international agreements, as well as state policies.⁹¹⁵

6.5.1.2 The president of the federation and his deputy

Article 51 of the Constitution states that '[t]he Federal Supreme Council shall elect from among its members a President, and Vice President of the Federation'. This article clearly states that the president of the Union and the vice president are both members of the Federal Supreme Council in which they both hold two offices: as ruler of an Emirate, and as president or vice president of the federation. Article 51 further provides that a president and vice president of the federation shall be elected by the Federal Supreme Council from amongst its members. Article 52 states that the term of office of the president and the vice president shall be five Gregorian years and those appointed can be re-elected to the same office. After the death of Sheikh Zayed bin Sultan Al Nahyun, on 3 November 2004 the new president was chosen to be Sheikh Khalifa bin Zayed Al Nahyun. This position was previously held from 2 December 1971 until his death on 2 December 2004.⁹¹⁶ The process of reaffirming the existing president or electing a new candidate is done by the Federal Supreme Council every five years. It should be noted that the Constitution does not limit the number of times a president and vice president can be re-elected.⁹¹⁷ Article 51 of the UAE Constitution makes clear that no one can hold the presidency or vice presidency of the UAE unless he is elected by the Federal Supreme Council. Although the election is confined to members of the Council, this is still a step towards a more comprehensive democratic government, particularly in comparison to other neighbouring states where the presidency is occupied only through heredity.⁹¹⁸ All members of the Council of Ministers are eligible to be appointed as

⁹¹³ Article 49 of the UAE Constitution.

⁹¹⁴ Jaffal (n 906) 194.

⁹¹⁵ Article 47 of the UAE Constitution.

⁹¹⁶ Barry Percy-Smith and Nigel Thomas, *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge 2009).

⁹¹⁷ Nawaf Kanaan, *Constitutional and Political System of the United Arab Emirates* (2nd edn, University's Library 2006) 150-151.

⁹¹⁸ *ibid* 150.

president or vice president. They are only empowered to carry out the general policy as formulated by the Federal Supreme Council. The Federal Supreme Council is politically responsible collectively before the president of the federation for both domestic and foreign affairs.⁹¹⁹ The UAE president signs and issues laws, which are prepared by the Council of Ministers, whom the president appoints. The president also appoints higher civil servants and diplomatic representatives together with ministers' approval. He oversees the execution of laws by the various arms of government and signs death sentences and pardons. He is elected by the Federal Supreme Council and the vice president for a five-year term which may be and has been renewed.⁹²⁰

6.5.1.3 The Federal Council of Ministers

The prime minister, his deputy and many ministers are chosen by the citizens of the federation through the Federal Council of Ministers.⁹²¹ Article 64 of the Constitution states that each minister is personally responsible to the Federal Supreme Council and the president of the federation. The impartiality of ministers is guaranteed since Article 62 proscribes any federal ministers, such as the prime minister or his deputy, exercising any profession, holding any commercial or financial position or entering into any commercial transactions with the government of the federation or the government of the Emirates; or sitting on the board of directors of any financial or commercial company whilst they are in office.

6.5.1.4 The Federal National Council

Article 68 requires the Federal National Council to comprise forty members, which are divided as follows between the different Emirates: Abu Dubai and Dubai have 8 seats each; Ras al-Khaimah and Sharjah have 6 seats each, and 4 seats are each given to Fujairah and Umm al-Quwain.⁹²² Article 72 states that the membership term for the Federal National Council is two Georgian years starting from the date of its first meeting. However, Constitutional Amendment No. 1 of 10 February 2009 extended the membership of the Federal National Council to four Gregorian years commencing from the date of the first

⁹¹⁹ Kristian Ulrichsen, *The United Arab Emirates: Power, Politics and Policy-Making* (Taylor & Francis 2016) 4, 5.

⁹²⁰ William M Ballantyne, 'The Constitutions of the Gulf States a Comparative Study' (1986) *Arab Law Quarterly* 166.

⁹²¹ See Article 55 and Article 56 of the UAE Constitution.

⁹²² Mohamed Kamel Obeid, *Systems of Governance and the Constitution of the Emirates* (1st edn, Fujairah National Press 2003) 461.

meeting.⁹²³ Members enjoy parliamentary immunity from penal proceedings and cannot be censured for any thoughts which they convey in the process of carrying out their responsibilities within the Council or in their community.⁹²⁴

Members of the Federal National Council are selected in two stages:

- According to Article 77 of the Decision of the President No. 3 of 2006, members of the Federal National Council are selected by each ruler of the Emirate who chooses and appoints the member he considers best to represent the state he governs. Members of the Federal National Council represent all people of the federation and not merely the Emirate which has selected them.
- Article 1 of Decision of the President No. 3 of 2006 further provides that '[h]alf of the members shall be elected by an electoral body consisting of a number of electors at least 300 times the number of representatives from each Emirate'. This is intended to broaden the base, ie to promote popular participation in elections by increasing the number of members of the electoral body. Prior to 2011, this was only 100 times the number of representatives from each Emirate.⁹²⁵

In 2006, the first Federal National Council elections resulted in half the members being voted for by the Electoral College, whereas previously the rulers of the various Emirates directly chose all the members.⁹²⁶ Hence, since 2006 attempts have been made by the UAE leadership to improve the democratic culture by increasing political participation.⁹²⁷

⁹²³ Sam Soliman Dallah, *The Principles of Constitutional Law, Political Systems: The Study of the Constitutional System in the United Arab Emirates* (1st edn, University of Sharjah 2014) 260.

⁹²⁴ Ghazi Karam, *Political Systems and Constitutional Law: A Comparative Study of the Constitutional System in the United Arab Emirates* (1st edn, University's Library 2009) 373-374.

⁹²⁵ Abdullah Al-Awadhi, 'Implications of Expansion of Popular Participation in FNC Elections' (*The Emirates Center for Strategic Studies and Research*, 8 June 2011) <http://www.ecssr.com/ECSSR/print/ft.jsp?lang=en&ftId=/FeatureTopic/Abdullah_AlAwadhi/FeatureTopic_1408.xml> accessed 23 June 2016.

⁹²⁶ Abdulfattah Yaghi and Osman Antwi-Boateng, 'Determinants of UAE Voters' Preferences for Federal National Council Candidates' (2015) 24 *Digest of Middle East Studies* 214.

⁹²⁷ Report Staff, 'Legislative Body Forms a Pillar of Governance' (*Gulf News*, 25 September 2011) <<http://gulfnews.com/news/uae/government/legislative-body-forms-a-pillar-of-governance-1.876259>> accessed 24 June 2016.

Although the Federal National Council is supposed to serve as the parliament of the federation, many commentators consider that its legislative function is weak. The Council only performs a consultative role and thereby assists the Federal Supreme Council to exercise legislative power in the federation. The Constitution clearly states in Article 110(3) that an amendment or rejection by the Federal National Council is not binding on the Federal Supreme Council. In other words, if the Federal National Council amends a bill which is not accepted by the president of the federation or by the Federal Supreme Council, then the bill will be referred back to the Federal National Council. This is also possible if the Federal National Council rejects a bill in the first place. However, any amendment by the Federal National Council which is not approved by the president or the Federal Supreme Council may be endorsed by the president after the Federal Supreme Council approves it. This clearly shows that the Federal National Council is no more than a consultative council for the Federal Supreme Council and the legislative power only consists of making consultative recommendations to the president of the federation and to the Federal Supreme Council. However, in practice the Federal National Council has used its power fully and has managed to amend many bills. It has also rejected certain bills which the government proposed.⁹²⁸ This highlights that the UAE is a democratic state, and therefore in theory should not be opposed to the issuance of democratic rights upon all of its inhabitants which include children.

6.5.1.4 The judiciary of the federation

According to Article 95, the federation recognises two types of court: the Federal Supreme Court and the federal primary courts, ie the courts of first instance. The Federal Supreme Court is the highest court in the UAE and is located in the federal capital and may exceptionally assemble when necessary in the capital of one of the Emirates.⁹²⁹ Judges of the federal primary courts sit permanently in the capital of the federation or in the capitals of one of the Emirates.⁹³⁰ Each court has a court of appeal, a court of first instance and a court of cassation. When settling disputes, each court applies the federal law of the UAE, as well as relevant local law of the particular Emirate. The common law principle of *res judicata* does not restrain the UAE although lower courts are guided by higher courts.⁹³¹ Three primary courts have been established in Dubai and Abu Dhabi: the court of first instance, to which all

⁹²⁸ Dallah (n 923) 269-270.

⁹²⁹ Article 100 of the UAE Constitution.

⁹³⁰ Article 102 of the UAE Constitution.

⁹³¹ Charles J Glasser, *International Libel and Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters and Lawyers* (3rd edn, Wiley 2013) 513-514.

cases are initially submitted; the court of appeal, which decides whether the rulings of the court of first instance are correct; and the court of cassation or supreme court, which decides whether the court of appeal's decisions are correct.⁹³²

The UAE Constitution did not establish a federal court of appeal. Article 105 states that any cases against decisions by local authorities are considered through the application of federal law. UAE Federal Law No. 6 of 1978 regarding the establishment of Federal Courts and Transfer of the Jurisdictions of the Local Judicial Authorities in certain Emirates thereto establishes federal courts in five of the Emirates, namely, Abu Dhabi, Sharjah, Ajman, Umm al-Quwain and Fujairah, where there is a federal judiciary, with courts of first instance also in each Emirate. Appeals can be filed at the courts of appeal in each of these Emirates.⁹³³ The Emirate of Dubai has its own judicial and legal system and its own courts which are independent from the UAE federal judicial system, as well as Ras al-Khaimah which also has its own courts.⁹³⁴

Accordingly, the constitutional institutions which regulate the political affairs are formally established and the state's political powers are clearly distributed amongst these institutions, as well as between the local and federal government. This is important to ensure limited and responsible government which enhances and promotes human rights in the UAE. However, as mentioned, international human rights could be strengthened if other international human rights instruments were adopted and reservations were withdrawn from the CRC. Islam is not an obstacle to the promotion of human rights. On the contrary, it encapsulates the very same core ideas of the inherent dignity and worth of all human beings, as well as equal rights of men and women – albeit in respect of realising equal rights of men and women a different approach has been adopted as the idea of motherhood has been given prominence in Islam. As a result, the distinct biological roles have been recognised. Yet traditional interpretations have resulted in a patriarchal approach which has contributed to what in certain respects constitutes gender discrimination. As discussed, as female children are particularly prone to sexual abuse, international law has therefore not fully resulted in preventing gender-based child sexual abuse.

⁹³² Thomas L Martin, 'UAE-Construction Disputes in the United Arab Emirates' (2009) 4 *Constance Law International* 5.

⁹³³ Ramni Taneja, 'Constitutional and Statutory Provisions Regarding the Appointment and Removal of Judges in the United Arab Emirates' (2000) 15 *Arab Law Quarterly* 159.

⁹³⁴ *ibid.*

6.6 A moderate Constitution in an Islamic state

Although the UAE is an Islamic state, it has constitutional provisions which are similar to those recognised in liberal states, especially in respect of judicial review. However, as the UAE's underpinnings are Islamic law, the relationship between the individual and the community is slightly different. The articles of the Constitution, in particular those which are concerned with rights and freedoms, do not seem to embrace a socialist position nor do they follow an individuality and autonomy approach. Article 21 protects private property and contravenes socialist theory which believes in collective ownership. It states that '[p]rivate property shall be protected ... No one shall be deprived of his private property'. However, the restraint that is imposed on private property suggests that individualism is not advocated.⁹³⁵ The Constitution embeds more aspects of socialism than individualism. For example, Article 17 affirms the right to education; Article 19 guarantees that the right to medical care shall be provided for by the community; and Article 20 affirms that the right to work shall be secured by society. Article 24 states that the national economy shall be governed by the values of social justice and shall be based on sincere cooperation between public and private activities. One scholar has therefore described the Constitution as socialist in nature.⁹³⁶

Public and individualist aspects found in both ideologies are therefore recognised by the UAE's Islamic Constitution. However, jurists disagree where the Constitution is exactly positioned. Some suggest that the Constitution has taken a moderate individualist stance which recognises the role of society.⁹³⁷ Others argue that the Constitution is a moderate socialist one that affirms the importance of the individual.⁹³⁸ This moderate position of the UAE Islamic Constitution results in a moderate version of Islam having been adopted towards the individual and the community. Islam seems to recognise the two sets of rights, individual and societal, as being equal and considers that both together form the cornerstones of any constitutional system. Protection of the soul (an individual's life) is one of the five most fundamental principles which are necessary to ensure the right to life. Social security and social responsibility, including through the provision of health care, are also very important. Islam therefore protects the life of the individual and tries to prevent

⁹³⁵ Ahmed Kamal Abul-Magd, *Constitution of the United Arab Emirates System: The United Arab Emirates United Comprehensive Survey Study* (Egyptian Company for Printing and Publishing 1978) 28.

⁹³⁶ Mohsen Khalil, *The Constitutional System of the United Arab Emirates* (1st edn, Modern Al Ain Press 1989) 163-164.

⁹³⁷ Abul-Magd (n 935) 27.

⁹³⁸ Khalil (n 936) 159.

circumstances that could lead to death. Yet the issue is that in Islam the notion of rights is not as firmly developed as a result of the lack of focus on individuality. Instead, more emphasis is placed on religious duties. As discussed, a child-rights based approach is needed to prevent child sexual abuse. A legal shift towards developing an Islamic rights-based approach towards children rights must therefore take place. However, international law does not necessarily focus on assisting state parties with very distinct and different legal systems to that of Western states in this regard. Arguably, this also limits the effectiveness of international law in according adequate protection to the rights of children.

6.6.1 Islam as a key source for legislation in the UAE

As stated previously, most of the Muslim states, such as the UAE, Bahrain, Kuwait, Yemen and Saudi Arabia, have adopted constitutions that use Islam or *Sharia* as ‘a source’ or ‘a primary source’ for legislation. For example, since 1980, the Egyptian Constitution provides that the principles of Islamic *Sharia* are the main source for legislation.⁹³⁹ Article 7 of the UAE Constitution states that ‘Islam is the official religion of the Federation’. Hence, the UAE is an Islamic state as opposed to a secular one.⁹⁴⁰ This means that the religious values of the state are Islamic and no other values can be adopted for the public domain.⁹⁴¹ The UAE can therefore not adopt rules which contradict Islamic law. Otherwise, they would not be Islamic and would be considered unconstitutional. As discussed above, Article 7 reaffirms the Islamic character of the state by stating that ‘[t]he Islamic Sharia shall be a main source of legislation in the Federation’.⁹⁴² Such an approach does not necessarily help with preventing child sexual abuse as long as the holy *Quran* is not carefully reviewed by Islamic scholars in order to identify the relevant parts which clearly protect child victims of sexual abuse and punish perpetrators. An Islamic jurisprudence must be developed to protect children against sexual abuse. This should enrich the international discourse concerning child rights, first properly brought to the fore by the CRC. As mentioned, the CRC itself is not a perfect international law instrument and the UAE should be a leading nation in protecting their children and those of residents against child sexual abuse and set an example for the rest of the world. Fundamentally, this requires that child victims are entirely exempted from being

⁹³⁹ Dawood I Ahmed and Tom Ginsburg, 'Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions' (2014) *Virginia Journal of International Law*, Forthcoming 15.

⁹⁴⁰ Jim Grant, Fatema Shabbir Golawala and Donelda S McKechnie, 'The United Arab Emirates: The Twenty-First Century Beckons' (2007) 49 *Thunderbird International Business Review* 527.

⁹⁴¹ Abed and Hellyer (n 853) 152.

⁹⁴² *ibid* 152.

penalised in any form for complaining about their perpetrators and are also provided the necessary care to rehabilitate them and help them overcome trauma from the abuse.

6.6.2 The UAE's adoption of the CRC

The UAE acceded to the CRC in January 1997. It expressed its agreement to be legally bound by the CRC although it did not initially sign it. It entered reservations to four articles. The first three reservations related to nationality (Article 7), freedom of religion (Article 14) and adoption (Article 21), and the fourth reservation was entered into in respect of Article 17. It stated that '[t]he State's reservation is based on its desire to avoid violating the cultural traditions and values of society. It protects children from cultures and information that harm their upbringing and expose them to deviance.'⁹⁴³

The CRC and the CEDAW are the most heavily adopted treaties in terms of the number of states which have adopted them although reservations, understandings and declarations (RUDs) have also been entered.⁹⁴⁴ Typically reservations have been entered by Muslim states in order to uphold *Sharia*.⁹⁴⁵ Critics argue that the reservations which some states have entered conflict with the purpose of the treaty and diminish its effectiveness. For example, many Islamic states added reservations which declare that the CRC does not apply to provisions which are deemed incompatible with *Sharia* law.⁹⁴⁶

Responding to the UAE's first CRC report, which was submitted in 2000, the CRC Committee expressed regret that the document had failed to follow the reporting guidelines and omitted important information.⁹⁴⁷ It stressed that under international law, domestic law is supposed to be aligned with the Convention once it has been signed. The Committee recommended that the reservations to Articles 7, 14 and 21 should be withdrawn or narrowed.

⁹⁴³ CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Second Periodic Reports of States Parties Due in 2004: United Arab Emirates' (3 November 2014) CRC/C/ARE/2, section 2, para 32(c) at 12-13.

⁹⁴⁴ Eric Neumayer, 'Qualified Ratification: Explaining Reservations to International Human Rights Treaties' (2007) 36 *The Journal of Legal Studies* 397, 410.

⁹⁴⁵ Hashemi (n 279) 196.

⁹⁴⁶ Other States Parties included similar reservations, such as Afghanistan, Algeria, Egypt, Iran, Iraq, Kuwait, Morocco, Saudi Arabia and Syria.

⁹⁴⁷ CRC Committee (n 815) para 2 at 1.

It did not mention the reservation to Article 17.⁹⁴⁸ However, the Committee suggested that the UAE consider withdrawing its reservations in the 2015 Concluding Observations.⁹⁴⁹

The UAE has signed but not confirmed the Optional Protocols on the Selling of Children, Child Prostitution and Pornography.⁹⁵⁰ Parts of the Optional Protocol were not signed, namely in respect of children involved in armed conflict.⁹⁵¹ After reviewing the first 2002 report, the Committee acknowledged the UAE's efforts, especially the adoption of the Disabled Person's Act, the Child Protection Act and the Juvenile Delinquency Act.⁹⁵² Conversely, they highlighted that some of the provisions of the CRC were not clearly exhibited in UAE domestic law, such as non-discrimination⁹⁵³ and the best interests of the child.⁹⁵⁴ The CRC also suggested that the UAE withdraw its reservations and interpretive declarations⁹⁵⁵ and adopt and execute a National Plan of Action by building a database on children, particularly the most defenceless groups. It was also recommended that the UAE create an independent monitoring body and involve civil society for the full transposition of the CRC. This is thought to ensure better cooperation between national and local levels of government. The Committee further urged the UAE to '[t]ake legislative measures to prohibit all forms of physical and mental violence, including corporal punishment and sexual abuse of children in the family, schools and in institutions'.⁹⁵⁶

6.6.3 Contextual analyses of the UAE Penal Code in relation to child sexual abuse

The Penal Code has 583 articles. The Draft Code was divided into two books. The first dealt with the general principles which govern criminal law and the second with specific crimes and punishment.⁹⁵⁷ Article 1 of the UAE Penal Law provides that Islamic *Sharia* applies when retaliating against blood money crimes.⁹⁵⁸ The Penal Law of the UAE ascertains how grave or severe a crime is and distinguishes three types of cases:

⁹⁴⁸ *ibid* para 6 (a-b) at 2-3.

⁹⁴⁹ CRC Committee (n 567) para 9 at 2.

⁹⁵⁰ Optional Protocol on the Sale of Children (n 188). The UAE signed but did not ratify this protocol.

⁹⁵¹ Optional Protocol on Armed Conflict (n 186). The UAE is not part of this protocol.

⁹⁵² CRC Committee (n 815) para 7 at 3.

⁹⁵³ *ibid* para 21 at 6.

⁹⁵⁴ *ibid* para 26 at 7.

⁹⁵⁵ *ibid* para 6(a-b) at 2-3.

⁹⁵⁶ *ibid* para 35(b) at 8.

⁹⁵⁷ Al-Muhairi Butti Sultan Butti Ali, 'The Islamisation of Laws in the UAE: The Case of the Penal Code' (1996) 11 *Arab Law Quarterly* 350, 360.

⁹⁵⁸ Sherif Heikal, 'Globalization Initiatives and Arab Penal Codes' (2016) 15 *Journal of Studies in Social Sciences* 98, 108.

1. Felonies (Article 28 of the Penal Law) are the gravest crimes and the penalty for this is temporary imprisonment from 3 to 15 years.
2. Misdemeanours (Article 29 of the Penal Law) are the second gravest cases for which imprisonment ranges from one month to three years.
3. Violations (Article 30 of the Penal Law) consists of detainment for one to ten days.

It is quite simple to differentiate felonies from these other categories since it is sufficient to identify the legally-established penalty in each case.⁹⁵⁹

Significance of this division

Attempted crime (Article 35(1)): The purpose is to discipline the committer of felonies unless stated otherwise and those who attempt a crime will be penalised according to Articles 36 and 37 of the Penal Law:

- Punishment is enforced in case of crime or felony by the legislator in accordance with Articles 192 and 172 of the Penal Law.
- The provisions are restricted to felonies and misdemeanours without any violations (Article 106).
- The elevated circumstances system is restricted to felonies and misdemeanours other than violations (Articles 100, 98).
- The scope of application of the seizure system is restricted to felonies and misdemeanours other than violations (Article 82).

6.6.4 An overview of the criminal justice system and the crime of rape in the UAE

Everything involving criminal cases from the commencement to the conclusion of the trial is covered by the Federal Law of UAE Criminal Procedure No. 35 (1992), including the responsibilities of the three institutions involved in the criminal process: the courts, the public prosecution and the judicial police officers. The law also contains some principles which keep defendants safe from arbitrary treatment and torture. Firstly, unless a person is proven to be guilty, no criminal punishment can be forced. Secondly, apart from certain conditions which are detailed in the law, no person can be arrested, searched or detained. Also, the detention must take place in the appropriate facility and the competent authority must also

⁹⁵⁹ Ali Hamoda, *Explanation of UAE Penal Code* (Dubai Police Academy 2008) 105-120.

specify a period. Lastly, the accused cannot be harmed in any way, whether physically or morally, and torture and degrading treatment are outlawed.⁹⁶⁰

The term ‘accused’ is identified for a person who is suspected of having committed a crime. Moreover, one of three procedures may be carried out: any liberty-depriving procedure, such as an arrest, arraignment or apprehension; an indictment can be obtained from the public prosecution or the judicial authority; the person may be summoned to be presented before a court.⁹⁶¹ There are two stages within the criminal justice system: the collection of evidence and the arrest of the perpetrator, and the criminal case.

While it is reasonable to punish offenders and violators of normative principles, the punishments that are prescribed in the UAE’s municipal Penal Code should at least conform to international criminal jurisprudence.⁹⁶² For instance, it is cause for grave concern that in the UAE the death penalty can be imposed as punishment for rape. This sentence could incentivise rapists to kill their victims so that no evidence of their crime exists. Another is that rape is only considered a criminal act when it has been committed by force against a victim who is under 14 years of age. As already discussed in Chapter Two, this age limit is very problematic as it leaves juveniles between the ages of 14 to 18 unprotected. This is exacerbated due to the fact that *Sharia* severely punishes fornication (ie sexual intercourse outside marriage) and adultery.⁹⁶³ Consequently, as discussed in Chapter Three, juveniles who are victims of rape may instead be treated like criminals since it may be presumed that they committed the *zina* offence of fornication and adultery.⁹⁶⁴ This situation needs to be urgently addressed as otherwise victims of rape, including children, will not feel encouraged to come forward and disclose the sexual abuse they have been subjected to. In sum, Islamic states such as the UAE cannot afford to operate with a medieval penal system as this has acute effects on its vulnerable inhabitants.⁹⁶⁵

⁹⁶⁰ Federal Law of Criminal Procedure No 35 (UAE) arts 25-44.

⁹⁶¹ Judah H Jihad, *Explain in Brief the UAE Federal Law of Criminal Procedure: Claims Arising from the Crime: The Preparations for the Criminal Case*, vol 1 (Al Bayan Press 2006) 74.

⁹⁶² Etim E Okon, 'Hudud Punishments in Islamic Criminal Law' (2014) 10 *European Scientific Journal* 227.

⁹⁶³ *ibid* 230-231.

⁹⁶⁴ *ibid*.

⁹⁶⁵ *ibid*.

6.7 Child sexual abuse in the UAE

It is difficult to ascertain the true extent of sexual offences in the UAE. As discussed in Chapter Four, since 2012 there has been mass expulsions of NGOs and widespread suppression of the work of academics, lawyers and even online bloggers. In 2007, there were 21 registered cases and the victims were predominantly girls. Incidents take place in schools or school buses but predominantly inside homes. The perpetrators are often acquaintances of the victims.⁹⁶⁶ The culture of UAE society prevents disclosure of the identification of the perpetrators; this is believed to be disgraceful for the family of the victims. It is also extremely difficult for child victims who are 14 years or older to disclose sexual abuse for fear that they will be treated as criminals for having engaged in adultery or fornication, as discussed above. This is because of the burdensome requirement that a male witness is required to establish that they have been subjected to sexual abuse.

In Dubai, one third of the 60 reported cases in 2013 were sexual attacks. In the two most shocking cases of child abuse in the UAE, the victims were girls who were eight years and four years old respectively. In both cases, the physical abuse was perpetrated by the parents who also murdered them. In Sharjah, another Emirate of the UAE, out of 400 registered cases 176 were for neglect, 148 for physical abuse incidents, 61 for emotional abuse and only 15 incidents were for sexual abuse.⁹⁶⁷ A study by Al-Mahroos highlights that there exists no publication in the UAE about child sexual abuse.⁹⁶⁸ This is arguably because child sexual abuse is a taboo topic. However, the CRC is not fully complied with without data collection and independent monitoring, ideally through a national human rights institution.⁹⁶⁹

6.7.1 Sexual consent

The Penal Code criminalises sexual offences against children. Article 354 states that:

Without prejudice to the provisions of the law on juvenile delinquents and displaced, they shall be sentenced to the death penalty whoever used coercion in having sexual intercourse with a female or

⁹⁶⁶ Gulf News, 'Hard to Identify Sexual Predators among Acquaintances' (February 2018) <<http://gulfnews.com/news/uae/crime/hard-to-identify-sexual-predators-among-acquaintances-experts-say-1.2040033>> accessed 4 February 2018.

⁹⁶⁷ Aghaddir Ali, 'Child Abuse Reports Increase in 2014 in Sharjah' (*Gulf News*, 2015) <<http://gulfnews.com/news/uae/society/child-abuse-reports-increase-in-2014-in-sharjah-1.1505921>> accessed 14 January 2017.

⁹⁶⁸ Fadheela T Al-Mahroos, 'Child Abuse and Neglect in the Arab Peninsula' (2007) 28 *Saudi Medical Journal* 241, 244.

⁹⁶⁹ CRC Committee (n 567) 4.

sodomy with a male. Coercion shall be considered existent if the victim is below fourteen years of age when the crime is perpetrated.⁹⁷⁰

The problem is again that the age limit is set at below fourteen years and it would be better if this were raised to below 18 years.

Article 455 states that an '[a]ttempt to perpetrate the crimes stipulated in the preceding article shall be sanctioned to life imprisonment'.⁹⁷¹

Article 357 provides that, 'should the death of the victim result from one of the crimes provided for in the preceding articles, the penalty shall be the death sentence'.⁹⁷²

If the victim of sexual abuse is a child whose age or stage of development is such that the offence is conducive to causing special injury to him/her, and the offence is committed in an especially humiliating manner or is conducive to causing special injury to the child owing to the special trust he/she has put in the offender or the special dependence of the child on the offender, the offender can be sentenced for aggravated sexual abuse of a child which attracts the death penalty or life imprisonment for an attempt. From the preceding provisions, it is clear that the legislator does not consider consent when a child is not yet fourteen years of age. Moreover, no distinction is made between female and male victims. Hence, the attempt of such a crime also attracts an aggravated punishment. This is mandatory and the judge cannot make any exception. An aggravated punishment is also imposed when the victim dies as a result of the rape.

The UAE legislator was very successful in adopting such special and clear protection for child victims and for not distinguishing between males and females. Children are also safeguarded because even attempts are severely sanctioned and because of the special rules which govern cases where a child dies because of rape. Yet, the fact that this only applies to those who are aged below 14 years is a defect as it appears inadequate to apply the general rules which protect adults to those who are aged between 14 and 18 years of age and who are clearly still children.

⁹⁷⁰ Federal Law No 3 concerning the Penal Code (UAE) art 354.

⁹⁷¹ *ibid* art 355.

⁹⁷² *ibid* art 357.

6.7.2 Child sexual pestering

Article 356 of the UAE Penal Code states that:

Without prejudice to the two preceding articles, the crime of voluntary debasement shall be penalized by detention for a minimum term of one year but if the said crime is perpetrated on a male or female below fourteen years of age or if committed by coercion, the penalty shall be term imprisonment.⁹⁷³

A prison sentence can be imposed for a period which is for not less than one year and an aggravated penalty can be imposed when the victim is not yet fourteen years of age or has been coerced. Hence, the legislator has ensured that child sexual molestation is clearly outlawed. Yet the scope of protection for children should be widened by amending the Penal Code so that this applies to all those who are below 18 years. This would also ensure that the Penal Code is aligned with Article 1 of UAE Law No. 9 of 1976 on Delinquent and Homeless Juveniles which confirms that a person '[s]hall be considered as juvenile in implementing the provisions of this law, whoever has not attained eighteen years of age at the time of committing the deed under question or presence in one of the homeless cases'. It would also be useful to adopt a childhood factor for sexual molestation cases where force or a threat has been used. This could then be considered an aggravating factor.

6.7.3 Child sexual exploitation crimes

The UAE legislator does not consider childhood an aggravating factor in sexual exploitation cases.⁹⁷⁴ This is problematic and does not protect children adequately. It also does not ensure full compliance with the CRC. Yet a childhood factor has been adopted when the crimes of incitement, attraction and seduction to commit debauchery or prostitution in simple and aggravated form takes place or a person is kept without his/her consent. Article 363 of the UAE Penal Code states that those:

Shall be sentenced to detention for a minimum term of one year and to a fine, whoever entices, induces or tempts, by any means, a male or female to commit debauchery or prostitution or assisted

⁹⁷³ *ibid* art 356.

⁹⁷⁴ The articles relating to sexual exploitation do not contain a childhood aggravating factor. Article 362 states that a person '[s]hall be sentenced to the penalty provided for in the preceding article, whoever manufactures, imports, exports, possesses, acquires or transports for the purpose of exploiting, distributing or displaying to others writings, drawings, pictures, films, symbols or other matters if they are violating public morals shall be sentenced to the same penalty, whoever advertises any of the mentioned objects.' The crime of exploiting prostitution is regulated in Article 366 of the Penal Code which states that a person '[s]hall be sentenced to detention for a term not exceeding five years, whoever exploits by any means the lewdness or debauchery of a person.' In respect of practising the crime of debauchery and prostitution, Article 368 of the Penal Code states that a person 'shall be sanctioned to term imprisonment, whoever habitually practices debauchery or prostitution'.

him to this end. In case the age of the victim is below eighteen years, then the penalty shall be detention for a minimum term of two years and the payment of a fine.

Also, Article 364 provides that a perpetrator:

Shall be sentenced to imprisonment for a term not exceeding ten years, whoever entices a male or female to debauchery or prostitution by means of coercion, threat or subterfuge. The penalty shall be imprisonment for a minimum term of ten years, should the age of the victim be below eighteen years of age. The foregoing penalties, as the case may be, shall apply to whoever detains a person against his will by means of coercion, threat or subterfuge in a place with the intention of enticing him to perpetrate one or more acts of debauchery or prostitution.

It is clear from these provisions that the legislator considers that childhood is an aggravating factor which warrants a more severe penalty as the punishment is two years and a fine instead of a period not less than one year and a fine. This is also the case in respect of cases where there is coercion, a threat or trickery, and where the punishment shall be imprisonment for a period not exceeding ten years. If the person is also a child, this is another aggravating factor which results in the punishment being for a period not less than ten years. This also applies to cases where a person is detained against his/her will to commit lewdness and prostitution.

The UAE legislator is correct in taking into account whether the accused is related to the victim, responsible for their upbringing or exercises power or control.⁹⁷⁵ When such an aggravating factor is established, the maximum limit of the punishment shall be doubled.⁹⁷⁶ The fact that the age of the victim is considered is also important for child protection.⁹⁷⁷

6.8 Child sexual abuse cases in the UAE

The following table illustrates the number of cases reported in each Emirate.

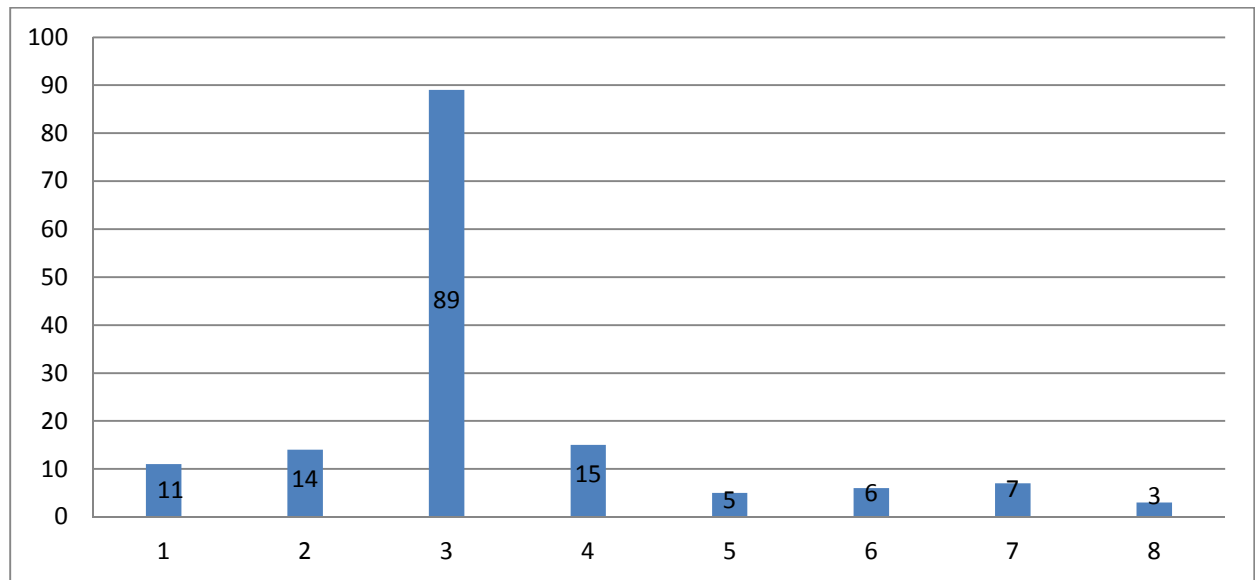
⁹⁷⁵ Article 367 of the Penal Code states: 'If the felon who commits any of the crimes provided for in Articles (363, 364, 366) is an ascendant of the victim or is related to him in such a way that he is forbidden to marry him, or if he is his custodian, guardian, someone who exercises control over him, his servant, or the servant of any of the above mentioned persons, it shall be considered an aggravating circumstance.'

⁹⁷⁶ Article 103 of the Penal Code states: 'Where there is an aggravating circumstance, the court may impose the penalty as follows: a - If the penalty originally prescribed for the crime is a fine, its maximum limit may be doubled or a judgment of detention may be given; b - If the penalty originally prescribed for the crime is detention, its maximum limit may be doubled; c - If the penalty originally prescribed for the crime is temporary imprisonment which upper limit is less than fifteen years, the penalty may reach the upper limit; d - If the penalty originally prescribed for the crime is temporary imprisonment that reached the maximum limit, the penalty may be exchanged for life imprisonment.'

⁹⁷⁷ The reason for criminalisation is the great danger which dissemination, display or dealings in the aforesaid prints or classified arts materials may have on children. It is considered that such prints or materials contravene the prevailing high values of the community which are passed onto children through their families, schools, clubs and the media.

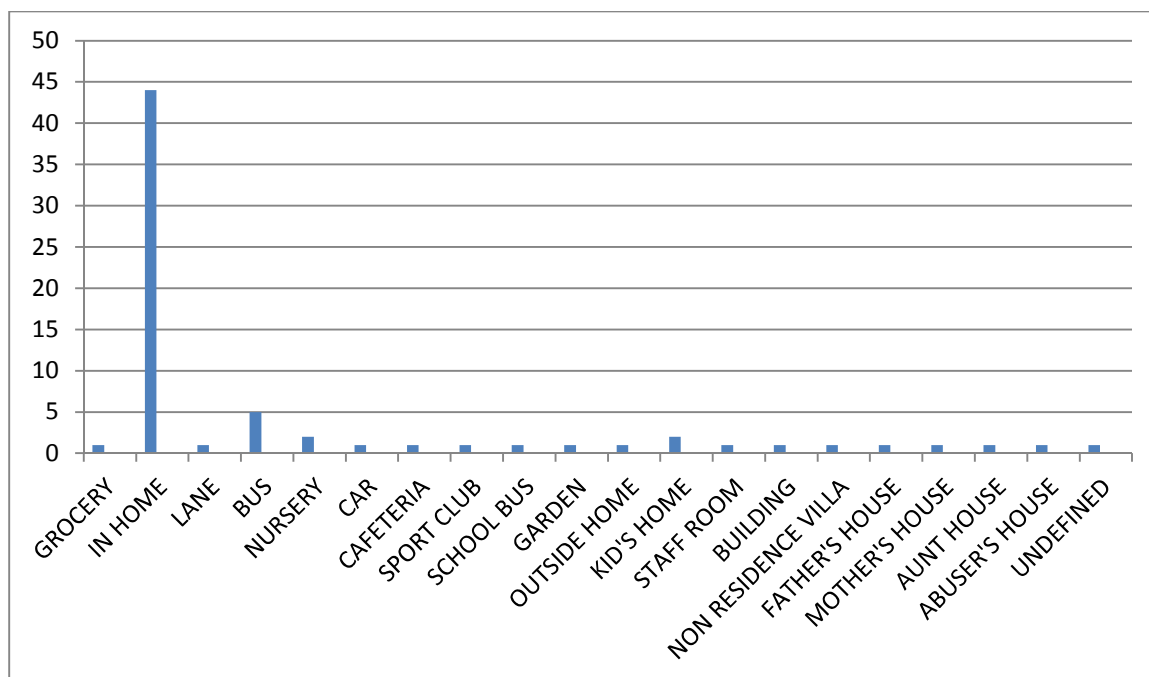
6.8.1 Sexual abuse reports according to each Emirate and by specific place of incident⁹⁷⁸

These cases were reported through the Child Helpline which was set up especially for sexual abuse cases in March 2015 and out of 150 reports Sharjah came first with 59.3% of the total number of reported child sexual abuse cases.



Abu Dhabi-Dubai-Sharjah-Ajman-Ras al-Khaimah-Umm al-Quwain-Fujairah
Graph 1 Child abuse reports by Emirate

⁹⁷⁸ Knowledge Management Office, *Analytical Study of Child Sexual Abuse* (Government of Sharjah: Social Services Department 2015).



Graph 2 Place of incident

What is of note in the above graph is that 49% of incidents took place inside homes.

In Dubai, one third of the 60 child abuse cases which were reported in 2013 involved sexual attacks.⁹⁷⁹ A 2013 study conducted by the Department for Eradicating Child Sexual Abuse at Dubai Police General Directorate of Investigations and Criminal Research found that children are often exposed to abuse at a very young age, starting from two years of age. Two-thirds of the abusers were either relatives or others who were close to the child and took care of him/her, such as servants, baby-sitters, drivers, neighbours and relatives. The main reason for abuse is that the family is absent and therefore monitoring does not take place. This makes it possible for perpetrators to seduce, threaten, hit and abuse children. The study also highlighted that children are made to watch porn movies by those they trust and are close to, such as servants and relatives. This, coupled with the child being aware that this is illegal and fearing that their parents may find out, makes detection difficult. The study also emphasised that religious reasons and reputation prevented these crimes being reported. Also, the failure

⁹⁷⁹ Janice Ponce de Leon, 'Law to Make Reporting Child Abuse Mandatory in UAE' (*Gulf News*, 2016) <<http://gulfnews.com/news/uae/society/law-to-make-reporting-child-abuse-mandatory-in-uae-1.1831238>> accessed 26 February 2017.

to adopt clear legal regulations to follow up the crime and investigate it have resulted in children being left unprotected.⁹⁸⁰

6.9 National mechanisms to protect children rights

The UAE has taken steps to safeguard children against abuse which impacts negatively on the development of the child.⁹⁸¹ Hence, it has tried to transpose Article 19 of the CRC. Social support centres have been created in Al Ain, Abu Dhabi and the western region.⁹⁸² These also offer assistance to child sexual abuse victims.⁹⁸³ Treatment and preventative programmes are run, including psychological rehabilitation services, and support is provided to child sexual abuse victims.⁹⁸⁴ Children as well as families receive support from social institutions.⁹⁸⁵ Awareness is raised through lectures, workshops and seminars.⁹⁸⁶ The topic is also discussed in the media in order to alert families to the importance of safeguarding children against violence.⁹⁸⁷ The Dubai Foundation for Women and Children offers psychological and medical care and shelters to women, including female children.⁹⁸⁸

The UAE government has also taken steps to transpose Article 34 of the CRC. It has outlawed all types of sexual exploitation.⁹⁸⁹ Human trafficking legislation has been enacted; relevant agencies have been empowered to take action to avert human trafficking; support is provided to victims; and international and bilateral cooperation has been enhanced in this field.⁹⁹⁰ Federal Act No. 51 of 2006 on combating human trafficking offenses imposes draconian sanctions on offenders, with a maximum sentence of life imprisonment and hefty fines.⁹⁹¹ Children can also not enter the UAE if they come from certain states and they do not have their own passport but are only mentioned on the passport of relatives.⁹⁹² The police

⁹⁸⁰ Shireen Farooq, 'According to a Study Prepared by the Reduction of Crime in the Dubai Police Department: 33% of Cases of Harassment of Children in the Family Surroundings' (*Albayan News*, 2013) <<http://www.albayan.ae/across-the-uae/accidents/2013-03-09-1.1838477>> accessed 26 February 2017.

⁹⁸¹ CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Second periodic reports of States Parties Due in 2004: United Arab Emirates' (3 November 2014) CRC/C/ARE/2, 1-59, 34.

⁹⁸² *ibid.*

⁹⁸³ *ibid.*

⁹⁸⁴ *ibid.*

⁹⁸⁵ *ibid.*

⁹⁸⁶ *ibid.*

⁹⁸⁷ *ibid.*

⁹⁸⁸ *ibid.*

⁹⁸⁹ *ibid.* 53.

⁹⁹⁰ *ibid.*

⁹⁹¹ *ibid.*

⁹⁹² *ibid.*

conducts monitoring in order prevent women being imported and it is made more difficult for women aged below 30 years to enter the country as they are classified as being more at risk.⁹⁹³ Compelling someone to work as a prostitute is rendered a crime.⁹⁹⁴ In Abu Dhabi, social work services offer support and victims are transferred by the police so that they can access these services.⁹⁹⁵ Other bodies exist, such as the Dubai Association for the Protection of Women and Children, which offer help to victims, including female children. Human trafficking victims are also provided with shelters, eg in Sharjah and Ras al-Khaimah, and assistance through centres established under the supervision of the National Red Crescent Society.⁹⁹⁶

Human trafficking cases are also monitored by a special centre created for this purpose within Dubai Police.⁹⁹⁷ A national committee to combat human trafficking crimes has also been created which, among with other matters, was entrusted with improving human trafficking legislation.⁹⁹⁸ Other steps have also been taken to combat human trafficking.

Additionally, promoting, advertising and facilitating child sexual exploitation online has been criminalised.⁹⁹⁹ When a child is subjected to harm online which contravenes public morals, an aggravated sentence is imposed.¹⁰⁰⁰ It has also been outlawed to abet, lure or assist a male or female to commit prostitution or lewdness using the Internet or a means of information technology.¹⁰⁰¹ When a child is a victim, a person is imprisoned for a minimum of five years and also receives a fine.¹⁰⁰² Those aged below 18 years are also not granted a work visa.¹⁰⁰³

Whilst these efforts are laudable, they unduly focus on human trafficking and thus sexual exploitation as opposed to child sexual abuse. This is insufficient to combat child sexual abuse. Even child sexual exploitation, whether because of trafficking or not, is not fully combated. The reason is that child rights are not sufficiently granted rights by law, partly

⁹⁹³ *ibid.*

⁹⁹⁴ *ibid.*

⁹⁹⁵ *ibid.*

⁹⁹⁶ *ibid.*

⁹⁹⁷ *ibid.*

⁹⁹⁸ Cabinet Decision No 5 of 6 May 2007 (UAE).

⁹⁹⁹ Federal Act No 2 of 2006 on Combating Information Technology Offenses (UAE).

¹⁰⁰⁰ *ibid* art 12.

¹⁰⁰¹ *ibid* art 13.

¹⁰⁰² *ibid.*

¹⁰⁰³ CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Second Periodic Reports of States Parties Due in 2004: United Arab Emirates' (3 November 2014) CRC/C/ARE/2, 1-59, 54.

because of the failure to adopt a sweeping approach towards child human rights. As discussed, various Islamic laws are still in conflict with the tenets of the CRC, particularly Articles 19 and 34.

6.10 The role of national human rights institutions

It is pertinent to mention here that NGOs and civil society organisations, which are considered to be the backbone of every society and help to identify the weaknesses and enhance the strengths of society, are missing in most Arab states.¹⁰⁰⁴

Human rights promotion and protection is one of the most critical issues in modern democratic societies. This issue has also been addressed directly or indirectly by religious institutions, NGOs, governmental organisations and other different institutions.¹⁰⁰⁵ NHRIs play a particularly important role at the domestic level. These human rights promoters are a product of the democratisation process that has taken place in several states.¹⁰⁰⁶ NHRIs are habitually used to bridge the gap between civil society and the government as they are different from both traditional government organs and NGOs.¹⁰⁰⁷

The UN has been central to the establishment of a growing network of NHRIs. It has formulated specific guidelines for their creation and function in a resolution called 'Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights',¹⁰⁰⁸ more commonly referred to as the Paris Principles.¹⁰⁰⁹ These were passed by the UN General Assembly in 1991 and adopted in 1993.¹⁰¹⁰ The UN describes NHRIs in the following terms: 'A body which is established by the government under the constitution, or by law or decree the functions of which are specifically defined in terms of

¹⁰⁰⁴ I Brownlie and GS Goodwin-Gill 'Arab and Other Islamic States' in *Brownlie's Documents on Human Rights* (Oxford University Press 2010) 1109; Rishmawi M, 'The Revised Arab Charter on Human Rights: A Step Forward.' (2005) 5(2) *Human Rights Law Review* 361, 363.

¹⁰⁰⁵ OHCHR, 'National Institutions for the Promotion of Human Rights' (UN Human Rights Fact Sheet No 19) 3 <<http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf>> accessed 6 February 2017.

¹⁰⁰⁶ *ibid* 6.

¹⁰⁰⁷ Anne Smith, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' (2006) 28 *Human Rights Quarterly* 904, 908.

¹⁰⁰⁸ Sanzhaun Guo, 'Independence of National Human Rights Institutions and Linkage between International Law and Domestic Law: A Case Study of the National Human Rights Commission of Korea' in Rehman, Shahid and Dickinson (n 615) 264.

¹⁰⁰⁹ Sonia Cardenas and Andrew Flibbert, 'National Human Rights Institutions in the Middle East' (2005) 59 *The Middle East Journal* 413.

¹⁰¹⁰ Guo (n 1008).

the promotion and protection of human rights.’¹⁰¹¹ This suggests that NHRIs are not disconnected from government organs.

Nevertheless, according to the Paris Principles, they should be both independent of the governmental authorities that created them and representative of a diverse range of societal actors. As delineated in the UN handbook on NHRIs, independence is a key factor. It encompasses legal and operational autonomy, financial autonomy, appointment and dismissal procedures and plural composition, the latter referring to the equitable representation of gender, ethnicity and minority status in the NHRI.¹⁰¹² It is only when this fundamental criteria is satisfied that they can receive international accreditation from the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).¹⁰¹³ As of May 2017, a total of 121 NHRIs were accredited and out of that number 78 were deemed to be in full compliance with the Paris Principles.¹⁰¹⁴

Pohjola defines NHRIs as ‘independent bodies established by a national government for the specific purpose of advancing and defending human rights at the domestic level’.¹⁰¹⁵ This is a better definition for national institutions since it acknowledges that these bodies must be independent, despite being established by the government. This strengthens their foundation. Yet this definition does not explain how these institutions should be established by the government, eg whether by virtue of a constitutional act, legislative text or through other means. Yet this also provides some flexibility since the government can choose how to best create them so that they there are independent.

Many of the NHRIs fall into two groups: human rights commissions and ombudsmen.¹⁰¹⁶ Human rights commissions protect individuals from governments or private actors who are violating their rights.¹⁰¹⁷ Ombudsmen control government officials and protect the rights of

¹⁰¹¹ Centre for Human Rights, *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (UN 1995) 6, para 39.

¹⁰¹² Guo (n 1008).

¹⁰¹³ Cardenas and Flibert (n 1009) 413.

¹⁰¹⁴ GANHRI, ‘GANHRI Sub-committee on Accreditation (SCA)’ <<https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/default.aspx>> accessed 2 February 2018.

¹⁰¹⁵ Anna-Elina Pohjola, *The Evolution of National Human Rights Institutions: The Role of the United Nations*, vol 318 (The Danish Institute for Human Rights, 1996) 1.

¹⁰¹⁶ Jeong-Woo Koo and Francisco O Ramirez, ‘National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004’ (2009) 87 *Social Forces* 1321, 1322.

¹⁰¹⁷ Linda C Reif, ‘The Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman’ (2011) 31 *Boston College Third World Law Journal* 269, 273; Centre for Human Rights (n 1011) 7, para 48.

individuals who have become victims of maladministration.¹⁰¹⁸ Human rights commissions can address a wider range of matters in both the public and private sectors, whereas ombudsmen only deal with maladministration by government officials. There also exists a less important type of national institution, namely ‘specialized national human rights institutions’.¹⁰¹⁹ The primary goal of these is to help protect the right of the weak and other disadvantaged groups, such as ‘persons belonging to ethnic, linguistic and religious minorities, indigenous people, non-nationals, migrants, immigrants, women, children, refugees, the poor and disabled people’.¹⁰²⁰ Since the 1990s, another type of national institution has been developed, namely ‘human rights ombudsmen’. This is a hybrid between a national human rights institution and an ombudsman, which therefore undertakes both functions.¹⁰²¹

Whilst several national rights institutions exist, states choose the model which best suit their historical experience, traditions, experience with other states, and political, social and legal orientation.¹⁰²² One of the following three approaches is used when establishing these institutions: a single system, a dual system or a multi-organ system.¹⁰²³ The single system opts to establish either a human rights commission or an ombudsman. In 1991, the Paris Principles were devised and these specifically discuss NHRIs. These principles were adopted two years later by the UN General Assembly,¹⁰²⁴ and therefore offer internationally recognised standards for these institutions.¹⁰²⁵

In the Middle East and North Africa, a new type of institution is emerging. Within the last decade, nine governments in this region have established NHRIs: Morocco (1990), Tunisia (1991), Algeria (1992), Palestine (1993), Yemen (1997), Jordan (2000), Qatar (2003), Egypt (2003) and Saudi Arabia (announced in 2003).¹⁰²⁶ However, the UAE has not yet created

¹⁰¹⁸ Linda C Reif, *The Ombudsman, Good Governance, and the International Human Rights System*, vol 79 (Martinus Nijhoff 2004) 2.

¹⁰¹⁹ Centre for Human Rights (n 1011) 8, para 54.

¹⁰²⁰ *ibid* 8, para 53.

¹⁰²¹ Smith (n 1007) 905.

¹⁰²² Pohjolainen (n 1015) 16.

¹⁰²³ Leonard FM Besselink, *Types of National Institutions for the Protection of Human Rights and Ombudsman Institutions: An Overview of Legal and Institutional Issues* (Kluwer Law International 2001) 157.

¹⁰²⁴ UNGA, ‘National Institutions for the Promotion and Protection of Human Rights’ (20 December 1993) UN Doc A/RES/48/134.

¹⁰²⁵ Thomas Pegram, ‘Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions’ (2010) 32 *Human Rights Quarterly* 729, 732.

¹⁰²⁶ Cardenas and Flibbert (n 987) 411.

such a NHRI despite this having been recommended by the CRC Committee.¹⁰²⁷ This inaction has severe implications for the protection of child rights in the UAE since as previously mentioned the express role of NHRIs is to safeguard and advocate for international human rights norms. Some NHRIs possess significant powers of investigation and legal standing whereas others – simply by their existence – insert the discourse of human rights into the public domain, and in so doing legitimise the idea of them which in turn can contribute to the construction of new social demands.¹⁰²⁸ NHRI protection and promotion with respect to child rights could entail the investigation and redress of child abuse and child sexual abuse violations, including the punishment of perpetrators and compensation for child victims. Concomitantly, it could involve the widespread education of child rights and raising awareness of child rights issues. In short, the substantial potential of this institutional apparatus that could be deployed in fighting child sexual abuse in the UAE is lost due to the complete absence of NHRIs.¹⁰²⁹

In the Middle East, NHRIs are not unambiguously beneficial to the defence of human rights but they nonetheless deserve close scrutiny. At the very least, the political environments in which they operate are affected. The fact that such associations exist at the very least ensures that claims are legitimised which are made by social actors who defend human rights. It also makes it more difficult to argue that human rights are culturally irrelevant or hinder development. Further, they act as political focal points for domestic and international disputes over rights violations and create a tangible bureaucratic forum so that state institutional actors can ensure that human rights are better monitored. Also, NHRIs are increasingly developing a global network of sub-state actors which deal with the same or similar issues and which regularly communicate with foreign counterparts and international bodies, as well as NGOs. Yet, without such a NHRI being in existence in the UAE, international law's ability to accord protection to children will remain limited. There therefore exists a strong need for a NHRI. Whilst national institutions have existed for a long time, their importance was certainly emphasised by the adoption of the Paris Principles. The international community can greatly promote human rights norms by supporting domestic establishments of NHRIs. The role of national institutions is very important and many organisations recognise this.¹⁰³⁰ NHRIs are

¹⁰²⁷ CRC Committee (n 567) 4.

¹⁰²⁸ Sonia Cardenas, 'Emerging Global Actors: The United Nations and National Human Rights Institutions' (2003) 9(1) *Global Governance* 23.

¹⁰²⁹ *ibid.*

¹⁰³⁰ Smith (n 1007) 1.

flourishing in developing and developed states because their significance is extensively recognised in the promotion and protection of human rights. However, it is important to note that the majority of NHRIs find it difficult to fully comply with the Paris Principles for a number of different reasons.

6.11 Difference between NHRIs and NGOs

At the national level, both human rights NGOs and NHRIs are highly involved in the promotion and protection of human rights. They therefore play an important awareness-raising role whilst also overseeing government actions.¹⁰³¹ ¹⁰³² Nonetheless, there are still differences in the way these institutions are structured as a result of their founding legislation. Governments have created national human rights institutions either through their constitutions or through legislative acts, coupled with an instruction to regulate and oversee governmental action in relation to human rights.¹⁰³³ They are quasi-governmental institutions which occupy an independent position that falls between the judiciary and the executive.¹⁰³⁴ In contrast, NGOs are part of civil society and are not related to the government, nor does the state necessarily create them.¹⁰³⁵

Another distinction is their relationship with the UN. The relationship between the UN human rights body and NHRIs is not explicitly established but NGOs perform a consultative role within the UN.¹⁰³⁶ As human rights activists, NGOs can influence the government to set up NHRIs in order to improve the promotion and protection of human rights.¹⁰³⁷ The other difference lies in the source of funding. National institutions receive a permanent budget from the government which is given without the imposition of any restrictions although they can seek funding from other sources.¹⁰³⁸ In contrast, NGOs receive funds from various local and

¹⁰³¹ Cynthia Price Cohen, 'The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child' (1990) 12(1) Human Rights Quarterly 137.

¹⁰³² Cardenas and Flibbert (n 987) 413.

¹⁰³³ UNGA (n 1024).

¹⁰³⁴ International Council on Human Rights Policy and OHCHR, *Assessing the Effectiveness of National Human Rights Institutions* (ICHRP 2005) 12.

¹⁰³⁵ Hildy Teegen, Jonathan P Doh and Sushil Vachani, 'The Importance of Nongovernmental Organizations (NGOs) in Global Governance and Value Creation: An International Business Research Agenda' (2004) 35 Journal of International Business Studies 463, 464.

¹⁰³⁶ ECOSOC Res 1296 (XLIV) (23 May 1968). This was superseded by Res 1996/31 (25 July 1996).

¹⁰³⁷ Kal Raustiala, 'States, NGOs, and International Environmental Institutions' (1997) 41 International Studies Quarterly 719, 720.

¹⁰³⁸ Katrien Meuwissen, 'NHRIs and the State: New and Independent Actors in the Multi-layered Human Rights System?' (2015) 15 Human Rights Law Review 441, 455.

international donors.¹⁰³⁹ It is for these reasons not only important for the UAE to create such national institutions but to also confer the political space on them and NGOs to operate independently without fear of repercussions.

6.12 The Wadeema Law

In 2015, when the CRC Committee issued its Concluding Observations to the 2012 UAE government report, the government introduced a draft Child Rights Law.¹⁰⁴⁰ The law is also called Wadeema's Law since this is the name of an 8-year-old girl who was starved and tortured to death by her father and his girlfriend in 2011.¹⁰⁴¹ However, the official name of the law is Child Rights Law because 'people will not recognise who or what Wadeema is. They don't know who she is or what her story is.'¹⁰⁴² The law introduced nationwide childcare specialist services in order to prevent similar cases of abuse. It was eventually passed in December 2015. The law guarantees those who are under 18 years of age basic rights to health, education, freedom from economic and sexual exploitation, and freedom of expression.¹⁰⁴³ The law entered into force on 15 June 2016.¹⁰⁴⁴

6.13 Wadeema Law: Too basic and insufficient?

One of the main issues with this law is that there is no specific article which addresses the child sexual abuse problem. Article 33 is the only provision which addresses child sexual abuse. It only lists 'exposure of a child to sexual abuse and exploitation' as one of the different instances which 'endanger the child's physical, psychological, moral or mental safety and necessitate his right to protection'. No straightforward operational definitions have been adopted for the different types of child sexual abuse and exploitation. As explained in

¹⁰³⁹ Gerald M Steinberg, 'Monitoring the Political Role of NGOs' (2003) Jerusalem Center for Public Affairs 1, 1.

¹⁰⁴⁰ CRC Committee (n 567) para 10 at 3.

¹⁰⁴¹ Staff Reporter, 'Wadeema: The Emirati Girl Tortured to Death by her Father' (*The National*, 2016) <<http://www.thenational.ae/uae/wadeema-the-emirati-girl-tortured-to-death-by-her-father>> accessed 24 February 2017; Simon Tomlinson, 'Merciless Father who Killed Daughter, 8, After Torturing her with Hot Irons and Stun Guns for Being "Naughty" is Sentenced to Death' (*Mail Online*, 2013) <<http://www.dailymail.co.uk/news/article-2277942/Dubai-father-killed-daughter-8-torturing-hot-irons-stun-guns-naughty-sentenced-death.html>> accessed 24 February 2017.

¹⁰⁴² Ayesha Al Khoori and Ola Salem, 'Wadeema's Law Renamed Child Rights Law' (*The National*, 2013) <<http://www.thenational.ae/uae/government/wadeemas-law-renamed-child-rights-law>> accessed 24 February 2017.

¹⁰⁴³ Naomi Sakr, 'Children's Access to Beneficial Information in Arab States: Implementation of Article 17 of the Convention on the Rights of the Child in Egypt, Morocco and the United Arab Emirates' (2016) 6 *Global Studies of Childhood* 376, 384.

¹⁰⁴⁴ Ramola Talwar Badam, 'UAE Child Protection Law to Take Effect on June 15' (*The National*, 2016) <<http://www.thenational.ae/uae/uae-child-protection-law-to-take-effect-on-june-15>> accessed 24 February 2017.

Chapter Three, it is important to specifically outlaw incest amounting to child sexual abuse, rape of a child, child sexual molestation, sexual touching of children, sexual harassment of a child, online child sexual abuse, commercial sexual exploitation of children, including online child sexual exploitation and to adopt definitions for all these different forms of child sexual abuse and exploitation. General Comment 13 of the CRC Committee also emphasises¹⁰⁴⁵ that a proper implementation of the CRC requires that the specific types of abuse, including (a) being induced or coerced to engage in any illegal or physically or psychologically detrimental sexual activity; (b) being used for the purpose of commercial sexual exploitation; (c) being used for making visual or audio child sexual abuse images; (d) being a victim of sexual slavery, child prostitution or for sexual exploitation in the tourism, and travel industry, for trafficking, for sale in order to be used for sexual purposes, as well as forced marriages; and (e) being sexually victimised psychologically or physically must be outlawed. Hence, the problem at present is that the different forms of the crime of child sexual abuse and exploitation have not been defined and properly codified. Instead, the Penal Code must be consulted but this does not specifically deal with child rights. This results in a fragmented approach which creates loopholes within the legislative framework when it should in fact properly protect children. For instance, it is not clear how one should distinguish child sexual abuse and exploitation from fornication and adultery. Arguably, in both instances sexual activities take place which are outlawed by Islam. Yet there is a clear difference between cases where two adults engage in consensual sexual activity outside the institution of marriage and cases where a child is involved. Whilst it may also be considered morally reprehensible, children are more vulnerable and may be seduced, tricked or coerced to engage in sexual conduct. This is also the case in respect of children who are forced into prostitution and who should also be protected. Hence, there has been a failure to take all appropriate legislative measures to protect the child from ‘all forms’ of sexual abuse and exploitation, as required by Article 19 of the CRC.

The other shortcoming of the Wadeema Law is that it omits to delineate any penalty for child sexual abuse and exploitation. As with the definitions, recourse must be made to the Penal Code which is rather cumbersome and it would have been better if the Wadeema Law had enacted a specific section which not only listed and defined the different types of child sexual abuse and exploitation but also stipulated the punishment for each of these different forms of

¹⁰⁴⁵ CRC Committee (n 399).

abuse. In other words, the Wadeema Law fails to properly define child sexual abuse and exploitation and to stipulate the different punishments for the different types of abuse. This should be urgently addressed.

A further fundamental issue is that the age limit to receive protection against child sexual abuse and exploitation has not been increased in other laws, namely the Penal Code and the Federal Act No. 9 of 1976 concerning juvenile delinquents and vagrants. Whilst the Wadeema Law stipulates that those who are below 18 years should be considered children, no efforts have been made to bring other laws into line with this definition. There has therefore been a failure to revise other laws and provisions. As discussed above, the Penal Code considers that when children are below 14 years this is an aggravating factor in rape and sexual molestation cases, although not in respect of sexual exploitation, except when the crimes of incitement, attraction and seduction to commit debauchery or prostitution have taken place. In contrast, Article 7 of Federal Act No. 9 of 1976 concerning Juvenile Delinquents and Vagrants permits judges to punish those who are seven years or older as if they are adults. Room is thus left for child sexual abuse to take place since those who are fourteen or older must comply with the Islamic evidence requirements which govern *zina* offences. As no conceptual distinction has been drawn, the crime of child sexual abuse and exploitation has become conflated with the *zina* offence category.¹⁰⁴⁶

Hence, by failing to distinguish the crimes of *zina* from rape and other sexual abuse cases, child victims' right to a fair hearing is significantly undermined.¹⁰⁴⁷ In effect, rapists are privileged and protected because the *hadd* burden of proof makes it extremely unlikely that they would ever be punished.¹⁰⁴⁸ Proof of rape under *hadd* can take one of two forms; first, a confession by the rapist before the court; or second, the eye-witness testimony of at least four adult Muslim male witnesses of the act of sexual penetration.¹⁰⁴⁹ The latter is compounded by the fact that the lifestyles and morals of the four witnesses have to comply with the pious requirements of *Tazkiyah-al-shuhood*, all of their testimonies must be consistent, and they cannot be women or non-Muslims (this will also be discussed in Chapter Eight).¹⁰⁵⁰ Also, the

¹⁰⁴⁶ Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (BIICL 2008) 136.

¹⁰⁴⁷ *ibid.*

¹⁰⁴⁸ Rubya Mehdi, 'The Offence of Rape in the Islamic Law of Pakistan'(1997) 18 *Women Living under Muslim Laws*, Dossier 98-108.

¹⁰⁴⁹ *ibid.*

¹⁰⁵⁰ *ibid.*

reference to ‘his right to protection’ in Article 33(5) of the Wadeema Law is problematic as strictly speaking this only protects boys and not girls.

Neither has the Wadeema Law been adequately implemented, principally because this requires human resources to be dedicated, technical capacities to be established, and material to be furnished to assist enforcement personnel.¹⁰⁵¹ Without this, it is extremely difficult to identify cases of child sexual abuse and to prevent children from being sexually abused. No mechanism has been created to evaluate and oversee whether progress is being made. Hence, no clear mechanism has been adopted to ensure that mandatory reporting takes place. It is a fact that the Wadeema Law has placed an obligation on every person to report the incidents of child abuse and to do this adopted the mechanism of mandatory reporting law.¹⁰⁵² The UAE government tried its best to provide adequate facilities and care to the victim child but all these efforts are not enough because there are still frequent reports of abuses.

Most fundamentally, Article 73 of the Wadeema Law provides that ‘[t]he Council of Ministers shall – upon the Minister's suggestion – issue the Implementing Regulation of this Law within six months from the date of publication thereof in the Official Gazette’. However, until now 18th February 2018 at the time when this thesis is submitted there is no such implementing regulation had yet been adopted.

The other issue is that there exists no specific law for child sexual abuse, such as, for instance, the Malaysian Sexual Offences against Children Act 2017 and Indian Protection of Children from Sexual Offences Act 2012. This Indian law outlaws sexual offences against children, ie penetrative sexual assault and aggravated penetrative sexual assault, sexual assault and aggravated sexual assault, sexual harassment, using children for pornographic purposes and abetting and attempting to commit an offence. The procedure is also statutorily detailed for reporting these cases. Procedures have also been created to record the statement of children, including in respect of medical examinations of children. Special courts have been created to ensure that cases are heard quickly. In terms of the presumption of guilt, a

¹⁰⁵¹ CRC Committee (n 399) 12, para 32.

¹⁰⁵² Article 42 of Wadeema Law states: ‘1. Each and every person shall notify Child protection specialist or the child protection units if there shall be what may threaten its safety, and his physical, psychological, moral or mental health. 2. Notification shall be a must onto the breeders, medical doctors, and social specialists, or others who shall have undertaken the child protection, caring thereof, or their education.’ Also, Article 43 states: ‘Each and every person who shall have reached the age of maturity, may help any child who requires help to notify the competent authorities or the concerned stakeholders about his complains, or the suffering of any of his brothers.’

reverse burden of proof operates in respect of some of the offences. It thus falls on the accused to prove that what the child is alleging is untrue. It is also presumed that the accused possessed the requisite *mens rea* to commit the offence and it falls on the accused to disprove this. The special court has also been equipped with powers and procedures, eg, to permit various breaks for children during the hearing, to ensure that the child remains anonymous, to order that the child receives compensation from the perpetrator. In cases where a child has committed an offence against another child, the law governing juveniles is applied. Other important procedures have been created. For example, a child must not see the accused when s/he gives evidence. The law also requires that guidelines are published for experts, professionals and public health bodies and other agencies. The adoption of a similar law by the UAE would mark a fundamental advancement in the protection of children against child sexual abuse and sexual exploitation. It would also complement the human trafficking law and send out a clear message that the UAE does not tolerate child sexual abuse.

6.14 Conclusion

Arguably, one of the main difficulties faced is that *Sharia* has not been correctly interpreted. In the words of Abiad, a conceptual error has been made by Islamic scholars since the following Quranic verse: ‘And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations) - flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors’ has been misinterpreted.¹⁰⁵³ A patriarchal interpretation has been adopted, which in the case of children who are subjected to child sexual abuse leaves them dangerously exposed, including to possible criminal charges. This has also arguably resulted in a half-hearted approach towards addressing the issue of child sexual abuse. Clearly, *Sharia* intends to prevent harm, especially to children who should be loved, nourished and cared for. This is further underscored by the fact that the *Quran* spells out many different rules in order to ensure that children are cared for. The Islamic prohibition of fornication and adultery is intended to protect the family unit so that children are properly cared for.

As the Constitution mandates obedience to *Sharia*, it is therefore important that in the future this conceptual error is corrected by Islamic scholars. *Sharia* stresses human dignity¹⁰⁵⁴ and

¹⁰⁵³ Abiad (n 1046) 136.

¹⁰⁵⁴ A Al-Ahsan, ‘Law, Religion and Human Dignity in the Muslim World Today: An Examination of OIC’s Cairo Declaration of Human Rights’ (2008) 24(2) *Journal of Law and Religion* 569, 569.

therefore does not require that children who are subjected to harm by adults are being criminalised. Children, namely all those who are below 18, must be exempted from being accused of fornication and adultery when they have been subjected to sexual abuse and exploitation. The different types of child sexual abuse and exploitation must be clearly defined and sanctions must be stipulated for these different types of offences.

Hence, the Wadeema Law must be revised and improved and the implementing regulations must be urgently passed. Other legislation, especially the Penal Code and the Federal Act No. 9 of 1976 concerning juvenile delinquents must also be amended. Material must be provided to the judiciary, the public prosecution and the police in order to educate them about such a change in law. Awareness campaigns must be launched so that the public no longer considers the topic a social taboo. Victims must be assured that they can come forward and speak out without fear of shame and prosecution.

A cross-sector approach has to be adopted so that different stakeholders work together on the common goal of combating child abuse. Perpetrators must be brought to justice and a victim-focused national strategy must be adopted. A database must be established to protect children against repeat offenders. Victims must receive comprehensive support services, which should be made available from the moment child sexual abuse is being reported. Those who come in contact with children must be able to identify vulnerable children. Capacity must be built in to offer victim support to sexually abused and exploited children. Children must also know how they can report cases. Easy channels must be created for children to lodge complaints, such as the Child Helpline. Additionally, independent national institutions should be created. NGOs should be allowed to freely operate and civil society activism should be encouraged in the field. It must be also monitored whether child sexual abuse and exploitation are being effectively combated and improvement measures must be identified. The next chapter discusses the factors and consequences of child sexual abuse and whether international law can address these.

Chapter Seven: International Law: The Factors and Consequences of Child Sexual Abuse

7.0 Introduction

This chapter critically analyses the extent to which international law addresses the factors and consequences of child sexual abuse and victimisation. One of the fundamental problems is that this crime takes place in private, which also renders detection more difficult. However, as mentioned already international law does not directly regulate the affairs with individuals but only creates a relationship between states and/or the international community. It is therefore crucial that domestic law is utilised in order to protect victims and punish perpetrators. It is against this background that this chapter discusses important aspects of child sexual abuse which international law must also address in order to effectively combat child sexual abuse. For this purpose, the extent to which children are affected is explored. Recourse is made to various scholars who have studied and analysed this topic. Child sexual abuse cases in which the perpetrators were either the parents or the caretaker of the child are also studied.

Child sexual abuse has received much attention from individual nations but also at the international level, including by IGOs, such as the UN and UNESCO, and NGOs, such as Save the Children. Moreover, various international agreements, particularly the CRC, contain provisions which are designed to protect children against sexual abuse. Child sexual abuse also contravenes fundamental human rights, namely of those who are particularly vulnerable members of society and this is irrespective of their gender, religion, culture or socio-economic status. Annually, an estimated two million children are forced to work in the sex industry.¹⁰⁵⁵ Moreover, around 12 million children are trafficked every year and these individuals are particularly susceptible to sexual abuse and exploitation.¹⁰⁵⁶

7.1 The changing crime of child sexual abuse

It has been traditionally assumed that sexual abuse of children is a crime committed by lurking strangers.¹⁰⁵⁷ However, Freud challenged this view and argued that childhood sexual

¹⁰⁵⁵ Sara Shapouri, 'Ending Child Sexual Abuse and Exploitation: A Guide for Child Protection in Iran' (2007) 7 Whittier Journal of Child & Family Advocacy 63.

¹⁰⁵⁶ *ibid.*

¹⁰⁵⁷ Louise Ainsley Jackson, *Child Sexual Abuse in Victorian England* (Psychology Press 2000) 8.

abuse is perpetrated by parents or adult caretakers. This view only became generally accepted during the last decade of the nineteenth century.¹⁰⁵⁸ Clearly, child maltreatment, including sexual abuse, has serious negative social repercussions, as highlighted by many studies.¹⁰⁵⁹ Cases from the US Department of Justice suggest that those parents who have experienced sexual abuse as children are more likely to commit crime, especially drug offences. There is therefore a higher chance that they become criminals than adults who were not sexually abused by their parents during their childhood.¹⁰⁶⁰ Neglect or abuse during one's childhood increases the risk of living a life of crime during adulthood.¹⁰⁶¹ Hence, those who are sexually assaulted as children will be more prone to becoming criminals than those who are not sexually assaulted during their childhood.¹⁰⁶² These experiences therefore have a long term impact on society and also public finances as these individuals require welfare support, drug rehabilitation and also have to be imprisoned in certain cases. They can often also not fully contribute to society so that another cost is their loss of productivity.¹⁰⁶³

7.2 Incidence estimates of child sexual abuse

It is difficult to estimate the impact child sexual abuse has on society. The main problem is that those affected by it often refuse to report it. Consequently, the experiences of victims are often not even published in self-reported surveys. It is also not easy to estimate its prevalence since even when research is conducted much depends on who is targeted, the particular research method and the way in which questions are worded in questionnaires or interviews.¹⁰⁶⁴ Whilst the CRC Committee mandates that a 'comprehensive and reliable national data collection system' is created in order to engage in 'systematic monitoring and evaluation of systems (impact analyses), services programmes and outcomes', in practice it is

¹⁰⁵⁸ Sigmund Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (James Strachey (ed), WW Norton 1964) 151.

¹⁰⁵⁹ Penelope K Trickett and Frank W Putnam, 'Developmental Consequences of Child Sexual Abuse' in PK Trickett and J Schellenbach (eds), *Developmental Consequences of Child Sexual Abuse* (APA 1998) 39, 50-51.

¹⁰⁶⁰ Diana Jane English, Cathy Spatz Widom and Carol Brandford, 'Childhood Victimization and Delinquency, Adult Criminality, and Violent Criminal Behavior: A Replication and Extension. Final Report to NIJ' (National Institute of Justice, 2002).

¹⁰⁶¹ Terri L Messman-Moore and Patricia J Long, 'Child Sexual Abuse and Revictimization in the Form of Adult Sexual Abuse, Adult Physical Abuse, and Adult Psychological Maltreatment' (2000) 15 *Journal of Interpersonal Violence* 489.

¹⁰⁶² Cathy Spatz Widom and M Ashley Ames, 'Criminal Consequences of Childhood Sexual Victimization' (1994) 18 *Child Abuse & Neglect* 303.

¹⁰⁶³ Ching-Tung Wang and John Holton, *Total Estimated Cost of Child Abuse and Neglect in the United States* (Citeseer 2007) 1-2.

¹⁰⁶⁴ Rebecca M Bolen and Maria Scannapieco, 'Prevalence of Child Sexual Abuse: A Corrective Metanalysis' (1999) 73 *Social Service Review* 281; Marije Stoltenborgh and others, 'A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World' (2011) 16 *Child Maltreatment* 79.

a very challenging task to identify child sexual abuse cases.¹⁰⁶⁵ International law can only make suggestions in this regard, with its effectiveness being limited in the absence of state cooperation.

Another complex task is to explain whether there are differences in the way male and female victims are affected by sexual abuse. Not much research has been conducted in order to identify whether there exist any differences in this regard. Moreover, it is difficult to compare studies which have investigated this particular issue since different methodologies are used. Consequently, it is difficult to know whether child sexual abuse affects men and women differently.

The history of the prohibition of incest is also briefly studied.¹⁰⁶⁶ It is then assessed to what extent societies are increasingly aware of the issue, including the effect this has on society. The story of Oedipus cautions against incestuous abuse as far back as Greek mythology. Conclusively, the *Quran*,¹⁰⁶⁷ as well as the Bible, namely the book of Leviticus,¹⁰⁶⁸ condemn sexual relations between individuals related by blood.

¹⁰⁶⁵ CRC Committee (n 399) 1, 15.

¹⁰⁶⁶ 'Incest' encompasses a variety of sexual contacts between persons related by blood or affinity and irrespective of the age or capacity to consent. This article deals with 'interfamilial child sexual abuse', ie the problem of family members abusing children. The more general term 'incest' is used to denote sexual behaviour between related adults, and to refer to laws penalising the crime of 'incest' in various states.

¹⁰⁶⁷ See Surat An-Nisa (The Women) (4:23). Translated by Sahih International <<https://quran.com/4>> accessed 2 January 2017, which reads: 'Prohibited to you [for marriage] are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives' mothers, and your step-daughters under your guardianship [born] of your wives unto whom you have gone in. But if you have not gone in unto them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your [own] loins, and that you take [in marriage] two sisters simultaneously, except for what has already occurred. Indeed, Allah is ever forgiving and Merciful.'

¹⁰⁶⁸ Leviticus 18:6-17 reads: 'None of you shall approach to any that is near of kin to him, to uncover their nakedness ... The nakedness of thy father, or the nakedness of thy mother, shalt thou not uncover: she is thy mother; thou shalt not uncover her nakedness. The nakedness of thy father's wife shalt thou not uncover: it is thy father's nakedness. The nakedness of thy sister, the daughter of thy father, or daughter of thy mother ... born at home, or born abroad ... their nakedness thou shalt not uncover. The nakedness of thy son's daughter, or of thy daughter's daughter ... their nakedness thou shalt not uncover: for theirs is thine own nakedness. The nakedness of thy father's wife's daughter, begotten of thy father, she is thy sister; thou shalt not uncover her nakedness. Thou shalt not uncover the nakedness of thy father's sister: she is thy father's near kinswoman. Thou shalt not uncover the nakedness of thy mother's sister: for she is thy mother's near kinswoman. Thou shalt not uncover the nakedness of thy father's brother; thou shalt not approach to his wife: she is thine aunt. Thou shalt not uncover the nakedness of thy daughter in law: she is thy son's wife; thou shalt not uncover her nakedness. Thou shalt not uncover the nakedness of thy brother's wife: it is thy brother's nakedness. Thou shalt not uncover the nakedness of a woman and her daughter; neither shalt thou take her son's daughter, or her daughter's daughter, to uncover her nakedness; for they are her near kinswomen: it is wickedness.'

7.3 The act of child abuse and the danger of silence

Freud's work on the impact of child sexual abuse did not receive attention until the late 19th century.¹⁰⁶⁹ Legal scholars who have studied old social work records have found that family members had sexual relations with children and this constituted a type of family violence.¹⁰⁷⁰ In the past, the problem was therefore not that there did not exist credible evidence which confirmed that child sexual abuse was perpetrated by family members but that no empirical studies had been conducted. In the UAE, the silence surrounding child abuse started to dissipate in the twentieth century. This is because journalists began publishing articles which reported about parents who had been arrested for assaulting their children.¹⁰⁷¹ Statistics derived from medical studies further supported the views expressed by journalists. Accordingly, scientific studies, as well as popular media, started casting light on this topic and revealed that most cases of child sexual abuse were committed by family members and caretakers.¹⁰⁷² The attention by the media and academics has resulted in the topic of child sexual abuse also receiving more attention from UAE legislators. Impetus to take steps to combat child sexual abuse has also been generated as a result of the ratification of the CRC and the observations of the CRC Committee.

7.4 Child sexual abuse and exploitation

The topic of child sexual abuse and exploitation has not been sufficiently addressed in the UAE since it is considered a taboo topic. As a result, there exist no comprehensive statistics about cases where sexual offences have been committed against children. However, it can be confidently stated that the UAE is not an unaffected region.¹⁰⁷³ Evidence shows that sexual exploitation of children occurs in all states.¹⁰⁷⁴ Researchers have discovered that sexual exploitation of children is equally common in rural and urban areas and that both male and

¹⁰⁶⁹ Freud (n 1058) 151.

¹⁰⁷⁰ Linda Gordon and Paul O'Keefe, 'Incest as a Form of Family Violence: Evidence from Historical Case Records' (1984) *Journal of Marriage and the Family* 27.

¹⁰⁷¹ Aghaddir Ali, 'Man Arrested Over Abusing Daughters in Sharjah' (*Gulf News*, 23 March 2015) <<http://gulfnews.com/news/uae/crime/man-arrested-over-abusing-daughters-in-sharjah-1.1478067>> accessed 13 September 2016.

¹⁰⁷² Abdulla Rashid, 'Maid Accused of Sexually Abusing Infant' (*Gulf News*, 22 September 2012) <<http://gulfnews.com/news/uae/crime/maid-accused-of-sexually-abusing-infant-1.1079653>> accessed 13 September 2016.

¹⁰⁷³ The United Arab Emirates is a destination country for women who have been trafficked for the purpose of prostitution from South East Asia, Central Asia, Eastern Europe, and Africa: see Mohamed Y Mattar, 'Trafficking in Persons, Especially Women and Children, in States of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses' (2002) 26 *Fordham International Law Journal* 733.

¹⁰⁷⁴ Charles Felzen Johnson, 'Child Sexual Abuse' (2004) 364 *The Lancet* 462, 462.

female children are targeted.¹⁰⁷⁵ A study highlights that ‘35% of sexual offences committed against children in the UAE are carried out by family members usually by the closest person to the victim, for example, a father, brother or uncle’.¹⁰⁷⁶ Research has found that girls are more likely to encounter sexual abuse than boys. The fact that no research has been conducted also demonstrates that no efforts have been made to combat child sexual abuse and to bring abusers to justice. The underlying reason is that the topic of sexual exploitation, especially of children, is still largely a taboo subject. It is therefore not considered appropriate to discuss such topic in public and it is believed to disrupt the privacy of one’s home. As a result, children and families who reside in the UAE are ill-equipped to tackle this phenomenon. Indeed, any problem of a sexual nature is difficult to address. However, in the UAE these topics are deemed private in order to prevent shame and dishonour.¹⁰⁷⁷ Consequently, organisations which protect children in the UAE are uninformed. However, this silence and resultant unwillingness to deal with any such issues make it possible for sexual deviants to continue targeting children. In this context, Al-Mahroos mentions that there exist no publications about child sexual abuse in the UAE. Yet this is not an isolated occurrence for Arab states; only Bahrain and Yemen reported child sexual abuse cases and in Yemen studies were also carried out.¹⁰⁷⁸ Between 2000 and 2008, only 20 child sexual abuse cases were reported in Saudi Arabia.¹⁰⁷⁹ Accordingly, social and cultural constraints result in cases being very rarely reported in the region.¹⁰⁸⁰

Yet recently society has come to realise that the needs of victims are undermined without a judicial process and reliable support system. This necessitates that the topic of child sexual abuse is openly addressed in order to actively address this problem. Without this, there is no hope of an end to children being abused for sexual gratification.

¹⁰⁷⁵ Shapouri (n 1055) 65.

¹⁰⁷⁶ Jassim Khalil Mirza, *Attitudes of United Arab Emirates Public Opinion towards Child Sexual Harassment: A Field Study (Arabic)* (Dubai Police 2013) 140.

¹⁰⁷⁷ Abbas Al Lawati Siham Al Najami, 'Social Taboos Make it Hard to Deal with Sexual Abuse' (*Gulf News*, 29 January 2010) <<http://gulfnews.com/news/uae/crime/social-taboos-make-it-hard-to-deal-with-sexual-abuse-1.575349>> accessed 13 September 2016.

¹⁰⁷⁸ Al-Mahroos (n 968).

¹⁰⁷⁹ Majid Al Eissa and Maha Almuneef, 'Child Abuse and Neglect in Saudi Arabia: Journey of Recognition to Implementation of National Prevention Strategies' (2010) 34 *Child Abuse & Neglect* 30.

¹⁰⁸⁰ Al-Mahroos (n 968) 242.

7.5 Factors associated with child sexual abuse and exploitation

This section discusses the features of child sexual abuse in detail. In particular, it assesses what impact child sexual abuse has. Hence, it provides ample justifications for the enactment of domestic laws. The section also explains how individuals are affected by such experiences during their adult life. It is essential that the factors associated with child sexual abuse are fully understood. As long as this topic is not openly discussed, children will continue to be victims of sexual exploitation. Victims suffer both in the short- and long-term physically and emotionally, and this hinders their development.

7.5.1 Physical impact

Both men and women may be physically injured by the experience. For instance, they may contract sexually transmitted diseases (STDs), including HIV/AIDS.¹⁰⁸¹ Progress in halting and reversing the HIV epidemic and meeting the needs of girls and women varies from region to region, depending on the country and age of the main population group. In 2014, 51% of the approximately 34.3 million adults who had contracted HIV globally were women and were aged 15 years or older.¹⁰⁸² Almost 60% of the 3.9 million young people aged 15 to 24 years who had HIV were young women and girls.¹⁰⁸³ Some states encourage intercourse with virgin females as it is believed to protect individuals from contracting sexually transmitted infections.¹⁰⁸⁴ However, research shows that men are willing to pay more for sex without a condom in these states. Females who work in the sex industry therefore rarely insist upon condom use.¹⁰⁸⁵ This leaves them in a vulnerable position as they risk unwanted pregnancies and pain associated with vaginal discharge due to STDs. Victims are often incapable of taking protective measures since they do not know how to prevent falling pregnant and contracting STDs. Those life skills are especially stunted by sexual abuse.¹⁰⁸⁶

¹⁰⁸¹ Clifton P Thornton and Tener Goodwin Veenema, 'Children Seeking Refuge: A Review of the Escalating Humanitarian Crisis of Child Sexual Abuse and HIV/AIDS in Latin America' (2015) 26 *Journal of the Association of Nurses in AIDS Care* 432.

¹⁰⁸² Joint United Nations Programme on HIV/AIDS (UNAIDS), 'How AIDS Changed Everything: MDG 6: 15 Years, 15 Lessons of Hope from the AIDS Response' (14 July 2015) 100.

¹⁰⁸³ UN Economic and Social Council (ECOSOC), 'Women, the Girl Child and HIV and AIDS: Report of the Secretary-General' (23 December 2015) UN Doc E/CN.6/2016/9, para 1 at 3.

¹⁰⁸⁴ Inter-Parliamentary Union and UNICEF, 'Combating Child Trafficking: Handbook for Parliamentarians' (2005) 16.

¹⁰⁸⁵ *ibid.*

¹⁰⁸⁶ Salome M Masemola, 'An Assessment of Policy Implementation on Sexual Assault and Rape in the Ngaka Modiri Molema District of the North-West Province' (Master dissertation, North-West University, 2013) 3.

7.5.2 The far-reaching emotional and developmental impact of child sexual abuse

There is evidence to suggest that encountering sexual abuse as a child can be highly traumatic. As will be analysed in more detail later in the chapter, research conducted in this area reveals that a wide range of acute psychological and interpersonal problems are experienced by those who have been sexually abused when compared to their peers who have not.¹⁰⁸⁷ Briere and Elliott write that key problems can include many of the following symptoms experienced and activities engaged in during childhood, adolescence and/or adulthood:¹⁰⁸⁸

- **Post-traumatic stress disorders (PTSDs):** sudden intrusive visual, auditory, olfactory, and/or tactile sensations reminiscent of the original sexual abuse and experienced as though they were occurring in real-time, and nightmares with violent abuse-related themes.
- **Cognitive distortions:** chronic and unrelenting self-perceptions of hopelessness, a lack of trust and low self-esteem.
- **Emotional distress:** sexual dysfunction or anxiety during sexual contact, sexually aggressive behaviour towards others, chronic irritability and a lack of empathy.
- **Physical problems:** headaches, asthma, bladder infections and chronic pelvic pain.
- **Avoidant behaviour:** chronic over-eating, self-mutilation, compulsive and/or high risk sexual activity, and suicidal attempts which in some cases ultimately lead to suicide.

The above findings show that child sexual abuse has incredibly severe and potentially indelible consequences for the victim. The impact depends on a number of different factors, such as the age and gender of the victim, the sex of the offender and the relationship between the perpetrator and the child.

¹⁰⁸⁷ John N Briere and Diana M. Elliott, 'Immediate and long-term impacts of child sexual abuse' (1994) *The Future of Children* 54.

¹⁰⁸⁸ *ibid.*

7.5.3 Poverty

The risk that children from poorer regions are forced into sexual exploitation is heightened.¹⁰⁸⁹ Parents who suffer from financial hardship may force their children into prostitution, eg, by selling them to brothels in order to increase their income.¹⁰⁹⁰ Children who live in poverty are also more likely to engage in sexual activity as they are desperate for money.¹⁰⁹¹ This makes them an easy target for sexual predators. However, international law does not provide the resources to state parties to help poor children out of poverty. International law cannot resolve one of the root causes of child sexual exploitation, namely poverty. It is for this reason limited in according protection to the rights of children.

7.5.4 Natural disasters and armed conflicts

During challenging times, it is more difficult to operate institutions which effectively protect children against sexual exploitation as these are weakened.¹⁰⁹² War results in the displacement of many, who then suffer from related problems, such as homelessness and insufficient food. This makes it easier for exploiters to employ tactics to entice vulnerable children. During armed conflicts, young girls are particularly forced to carry out sexual acts and are often subjected to rape and other sexual offences.¹⁰⁹³ Protection efforts are at their weakest during these times as the government lacks financial resources and most importantly manpower.¹⁰⁹⁴

In August 2014, the so-called Islamic State of Iraq and the Levant (ISIL) swept across Northern Iraq. ISIL members systematically targeted members of the Yezidi community, killing and capturing thousands from their villages located in Ninewa Governorate. Tens of thousands of residents fled to Sinjar Mountain, while many others fled to the Dohuk Governorate, which is located in the Kurdistan Region of Iraq (KR-I).¹⁰⁹⁵ After the capture of thousands of Yezidi civilians, ISIL systematically separated the men from the women and children. Often, after the women and children had been deprived of their liberty, ISIL would take the younger girls away. Witness reports indicate that girls as young as nine were taken

¹⁰⁸⁹ Inter-Parliamentary Union and UNICEF (n 1084) 17.

¹⁰⁹⁰ Elaine Chase and June Statham, 'Commercial and Sexual Exploitation of Children and Young People in the UK—A Review' (2005) 14 Child Abuse Review 9.

¹⁰⁹¹ *ibid* 18.

¹⁰⁹² Inter-Parliamentary Union and UNICEF (n 1084) 18-19.

¹⁰⁹³ *ibid*.

¹⁰⁹⁴ *ibid* 16.

¹⁰⁹⁵ UN Assistance Mission for Iraq (UNAMI), 'A Call for Accountability and Protection: Yezidi Survivors of Atrocities Committed by ISIL' (August 2016) 4.

away from their mothers and taken hostage. Even women with younger children or those who were pregnant were subjected to sexual harassment and violence, as well as rape.¹⁰⁹⁶ The limitations of international law and international law of human rights are well documented in relation to the protection of the vulnerable people of Syria and Iraq at the hands of ISIL.

7.5.5 Lack of birth registration

A child who has no valid birth certificate and is therefore not registered is at risk of being targeted for a variety of reasons. It is easier for such children to disappear, ie to be the victim of traffickers since it is more difficult to trace the child. This is because the authorities are unaware that these children exist because of the lack of official records. Hence, a legal requirement which mandates registration is essential so that children can be protected against underage child labour and prostitution.¹⁰⁹⁷ Birth registration is a fundamental right, which is recognised by virtue of Article 24, paragraph 2 of the ICCPR and Article 7 of the CRC. The fulfilment of the right to be registered at birth is closely linked to the realisation of many other rights, including socio-economic rights. Failing to systematically register children thus risks other rights, eg, the right to health and the right to education, and this jeopardises the protection of children.¹⁰⁹⁸ The absence of a birth certificate and unsuccessful registration means that once a child is retrieved from traffickers, s/he cannot be returned to their home country or community.¹⁰⁹⁹ As a result, prevention efforts are disrupted as it is difficult to distinguish which protected class the victim falls under.¹¹⁰⁰ Moreover, the offender will escape his punishment if it cannot be identified that the victim was a child. This in turn encourages perpetrators to continue exploiting other children.¹¹⁰¹ Whilst the global rate of birth registration grew from approximately 58 to 65% between 2000 and 2010, UNICEF estimates that 230 million children under the age of five are still unregistered.¹¹⁰²

¹⁰⁹⁶ *ibid* 14.

¹⁰⁹⁷ Matthew Pelowski and others, 'Why Don't you Register your Child? A Study of Attitudes and Factors Affecting Birth Registration in Kenya, and Policy Suggestions' (2015) 51 *The Journal of Development Studies* 881.

¹⁰⁹⁸ UN Human Rights Council, 'Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law: Report of the Office of the United Nations High Commissioner for Human Rights' (17 June 2014) UN Doc A/HRC/27/22, para 3 at 3.

¹⁰⁹⁹ Pelowski and others (n 1097) 882.

¹¹⁰⁰ Inter-Parliamentary Union and UNICEF (n 1084) 18.

¹¹⁰¹ *ibid*.

¹¹⁰² UNICEF, 'A Passport to Protection: A Guide to Birth Registration Programming' (December 2013) 6.

7.5.6 Unaccompanied children

Children who run away from home or are separated from their families due to incidents are categorised as ‘unaccompanied children’. These children are more susceptible to the tactics of sexual exploiters as they do not have the protection from their family and the community.¹¹⁰³ Hence, when children have unstable living situations, they normally lack adult supervision and they therefore are not as well protected against sexual exploiters.¹¹⁰⁴ As discussed, the CRC places prime responsibility with parents and the state. Yet when parents are not there, one of the most crucial safety nets for children is not there. Moreover, these children often have no access to basic education and as a result lack the required skills to earn a living.¹¹⁰⁵ They may as a result be more prone to sexual exploitation, especially if they are poor.

7.5.7 Education

Children who have been deprived of proper education are more likely to fall prey to sex traffickers.¹¹⁰⁶ Hence, the lack of education creates an environment which facilitates their abuse.¹¹⁰⁷ Outreach programmes which have been set up to protect them cannot reach them. This is mainly because such programmes are usually run by educational institutions. Also, children who are deprived of basic education cannot absorb information which is taught to them by such programmes as they are illiterate.¹¹⁰⁸ As mentioned in the previous paragraph, being illiterate and poor and without parents further heightens the risk of sexual exploitation. However, international law cannot guarantee education to every child and to grow up in a caring family environment without poverty. The underlying causes which may heighten the risk of child sexual abuse and exploitation are difficult to address, especially in states which lack the requisite resources.

7.6 Inequality for women and girls

Girls who live in societies which degrade women and view them as property or assets are at greater risk of sexual exploitation.¹¹⁰⁹ In certain cultures, it is a common occurrence that girls

¹¹⁰³ UN High Commissioner for Refugees (UNHCR), ‘Assistance to Unaccompanied Refugee Minors: Report of the Secretary-General’ (24 August 2005) UN Doc A/60/300, 15, para 59.

¹¹⁰⁴ *ibid.*

¹¹⁰⁵ *ibid.*

¹¹⁰⁶ Asif Khan, ‘Child Trafficking in India: A Staid Predicament’ (2015) 4 International Journal of Advanced Research in Management and Social Sciences 186.

¹¹⁰⁷ Inter-Parliamentary Union and UNICEF (n 1084) 18.

¹¹⁰⁸ UNHCR (n 1103) 10, para 33.

¹¹⁰⁹ Inter-Parliamentary Union and UNICEF (n 1084) 17.

are not properly protected. This is because of patriarchy which has rendered this a socially accepted norm.¹¹¹⁰ The failure to protect girls exacerbates the problem since perpetrators are not deterred. Moreover, young girls are often ashamed and embarrassed to report their plight to their families and this prevents victims from reporting incidents and seeking refuge. Shame and denial can also result in victims being fearful of the authorities.¹¹¹¹ Girls may be accused of having initiated the sexual acts and may be criminally charged, eg, for prostitution or Islamic *zina* offences (ie for unlawful sexual relations), despite having been forced to commit the acts.¹¹¹² As the CRC cannot determine the age of the child if domestic law suggests otherwise, they can be prosecuted like adults, especially in states which fail to distinguish between victims of child sexual abuse and unlawful sexual relations.

Some societies thus stigmatise women. This also undermines the recovery of victims and therefore most probably aggravates the detrimental effects of the abuse.¹¹¹³ The status of women is thereby also degraded as it is easier to subject them and this may additionally lead to women feeling humiliated. Women who have been traumatised by the sexual mistreatment should be supported by their community but this rarely happens. This discrimination makes women more vulnerable and heightens the risk of them being forced into the sex trade, especially when they have few opportunities to earn a living.¹¹¹⁴

In the UAE, international law has not yet ensured that the fundamental principle of non-discrimination is firmly entrenched. Whilst an Anti-Discrimination law was enacted in 2015, this does not outlaw discrimination on the basis of sex. Inequality is therefore not sufficiently combated.

¹¹¹⁰ *ibid* 17.

¹¹¹¹ Wendy Macias Konstantopoulos and others, 'An International Comparative Public Health Analysis of Sex Trafficking of Women and Girls in Eight Cities: Achieving a More Effective Health Sector Response' (2013) 90 *Journal of Urban Health* 1198.

¹¹¹² Olga Gajic-Veljanoski and Donna E Stewart, 'Women Trafficked into Prostitution: Determinants, Human Rights and Health Needs' (2007) 44 *Transcultural Psychiatry* 344.

¹¹¹³ *ibid* 353.

¹¹¹⁴ Brian M Willis and Barry S Levy, 'Child Prostitution: Global Health Burden, Research Needs, and Interventions' (2002) 359 *The Lancet* 1417.

7.6.1 Cultural and societal denial

The chance of girls being victimised is increased by societies which consider child sexual abuse and sexual exploitation as an unmentionable topic.¹¹¹⁵ The denial and silence creates an environment which allows offenders to thrive and this causes them to further offend. The sexual abuse of young children will not be stopped as long as the authorities fail to enact appropriate laws and also ensure that these are enforced. Otherwise, there exists no legal accountability. Furthermore, children, who are oblivious to the tactics which perpetrators employ to lure them in, require ongoing support. However, individuals who work to assist victims may feel hostility towards them and this may make it more difficult to properly assist victims. It may also cause delays in the recovery period of victims. Children may be reluctant to report their experience since they are afraid of being stigmatised and deprived of services. Even now, sexual abuse is a forbidden topic in many states in the Middle East. This is because there has been no public discourse about this issue.¹¹¹⁶ The population is therefore unaware how prevalent and serious this issue is. Yet, as long as the public shows no interest in this topic, no real efforts will be made to improve the situation.

7.6.2 Increase in demand

Young children are being sexually exploited because these acts are popular. Individuals can make money from pornography and prostitution, and therefore want to reap monetary rewards.¹¹¹⁷ Those who use children for these purposes therefore stand to gain financially. Hence, like in any other business, the objective is to increase profits and this is why those working in this industry try and entice children, whether by deception or even force.¹¹¹⁸

7.6.3 Factors which increase the risks of children being exposed to sexual abuse

Undoubtedly, child sexual abuse remains a major concern for the wellbeing of society.¹¹¹⁹ It is unclear how prevalent child sexual abuse is, which is mainly attributable to the fact that many incidents are unreported and are therefore not included in official statistics. Also, it is difficult to identify child sexual abuse as clear medical and physical evidence cannot be

¹¹¹⁵ Kerry H Robinson, *Innocence, Knowledge and the Construction of Childhood: The Contradictory Nature of Sexuality and Censorship in Children's Contemporary Lives* (Routledge 2013) 17.

¹¹¹⁶ Pinar Ilkcaracan, *Deconstructing Sexuality in the Middle East: Challenges and Discourses* (Routledge 2016) 29.

¹¹¹⁷ Yvonne Rafferty, 'Child Trafficking and Commercial Sexual Exploitation: A Review of Promising Prevention Policies and Programs' (2013) 83 *American Journal of Orthopsychiatry* 565.

¹¹¹⁸ UNICEF, *Child Protection: A Handbook for Parliamentarians* (No 7, 2004) 56-66.

¹¹¹⁹ Margaret-Ellen Pipe and others, *Child Sexual Abuse: Disclosure, Delay and Denial* (Psychology Press 2013) 11.

obtained in the majority of cases.¹¹²⁰ It is important to stress that child sexual abuse takes place in any culture and society, and neither is it caused solely by the economic environment.¹¹²¹ Instead, sexual abuse takes place all around the world in all racial, ethnic and social groups. Two studies were conducted which showed that the psychological impact which victims face from child sexual abuse is the same.¹¹²² The average age a young male encounters sexual abuse is 9.9, whereas the average age for girls is 9.6 years.¹¹²³ Also, in 20% of cases the victim is under the age of 8. Furthermore, 24% of females first experience abuse when they are 5 years old or younger.¹¹²⁴

There are many factors which increase the risk of sexual abuse for girls. One reason is that they lack friends and trusted acquaintances. In other cases, this is because the parents have relationship problems or there is a stepfather.¹¹²⁵ International and domestic law does not provide assistance in these instances and it is difficult to find out from state agencies that there exist these problems. Even when state agencies are aware, this is insufficient in itself to suspect child sexual abuse. A mental or physical disability can also constitute a factor which makes individuals more susceptible to being abused. Also, being addicted to drugs or witnessing drug abuse in a household can force an individual into the sex trade.¹¹²⁶ This is because the individual may view prostitution as an easy method to fuel his/her addiction. However, the state may not be able to find out that a person is addicted.

Many argue that witnessing a parent being subjected to sexual abuse can also passively encourage children.¹¹²⁷ Domestic violence and possible divorce can result in parents not properly raising their children and being disconnected from them.¹¹²⁸ It is common that the

¹¹²⁰ Jan Bays and David Chadwick, 'Medical Diagnosis of the Sexually Abused Child' (1993) 17 *Child Abuse & Neglect* 91.

¹¹²¹ Dirk Huyer, 'Childhood Sexual Abuse and Family Physicians' (2005) 51 *Canadian Family Physician* 1317.

¹¹²² Nancy D Vogeltanz and others, 'Prevalence and Risk Factors for Childhood Sexual Abuse in Women: National Survey Findings' (1999) 23 *Child Abuse & Neglect* 579.

¹¹²³ Gavin Andrews and others, 'Child Sexual Abuse' in Majid Ezzati and others (eds), *Comparative Quantification of Health Risks: Global and Regional Burden of Disease Attributable to Selected Major Risk Factors*, vol 1 (WHO 2004) 1851.

¹¹²⁴ Debra Boyer and David Fine, 'Sexual Abuse as a Factor in Adolescent Pregnancy and Child Maltreatment' (1992) *Family Planning Perspectives* 4.

¹¹²⁵ Amy C Butler, 'Child Sexual Assault: Risk Factors for Girls' (2013) 37 *Child Abuse & Neglect* 643.

¹¹²⁶ Eryl A Davies and Alyson C Jones, 'Risk Factors in Child Sexual Abuse' (2013) 20 *Journal of Forensic and Legal Medicine* 149.

¹¹²⁷ Laura T Gutman and others, 'Human Immunodeficiency Virus Transmission by Child Sexual Abuse' (1991) 145 *American Journal of Diseases of Children* 137.

¹¹²⁸ Joseph H Beitchman and others, 'A Review of the Long-Term Effects of Child Sexual Abuse' (1992) 16 *Child Abuse & Neglect* 101.

parent of a victim also experienced sexual abuse in the past. In most cases, children are sexually abused by those they trust and feel close to, though boys are more likely to be sexually abused by persons who are not family members.¹¹²⁹ Statistics suggest that 75% of offenders are family members or people who personally know and have contact with the child.¹¹³⁰ The majority of those who sexually abuse girls are family members. In contrast, only 10 or 20% of those who target young boys are family members.¹¹³¹ Furthermore, a national study conducted in the 1990s found that out of the reported cases, 50% of the offenders were teenagers.¹¹³²

7.7 Consequences

This section discusses the adverse effects which sexual abuse has on children. The problem surrounding disclosure and failing to report incidents is also discussed. The physical and psychological side effects that arise from sexual abuse last a lifetime. The negative effect which sexual abuse has on a child depends on various aspects, for instance, the age and gender of the child and the relationship which the victim has with the offender. The frequency and duration of the experience also have an impact.¹¹³³ Studies suggest that females who are sexually abused often marry at a young age, though their relationships often end abruptly in divorce. Formerly abused women are often objectified and have a lower social status than other women. They are more likely to experience domestic pressure than non-abused women.¹¹³⁴ The consequences on the mental and psychological health of victims has been extensively documented. Individuals who have been subjected to sexual abuse have a higher probability of developing mental disorders, such as posttraumatic stress disorder (PTSD) and depression and may as a result suffer from substance abuse.¹¹³⁵

¹¹²⁹ American Medical Association, 'Diagnostic and Treatment Guidelines on Domestic Violence' (1992) 1 Archives of Family Medicine 39.

¹¹³⁰ Juliette DG Goldman and Usha K Padayachi, 'The Prevalence and Nature of Child Sexual Abuse in Queensland, Australia' (1997) 21 Child Abuse & Neglect 489; Heather Y Swanston and others, 'Sexually Abused Children 5 Years After Presentation: A Case-Control Study' (1997) 100 Pediatrics 600.

¹¹³¹ Finkelhor (n 332).

¹¹³² Glenn D Wolfner and Richard J Gelles, 'A Profile of Violence Toward Children: A National Study' (1993) 17 Child Abuse & Neglect 197.

¹¹³³ Frank W Putnam, 'Ten-Year Research Update Review: Child Sexual Abuse' (2003) 42 Journal of the American Academy of Child & Adolescent Psychiatry 269; Katherine Hunt Federle, *Children and the Law: An Interdisciplinary Approach with Cases, Materials and Comments* (Oxford University Press 2012) 399.

¹¹³⁴ Antonia Bifulco, George W Brown and Zsuzsanna Adler, 'Early Sexual Abuse and Clinical Depression in Adult Life' (1991) 159 The British Journal of Psychiatry 115; Paul E Mullen and others, 'Impact of Sexual and Physical Abuse on Women's Mental Health' (1988) 331 The Lancet 841; Christopher Bagley and Richard Ramsay, 'Sexual Abuse in Childhood: Psychosocial Outcomes and Implications for Social Work Practice' (1986) 4 Journal of Social Work & Human Sexuality 33.

¹¹³⁵ Roberto Maniglio, 'The Impact of Child Sexual Abuse on Health: A Systematic Review of Reviews' (2009) 29 Clinical Psychology Review 653; Elizabeth Oddone Paolucci, Mark L Genuis and Claudio Violato, 'A Meta-

When a child is continuously abused, s/he may develop a functional disability. Health care costs increase when a child is diagnosed with a disability.¹¹³⁶ Typical physical symptoms are panic attacks and gastric disorders.¹¹³⁷ However, symptoms often only surface after years of continuous sexual abuse. This makes it more difficult to establish a clear correlation between the physical health issues and the sexual abuse.¹¹³⁸ Children, who have had a history of sexual abuse, are more likely to suffer psychologically. This can reduce their intelligence and may hamper their educational progress.¹¹³⁹ In the long-term, they also suffer emotionally. Moreover, there exists a high risk that they face social problems.¹¹⁴⁰ This may prevent them from living a normal marital life.¹¹⁴¹ Studies show that females have a high chance of developing mental disorders because of their past experiences.¹¹⁴² This is because they have a negative self-image, which can result in the display of self-destructive behaviour, including thoughts of suicide. Additionally, they may suffer from eating disorders and engage early in sexual activity.¹¹⁴³ It has been found that there is a correlation between experiencing sexual abuse as a child and performing poorly in school.¹¹⁴⁴ It is also one of the causes for teenage pregnancies¹¹⁴⁵ and prostitution.¹¹⁴⁶

Analysis of the Published Research on the Effects of Child Sexual Abuse' (2001) 135 *The Journal of Psychology* 17; Josie Spataro and others, 'Impact of Child Sexual Abuse on Mental Health' (2004) 184 *The British Journal of Psychiatry* 416, 417-418.

¹¹³⁶ Edward A Walker and others, 'Adult Health Status of Women with Histories of Childhood Abuse and Neglect' (1999) 107 *The American Journal of Medicine* 332.

¹¹³⁷ Jane Leserman and others, 'Impact of Sexual and Physical Abuse Dimensions on Health Status: Development of an Abuse Severity Measure' (1997) 59 *Psychosomatic Medicine* 152.

¹¹³⁸ Polly A Hulme, 'Symptomatology and Health Care Utilization of Women Primary Care Patients who Experienced Childhood Sexual Abuse' (2000) 24 *Child Abuse & Neglect* 1471; Jacqueline M Golding, 'Sexual Assault History and Limitations in Physical Functioning in Two General Population Samples' (1996) 19 *Research in Nursing & Health* 33.

¹¹³⁹ Janice Hinson and Richard Fossey, 'Child Abuse: What Teachers in the '90s Know, Think, and Do' (2000) 5 *Journal of Education for Students Placed at Risk* 258.

¹¹⁴⁰ Cathy Spatz Widom, 'The Cycle of Violence' (1989) 244 *Science* 160.

¹¹⁴¹ Angela Browne and David Finkelhor, 'Impact of Child Sexual Abuse: A Review of the Research' (1986) 99 *Psychological Bulletin* 66.

¹¹⁴² Lauren A Wise and others, 'Adult Onset of Major Depressive Disorder in Relation to Early Life Violent Victimization: A Case-Control Study' (2001) 358 *The Lancet* 881; Beth E Molnar, Stephen L Buka and Ronald C Kessler, 'Child Sexual Abuse and Subsequent Psychopathology: Results from the National Comorbidity Survey' (2001) 91 *American Journal of Public Health* 753; Paolucci, Genuis and Violato (n 1135); Jeanne McCauley and others, 'Clinical Characteristics of Women with a History of Childhood Abuse: Unhealed Wounds' (1997) 277 *JAMA* 1362.

¹¹⁴³ Diana Scully, *Understanding Sexual Violence: A Study of Convicted Rapists* (Routledge 2013) 71; Anne Dyer and others, 'Body Image Disturbance in Patients with Borderline Personality Disorder: Impact of Eating Disorders and Perceived Childhood Sexual Abuse' (2013) 10 *Body Image* 221.

¹¹⁴⁴ Pamela I Erickson and Andrea J Rapkin, 'Unwanted Sexual Experiences Among Middle and High School Youth' (1991) 12 *Journal of Adolescent Health* 319.

¹¹⁴⁵ Boyer and Fine (n 1124) 4.

As portrayed earlier in the chapter, Kendall-Tackett and Marshall also corroborate some of the mental disorders found in adults who were sexually abused as children or adolescents:

- 1) PTSDs: when an individual has obsessive thoughts or continuous flashbacks about the abusive experience;
- 2) Cognitive disorders: the person develops a perception of the world being a dangerous place. This causes a chronic sense of helplessness and self-depreciation;
- 3) Emotional disorders: depression, anxiety, phobias, obsessive compulsive disorder and anger;
- 4) Self-depreciation: when the individual loses the ability to protect him/herself and has problems adhering to limitations.
- 5) Avoiding confrontation: dissociation, excessive absent-mindedness and blocking out memories related to the sexual abuse;
- 6) Difficulty in maintaining relationships with others: sexual disorders, difficulty in expressing feelings and having intimate connections, a great need for closeness;
- 7) Health issues: changes in the brain structure, deficiency in the immune system, fatigue, issues in the reproductive system, abuse of drugs or alcohol and headaches.¹¹⁴⁷

It is crucial to recognise that the symptoms listed above do not appear in all children. This was proven by a study conducted by Kendall-Tackett and Marshall which revealed that 31 to 49% of victims did not exhibit any symptoms. However, there is no research available which explains why some victims exhibit symptoms whilst others do not. Symptoms can also be aggravated because of the particular circumstances surrounding the sexual abuse. Studies prove that individuals who experience sexual abuse at a young age are more likely to develop mental illnesses than those who experience it during adulthood.¹¹⁴⁸ A study conducted in Canada, Europe and the US found that victims first encountered sexual abuse between 13 and

¹¹⁴⁶ Kenneth S Kendler and others, 'Childhood Sexual Abuse and Adult Psychiatric and Substance Use Disorders in Women: An Epidemiological and Cotwin Control Analysis' (2000) 57 Archives of General Psychiatry 953.

¹¹⁴⁷ Kathleen A Kendall-Tackett and Roberta Marshall, 'Victimization and Diabetes: An Exploratory Study' (1999) 23 Child Abuse & Neglect 593.

¹¹⁴⁸ M Audrey Burnam and others, 'Sexual Assault and Mental Disorders in a Community Population' (1988) 56 Journal of Consulting and Clinical Psychology 843.

14 years of age.¹¹⁴⁹ Women who were abused during their childhood and who were under 14 years of age scored higher on the Beck Depression Inventory than those who had not been sexually abused.¹¹⁵⁰ Accordingly, children are most vulnerable when they are being sexually abused in their childhood years or when they just enter into adolescence. However, about a quarter of child sexual abuse survivors reported that they were first sexually exploited before they were six years old.¹¹⁵¹ A study conducted in the late 20th century by Kendall-Tackett showed that the extent to which an individual is affected by sexual abuse is dependent on their age. Past reports have suggested that children below the age of five often experience anxiety in the form of nightmares. In comparison, children who are over five years old are shown to be increasingly fearful and aggressive. This often becomes an issue since it prevents the child from excelling in school or in other situations where they are encouraged to interact. More mature victims (ie those in their teenage years) often use drugs to relieve their pain and then become addicted. Accordingly, the older a child gets the more detrimental the impact can be on their development. The child overcomes the trauma through a defence mechanism. Of course, the person's personality has a great bearing on his/her ability to overcome the experience.¹¹⁵²

A comprehensive study which investigated the impact of child abuse found that it can affect the victim's intellectual ability as well as his/her social skills.¹¹⁵³ When a child is subjected to sexual abuse for a short amount of time, this has a psychological impact.¹¹⁵⁴ In contrast, persistent abuse over a period of years may additionally lead to a physical impairment.¹¹⁵⁵

¹¹⁴⁹ Willy Pedersen and Kristinn Hegna, 'Children and Adolescents who Sell Sex: A Community Study' (2003) 56 *Social Science & Medicine* 136; Jessica M Edwards, Bonita J Iritani and Denise Dion Hallfors, 'Prevalence and Correlates of Exchanging Sex for Drugs or Money Among Adolescents in the United States' (2006) 82 *Sexually Transmitted Infections* 354.

¹¹⁵⁰ M Gorcey, JM Santiago and F McCall-Perez, 'Psychological Consequences for Women Sexually Abused in Childhood' (1986) 21 *Social Psychiatry* 129.

¹¹⁵¹ Delphine Collin-VéZina, Isabelle Daigneault and Martine Hébert, 'Lessons Learned from Child Sexual Abuse Research: Prevalence, Outcomes and Preventive Strategies' (2013) 7 *Child and Adolescent Psychiatry and Mental Health* 3.

¹¹⁵² P David Kurtz, Gail L Kurtz and Sara V Jarvis, 'Problems of Maltreated Runaway Youth' (1991) 26 *Adolescence* 543.

¹¹⁵³ Karen J Terry and Jennifer Tallon, *Child Sexual Abuse: A Review of the Literature* (Citeseer 2004) 160.

¹¹⁵⁴ Michael R Nash, Olivia A Zivney and Timothy Hulsey, 'Characteristics of Sexual Abuse Associated with Greater Psychological Impairment among Children' (1993) 17 *Child Abuse & Neglect* 401.

¹¹⁵⁵ Mary Ellen Rimsza, Robert A Berg and Catherine Locke, 'Sexual Abuse: Somatic and Emotional Reactions' (1988) 12 *Child Abuse & Neglect* 201.

7.7.1 Suicide

Childhood sexual abuse correlates with suicide ideation and a history of attempting suicide.¹¹⁵⁶ A child who has experienced sexual abuse over an extensive period of time is at a higher risk of committing suicide during adolescence and adulthood.¹¹⁵⁷ According to Sapp and Vandeven, males who have been sexually abused throughout their childhood are more at risk of committing suicide than females. An individual who expresses an intention to commit suicide must be psychologically assessed for sexual abuse, irrespective of whether they are a child or adolescent.¹¹⁵⁸

7.7.2 Disclosure

Disclosing child sexual abuse is commonly perceived as a process rather than a result.¹¹⁵⁹ Individuals often feel pressurised to not disclose their feelings. They fear the consequences of sharing the experience, ie disclosure can make them feel uncomfortable. They fear being judged and feel embarrassed.¹¹⁶⁰ It is crucial to realise that only around 10% of child sexual exploitation cases are reported to the relevant authorities.¹¹⁶¹

7.7.3 Understanding disclosure

A young child can only recall events to the best of his/her ability. Often a child does not possess the level of intellect to recall exactly what happened at a specific time. Their immaturity causes them to lack the understanding of what a fully-fledged sexual relationship entails.¹¹⁶² They can therefore only shed light on situations when they judge it necessary. In fact, research found that children often only reveal details years later.¹¹⁶³ A child is not only prone to encounter emotional problems but also face being judged by society once they fully disclose the truth. Those who choose to disclose what happened to them therefore face further

¹¹⁵⁶ Graham Martin and others, 'Sexual Abuse and Suicidality: Gender Differences in a Large Community Sample of Adolescents' (2004) 28 *Child Abuse & Neglect* 492.

¹¹⁵⁷ Gail Hornor, 'Child Sexual Abuse: Consequences and Implications' (2010) 24 *Journal of Pediatric Health Care* 360.

¹¹⁵⁸ *ibid* 360.

¹¹⁵⁹ Paris Goodyear-Brown, *Play Therapy with Traumatized Children* (John Wiley & Sons 2009) 220.

¹¹⁶⁰ Finkelhor (n 332) 42; Tina B Goodman-Brown and others, 'Why Children Tell: A Model of Children's Disclosure of Sexual Abuse' (2003) 27 *Child Abuse and Neglect* 525, 526; Mary L Paine and David J Hansen, 'Factors Influencing Children to Self-Disclose Sexual Abuse' (2002) 22 *Clinical Psychology Review* 271.

¹¹⁶¹ Paris Goodyear-Brown, *Handbook of Child Sexual Abuse: Identification, Assessment, and Treatment* (John Wiley & Sons 2011) 6.

¹¹⁶² Kamala London and others, 'Disclosure of Child Sexual Abuse: What Does the Research Tell us about the Ways that Children Tell?' (2005) 11 *Psychology, Public Policy and Law* 194, 208.

¹¹⁶³ Diana EH Russell, 'The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children' (1983) 7 *Child Abuse & Neglect* 144; Gail Elizabeth Wyatt, 'The Sexual Abuse of Afro-American and White-American Women in Childhood' (1985) 9 *Child Abuse & Neglect* 507, 517-518.

psychological hardship when they reveal what they were subjected to. This burden often stems from socio-cultural expectations that arise because of a patriarchal system.¹¹⁶⁴

7.7.4 Cultural values impacting disclosure

A particular value does not define a culture or society and not one particular value is shared by one culture. Yet understanding which values can be found in a society can help to combat obstacles which exist when sexual abuse is being disclosed in different cultures. The extent to which values render disclosure more difficult or even encourage victims to come forward has not been identified.¹¹⁶⁵ Certain morals which are held by particular cultures put pressure on sexual abuse victims to remain silent. However, it is possible to identify certain values from observations. The need to uphold modesty and refrain from shameful behaviour is reinforced in many cultures.

7.7.5 Shame

Fontes¹¹⁶⁶ investigated how modesty and shame can prevent an individual from opening up about his/her experience. This is of particular importance as the level of degradation a female may face from members of her culture can have a vital impact on her recovery.¹¹⁶⁷ The involvement of authorities and the extent to which her disclosure will be known by her family and friends can also exacerbate feelings of shamefulness. Also, religious teachings which consider sex a taboo topic discourage victims from opening up about their experiences. For instance, children may not refer to their genital area but instead describe it as 'something that's happening down there' without using the actual terms because of a religious upbringing. Offenders may exploit children's naivety and guilt to their advantage in order to ensure that they remain silent.¹¹⁶⁸

¹¹⁶⁴ Angela Browne, 'The Victim's Experience: Pathways to Disclosure' (1991) 28 *Psychotherapy: Theory, Research, Practice, Training* 152.

¹¹⁶⁵ Delphine Collin-Vézina and others, 'A Preliminary Mapping of Individual, Relational, and Social Factors that Impede Disclosure of Childhood Sexual Abuse' (2015) 43 *Child Abuse & Neglect* 125.

¹¹⁶⁶ Lisa Aronson Fontes, *Child Abuse and Culture: Working with Diverse Families* (Taylor & Francis 2005) 139.

¹¹⁶⁷ Candice Feiring, Lynn Taska and Michael Lewis, 'Adjustment Following Sexual Abuse Discovery: The Role of Shame and Attributional Style' (2002) 38 *Developmental Psychology* 83.

¹¹⁶⁸ Lisa Aronson Fontes, 'Sin Vergüenza: Addressing Shame with Latino Victims of Child Sexual Abuse and their Families' (2007) 16 *Journal of Child Sexual Abuse* 65.

7.7.6 Taboos and modesty

It is clear that it is difficult for a child to discuss a traumatic experience, such as sexual abuse, in a culture which strongly suppresses such topics. The Islamic values of upholding *izzat* (honour/respect) and showing *haya* (modesty), and most importantly refraining from *sharam* (shame/embarrassment), are heightened in Arab and Asian cultures.¹¹⁶⁹ This understandably makes disclosure of child sexual abuse an extremely daunting task. Furthermore, it is clear that various family practices and acts amount to child sexual abuse. However, it is extremely difficult to find any proper references since most of the acts are protected by customs, conventions and practices.

7.7.7 Obligatory violence

Disclosure of an event, such as sexual abuse, can spark feelings of anger amongst men. This may trigger a duty to actively seek revenge from the guilty offender.¹¹⁷⁰ The violence that can occur because of these feelings of revenge can destroy the family. The family member, who acted because of rage, may be arrested. Families may therefore avoid talking about the subject, ie members of the culture reject the truth in order to prevent retributive violence which would otherwise take place in response to the destroyed family honour.

7.7.8 Religious values influencing disclosure

Although no mainstream religion encourages sexual abuse of children, many will make disclosure extremely difficult. In the *Quran*, the Prophet Muhammad (pbuh) married Aisha when she was six years old and consummated the marriage when she was nine years old.¹¹⁷¹ Aisha remained with him until his death when she was eighteen. This information has been used to justify child marriages in most of Islamic states. Nevertheless, child marriages directly violate the human rights of young girls. A key factor is poverty as the marriage of girls is often considered a strategy for economic survival. In addition, it is considered a way to protect girls and to provide some stability in situations where societies are under extreme pressure.¹¹⁷² Hence, securing marriage enables the family to transfer their responsibility of caring for her to others.¹¹⁷³ Also, a girl who becomes pregnant before she is psychologically

¹¹⁶⁹ Gilligan and Akhtar (n 430) 1369.

¹¹⁷⁰ Lisa Aronson Fontes, Mario Cruz and Joan Tabachnick, 'Views of Child Sexual Abuse in Two Cultural Communities: An Exploratory Study among African Americans and Latinos' (2001) 6 *Child Maltreatment* 114.

¹¹⁷¹ Y Admon, 'Rising Criticism of Child Bride Marriages in Saudi Arabia' (2009) 502 *Inquiry and Analysis* 1.

¹¹⁷² Ruth Gaffney-Rhys, 'International Law as an Instrument to Combat Child Marriage' (2011) 15 *The International Journal of Human Rights* 360.

¹¹⁷³ UNICEF Innocenti Research Centre, 'Early Marriage Child Spouses' (Innocenti Digest No 7, 2001) 6.

ready runs the risk of suffering injuries when giving birth which could possibly lead to her death. Girls married at a young age are especially vulnerable to sexual and reproductive health problems, with potentially life-threatening consequences.¹¹⁷⁴ Married girls are in most cases expected to become pregnant immediately or soon after marriage, and early marriage contributes to elevated fertility rates overall. Globally, 36.4 million women aged 20 to 24 reported in 2010 that they had their first live birth before the age of 18; 5.6 million of these women had done so before the age of 15. This equates to 7.3 million girls under the age of 18 giving birth every year, or 20,000 every day.¹¹⁷⁵ A religious explanation for child marriages should never be used to justify child rape.¹¹⁷⁶ Children from these religions will pray for their abuse to end and when it does not come to end accept this as fate.¹¹⁷⁷ A strong belief in God can provide comfort and refuge for a child during this difficult period.¹¹⁷⁸ A popular belief is held by Jews to honour parents and the elderly. As a result, this may cause children to resist defending themselves, despite having endured sexual abuse. A principle known as *Lashon Hara* in the Jewish faith commands that individuals should abstain from speaking ill of others. This is regularly used as an excuse to not publicly expose the names of offenders.¹¹⁷⁹

Child and forced marriage also constitutes a form of gender-based violence since it can be perceived as ill-treatment and torture. The Special Rapporteur on contemporary forms of slavery, including its causes and its consequences, explained that child marriage heightens the risk of child servitude and other slavery-like practices and can in certain cases constitute slavery.¹¹⁸⁰

7.8 The reality of child sexual abuse in the Arab world (Middle-East)

This section deals with the phenomenon of child sexual abuse in the Arab world. Recourse is also made to relevant statistics. Fundamentally, child sexual abuse is covered up and shrouded in secrecy in order to protect the reputation of the family from shame and scandal.

¹¹⁷⁴ Anita Raj, 'When the Mother is a Child: The Impact of Child Marriage on the Health and Human Rights of Girls' (2010) Archives of Disease in Childhood 1.

¹¹⁷⁵ World Health Organization, 'Child, Early and Forced Marriage Legislation in 37 Asia-Pacific States' (2016) 9.

¹¹⁷⁶ Margaret Kennedy, 'Christianity and Child Sexual Abuse: The Survivors' Voice Leading to Change' (2000) 9 Child Abuse Review 125.

¹¹⁷⁷ *ibid* 126.

¹¹⁷⁸ *ibid* 126.

¹¹⁷⁹ Toby Myers, 'Jewish Perspectives in Domestic Violence' (National Center on Domestic and Sexual Violence, 2009) <http://www.ncdsv.org/images/Myers_JewishPerspectivesinDV_2009.pdf> accessed 20 July 2017.

¹¹⁸⁰ UNGA, 'Child, Early and Forced Marriage' (29 July 2016) UN Doc A/71/253, para 6 at 4.

Not much information is available about sexual abuse which takes place in Arab states, despite organisations having been created to rehabilitate victims. However, in certain nations, such as Bahrain and Palestine, government institutions keep up to date records about child sexual abuse. Nonetheless, it does not appear that child sexual abuse has been extensively studied in Arab states to the extent it has been in Western states.¹¹⁸¹

Mennen investigated the relationship between race and ethnicity and frequency of child sexual abuse. The research found that there was no correlation between particular ethnicities and child sexual abuse. One of the findings of the research was that Latin girls who had been subjected to sexual intercourse by an abuser were prone to develop depression.¹¹⁸² Depression amongst young girls can be reinforced by the expectation to abstain from sex and remain pure, which is an important value conveyed by Arab teachings. Furthermore, in Middle Eastern states, it is encouraged that females uphold honour and integrity and this means abstaining from any sexual behaviour.¹¹⁸³ This often leads to children remaining silent as they feel that they are responsible for inciting the sexual activity. Their silence is thus an attempt to maintain and protect the family's honour in their community.

Islamic and Christian communities generally consider that sexual intercourse is permissible for the purpose of pleasure between a husband and a wife. However, controversially it is also thought that sex is a sinful act when it is performed outside of marriage since this is then considered an illegitimate relationship. Hence, individuals who engage in extramarital sex are considered to have committed a sin. Also, the *Quran*, 5:33¹¹⁸⁴ and 24:10¹¹⁸⁵, states that victims of sexual abuse should be punished. These Islamic principles directly influence the lives of families and people in the Muslim community.

Arab families are extremely sensitive to the issue of *fadiha* and do everything in their power to avoid it. In Arabic, *fadiha* denotes scandal and refers to anything that has the potential to destroy the reputation of a society. This means that behaviour is therefore regulated by

¹¹⁸¹ Jinan A Usta and others, 'Child Sexual Abuse: The Situation in Lebanon' (KAFA, 2008) 24.

¹¹⁸² Ferol E Mennen, 'The Relationship of Race/Ethnicity to Symptoms in Childhood Sexual Abuse' (1995) 19 *Child Abuse & Neglect* 115.

¹¹⁸³ Halim Barakat, *The Arab World: Society, Culture and State* (University of California Press 1993) 111.

¹¹⁸⁴ See Surat Al-Ma'idah (The Table Spread) (5:33). Translated by Sahih International <<https://quran.com/5>> accessed 2 January 2017.

¹¹⁸⁵ See Surat An-Nur (The Light) (24:10). Translated by Sahih International <<https://quran.com/24>> accessed 2 January 2017.

certain expectations and every individual tries to live according to these. These expectations are usually set by collective norms.¹¹⁸⁶ Traditionally, extramarital relationships are seen as a threat to the honour or *sharaf* of every party involved, including the respective families.¹¹⁸⁷ Honour killings are thus practised when a family's honour is being violated. These result in either the victim or perpetrator, and in some cases even both, being killed.

For this reason, it is unusual to talk about an 'epidemic of sexual abuse' yet this is deemed normal in Western parts of the world. However, without an open debate it is difficult to adopt the necessary precautions to protect children. Instead, there is insufficient awareness, most probably because the subject is such a taboo topic. This is also illustrated by the fact that sex education is excluded from the curriculum. Overall, sex is perceived as an act which brings about shame and dishonour and is therefore not discussed. This also leads to exaggeration and the issue being dealt with by violence. Even the enactment of domestic legislation may therefore not fundamentally change the prevalence of child sexual abuse and exploitation because of these deeply ingrained beliefs.

These social and cultural aspects have also shaped the legal environment. Whilst various Middle Eastern states have signed the CRC, for instance, Bahrain, Egypt, Iran, Iraq, Kuwait, Libya, Oman, Qatar, United Arab Emirates and Saudi Arabia,¹¹⁸⁸ the 2008 Child Rights Situation Analysis for the Middle East and North Africa (MENA) observed that:

[D]espite progress in the legislative and programmatic fronts - with many of the governments of MENA States working with civil society groups, international NGOs, regional bodies, donors and United Nations agencies to better protect children - child protection remains a serious issue in every country of the region. The nature and extent of child protection issues varies from country to country, and includes issues such as violence against children - whether at home, schools or institutional settings - harmful practices [eg] early marriage.¹¹⁸⁹

Equally, the 2011 Child Rights Situation Analysis for MENA pointed out that there are still 'significant gaps' although it acknowledged that these states are increasingly paying more

¹¹⁸⁶ Charlotte Karen Albrecht, 'An Archive of Difference: Syrian Women, the Peddling Economy and US Social Welfare, 1880–1935' (2016) 28 *Gender & History* 136.

¹¹⁸⁷ Anahid Devartanian Kulwicky, 'The Practice of Honor Crimes: A Glimpse of Domestic Violence in the Arab World' (2002) 23 *Issues in Mental Health Nursing* 84.

¹¹⁸⁸ Forced Migration Review, 'Who has Signed What ...' (2016) <<http://www.fmreview.org>> accessed 2 January 2017.

¹¹⁸⁹ Y Abdul-Hamid, 'Child Rights Situation Analysis for MENA Region' (Save the Children Sweden, MENA Regional Office, August 2008) 8.

attention to safeguarding child rights.¹¹⁹⁰ UNICEF also recognises that progress has been undermined because there exists cultural resistance due to the topic being considered a taboo, as discussed above.¹¹⁹¹ This has resulted in a lack of regional consensus on how to adopt child sexual abuse law.¹¹⁹² Some states consider these to be indecent acts whereas other States focus on rape. However, most states have adopted penal codes which can to a certain degree be invoked.¹¹⁹³ Yet it is questionable that this is sufficient to achieve compliance with Article 34 of the CRC which mandates that:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.¹¹⁹⁴

This is particularly the case since child sexual abuse is an inherently clandestine occurrence which makes it difficult to predict its prevalence within societies.¹¹⁹⁵ International law has also particularly focused on commercial sexual exploitation and the topic of child sexual abuse has only been discussed at the international level since the arrival of the CRC.¹¹⁹⁶ Moreover, the CRC does not clearly establish norms and does not ensure enforcement of rights. Research investigating child sexual abuse in the Middle East has only slowly started to gather pace but widespread ratification of the CRC and engagement with its Committee have incrementally resulted in the topic becoming a more pressing legislative matter.

7.8.1 UAE

It is unclear to what extent sexual abuse constitutes a problem in Arab cultures. However, there was some field research conducted by a group of psychologists as part of the Sixth International Rahma Conference to protect children against sexual exploitation, which was held in Dubai in 2016. This field research was promoted by the Dubai police officer club. Dr. Jasim Khalil Mirza, the director of security awareness at Dubai Police, informed that sexual exploitation and child abuse are increasing. Reports show that the problem of child sexual

¹¹⁹⁰ *ibid* 4.

¹¹⁹¹ UNICEF, 'Commercial Sexual Exploitation of Children: The Situation in the Middle East/North Africa Region' (2001) <https://www.unicef.org/events/yokohama/background8.html#_edn1> accessed 3 January 2017.

¹¹⁹² *ibid*.

¹¹⁹³ *ibid*.

¹¹⁹⁴ CRC (n 21).

¹¹⁹⁵ Buck (n 132) 354.

¹¹⁹⁶ *ibid*.

abuse has worsened over the years. At a press conference, he shared statistics which had been collected between 2012 and 2014 which highlighted that there had been a surge from 40 reported cases in 2012, to 51 in 2013 and 57 in 2014. Mirza further observed that the majority of child abuse victims were Emirati children and juveniles, namely 19 in 2014, 12 in 2013 and again 12 in 2012. This was followed by Indians and then other nationalities. He further explained that the police had arrested 60 suspects for committing sexual violence against children in 2014, 58 suspects in 2013, and 55 in the year 2013. This included individuals with whom children interacted almost on a daily basis, eg, their relatives, drivers or domestic workers.¹¹⁹⁷

Unfortunately, it was pointed out that it was difficult to collect details about sexual abuse perpetrated by family members because these are shadow crimes. It is also for this reason that international law and domestic law are limited in protecting children against sexual abuse. Nonetheless, when these crimes come to light, the offender should face serious punishment as only this sends out a clear message to the rest of society that child sexual abuse is not tolerated and is treated as a serious crime.¹¹⁹⁸ This highlights that child sexual abuse has become a concern for law enforcement officers, which is to a certain extent attributable to the UAE having ratified the CRC. By assuming international commitments, the UAE has sent out a clear message that it is committed to improving the rights of children and this includes protecting them from child sexual abuse. This was an important first step.

However, in 2001 the CRC Committee stated that the UAE had not assessed the nature and extent of ill-treatment and abuse of children nor designed policies and programmes to address the issue. It had also failed to '[t]ake legislative measures to prohibit all forms of physical and mental violence, including corporal punishment and sexual abuse of children in the family, schools and in institutions'. Neither had it '[e]stablish[ed] effective procedures and mechanisms to receive, monitor and investigate complaints, including intervening where necessary', nor 'investigate[d] and prosecute[d] instances of ill treatment, ensuring that the abused child is not victimized in legal proceedings and that his/her privacy is protected'.¹¹⁹⁹

¹¹⁹⁷ Amira Agarib, 'Child Abusers are Mostly Relatives' (*Khaleej Times*, 6 December 2015) <<https://www.pressreader.com/uae/khaleej-times/20151206/281513635084888>> accessed 25th September 2016.

¹¹⁹⁸ *ibid.*

¹¹⁹⁹ CRC Committee, 'State Party Report: United Arab Emirates' (24 October 2001) CRC/C/78/Add.2, 1, 8-9.

The UAE was meant to reply in 2004 but only responded to the CRC Committee in 2012.¹²⁰⁰ This response shows that the UAE has taken many steps to improve the situation of children. It has adopted a four-pronged strategy to combat sexual exploitation and abuse of children in accordance with Article 34 of the CRC, which is based on passing and enforcing human trafficking laws; empowering the relevant authorities to combat human trafficking; safeguarding and assisting victims; and cooperating with other states and with international partners.¹²⁰¹ However, as discussed in Chapter Six, much emphasis has been placed on human trafficking which has been outlawed by virtue of Federal Act No. 51 of 2006 on combating human trafficking.¹²⁰² A National Committee to Combat Human Trafficking was also formed.¹²⁰³ Federal Act No. 2 of 2006 on combating information technology offences also criminalises advertising, promoting, abetting and facilitating the sexual exploitation of children, with Articles 12 and 13 of the CRC containing similar provisions.¹²⁰⁴ The UAE is also contemplating ratifying the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.¹²⁰⁵ However, to date this has not been done which further highlights that international law depends on state commitment and without this it is limited. Also, whilst recently Law No. 3 of 2016 on Children's Rights was enacted which makes it mandatory to report child abuse, the implementing regulations were still not passed in 2017.¹²⁰⁶ No comprehensive child sexual offences law has been enacted as, for instance, India and Malaysia have done. Without this, it is difficult to mobilise society not to ignore child sexual abuse, especially in a culture where the topic is deemed a social taboo. International law has therefore been limited in ensuring that children are adequately protected against child sexual abuse in the UAE.

7.8.2 Jordan

University professors Dr Rawashdeh and Dr Alarab conducted field research in Jordan. Its aim was to explore which factors cause individuals to sexually abuse children. In Jordan, 1,200 children were sexually abused or exploited between 1998 and 2001. Moreover, it was

¹²⁰⁰ CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Second Periodic Reports of States Parties Due in 2004, United Arab Emirates' (3 November 2014) CRC/C/ARE/2, 1, 52.

¹²⁰¹ *ibid.*

¹²⁰² *ibid.*

¹²⁰³ Cabinet Decision No 5 of 6 May 2007.

¹²⁰⁴ CRC Committee (n 1200).

¹²⁰⁵ *ibid.*

¹²⁰⁶ Gulf News, 'Law to Make Reporting Child Abuse Mandatory in the UAE (19 May 2016) <<http://gulfnews.com/news/uae/society/law-to-make-reporting-child-abuse-mandatory-in-uae-1.1831238>> accessed 3 January 2017.

reported that annually 600 children were sexually abused in Jordan. Between 2005 and 2006, 276 more cases of child sexual abuse were reported to the government. 1,740 offenders were sentenced of which the vast majority was male. More specifically, 76% of the offenders were adults and 24% were minors. Many of the 1,740 offenders were unemployed and surviving on a low income. They were categorised as unemployed students whose relationship status was single at the time.¹²⁰⁷ The findings thus highlight that there exists a problem with child sexual abuse in Jordan.

This also potentially explains why Jordan has actively engaged in a dialogue with the CRC Committee in order to promote children's rights.¹²⁰⁸ Jordan has submitted five periodic reports and has also replied to the Committee's list of issues.¹²⁰⁹ It has adopted various legislative measures in order to protect the rights of children and in the context of child sexual abuse it has adopted the Human Trafficking Act No. 9 of 2009 and the Act No. 6 on the protection from domestic violence of 2008.¹²¹⁰ It has also ratified the Optional Protocol on the involvement of children in armed conflict; the Optional Protocol on the sale of children, child prostitution and child pornography and the Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Conventions against Transnational Organised Crime.¹²¹¹ Additionally, it has pursued a national strategy to combat human trafficking and indicators have been formulated in order to assist with assessing whether the Convention is being implemented.¹²¹² Between 2005 and 2009, the National Strategic Plan on Family Protection and the Prevention of Violence was also pursued.¹²¹³ Jordan also created a family violence tracking process.¹²¹⁴ However, in 2014 the Committee observed that these measures were not effective and that child abuse, especially of girls, was still endemic.¹²¹⁵ The Committee therefore made various recommendations, including conducting a domestic study to identify the causes, scope and nature of child abuse at home and to promulgate a far-reaching strategy to avert child abuse

¹²⁰⁷ Dr. Alaa Zuhair Rawashdeh and Dr. Asma AlArab (International Conference on Protecting Children from Abuse, Rahma Conference, Dubai, 19-21 October 2015).

¹²⁰⁸ *ibid.*

¹²⁰⁹ CRC Committee, 'Concluding Observations on the Consolidated Fourth and Fifth Periodic Reports of Jordan (13 June 2014) CRC/C/JOR/CO/4-5, 1-17, 1.

¹²¹⁰ *ibid.*

¹²¹¹ *ibid* 1-2.

¹²¹² *ibid* 2.

¹²¹³ *ibid.*

¹²¹⁴ *ibid* 7.

¹²¹⁵ *ibid.*

and to identify, report and manage child abuses instances.¹²¹⁶ This is an important recommendation, particularly in light of the fact that only limited research has been undertaken to date. Additionally, Jordan was urged to abolish any statutory provisions which exempt perpetrators.¹²¹⁷ The Committee particularly criticised Jordan for allowing those who rape girls not to be punished when they marry them.¹²¹⁸ The repeal of the relevant provision in the Penal Code, namely Article 308, is therefore a crucial step to fight child sexual abuse. Article 310 of the Penal Code also provides an excuse for those who rape girls with an ‘immoral character’, which again goes entirely against the spirit of Article 34 of the CRC and should therefore be repealed.¹²¹⁹ The Committee also made clear that Jordan’s legislative framework fails to safeguard boys against sexual abuse.¹²²⁰

7.8.3 Kuwait

Dr Rashid, the Head of Accreditation at the Faculty of Social Sciences at the University of Kuwait, noted that it was difficult to define what amounts to child sexual abuse. As a result, researchers employ the definition spelled out by the WHO when trying to identify which behaviour should be considered to be of a sexual nature. The WHO’s definition recognises sexual abuse as a form of violence which is done in order to sexually gratify the delinquent. Sexual behaviour is carried out and initiated by teenagers and adults. Sexual abuse can involve touching the genital area of a child or even looking at the child’s private area without any physical contact as these acts violate the social standards set by the community.

Dr Rashid explained that a study conducted in 2010 aimed to investigate how acts of violence against children caused them to engage in sexual activity. A sample size of 2,508 students was used as part of the research. The students were asked to complete a questionnaire which inquired about how much abuse they were exposed to as children. When the questionnaire was statistically analysed, it was found that 12% of the participants had been encouraged to expose their private areas in front of others. Moreover, 7% had been persuaded to touch the private parts of another and 2% appeared undressed in front of cameras. Furthermore, 2% of the participants had been raped, whilst 13% had been sexually abused. Sexual abuse was defined as having one’s genital area touched by another individual.

¹²¹⁶ *ibid.*
¹²¹⁷ *ibid.*
¹²¹⁸ *ibid* 8.
¹²¹⁹ *ibid.*
¹²²⁰ *ibid.*

A more recent study was conducted in 2006 in which 4,467 students from public secondary schools took part. Out of this sample, 8.6% had been sexually assaulted and 5.9% had been threatened with sexual abuse if they did not follow instructions. In total, out of the 4,467 sample size, 15.3% of the population had been sexually abused in the past. Information gathered in the form of clinical reports highlighted that the majority of sexual abuse occurred before the individuals had reached the age of seven years. In response to these findings, prevention programmes were developed for children at the pre-school stage. Dr Rashid also conducted a field study with parents in order to formulate an anti-sexual abuse programme for children who attend nursery. He used a sample size of 320 participants and directly asked them in a questionnaire to what extent they were willing to talk to their children about previous sexual abuse cases.¹²²¹

The findings highlight that there also exists an issue with child sexual abuse in Kuwait. This is despite the fact that victims of abuse are entitled to pursue legal proceedings and can seek restitution by virtue of Article 166 of the Constitution.¹²²² The CRC was automatically transposed into domestic law as a result of Article 70 of the Constitution.¹²²³ Accordingly, children of sexual abuse can directly invoke Article 34 against their abusers.¹²²⁴ Moreover, Ministerial Decision No. 314 of 2009 mandates that doctors notify psychological, physical or sexual abuse of children to a local committee, which then follows up these cases.¹²²⁵ The legal authorities are thereby informed and an investigation can be started and the child can be offered treatment.¹²²⁶ Between 2008 and 2009, the authorities identified forty cases where children had been severely harmed and this also led to the conviction of six perpetrators, and possibly three further sentences which were not yet confirmed at the time of the submission of the report.¹²²⁷ Yet, when one compares the findings from the research with the number of prosecutions, it is clear that there still exists a big discrepancy. Hence, identifying child sexual abuse is challenging, even once the different recommendations made by the CRC

¹²²¹ Dr. Malak Rashid, head of accreditation at the faculty of social sciences at Kuwait University – Rahma Conference (n 1207).

¹²²² CRC Committee, ‘Consideration of Reports Submitted by States Parties Under Article 44 of the Convention on the Rights of the Child: 2nd Periodic Reports of States Parties Due in 1998: Kuwait’ (12 May 2012) CRC/C/KWT/2, 1, 14.

¹²²³ *ibid* 15.

¹²²⁴ *ibid*.

¹²²⁵ *ibid* 27.

¹²²⁶ *ibid*.

¹²²⁷ *ibid*.

Committee are implemented and Articles 19 and 34 of the CRC are fully transposed into domestic law. Practicalities therefore contribute to the limitations of international law.

7.8.4 Iraq

Dr Hadi and Dr Fadel, professors at the University of Babel, conducted scientific research in order to investigate sexual abuse against women and children after the occupation of Iraq in 2003. A descriptive style of screening was used and statistics were analysed which had been collected by CSOs. This research had a sample size of 1,200 people. The sample size remained a constant variable throughout the research. Results from the study identified that 3 million children had been living in a state of disease and poverty; 1,200 children faced imprisonment when they were below 18 years of age; and 11,000 children were identified as smokers. 350 children out of the 1,200 used in the sample received education and took part in awareness programmes which were designed to warn them and socially reintegrate them back into society.¹²²⁸

Girls are particularly vulnerable to sexual abuse and exploitation since gender-based discrimination is still endemic. This is also the case since various laws still foster discrimination and stereotypes.¹²²⁹ Children from certain religious or ethnic minority groups or those who are born to unmarried parents or who are disabled are also more vulnerable.¹²³⁰ Moreover, perpetrators of child abuse which is conflict-related are frequently not brought to justice.¹²³¹ In 2011, Act No. 8 on Prevention of Domestic Violence Act in the Kurdistan Region of Iraq was adopted, but this legal measure is not sufficient to adequately protect children as it does not apply to other regions and is also not properly enforced.¹²³² Like in other Muslim states, this is because it is considered a shame for the family to report abuse and those who still complain risk reprisals from their community or family or may be harassed by security forces or the police.¹²³³ Cultural taboos thus make it difficult to report child

¹²²⁸ Dr. Numan Hadi Khazragy and Dr. Aminah Fadel Mahmoud of the faculty of physical education and sports science at the University of Babel – Rahma Conference (n 1207).

¹²²⁹ CRC Committee, 'Concluding Observations on the Combined Second to Fourth Periodic Reports of Iraq' (3 March 2015) CRC/C/IRQ/CO/2-4, 1, 4.

¹²³⁰ *ibid* 5.

¹²³¹ *ibid* 6.

¹²³² *ibid* 9.

¹²³³ *ibid*.

abuse.¹²³⁴ Not enough awareness exists amongst children as they do not receive education in this field.¹²³⁵

Similar to Jordan, in Iraq, those who commit rape can escape punishment if they marry the girl and this is statutorily sanctioned by Article 427 of the Penal Code (Act No. 111 (1969)).¹²³⁶ Child abuse victims are also stigmatised and discriminated against and children are not supported physically or psychologically, thereby making social reintegration and recovery very difficult.¹²³⁷ The issue is further compounded by the fact that child sexual abuse is not properly investigated and offenders escape their just punishment.¹²³⁸ No guidelines, procedures and mechanisms exist, which make it compulsory to notify child sexual abuse.¹²³⁹ Another issue is that children are sexually enslaved by ISIL and not enough is done to rescue and assist them.¹²⁴⁰

The case of Iraq illustrates another shortcoming of international law, namely that child victims need to be not only equipped with rights but also aware of them and need to feel reassured that they can also use them without fear of repercussions. They must also know that there is care and support available to them. Hence, an effective national child protection system must be created, of which children must also be aware. Yet in states torn apart by conflict or in poor communities where children lack education, this is unlikely to be the case.

7.8.5 Saudi Arabia

Professor Aziz of King Fesal University found that only 25.5% of cases of child abuse were included in statistics published by the Saudi Ministry of Interior. His study aimed to investigate which preventative measures teachers from the Eastern province had been adopted. He found that children were mostly exposed to sexual abuse when they were aged two to five years. The offenders who usually targeted the children at this age were close family members, ie parents, siblings, cousins and uncles. In contrast, children who were aged 5 to 12 years were abused by more distant relatives or even friends. The sample size was 600 teachers and this remained constant throughout the research. Data were generated through a

¹²³⁴ *ibid* 10.

¹²³⁵ *ibid*.

¹²³⁶ *ibid* 10.

¹²³⁷ *ibid*.

¹²³⁸ *ibid*.

¹²³⁹ *ibid*.

¹²⁴⁰ *ibid*.

questionnaire. It was found that 72% of teachers knew that the child was being sexually abused. The great majority of teachers, namely 91%, agreed that sexual abuse is on the rise in primary schools. The researcher also spelled out various methods to educate teachers so that they can warn children. He also suggested programmes for schools in order for abused children to recover from their experiences.

Dr Al Shaya, a professor of family psychology at the University of Mujama in Saudi Arabia, also conducted field research. This investigated to what extent the media, eg, newspapers, reported child sexual abuse. Dr Al Shaya stressed that children in poverty are more likely to be subjected to sexual abuse when they were aged 3 to 12 years. The results were skewed towards females having a higher probability of experiencing sexual abuse in comparison to males. Data collated showed that children from broken families were more at risk of experiencing sexual abuse. The research found that 90% of perpetrators were male relatives of the children who were below the age of 30 years.¹²⁴¹

The research by Professor Aziz highlights that child sexual abuse is a pressing issue and Dr Al Shaya's findings confirm that tackling child sexual abuse is not easy since it takes place within the family setting. Saudi Arabia has recognised this and has therefore enacted a series of laws and measures to address this issue. In 2011, it enacted the Children Protection Act and in 2013 the Prevention from Abuse Act.¹²⁴² Saudi Arabia also enacted a child abuse programme within hospitals.¹²⁴³ Under this programme, doctors are required to report cases and a domestic database for child abuse and neglect has been created by the health sector.¹²⁴⁴ This national register makes it possible to ascertain data about the demographics, therapeutic and diagnostic interventions and cases reported by child protection agencies.¹²⁴⁵ Saudi Arabia has also launched a child abuse awareness programme.¹²⁴⁶

¹²⁴¹ Professor Abdel-Aziz Abdel-Kareem Mustafa, professor at King Fesal University and Dr. Mohammed bin Abdullah Al Shaya, professor of family sociology at the University of Mujama' – Rahma Conference (n 1207).

¹²⁴² CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Combined Third and Fourth Periodic Reports of States Parties Due in 2011: Saudi Arabia' (8 April 2015) CRC/C/SAU/3-4, 1, 7 & 9.

¹²⁴³ Decision No 84/107554 of 26/12/1428 AH (5 January 2008) (KSA).

¹²⁴⁴ CRC Committee (n 1242) 13.

¹²⁴⁵ *ibid* 17.

¹²⁴⁶ *ibid* 12.

A free child helpline is operated by the National Family Safety Programme which enables children to confidentially report sexual abuse in the home and elsewhere.¹²⁴⁷ Children and adolescents who report cases are fully supported, eg, receive access to expert counselling services and are protected by the relevant authorities which then intervene.¹²⁴⁸ Saudi Arabia has also started publishing statistical data about child abuse and neglect cases and is training registrars, data entry clerks and observers in order to develop its technical capacity in this field.¹²⁴⁹ Research is also conducted by different bodies about the causes of child sexual abuse.¹²⁵⁰ The Ministry of Culture and Information has also launched television and radio debates and seminars in order to raise awareness about children rights, including child abuse.¹²⁵¹ Several surveys have been conducted by the National Family Safety Programme in order to identify how prevalent child abuse is and to identify the different kinds of abuse.¹²⁵² Social protection units have been opened in the different regions and staff have been trained to deal with abuse.¹²⁵³ Over 2,000 individuals have been taught how to deal with child abuse cases, ranging from the applicable criminal procedures to physician skills.¹²⁵⁴

However, despite these various initiatives and measures, the CRC Committee recently questioned how it is ensured that children who complain about sexual abuse are protected against being charged for extra-marital sexual affairs.¹²⁵⁵ This question is very important, as in Muslim States, *Sharia* imposes severe sanctions for *zina* offences, as also further discussed in Chapter Six. The measures which Saudi Arabia has enacted have also been doubted since girls have to receive permission from their male guardian before they can complain, which substantially undermines their effectiveness.¹²⁵⁶ This is particularly the case in light of the research conducted by Dr Al Shaya which confirms that females are at a higher risk of being victims of sexual abuse. Saudi Arabia has also been pressed to explain why Fayhan al-Ghamdi, who was convicted for torturing, raping and murdering his five-year-old daughter, nonetheless escaped punishment.¹²⁵⁷ The state practice of Saudi Arabia further elucidates the

¹²⁴⁷ *ibid* 12.

¹²⁴⁸ *ibid* 13.

¹²⁴⁹ *ibid* 18.

¹²⁵⁰ *ibid*.

¹²⁵¹ *ibid*.

¹²⁵² *ibid* 44.

¹²⁵³ *ibid* 45.

¹²⁵⁴ *ibid* 48.

¹²⁵⁵ CRC Committee, 'List of Issues in Relation to the Combined Third and Fourth Periodic Reports of Saudi Arabia' (14 March 2016) CRC/C/SAU/Q/3-4, 1-4, 2.

¹²⁵⁶ *ibid*.

¹²⁵⁷ *ibid*.

limitations of international law and particularly the CRC. Whilst measures have been taken to transpose Articles 19 and 34 of the CRC, legislative reform has not gone far enough. As discussed, the reason for this is that the CRC cannot definitively determine the age of the child when Saudi domestic law suggests otherwise. Also, the lack of enforcement means that the CRC is more of a paper tiger.

In her article on human trafficking and the limitations of international law, Smith makes a number of salient observations which can be applied to the analysis in this chapter.¹²⁵⁸ Smith examines some of the challenges to the implementation of international legislation and pinpoints several typical factors. First, states can be overwhelmingly concerned with guarding their sovereignty. Shaw similarly noted that states ‘jealously guard’¹²⁵⁹ their prerogative to legislate free from outside control. This is a tendency – with democratic implications – that can make them ‘slow and conservative’ when faced with adapting their state practices or creating and implementing international treaties. Hard international legislation would necessitate that states use their financial resources to assist and protect victims, educate their residents and effectively deal with perpetrators. These are actions which many states are still unprepared to meaningfully commit to.

A corollary of the above, writes Smith, is that the signing of treaties and even the passage of new domestic legislation can be perceived as lip-service when it is unaccompanied by any real change on the ground, for example, an increase in criminal convictions. Next, Smith importantly mentions how government corruption can inhibit the implementation and enforcement of international agreements owing to the fact that several forms of sexual abuse, exploitation and violence – sex tourism and trafficking – are very lucrative and can significantly increase the GDP of a state. Related to this point is that government officials may personally benefit financially from these activities causing them to overlook, disregard or even inflate their own national and international efforts to eradicate them.

7.9 Conclusion

Efforts have to be made to combat child sexual abuse more effectively. It is not only children who are trafficked and made to work in the sex industry that have to be protected but also

¹²⁵⁸ Heather M Smith, ‘Sex Trafficking: Trends, Challenges and the Limitations of International Law’ (2011) 12(3) Human Rights Review 271.

¹²⁵⁹ Shaw (n 84).

those who are sexually abused by their parents, family members and friends. Otherwise, a vicious circle is started from which victims often find it difficult to escape. This is because there is a higher risk that they turn to crime, require welfare support and fail to be productive members of society. The silence surrounding child sexual abuse has to be broken, particularly in the Middle East, including the UAE. It is particularly important that children are protected against family members who commit such crimes in the UAE, especially girls. The concept of the privacy of one's home has to be redefined in a way which permits disclosure of child sexual abuse, ie it can no longer be tolerated that this continues to be a taboo topic. The recent enactment of Law No. 3 of 2016 on Children's Rights, which renders it compulsory to notify child abuse in the UAE, is an important step to overcome cultural taboos. However, additional measures must be taken to combat child sexual abuse effectively and valuable lessons can be learned from other Arab states. For instance, more information has to be published. Fundamentally, the public has to be educated that the crime of child sexual abuse cannot be suppressed in order to avoid shame and dishonour. Otherwise, victims will continue to suffer, whether physically, emotionally or in their development. Those from poorer regions, those living in war-torn states or areas where natural disasters have struck, as well as unaccompanied children and those lacking basic education have to be particularly protected against sexual exploiters. Yet, as discussed, it is unlikely that international law can achieve this.

Furthermore, steps have to be taken to realise the fundamental right to be registered at birth in order to comply with international law. This is also important in order to combat trafficking. Child sexual abuse of girls is also heightened in patriarchal societies in which the authorities pursue the victims as opposed to the perpetrators. The attitude of these enforcement agencies, which discriminate women in such a way, is caused by cultural and societal denial, which is particularly prevalent in the Middle East. International law is unlikely to change these attitudes without grassroots initiatives.

Moreover, the sex trade is a lucrative market in almost all states and the increasing demand puts vulnerable children at risk. International law cannot change this and this problem will exist as long as poverty does. Other underlying factors which may heighten the risk of abuse are diverse and can range from unstable family circumstances to substance abuse. Mostly, younger children are targeted and girls are predominantly abused by family members.

Child sexual abuse scars its victims, often for life. For instance, those abused may suffer from depression, panic attacks and may even contemplate ending their own life. Hence, it is relatively common for those who have been sexually abused to have mental disorders in later life. The older a child is when the sexual abuse takes place, the more severe can the adverse effect be. Despite these very serious consequences, child sexual abuse is mostly not disclosed. This is also because cultural and religious values act as restraining forces. The concept of shame, which is also rooted in religious interpretations, renders disclosure difficult. Accordingly, various Islamic values, particularly honour, modesty and shame, reinforce that it is not proper to discuss sexual abuse. Disclosure can also cause acts of revenge and result in violence because of the idea of honour and respect. The sanctioning of child marriages in the name of Islam also puts children at risk. Similarly, the Jewish teaching not to speak badly of parents and elders impedes disclosure. Religious values therefore further contribute to the limitations of international law.

In the Middle East, child sexual abuse is an ignored topic which has not been fully studied. This is because most states still embrace a patriarchal and religious system. As sex is deemed illegal when it takes place outside marriage, it is not considered proper to disclose child sexual abuse – also because this causes scandal. Preventing child sexual abuse is therefore made much more difficult since reputation is assigned so much meaning. Consequently, the topic is restricted, if not even prohibited, by social custom.

The UAE has made efforts to address this issue and has hosted an international conference on protecting children from abuse in order to shed light on this understudied topic. Dubai police has taken steps to investigate cases, particularly domestic ones, and to bring perpetrators to justice. Jordan has also been proactive and nearly 2,000 perpetrators have been sentenced. In Kuwait, a study found that quite a high number of students had been abused when they were young and in response a programme was developed to combat sexual abuse at nursery age. In Iraq, research was conducted which was used to identify victims and offer them help. A study in the Saudi Arabia was also used as a basis to develop programmes for schools, including by educating teachers. Research also established that the great majority of offenders were male relatives who particularly abused girls. Nonetheless, issues still exist in all these states, as pointed out by the CRC Committee. These issues are related to the question of how victims can be encouraged to come forward without fearing punishment for having committed a *zina* offence (ie having engaged in extra-marital sex) which is also a cultural sin or a *hudud* crime

(ie not being able to present four eyewitnesses who have seen them sexually abused). This issue is further discussed in the next chapter which discusses the misinterpretation of religion in respect of child sexual abuse.

Chapter Eight: Child Sexual Abuse in Islam

8.0 Introduction

Every society has laws which protect the rights of its citizens, irrespective of sex, age and religion. These laws or guidelines help to maintain peace, harmony and equality within society. As children are arguably the most significant section of society since they will determine the future, several laws have been enacted to protect the rights of children so that they are not poorly treated.¹²⁶⁰ Apart from social laws, several religious laws govern societies to differing degrees. Islamic or *Sharia* law is an important religious source of law for Muslim societies, including the UAE. Islam is thus a custodian of the rights of the child in the UAE. Yet it is argued that the issue is that the *Quran* does not mention specifically child sexual abuse. As a result, children are insufficiently protected against sexual abuse, as well as because Islamic indecency laws, ie the *zina* offences have been wrongly mixed up with this subject. Child victims are therefore not only inadequately protected but even risk being accused of criminal wrongdoing, despite them having been harmed. Clearly, this is not the intention of *Sharia* which emphasises the importance of caring for children. The underlying objective of Islamic indecency laws are also to promote family union in order to provide care for children. It is for this reason essential that Islam also confers additional rights on children in order to protect them against sexual abuse.

Islam considers children God's creations who must be afforded dignity and respect. Islam commands that primary rights should be afforded to children, namely the right to be breastfed, parentage, custody, support and inheritance.¹²⁶¹ Additionally, Islam affirms natural rights, ie the right to life, including a decent upbringing and education. Scholars of Islam explain that children have a number of 'rights' which arise in different circumstances.¹²⁶² This is because Islam governs all aspects of human life: education, upbringing, profession, social interaction, food and clothing. Many other aspects of one's life are also discussed in depth in *Sharia*, and it is therefore thought that *Sharia* provides the best solutions for all situations. Prophet Muhammad (pbuh) said that parents should show love and compassion

¹²⁶⁰ Marcia JoAnn Bunge, *Children, Adults and Shared Responsibilities: Jewish, Christian and Muslim Perspectives* (Cambridge University Press 2012).

¹²⁶¹ Aisha Jane Hutchinson and others, 'Child Protection in Islamic Contexts: Identifying Cultural and Religious Appropriate Mechanisms and Processes Using a Roundtable Methodology' (2015) 24 *Child Abuse Review* 395, 396; see more, UNICEF and Al-Azhar University, 'Children in Islam: Their Care, Development and Protection' (2005).

¹²⁶² *ibid.*

towards their children. Yet in instances of child sexual abuse this holy instruction is not honoured and Islamic jurisprudence must be promulgated to close this gap. The fact that the *Quran* does not specifically mention child sexual abuse is no obstacle in this respect as there exist many verses which clearly mandate this. Without this, cultural relativity will trump international law which, as discussed, is not particularly strong in establishing norms and enforcing the obligations of the member states.

It has been stated in the *Quran* at 8:28 and 64:15 that property or wealth and children are a test or trial for people: ‘And know that your properties and your children are but a trial and that Allah has with Him a great reward’.¹²⁶³ Hence, ‘your wealth and your children are but a trial, and Allah has with Him a great reward’.¹²⁶⁴

Children are entrusted by Allah to their parents and are the parents’ asset. Islam therefore views children as being equivalent to wealth, which must be protected. The Prophet also said that those who take care of a poor mother’s daughters will be protected themselves: ‘[t]he one who is in charge of these girls and treats them well, they will be a shield for him from the Fire’.¹²⁶⁵ Care and protection of children is a priority in Islamic theology. Taking care of girls was considered crucial more than a thousand years ago and helped end female infanticide.

The *Quran* condemns murdering children, including abortion, and no reason is sufficient to justify this. In this context, the *Quran* states:

Do not kill your children out of poverty; We will provide for you and them. And do not approach immoralities - what is apparent of them and what is concealed. And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right. This has He instructed you that you may use reason.¹²⁶⁶

Children must thus be treated well and nurtured so that they become good citizens of the world. It also implies that children must be protected against child sexual abuse as they are harmed by this.

¹²⁶³ See Surat Al-Anfal (The Spoils of War) (8:28). Translated by Sahih International <<https://quran.com/8>> accessed 2 January 2017.

¹²⁶⁴ See Surat At-Taghabun (The Mutual Disillusion) (64:15). Translated by Sahih International <<https://quran.com/64>> accessed 2 January 2017.

¹²⁶⁵ Sahih Al Bukhari, Hadith 8.24.

¹²⁶⁶ See Surat Al-An'am (The Cattle) (6:151). Translated by Sahih International <<https://quran.com/6>> accessed 3 January 2017.

The protection of the right of the child to life begins under Islamic law even before the child is born. It is for this reason that abortion is prohibited and as are additionally any other acts by the child's parents or any other person which may endanger the life of the child. Once a child is conceived, the law accords the foetus special status and protection.¹²⁶⁷ *Allah Ta'ala* prohibits the killing of children before and after birth, thus ensuring the right of the unborn to be born and the alive child to thrive. *Sharia* also states that '[t]hose will have lost who killed their children in foolishness without knowledge and prohibited what Allah had provided for them, inventing untruth about Allah. They have gone astray and were not [rightly] guided'.¹²⁶⁸

It is against this background that this chapter seeks to address how Islamic laws and the *maslahah mursalah* concept apply in the context of child sexual abuse. For this purpose, the chapter is divided into three sections. The first section defines how Islam defines child protection and in this context also discusses how *zina* crimes pose an obstacle to the realisation of the child rights spelled out by international law. It is identified what child abuse prevention means in Islam. The second section then discusses honour killings and how they are related to the problem of child sexual abuse in Muslim states and the limitation of international law. Islamic primary sources, ie the *Quran* and *Sunnah*, are contextually analysed in order to investigate how child sexual abuse is addressed. The last section of this chapter then discusses the *maslahah mursalah* concept and how it is justified in the context of child sexual abuse.

8.1 The notion of *zina* (adultery or fornication) and its punishment when children are involved

Islamic law applies at least to a certain extent in 53 Muslim states around the world, as well as in a number of non-Muslim states such as India.¹²⁶⁹ However, only Iran, Sudan and Saudi Arabia apply traditional Islamic criminal law.¹²⁷⁰ Islamic law (*Sharia*) shapes the political, legal and social environment of all Islamic states.¹²⁷¹ It outlaws *zina* and so it is considered a

¹²⁶⁷ Alhaji Umar Alkali and others, 'Abortion: An Infringement of the Foetus' Right to Life in Islamic Law' (2015) 23 *IJUM Law Journal* 87, 94.

¹²⁶⁸ *Al-An'am* (n 1266) 140.

¹²⁶⁹ Hossin Esmaili and Jeremy Gans, 'Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials' (1999) 28 *Denver Journal of International Law & Policy* 145, 148.

¹²⁷⁰ Maha Abualfaraj, 'Evidence in Islamic Law: Reforming the Islamic Evidence Law Based on the Federal Rules of Evidence' (2011) 13 *Journal of Islamic Law and Culture* 140, 146.

¹²⁷¹ Mohamed Elewa Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court' (2011) 24 *Leiden Journal of International Law* 411, 412.

crime by some Islamic schools of thought. The Hanbali School, which applies in Saudi Arabia,¹²⁷² construes *zina* particularly extensively. *Zina* generally denotes ‘sexual intercourse between a man and a woman without legal right or without semblance of legal right’.¹²⁷³ Whilst there exist differences in the way *zina* is being defined by different schools of Islamic law, most jurists agree that the main element is wilful intercourse. Hence, any sexual relationship between a man and a woman which does not involve intercourse is not punishable.¹²⁷⁴

In Arabia, rape is called *ightisab* or *zina bi al-ikrah*; a literal translation of these words is forcible unlawful sexual intercourse. The word *ightisab* or its root *ghasb* literally means usurpation, illegal seizure, coercion, ravishing, violation and rape.¹²⁷⁵ International human rights documents stress the protection of children from sexual abuse as a right of every child. Similarly, Islamic law lays importance on regulating and prohibiting sexual relations out of wedlock (*zina*). Islam strictly regulates sexual relationships and therefore prohibits extra-marital sex since this guarantees the children’s rights to care and protection within a family environment.¹²⁷⁶ In Islamic jurisprudence, *zina* is defined as sexual intercourse between a man and woman outside a valid marriage contract. The punishment is the same for female and male offenders but it is taken into account whether the offenders are married to other people.¹²⁷⁷ Punishment is prescribed in the *Quran* (24:2) where it is explained that:

The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment.¹²⁷⁸

Crimes against God are called *hudud* by states with an Islamic penal system. *Hudud* crimes are violations of ‘natural law’ and are interpreted in accordance with the particular culture of

¹²⁷² Dana Zartner, *Courts, Codes and Customs: Legal Tradition and State Policy toward International Human Rights and Environmental Law* (Oxford University Press 2014) 153; Butler T, 'The Times: Are They a-Changin' - Saudi Law Finally Addresses Domestic Violence with Its Regulation on Protection from Abuse' (2015) 100(3) Iowa Law Review 1233, 1236.

¹²⁷³ Abdulmajeed Hassan Bello, 'The Punishment for Adultery in Islamic Law and its Application in Nigeria' (2011) 13 Journal of Islamic Law and Culture 166, 170.

¹²⁷⁴ *ibid* 170.

¹²⁷⁵ Azman Mohd Noor, 'Rape: A Problem of Crime Classification in Islamic Law' (2010) 24 Arab Law Quarterly 417, 427.

¹²⁷⁶ Rajabi-Ardeshiri (n 243) 479.

¹²⁷⁷ Liv Tønnessen, *When Rape Becomes Politics: Negotiating Islamic Law Reform in Sudan* (Elsevier 2014) 145, 146.

¹²⁷⁸ See Surat An-Nur (The Light) (24:2). Translated by Sahih International <<https://quran.com/24>> accessed 2 January 2017; Stephen P Heyneman, *Islam and Social Policy* (Vanderbilt University Press 2004) 68.

the Islamic country. As *hudud* crimes safeguard against violations of God's rights, it is thought that they must merit divine displeasure. A declaration of war against an Islamic state is considered to take place when Allah and his messenger are offended.¹²⁷⁹ There are seven recognised *hudud* crimes: *ridda* (apostasy); *baghi* (transgression); *sariqa* (theft); *haraba* (highway robbery); *zina* (illicit sexual relationship); *qadhif* (slander); and *shorb al-khamr* (drinking alcohol).¹²⁸⁰ The Holy *Quran* clearly states that:

The penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment.¹²⁸¹

This verse also highlights that there is equal treatment for both women and men. The *Quran* spells out strict rules for those who falsely accuse others of *zina* crimes. At 24:4 and 24:5, the *Quran* provides that:

And those who accuse chaste women and then do not produce four witnesses - lash them with eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient, Except for those who repent thereafter and reform, for indeed, Allah is Forgiving and Merciful.¹²⁸²

This is the last verse which deals with *zina* crimes. The verse applies to both married and unmarried persons who commit *zina* offences. *Zina* offences must therefore be properly evidenced by four male eyewitnesses. Additionally, they must have seen the actual penetration itself and the sexual act must have been vividly clear.¹²⁸³ If the testimony of one of the necessary four witnesses is inadmissible or legally insufficient, the remaining three witnesses are liable for punishment of the *hadd* crime of *qadhif*, namely false accusation of adultery.¹²⁸⁴ Islam thereby attempts to protect women's dignity and honour by imposing heavy punishment for slander or false accusations. Children are exempt from *hudud* (plural of *hadd*) punishments until they reach a certain age or when they reach puberty.¹²⁸⁵ However, as discussed, the age limit for criminal responsibility is not 18 years in all cases. The age of

¹²⁷⁹ Okon (n 962) 229.

¹²⁸⁰ Badar (n 1271) 417.

¹²⁸¹ See Surat Al-Ma'idah (The Table Spread) (5:33). Translated by Sahih International <<https://quran.com/5>> accessed 2 January 2017.

¹²⁸² See Surat An-Nur (The Light) (24:4-24:5). Translated by Sahih International <<https://quran.com/24>> accessed 2 January 2017.

¹²⁸³ Abualfaraj (n 1270) 149.

¹²⁸⁴ Sadiq Reza, 'Due Process in Islamic Criminal Law' (2013) 46 *George Washington International Law Review* 1, 22.

¹²⁸⁵ Mariya Ali, 'Child Sexual Abuse: Can the Doctrines of Al-Maqasid Al-Shariah and Maslahah Assist in Challenging the Honour Ideology?' (2014) 18 *The International Journal of Human Rights* 508, 509.

puberty is too low, but the issue is that the CRC does not proscribe this due to its allowance for domestic law to determine the age of the child. Moreover, when a child is subjected to sexual abuse or exploitation, a defence should automatically apply to the *zina* crimes. Without this, international law is limited in protecting children against sexual abuse.

Furthermore, a marriage bar is imposed which is based on consanguinity, affinity and fosterage, and this is intended to prevent damaging sexual practices, such as child sexual abuse.¹²⁸⁶ One issue is whether repentance affects punishment and whether an amnesty should be granted and if so in which circumstances. All schools permit this, apart from the Hanafi School which does not consider that an amnesty should be granted for the *hudud* offences of adultery, intoxication and theft. There exists consensus that repentance justifies an amnesty for *hudud* offences when offenders show remorse before they are reported to the authorities.¹²⁸⁷

The Quranic verses 4:22, 4:23 and 4:24 also contain the following clear provisions:

And do not marry those [women] whom your fathers married, except what has already occurred. Indeed, it was an immorality and hateful [to Allah] and was evil as a way. Prohibited to you [for marriage] are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives' mothers, and your step-daughters under your guardianship [born] of your wives unto whom you have gone in. But if you have not gone in unto them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your [own] loins, and that you take [in marriage] two sisters simultaneously, except for what has already occurred. Indeed, Allah is ever forgiving and Merciful. And [also prohibited to you are all] married women except those your right hands possess. [This is] the decree of Allah upon you. And lawful to you are [all others] beyond these, [provided] that you seek them [in marriage] with [gifts from] your property, desiring chastity, not unlawful sexual intercourse. So for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation. And there is no blame upon you for what you mutually agree to beyond the obligation. Indeed, Allah is ever Knowing and Wise.¹²⁸⁸

These verses make clear which sexual relations are prohibited and it is also stated: 'do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.'¹²⁸⁹ Moreover, it is written that 'those who do not invoke with Allah another deity or kill the soul which Allah has forbidden [to be killed], except by right, and do not commit

¹²⁸⁶ Nasimah Hussin and Majdah Zawawi, 'Preventing Criminal Victimization through Community Education: An Islamic Perspective' (2013) 3 Journal of Asian Behavioural Studies 1, 9.

¹²⁸⁷ Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice' (2015) 6 Islam and Civilisational Renewal 442, 448.

¹²⁸⁸ See Surat An-Nisa (The Women) (4:22, 4:23, 4:24). Translated by Sahih International <<https://quran.com/4>> accessed 2 January 2017.

¹²⁸⁹ See Surat Al-Isra (The Night Journey) (17:32). Translated by Sahih International <<https://quran.com/17>> accessed 2 January 2017.

unlawful sexual intercourse. And whoever should do that will meet a penalty.’¹²⁹⁰ While the *Quran* does not address the issue of rape directly, it does explicitly condemn *zina bi al-ikrah* (rape) and leading classical jurists have therefore developed laws which govern rape through different types of legal reasoning. Jurists base their arguments on the *hadith* which reads: ‘Allah has forgiven my nation for mistakes and forgetfulness, and what they are forced to do.’¹²⁹¹ Jurists unanimously conclude that if it is established that a forced sexual act has been perpetrated, then the victim of the coercion is not liable to any kind of punishment as her actions were not her own.¹²⁹² All schools therefore accept that a woman who has been raped (*mustakraha*) is not punishable since she acted under duress. However, she may be confronted with some unfortunate consequences if she reports the case to the authorities and identifies the perpetrator in circumstances where she is unable to produce legal proof against the perpetrator.¹²⁹³ As the burden of proof is extremely unrealistic to establish, ie that there are several male witnesses to the act, it should not apply to sexual abuse cases. Furthermore, the issue is that the topic of sexual relations outside marriage is not separated from the topic of child sexual abuse and exploitation. Presumably, this is the case since traditionally it was custom to marry very young. These issues result in the protective reach of Article 19 and 34 of the CRC being severely curtailed.

8.2 The paradigm of honour killing within the framework of child sexual abuse in Muslim states

Ouis argues that gender-based violence, including child sexual abuse, can be understood through the honour ideology.¹²⁹⁴ However, Ouis explains that the honour ideology is not solely restricted to Islam, as ‘in the West, there is a tradition coming from Protestantism which operates through individualist feelings of guilt and innocence, while in the Middle East both in Christianity and in Islam the same mechanism is coloured by the collectivist honour and shame dichotomy’.¹²⁹⁵ The author proves with data that in practice, traditions and

¹²⁹⁰ See Surat Al-Furqan (The Criterion) (25:68). Translated by Sahih International <<https://quran.com/25>> accessed 2 January 2017.

¹²⁹¹ Vol 3, Book 10, Hadith 2045, Sahih (Darussalam) <<http://www.sunnah.com/urn/1263640>> accessed 2 January 2017.

¹²⁹² Ruba Saboor, 'Rape Laws in Pakistan: Will We Learn From Our Mistakes?' (2014) 1 Islamabad Law Review 65, 67; Fida Mohammad and Richard Lee, 'Evidentiary Standards for Sexual Offenses in Islam' (2015) 7 Pakistan Journal of Criminology 35.

¹²⁹³ See more in Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press 2005) 62.

¹²⁹⁴ Ouis (n 407) 469-470.

¹²⁹⁵ *ibid* 470.

customs mean more to people in most Arabic states than Islam. Yet in relation to laws and conventions, Islam has more legitimacy.¹²⁹⁶

As a remedy for gender-based violence, Ouis recommends that progressive aspects of Islam are used as a tool to prove that these acts are anti-Islamic. The author argues that modernisation is a way to ensure that laws are considered more important than custom and religious laws, and that the CRC is the applicable framework for combating gender-based violence. Hence, Islam, laws and human rights conventions can be employed to challenge customs but there exists an inherent tension between Islam and human rights. These would have to be harmonised in order to utilise law as an effective tool.¹²⁹⁷ It is therefore important to explore the approaches which attempt to overcome the tension which exists between Islam and human rights.

An Na'im spells out a framework to achieve normative consensus based on cross-cultural dialogue and internal discourse in order to protect the interests of children.¹²⁹⁸ He suggests transforming rather than challenging what he calls existing folk models by means of a cross-cultural dialogue and internal discourse framework. Such a model allows all sections of society to be part of the transformation process through internal dialogue, which is important since issues such as female genital mutilation or corporal punishment continue to be perceived and rationalised through cultural filters. Such a framework is also highly relevant to this study as it makes it possible for victims of child sexual abuse to be heard. It also allows community consensus to be reached on an issue which is in the public interest (*maslahah*), which is crucial in light of the arguments which this research puts forward. An Na'im particularly emphasises the importance of community dialogue in relation to honour killings.¹²⁹⁹ However, he acknowledges that there are irreconcilable differences between folk models and standards set by the CRC.¹³⁰⁰

It is these irreconcilable differences, ie that *zina* offences and *hudud* punishments can result in children being found guilty of committing sexual acts out of wedlock, which the CRC

¹²⁹⁶ Ouis (n 407) 469-470.

¹²⁹⁷ *ibid* 469.

¹²⁹⁸ An Na'im (n 795) 64.

¹²⁹⁹ Abdullahi Ahmed An-Na'im, 'The Role of "Community Discourse" in Combating "Crimes of Honour": Preliminary Assessment and Prospects' in Lynn Welchman and Sara Hossain (eds), *'Honour': Crimes, Paradigms and Violence against Women* (ZED 2005) 62.

¹³⁰⁰ *ibid* 70.

Committee deems highly problematic. It particularly contravenes Article 37(a) of the CRC which states that: ‘No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.’¹³⁰¹

According to the HRC:

[A] State may not reserve the right to engage in slavery, or torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.¹³⁰²

Articles 19 and 34 of the CRC are also contravened since they fundamentally mandate protection of children who are victims of sexual abuse and exploitation instead of punishment. Islamic *zina* offences and *hudud* punishment therefore pose a huge cultural obstacle to international law according adequate protection to child victims of sexual abuse and exploitation.

Another problem with *Sharia* law is that child execution is not outlawed since the law assigns importance to the rights of the victims of crimes and their next of kin. In almost all cases of child execution in Iran, the offenders were sentenced to death for alleged murder and in extremely rare cases also for rape or sexual promiscuity.¹³⁰³

The United Nations General Assembly expressed deep concern about the serious and ongoing human rights violations in Iran which relate to ‘[t]he continuing imposition and carrying-out of the death penalty against minors and persons who at the time of their offence were under

¹³⁰¹ CRC (n 21).

¹³⁰² HRC, ‘CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant’ (4 November 1994) CCPR/C/21/Rev.1/Add.6, para 8 at 2.

¹³⁰³ Masoud Rajabi-Ardeshiri, ‘Childhood and Modernity: A Social Constructionist Reflection onto the Dilemma of ‘Child Execution’ within the Islamic Context’ (2014) 18 *The International Journal of Human Rights* 433, 438.

the age of 18, in violation of the obligations of the Islamic Republic of Iran under the Convention on the Rights of the Child'.¹³⁰⁴

An Na'im states in relation to the *hudud* punishment that '[n]either internal Islamic reinterpretation or cross-cultural dialogue is likely to lead to the total abolition of this punishment as a matter of Islamic law'.¹³⁰⁵ An Na'im advocates the adoption of a secular approach for family law and argues that with sufficient political will much can be done to restrict the scope of *hudud* punishment and its implementation. He suggests that a relationship could be maintained between *Sharia* and state law under which *Sharia* is considered a 'jurisprudential resource for state law through scholarly and judicial legal analysis or civic reason in a democratic political process, without claiming that *Sharia* as such can be state law'.¹³⁰⁶ However, in light of Islamic resurgence and Islamic states only embracing democratic principles to a certain extent, as well as the limited education of the general population, it may be problematic to put forward such a proposition and it may even create a backlash.¹³⁰⁷

An Na'im therefore suggests that reform can be achieved by recognising the classical Islamic legal principle of abrogation (*naskh*) so that early Quranic statements are discarded which appear to contradict later statements. This process of abrogation could be utilised but in a reverse manner.¹³⁰⁸ The more tolerant and liberal views found in the Meccan sections could trump later verses revealed in the Medina *Quran*. Contemporary societal needs could thus be met through a reverse process and the Medina *Quran* could be abrogated whenever it contradicts the Meccan *Quran*. Ali concurs with An Na'im and also advocates that such a reverse approach should be used when analysing children's rights in Islam.¹³⁰⁹ This highlights how important it is for Islamic jurists to engage in a debate on how to delineate

¹³⁰⁴ UNGA, 'Situation of Human Rights in the Islamic Republic of Iran' (adopted 4 February 2014) UN Doc A/RES/68/184, para 5(c) at 2.

¹³⁰⁵ William Twining, 'Human Rights: Southern Voices-Francis Deng, Abdullahi An-Na'im, Yash Ghai, Upendra Baxi' (2005) 11 *Review of Constitutional Studies* 203, 233.

¹³⁰⁶ Abdullahi Ahmed An Na'im, 'Religious Norms and Family Law: Is it Legal or Normative Pluralism' (2011) 25 *Emory International Law Review* 785, 806.

¹³⁰⁷ *ibid* 809.

¹³⁰⁸ W Cole Durham and others, *Facilitating Freedom of Religion or Belief: A Deskbook* (Springer 2013) 685; Ali Mirsepassi and Tadd Graham Fernée, *Islam, Democracy, and Cosmopolitanism: At Home and in the World* (Cambridge University Press 2014) 166; Joshua Andresen, 'Deconstruction, Secularism, and Islam' (2012) 56 *Philosophy Today* 375, 382.

¹³⁰⁹ Shaheen Sardar Ali, 'A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law Law Reform and Children's Rights in Muslim Jurisdictions' in UNICEF, *Protecting the World's Children: Impact of the Rights of the Child in Diverse Legal Systems* (Cambridge University Press 2007) 142, 143.

child sexual abuse and exploitation from *zina* offences and *hudud* punishment. Only once consensus has been reached will it become possible for international law to be less limited.

8.2.1 The dynamics of child sexual abuse and its mechanism in Islamic society

The dynamics of child sexual abuse are complex and manifestations of such abuse are constantly misunderstood. Research shows that children who have been sexually abused exhibit knowledge of sexual acts and organs that is inappropriate for their age and maturity. They engage in play which is sexual and seductive, become withdrawn, engage in self-harm, are anxious or aggressive, start bedwetting, have difficulty sleeping and display other unusual behaviour.¹³¹⁰ Research suggests that in response to their abuse children often attempt to keep secret what has happened to them and delay or retract disclosure. Fears of retribution and abandonment and feelings of complicity, embarrassment, guilt and shame all conspire to silence children and inhibit the disclosure of their abuse.¹³¹¹

Links have been found to exist between cultural factors and disclosure rates, suggesting that there might be low levels of disclosure amongst children from certain cultures and ethnic backgrounds.¹³¹² This is highly relevant since most research on sexual abuse is conducted in the West whereas this chapter is concerned with child sexual abuse in Islamic states. A few studies from Islamic states have identified that attitudes towards female sexuality and the emphasis on protecting honour are risk factors in relation to child sexual abuse, which can adversely affect disclosure.¹³¹³

In some Muslim states, victims of child sexual abuse are at risk of being killed by their family or forced to marry their rapist in order to restore the family honour. The honour ideology

¹³¹⁰ Pia Pechtel, Ian M Evans and John V Podd, 'Conceptualization of the Complex Outcomes of Sexual Abuse: A Signal Detection Analysis' (2011) 20 *Journal of Child Sexual Abuse* 677, 684-685; Ofelia Rodriguez-Srednicki, 'Childhood Sexual Abuse, Dissociation, and Adult Self-Destructive Behavior' (2002) 10 *Journal of Child Sexual Abuse* 75, 78-79.

¹³¹¹ Tina B Goodman-Brown and others, 'Why Children Tell: A Model of Children's Disclosure of Sexual Abuse' (2003) 27 *Child Abuse & Neglect* 525, 526; Elisabeth Kahl DiPietro, Desmond K Runyan and Doren D Fredrickson, 'Predictors of Disclosure During Medical Evaluation for Suspected Sexual Abuse' (1997) 6 *Journal of Child Sexual Abuse* 133, 135.

¹³¹² Kristine Toshiko Futa, Eugenia Hsu and David J Hansen, 'Child Sexual Abuse in Asian American Families: An Examination of Cultural Factors that Influence Prevalence, Identification, and Treatment' (2001) 8 *Clinical Psychology: Science and Practice* 189, 193-194.

¹³¹³ Mujgan Alikasifoglu and others, 'Sexual Abuse Among Female High School Students in Istanbul, Turkey' (2006) 30 *Child Abuse & Neglect* 247, 248; Salman Elbedour and others, 'The Scope of Sexual, Physical, and Psychological Abuse in a Bedouin-Arab Community of Female Adolescents: The Interplay of Racism, Urbanization, Polygamy, Family Honor, and the Social Marginalization of Women' (2006) 30 *Child Abuse & Neglect* 215, 216.

therefore places children in a position in which they are scared to disclose what happened to them since they may be blamed for their abuse and may resultantly face harsh punishment from their parents. The honour ideology also makes children believe that they are responsible for the sexual abuse.¹³¹⁴ In some communities, Islam has been used to justify violence, eg, honour killings, in order to restore family honour.¹³¹⁵ Globally, there exist widely different practices and opinions about childhood and within Islam the innocence of childhood concept has shaped debates and legislation about offences committed by minors.¹³¹⁶ It has been suggested that the *Quran* amplifies the perception of childhood innocence through its narration, for example, by explaining the following:

So direct your face toward the religion, inclining to truth. [Adhere to] the fitrah of Allah upon which He has created [all] people. No change should there be in the creation of Allah. That is the correct religion, but most of the people do not know.¹³¹⁷

The *Quran* also contains verses dealing with female infanticide (6:58-16:59);¹³¹⁸ throwing women out of their home (65:1);¹³¹⁹ divorcing wives when they get old (58:2);¹³²⁰ making women suffer (65:6);¹³²¹ burying women alive (81:8-81:9);¹³²² and making women's lives complicated (2:236).¹³²³ The Prophet's teachings were modelled on those revelations which support women and adopted progressive steps to end cruelty against women and girls. Unfortunately, despite these provisions in the *Quran* and the *Sunnah*, many Islamic legal systems make it impossible for victims of child sexual abuse to receive justice since *Sharia* is narrowly interpreted as a result of the honour ideology. Consequently, not Islam but misinterpretations of its substantive texts has given rise to an 'ideology' which has been internalised and become a cultural trait which determines gender roles in these states.¹³²⁴ Many Muslim academics have written about honour and honour crimes and some have put

¹³¹⁴ Ouis (n 407) 465.

¹³¹⁵ Welchman and Hossain (n 1299) 46.

¹³¹⁶ Rajabi-Ardeshiri (n 1303) 435.

¹³¹⁷ See Surat Ar-Rum (The Romans) (30:30). Translated by Sahih International <<https://quran.com/30>> accessed 2 January 2017.

¹³¹⁸ See Surat An-Nahl (The Bee) (16:58, 16:59). Translated by Sahih International <<https://quran.com/16>> accessed 2 January 2017.

¹³¹⁹ See Surat At-Talaq (The Divorce) (65:1). Translated by Sahih International <<https://quran.com/65>> accessed 2 January 2017.

¹³²⁰ See Surat Al-Mujadila (The Pleading Women) (58:2). Translated by Sahih International <<https://quran.com/58>> accessed 2 January 2017.

¹³²¹ *ibid.*

¹³²² See Surat At-Takwir (The Overthrowing) (81:8-81:9) Translated by Sahih International <<https://quran.com/81>> accessed 2 January 2017.

¹³²³ See Surat Al-Baqarah (The Cow) (2:236). Translated by Sahih International <<https://quran.com/2>> accessed 2 January 2017.

¹³²⁴ Ouis (n 407) 453.

forward models to address the issue of child sexual abuse. However, until the honour ideology is eroded, international law and domestic law will not be extremely effective.

8.3 Islamic law in the modern Muslim world

Sharia is deeply embedded in the political, legal and social sphere in all Islamic states and therefore plays an essential role within government.¹³²⁵ Muslims and Orientalists therefore describe it as the most typical manifestation of the Islamic way of life – the core and kernel of Islam itself.¹³²⁶ Other commentators deem this an exaggeration and do not believe that Islam was meant to be a law-based religion as it has often been made out to be.¹³²⁷ *Sharia* is a set of laws which was developed in the early centuries following the death of the Prophet Muhammad (pbuh) in order to organise Islamic authority. It comprises ‘the totality of divine categorizations of human acts’.¹³²⁸ Apart from fostering obedience to God, *Sharia* also seeks to protect religion, life, lineage, property and intellect. From a normative perspective, any Islamic system is obligated to pursue and promote these norms.¹³²⁹ *Sharia* law not only determines the personal affairs of believers, such as daily religious practices, but also regulates social relationships, marriage, divorce, kinship, economic and political relationships, heritage, trade and finance, etc.¹³³⁰ After the death of the Prophet, it fell on political authorities and legal scholars to interpret and clarify the legal doctrine. Different juristic opinions flourished, making Islamic law one of the most dynamic legal systems during its early history. Consequently, diversity prevailed during the early period, resulting in numerous interpretations of the sources and facilitating comparative legal analysis.

Despite this diversity, a commonly held misconception about *Sharia*, still held by many Muslims today, is that it is wholly divine and unchangeable. This view arises from the belief that there is no distinction between sources and methods of Islamic law. This is despite the fact that Islamic law is the result of ‘a process of interpretation of, and logical derivation from the text of the Qur’an and Sunna and other traditions’.¹³³¹ It is a stance that is highly

¹³²⁵ Wael B Hallaq, *A History Of Islamic Legal Theories: An Introduction To Sunni Usul Al-Fiqh* (Cambridge University Press 1999) 3-4; Badar (n 1271) 412.

¹³²⁶ Badar (n 1271) 412.

¹³²⁷ Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld Publications 2008) 1.

¹³²⁸ Bernard G Weiss, *The Spirit of Islamic Law*, vol 5 (University of Georgia Press 1998) 18.

¹³²⁹ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2006) 27.

¹³³⁰ Bernard Lewis, *What Went Wrong?: The Clash Between Islam and Modernity in the Middle East* (Weidenfeld & Nicolson 2002) 64; Sami Zubaida, *Law and Power in the Islamic World* (IB Tauris 2003) 27-32.

¹³³¹ A Abdullahi, *An Na'im, Toward an Islamic Reformation: Civil Liberties* (1990) 11 *Human Rights and International Law* 11.

problematic for the realisation of international law and also limits its effectiveness. As already examined, fixed and rigid notions of Islam bestow unjustified and unequal privileges on religious men over non-Muslims, women and children.¹³³² Furthermore, vis-à-vis children's rights, these archaic and patriarchal interpretations predominantly focus on children's obedience, respect, duties and life-long obligations towards their parents, with little to no regard for their safety and protection within the familial and societal realm. This stance subordinates and disempowers children to such an extent that it makes them prime targets for abuse and violence, a situation which is exacerbated when combined with gender discrimination and the male guardianship system which girls must submit to. Ultimately, these draconian understandings of Islamic law contravene contemporary universal understandings of human rights and international legislation for the rights of children.

The term for Islamic law, ie '*Sharia*', literally means 'path to be followed' and refers to the primary sources of law, namely the revealed law in the *Quran* and the authentic traditions and sayings.¹³³³ *Sharia* can thus be defined as a system of ethics and values which covers all aspects of life (eg personal, social, political, economic and intellectual matters), and which therefore cannot be separated or isolated from Islam's basic beliefs, values and objectives.¹³³⁴ *Sharia* law refers to a whole set of religious obligations which are found in the *Quran* or are understood from a study of the *Sunnah*.¹³³⁵ The word *Sharia* is mentioned once in the *Quran*, where it is also observed: 'Then We put you, [O Muhammad], on an ordained way concerning the matter [of religion]; so follow it and do not follow the inclinations of those who do not know'.¹³³⁶

In other words, *Sharia* spells out religious, legal and moral guidelines which inform how one should conduct one's life, while *fiqh* embodies the judicial aspects which are required to fully understand Islamic law. *Fiqh* is therefore the methodology of Islamic law and relies on human logic which is deduced from *Sharia* as well as its application. Moreover, *fiqh* informs which practical role *Sharia* plays.¹³³⁷ Accordingly, *fiqh* is not constant but changes with time

¹³³² Rajabi-Ardeshiri (n 243).

¹³³³ Urfan Khaliq, 'Beyond the Veil: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah' (1995) 2 Buffalo Journal of International Law 7.

¹³³⁴ Asyraf Wajdi Dusuki and Nurdianawati Irwani Abdullah, 'Maqasid Al-Shari'ah, Maslahah and Corporate Social Responsibility' (2007) 24 The American Journal of Islamic Social Sciences 30.

¹³³⁵ John L Esposito, *The Oxford Dictionary of Islam* (Oxford University Press 2003).

¹³³⁶ See Surat Al-Jathiyah (The Crouching) (45:18). Translated by Sahih International <<https://quran.com/45>> accessed 2 January 2017.

¹³³⁷ Kamali (n 1327) 1.

and is situation specific. Nevertheless, these two terms, *Sharia* and *fiqh*, continue to be used synonymously in order to describe Islamic law, even though they represent two very different concepts. It is therefore important to examine these two types of Islamic law more thoroughly since they are the source of much confusion.

8.3.1 Basic sources of Islamic law and their capacity to meet child sexual abuse challenges

The *Quran* and the *Sunnah* constitute the primary sources of Islamic law.¹³³⁸ These sources are the only material sources which contain the corpus of the revealed law. *Sharia* is directly derived from the *Quran* and the *Sunnah* which Muslims consider to constitute the divine revelations and thus the immutable part of Islamic law, whereas *fiqh* is mainly the product of human reason:

Muslim jurists throughout Islamic history have, therefore, not been concerned with establishing a particular field or science or even theory. To them the divine sources are comprehensive enough to encompass any possible human action, conduct or transaction.¹³³⁹

However, in contrast to *Sunni* Muslims, *Shia* Muslims believe that the divine revelations were also transmitted after the Prophet's death to recognised religious leaders (*imams*). Accordingly, *Shia* Muslims consider that pronouncements by *imams* also amount to divine revelations which are infallible.¹³⁴⁰

8.3.1.1 The *Quran*

Muslims consider the *Quran* the embodiment of the words of God, as revealed to the Prophet Muhammad through the Angel Gabriel. It is the chief source of Islamic law and the root of all other sources.¹³⁴¹ The *Quran* comprises 114 *surahs* or chapters, which were revealed to the Prophet Muhammad from the year 610 until his death in 632.¹³⁴² Muslims believe that the *Quran* contains the exact words of God which they religiously obey and follow. It is for this reason that the *Quran* is at the apex of the hierarchy of Islamic sources. The *Quran* is primarily a book which provides guidance and is not a book of law or jurisprudence, history

¹³³⁸ Irshad Abdal-Haqq, 'Islamic Law – An Overview of its Origin and Elements' (2002) 7 *Journal of Islamic Law & Culture* 27, 33.

¹³³⁹ Mahdi Zahraa, 'Characteristic Features of Islamic Law: Perceptions and Misconceptions' (2000) 15 *Arab Law Quarterly* 168, 171.

¹³⁴⁰ Badar (n 1271) 414-415.

¹³⁴¹ Abdullah Saad Alarefi, 'Overview of Islamic Law' (2009) 9 *International Criminal Law Review* 707, 710.

¹³⁴² Stephen Heyneman, *Islam and Social Policy* (Vanderbilt University Press 2004) 186.

or any other specialisation.¹³⁴³ It therefore does not specifically address the issue of child sexual abuse and exploitation. Instead, the *Quran* explains that '[This is] a Book which We have revealed to you, [O Muhammad], that you might bring mankind out of darkness into the light by permission of their Lord - to the path of the Exalted in Might, the Praiseworthy'.¹³⁴⁴ Also, '[a]nd We have sent down to you the Book as clarification for all things and as guidance and mercy and good tidings for the Muslims'.¹³⁴⁵ Accordingly, one fundamental problem is that the topic of child sexual abuse and exploitation has received insufficient attention and this also hinders international law since the religious basis is lacking. In other words, there exist no specific verses dealing with the issue. Notwithstanding what appears to be a lack of clarity, Rehman writes that *Sharia* has 'a reform mechanism built into it' which presents the opportunity for numerous possibilities of evolution within the Islamic legal traditions, thereby reflecting its true spirit and essence.¹³⁴⁶ This has encouraging implications for how child sexual abuse can be dealt with in Islamic states as will be analysed next.

8.3.1.2 The *Sunnah*

The *hadith* and the *Sunnah* are the second chief sources of Islamic law and contain the mandate to establish law and rules of conduct which are modelled on the Prophet's behaviour and which directly flow from the language of the *Quran*.¹³⁴⁷ Unlike the *Quran*, the *hadith* was not written during the lifetime of the Prophet but was written and compiled in order to explain the provisions of the *Quran*, including dealing with some aspects which were not expressly addressed in the text of the *Quran*.¹³⁴⁸ The following three verses represent a sample of numerous Quranic expressions which confirm Muhammad as a guide and model for the believers and which mandate obedience to his directives: 'He who obeys the Messenger has obeyed Allah; but those who turn away - We have not sent you over them as a guardian.';¹³⁴⁹ 'There has certainly been for you in the Messenger of Allah an excellent pattern for anyone whose hope is in Allah and the Last Day and [who] remembers Allah

¹³⁴³ Muhammed Selim El-Awa, 'Approaches to Sharī'a: A Response to NJ Coulson's "A History of Islamic Law"' (1991) 2 *Journal of Islamic Studies* 143, 146.

¹³⁴⁴ See Surat Ibrahim (Abraham) (14:1). Translated by Sahih International <<https://quran.com/14>> accessed 2 January 2017.

¹³⁴⁵ See Surat An-Nahl (The Bee) (16:89). Translated by Sahih International <<https://quran.com/16>> accessed 2 January 2017.

¹³⁴⁶ Rehman (n 233) 165.

¹³⁴⁷ Abdal-Haqq (n 1338) 34.

¹³⁴⁸ Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Kluwer Law International 2000) 24.

¹³⁴⁹ See Surat An-Nisa (The Women) (4:80). Translated by Sahih International <<https://quran.com/4>> accessed 2 January 2017.

often’;¹³⁵⁰ ‘It is not for a believing man or a believing woman, when Allah and His Messenger have decided a matter, that they should [thereafter] have any choice about their affair. And whoever disobeys Allah and His Messenger has certainly strayed into clear error.’¹³⁵¹

Moreover, the Prophet’s mission was to explain the meaning of the Holy *Quran* and its rules. The *Sunnah* completes the *Quran* and is important for believers to understand Allah’s will, as stated in the *Quran*, ‘And We revealed to you the message that you may make clear to the people what was sent down to them and that they might give thought’.¹³⁵² The authentic *Sunnah* provides insight into the life of Muhammad. This is important as he is the role model and teaches all Muslims how they should conduct themselves. Muslims must therefore strive to emulate his behaviour as demanded by the *Quran*. This second tier of the primary sources of Islamic law is collected in multiple volumes which are called *hadith*.¹³⁵³

Ali, like other modernist writers, argues that the *hadith* was narrated by the ruling elite in a manner that was favourable to them and in order to legitimise their political authority.¹³⁵⁴ She also explains that ‘numerous *hadith*, were generated to reinforce societal norms and political expediency’.¹³⁵⁵ For these reasons, the authenticity of the *hadith* continues to be debated. Baderin cites Kamali, who states that ‘[t]he general rule on the application of the Qur’an and the Sunna as main sources of Islamic law is that in case of any irresolvable conflict between the verse of the Qur’an and a reported Sunna, the former prevails, because of its indubitable authenticity in Islamic law’.¹³⁵⁶ The norms and rules of Islamic law are derived from a methodological interpretation of the *Quran* and *Sunnah*.

Despite more than fourteen hundred years having elapsed, there exist complexities which continue to envelop Islamic jurisprudence and interpretations and these issues are reflected by the varying points of views and opinions within the Islamic discourse itself. The human

¹³⁵⁰ See Surat Al-Ahzab (The Combined Forces) (33:21). Translated by Sahih International <<https://quran.com/33>> accessed 2 January 2017.

¹³⁵¹ See Surat Al-Ahzab (The Combined Forces) (33:36). Translated by Sahih International <<https://quran.com/33>> accessed 2 January 2017.

¹³⁵² See Surat An-Nahl (The Bee) (16:44). Translated by Sahih International <<https://quran.com/16>> accessed 2 January 2017.

¹³⁵³ Abdal-Haqq (n 1338) 35.

¹³⁵⁴ Ali (n 1309) 25.

¹³⁵⁵ *ibid* 25.

¹³⁵⁶ Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 42.

factor which may have exerted influence on the collection of the *hadith* cannot be overlooked as these were not divine words or accounts, unlike the *Quran*. It is for this reason that the *hadith* is susceptible to individual presentations and interpretations of events and the Prophet's words. The reporting and thus authenticity of the Prophet Muhammad's traditions after his death has been a source of considerable concern for Muslim scholars, particularly with regards to the formation of *Sharia* laws.¹³⁵⁷

The growing Islamic empire inherited culturally diverse sets of states which were not just located in Arabia. This led to the development of a number of legal schools that appeared and disappeared, whilst others joined. Within the *Sunni* tradition, four hermeneutical schools have survived: the *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali* schools. Other schools of jurisprudence developed within the *Shia* tradition: the *Ithna Ashari* or *Twelvers*, the *Zaydi*, *Isma'ili* and the *Ibadi* schools.¹³⁵⁸ The way in which Islamic law is applied therefore depends on how the *Quran* and *hadith* are interpreted by the respective school of jurisprudence (*madhab*). This process of interpretation also depends on the culture, ethical differences, historical contexts, political and economic system and regulations of the state and this affects the way in which *Sharia* is followed.¹³⁵⁹ As *hadith* plays an important role within Islam, the issue is that patriarchal notions have become interwoven into Islamic laws. These particularly discriminate women, including female children and have resulted in widespread gender discrimination in the Middle East. Gender discrimination is a contributing factor to the occurrence of child sexual abuse and exploitation, as discussed in Chapter Seven. Another paradigm shift is therefore required towards gender equality in order to fully transpose Article 19 and 34 of the CRC. Put differently, gender discrimination must also be overcome as otherwise it is unrealistic to expect the realisation of the rights in the CRC.

After the *Quran* and *Sunnah*, all other sources come under the category of secondary sources of Islamic law. Hence, the first secondary source of Islamic law is *ijma* (consensus of opinion)¹³⁶⁰ or agreement of jurists among the followers of the Prophet Muhammad in a

¹³⁵⁷ Rahat Imran, 'Legal Injustices: The *Zina* Hudood Ordinance of Pakistan and its Implications for Women' (2013) 7 *Journal of International Women's Studies* 78, 82.

¹³⁵⁸ Baderin (n 1356) 37-38.

¹³⁵⁹ Shaheen Sardar Ali, 'Women's Human Rights in Islam: Towards a Theoretical Framework' (1997) 4 *Yearbook Islamic & Middle East Law* 117.

¹³⁶⁰ Meaning consensus of the *Ummah* (the community of Believers). *Ijma* provided essential tools for the muslim community to reach agreements over contentious issues. According to an established *Sunnah*, the Prophet is reported to have said 'My People will never agree together on an error', in Weeramantry, Christopher

particular age on a question of law.¹³⁶¹ However, no consensus has been reached that child sexual abuse and exploitation should be exempt from the *zina* offences and *hudud* punishment. *Qiyas* (analogical deduction)¹³⁶² is the second secondary source of Islamic law;¹³⁶³ *ijtihad*¹³⁶⁴ (independent reasoning) is the third; *istihsan* (jurists' preference) is fourth; *istishab* (presumption of continuity) is fifth; and the sixth secondary source of Islamic law is *urf* (custom).¹³⁶⁵ It is important to understand that when researching *Sharia* in relation to any particular matter reference must be made to these sources, and arguments based on *Sharia* sources should be according to their place in this hierarchy of evidence. Yet no efforts have been made to deduct from the holy verses that child sexual abuse and exploitation must be prevented and that victims must be protected and not punished.

8.4 The prevention of harm and the promotion of human welfare (*maslahah*)

Maslahah provides the means for addressing issues which arise from scientific, social and political developments. Some jurists have approached these by focusing on the moral content of Islam, its flexibility and adaptability, whilst others have tried to preserve and retain the traditional structure of *Sharia*.¹³⁶⁶ The way in which these two approaches have been applied is illustrated by the laws which states have passed to regulate divorce and underage marriage.

Maslahah is a juristic device within Islamic legal theory which promotes the public good and prevents social evil or corruption. The plural is *masalih* which means 'welfare, interest, or benefit'.¹³⁶⁷ In Islamic law, rulings based on considerations of *maslahah* or the social good are found in legal writings as far back as the 2nd and 3rd centuries.¹³⁶⁸ Literally, *maslahah* means seeking a benefit and repelling harm. *Maslahah* and *manfa`ah* (benefit or utility) are considered synonymous. However, *manfa`ah* is not a technical term within the *maslahah*

Gregory, *Islamic jurisprudence: an international perspective* (Springer 1988) 39 ; Majid Khadduri and Herbert J Liebesny, *Origin and Development of Islamic Law* (The Lawbook Exchange 2010) 87.

¹³⁶¹ Shaheen Sardar Ali, 'Conceptual Foundations of Human Rights: A Comparative Perspective' (1997) 3 European Public Law 261, 268.

¹³⁶² *Qiyas* (judgment by analogy) is a practice accepted by all Islamic legal schools as a method of solving legal problems when the Holy *Quran* and the *Sunnah* do not contain the relevant provisions and no *ijma* exists on the matter, In Bekkin, Renat, 'Islamic insurance: national features and legal regulation' (2007) 21 Arab Law Quarterly, 3-34, 5-6; See also Wael B Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) 22.

¹³⁶³ Wael B Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009) 22.

¹³⁶⁴ *Ijtihad* is term that refers to the use of independent legal reasoning in search of an opinion. *Ijtihad* conveys a sense of exertion, a sense of struggle and has the same meaning as *Jihad*, Rehman (n 250) 354.

¹³⁶⁵ H Hamid Hassan, *An Introduction to the Study of Islamic Law* (Adam Publishers and Distributors 2010) 22.

¹³⁶⁶ Felicitas Opwis, 'Maslahah in Contemporary Islamic Legal Theory' (2005) 12 Islamic Law and Society 221.

¹³⁶⁷ Dusuki and Abdullah (n 1192) 31.

¹³⁶⁸ Opwis (n 1220) 187.

concept as Muslim jurists simply define it as seeking benefit and repelling harm, as directed by God or *Sharia*.¹³⁶⁹ Kamali explains that:

The doctrine of *maslahah* is broad enough to encompass within its fold a variety of objectives, both idealist and pragmatic, to nurture the standards of good government, and to help develop the much-needed public trust in the authority of statutory legislation in Muslim societies. The doctrine of *maslahah* can strike a balance between highly idealistic levels of expectation from the government on the part of public efforts of the latter to identify more meaningfully with Islam.¹³⁷⁰

Baderin observes that *maslahah* is mostly applied to benefit the Muslim community as a whole (*maslahah al-ummah*) and collective and communal benefits and welfare are therefore emphasised. However, this broader application does not exclude the prevention of individual harm and welfare (*maslahah shakhsiyyah*) and can therefore be used to guarantee the protection of human rights for all.¹³⁷¹ It can therefore also be employed in respect of preventing child sexual abuse which would clearly benefit the community at large.

The principle objective of *Sharia* is the realisation of benefits for people, both in this world and the hereafter. Generally, *Sharia* is predicated on benefiting the individual and the community and its laws are designed to protect these benefits and to facilitate improvement and perfection of the conditions of human life on earth.¹³⁷² The *Quran* explains that the most important purpose of the Prophet Muhammad (pbuh) is 'as a mercy to the worlds'.¹³⁷³ The *Quran* also describes the objectives of *Sharia* when it is declared: 'O mankind, there has to come to you instruction from your Lord and healing for what is in the breasts and guidance and mercy for the believers.'¹³⁷⁴ Kamali identifies three areas which constitute the primary objectives of *Sharia* (*maqasid al Sharia*): to educate the individual; to establish justice; and to realise benefit for the people (*maslahah*). The majority of Islamic jurists agree that *Sharia* contains no law which does not seek to secure *maslahah*.¹³⁷⁵ However, in the context of child sexual abuse, *maslahah* is not optimised since there exists the risk that individuals are harmed and welfare is diminished when victims are wrongly punished.

¹³⁶⁹ Imran Ahsan Khan Nyazee, *Islamic Jurisprudence (Usul Al-Fiqh)* (Islamic Research Institute Press 2000) 121.

¹³⁷⁰ Mohammad Hashim Kamali, 'Have We Neglected The Shari'ah-Law Doctrine Of Maslahah?' (1988) 27 *Islamic Studies* 287, 287-288.

¹³⁷¹ Baderin (n 1356) 43.

¹³⁷² Mohammad Hashim Kamali, *Maqasid Al-Shariah Made Simple*, vol 13 (IIIT 2008) 1.

¹³⁷³ See Surat Al-Anbya (The Prophets) (21:107). Translated by Sahih International <<https://quran.com/21>> accessed 2 January 2017.

¹³⁷⁴ See Surat Yunus (Jonah) (10:57). Translated by Sahih International <<https://quran.com/10>> accessed 2 January 2017.

¹³⁷⁵ Muhammad Hashim Kamali, 'Source, Nature and Objectives of Shari'ah' (1989) 33 *Islamic Quarterly* 215.

Masood explains that *maslahah* in its relational sense means a cause, occasion or goal which is good. It is also a matter, concern, engagement or business which is conducive to the good. It should therefore be recognised that *maslahah* is applied in respect of the topic of child sexual abuse and exploitation. Otherwise, international law will struggle in ensuring that Islamic law is sufficiently flexible to be brought into line with Articles 19 and 34 of the CRC and international child rights instruments in general. Hence, the *maslahah* principle should be employed for legal reasoning in order to ascertain whether certain laws are good in preventing child sexual abuse or not, as further discussed next.¹³⁷⁶

8.5 Is the application of *maslahah mursalah* (the public good) justified in the context of child sexual abuse?

The first requirement for applying *maslahah* is that the benefit of the action required to achieve something in the public interest outweighs the harm that may result from it. Genuine *maslahah* rulings are therefore those which are intended to protect faith, the human being, intellect, prosperity or wealth. Preventative measures which relate to these aspects are also central to Islam since they help prevent social chaos (*fitna*). It is clear from Quranic verse 5:33 that those acts which result in social problems or chaos are classified as *hadd* crimes and the crime of *hiraba*. In this context, the verse provides: ‘Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment.’¹³⁷⁷

This verse underscores the seriousness of such crimes and explains why they attract harsh retributive punishments. Classical jurists consider that the crime of *hiraba* includes the crime of rape and this causes fear in people.¹³⁷⁸ This inclusion of forced and non-consensual sexual relations can be extended to child sexual abuse. Such an approach considers non-consensual sexual acts not a subcategory of *zina* but rather as a crime of violence falling within the

¹³⁷⁶ M Khālid Masood, *Islamic Legal Philosophy* (International Islamic Publishers 1989).

¹³⁷⁷ See Surat Al-Ma'idah (The Table Spread), (5:33). Translated by Sahih International <<https://quran.com/5>> accessed 2 January 2017.

¹³⁷⁸ Asifa Quraishi-Landes, 'Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective' (1997) 18 Michigan Journal of International Law 287, 315.

concept of *hiraba*, thus requiring more stringent circumstantial evidence and expert testimony, unlike *zina*.¹³⁷⁹

The crime of *hiraba* includes armed robbery, forcible entry into houses or business premises with weapons and harassing innocent people with weapons. In Islamic criminal law, armed robbery is synonymous with waging war against society.¹³⁸⁰

The social consequences which flow from *hiraba* crimes are similar to the social problems which child sexual abuse causes. The growing body of literature from Muslim writers in the fields of social sciences, psychology and other disciplines confirms that child sexual abuse leads to short- and long-term problems for society.

If *hiraba* rather than *zina* was employed as a method to deal with child sexual abuse, offenders would be more deterred as the punishment is more severe when one of the five components, ie the *daruriyyat* (life) is harmed which *maslahah* seeks to protect. Also, promotion of intellect requires that the child is provided with learning opportunities and is protected from circumstances which may undermine this process and which may result in him or her becoming a burden for society. As explained in Chapter Seven, one of the long-term consequences of child sexual abuse is that the individual's intellect suffers and he or she therefore cannot be a productive member of society. Moreover, safeguarding the purity of a lineage protects the family and ensures that children can grow up in a safe environment in which they can reach their full potential. Child sexual abuse threatens the harmonious relationship between parents, creates a hostile environment and puts the child at risk of harm.

The second condition of *maslahah* is that it benefits or prevents harm for all and not just a few or a particular group. As mentioned above, if child sexual abuse is allowed to occur, the abuse usually continues and can proliferate, leading to more incidences and other social problems which affect the entire community.

Finally, *maslahah* cannot be in conflict with a principle or value that is upheld by a clear injunction, a textual ruling or *ijma* (consensus). Child sexual abuse clearly violates Quranic injunctions on sexual relations out of wedlock as they are committed against children and are

¹³⁷⁹ *ibid* 316.

¹³⁸⁰ Okon (n 962) 234.

frequently committed by family members.¹³⁸¹ Jurists from all the jurisprudential schools agree that non-consensual sexual relations, ie rape, constitutes a crime. However, their views diverge on how to prove rape in the absence of eyewitnesses. Hence, they disagree on how it can be established whether or not an individual consented to the act or not as criminal responsibility only arises when there is no consent.

Jurists distinguish two types of cases: where an unmarried woman is pregnant and claims that she has been raped but is unable to name the perpetrator; and where a woman who reports the rape to the authorities is able to identify the perpetrator.¹³⁸² Many jurists argue that pregnancy is not sufficient proof for the *zina* offence whilst others argue that a *zina* offence has been committed when a pregnant unmarried woman has not reported that she has been raped.¹³⁸³ Classical jurists rely on three famous Caliphs – Umar ibn Khattab, Uthman ibn Affan and Ali ibn Talib – who state that a private act becomes public when a woman becomes pregnant or a confession is made.¹³⁸⁴

Extramarital pregnancy as a result of *zina* undermines the morals of society and therefore society's right to protect its moral values under Islamic jurisprudence. Consequently, if an unmarried pregnant woman is unable to prove rape or marriage, pregnancy evidences sex out of wedlock and no four male witnesses are required. Imam Malik considers unfairly executing *hadd* punishment for *zina* a serious matter and therefore argues that circumstantial evidence should be accepted.¹³⁸⁵ He argues that when there is no circumstantial evidence or no eyewitness accounts then *hadd* should not be applied and pregnancy should not be considered to constitute a confession or a false accusation.

The pursuance of *maslahah* in the case of child sexual abuse is valid and genuine as child sexual abuse does not conflict with clear textual rulings and there exists consensus among jurists that sexual acts without consent or committed under duress constitute a crime. However, jurists do not agree how consent can be proven and it is for this reason that the

¹³⁸¹ Paul Nash, Zamir Hussain and Madeleine Parkes, *Multifaith Care for Sick and Dying Children and Their Families: A Multi-disciplinary Guide* (Jessica Kingsley 2015) 127.

¹³⁸² Quraishi-Landes (n 1378) 300.

¹³⁸³ *ibid.*

¹³⁸⁴ Julie Norman, 'Rape Law in Islamic Societies: Theory, Application and the Potential for Reform' (CSID Sixth Annual Conference, 'Democracy and Development: Challenges for the Islamic World', 22-23 April 2005) 'The Origins of Rape Law in the Qur'an, Sunnah, and Hadith' 3.

¹³⁸⁵ Noel James Coulson, *A History of Islamic Law* (Aldine Transaction 2011) 174.

principle of *takhayyur* is employed in order to establish the means which the offenders have used, including duress. The pursuance of *maslahah* proscribes that children are being harmed and therefore reduces the hardship which child sexual abuse inflicts on society. If, on the other hand, victims continue to be seen as offenders and the offenders are excused from punishment, this could lead to an increase in the incidence of child sexual abuse and other social problems which flow from this.

Draconian religious and cultural attitudes towards child sexual abuse have acute ramifications for the victim and society at large and severely impedes international legislative efforts to eradicate it. Child sexual abuse involves the most deviant, intimate, base and uncomfortable aspects of the human psyche and behaviour. Owing to this, governments of Islamic states could feel religiously and culturally inclined to cover-up and/or deny the magnitude of this crime within their borders, especially when engaging with the international community in a climate where some members may already hold discriminating views against religious and/or cultural practices in their states. Nonetheless, denial and secrecy harms child victims and allows child sexual predators to thrive. Moreover, as has been investigated in this chapter, the rigid religious and cultural environments of these Islamic regions habitually fail victims of child sexual abuse by assigning them blame, making it difficult for them to disclose their abuse, and allowing their abusers freedom from punishment. Unsurprisingly, this produces an inability, unwillingness and fear in victims of ever disclosing what happened to them. It is an aggregate of all of the above factors that seriously undermines any international efforts to ascertain, gather data, report on, legislate and essentially deal with the true nature and extent of child sexual abuse.

8.6 Conclusion

Legislation based on Islamic criminal and family law in Muslim states has not demonstrated an understanding of the paradigm of abuse but has rather reinforced the honour ideology. Various models have been discussed which Muslim academics have developed in order to address the issue of child sexual abuse in Islamic states. However, some of the models reinforce the honour ideology, despite an abundance of research on the dynamics of abuse. One of the most influential and compelling methodologies has been put forward by An Na'im which seeks to reconcile human rights with Islamic law. He proposes that a cross-cultural dialogue and internal discourse be adopted in order to achieve normative consensus on what is in the best interests of the child. However, his overall methodology in relation to human

rights supports the introduction of secular legislation. This chapter has argued that an Islamic framework could be employed in order to reconcile human rights with Islamic law by using flexibility, which is allowed by *al-maqasid al-Sharia*, as well as by employing the *maslahah* concept to protect children from sexual abuse. The *maqasid* approach aims to promote human welfare and prevent harm and can therefore incorporate a more victim-centred approach. It is able to connect the private with the political and legal spheres. Furthermore, this approach makes room for new knowledge to be generated from research and scientific developments which can be applied in order to better understand certain social problems in modern Muslim societies. Furthermore, it has been discussed how the issue of child sexual abuse has not been properly addressed and that a common understanding has to be reached between the two different paradigms underlying child sexual abuse: the Western understanding that child sexual abuse is an abusive act which violates the rights of the child, and the Islamic understanding which is influenced by custom and is considered an act which damages honour without acknowledging the rights of the child. Both paradigms violate the fundamental rights of the victim but in Islamic states child sexual abuse is overshadowed by the honour ideology, resulting in a violation of the fundamental rights of the child. *Al-maqasid al-sharia* assists in dispelling the confusion and offers a common understanding of the two paradigms. *Al-maqasid al-sharia* highlights that child sexual abuse actually violates the fundamental rights of the victim or the essential benefits considered under *maslahah*, which mirrors the stipulated rights under international human rights law. The congruency of these aims is more acceptable to people than those put forward by secular models, especially at a time when Islamic resurgence has raised the issue of incompatibility between Islamic law and human rights. Moreover, the acceptability of public welfare (*maslahah*) and the end goals of Islamic law (*maqasid*), as advocated by modern Islamic writers and even extremist groups, make this approach more acceptable and applicable for Islamic states. Despite the conditions which apply to *maslahah*, this chapter has argued that the application of this doctrine to address the problem of child sexual abuse is justified due to the level of harm which individual children and the community suffers that could be prevented. It has also been demonstrated that the honour ideology imposes cultural patriarchy which has influenced certain aspects of Islamic law. This has resulted in abuse of Islam's higher aims and aspirations, namely to protect women and children, essentially turning those aims against it.

Part V: Conclusions

Chapter Nine: Concluding Reflections

The research aim was to ascertain whether international law is limited in protecting children against sexual abuse. This hypothesis was tested by using the UAE as a case study. Hence, this study highlighted the limitations of international law in protecting children against sexual abuse through the case study of the UAE. International law was analysed in order to identify gaps within its protective reach over children. A holistic approach was adopted towards understanding the issue of child sexual abuse, including its scope, nature and the current legislative responses adopted by the UAE to the problem. The scale and nature of child protection and the UAE's current measures and policies were thus critically evaluated. The factors and consequences of child sexual abuse globally and within the UAE were also explored. Fundamentally, the effectiveness of current approaches to child protection globally and within the UAE was probed.

The research structure helped to achieve the research aim. The first chapter provided the requisite context and therefore discussed the concept of rights in child protection, as well as conceptual issues when defining who should be considered a child. The chapter introduced the concepts of child protection and child abuse. Subsequently, the research significance, limitation, problem and aims and objectives were discussed. It was explained what is meant by the rights of the child. In the penultimate section, the research hypothesis was then presented before introducing the structural framework of the research.

The second chapter analysed how a child is defined in international and regional legal instruments and by the domestic law of the UAE and other Middle Eastern states. Such an analysis was undertaken in order to ascertain whether international law has been effective in protecting all those below 18 years of age. The definitional lacunae was particularly highlighted. It therefore lent support to the research hypothesis that international law is limited in protecting children against sexual abuse.

The third chapter focused on the offence of child sexual abuse and specifically its definition in international and regional instruments. The different forms of child sexual abuse and

exploitation were analysed. It was identified that the CRC fails to establish clearly established norms. For instance, the CRC does not clarify how child sexual abuse can be distinguished from child sexual exploitation. Recourse was especially made to General Comment 13 of the CRC Committee. Issues which undermine child rights, such as a failure by state parties to enact the requisite domestic laws, were pointed out. The topic of child sexual abuse was also analysed through the lens of Islamic law, which further highlighted the cultural differences which result in international law being limited in protecting children against sexual abuse.

The fourth chapter analysed the international framework which has been created through the UDHR, the CRC, the ICCPR, the ICESCR and the Convention 138 on the Minimum Age for Admission to Employment 1973. The chapter particularly analysed the CRC, including how it became adopted, the Optional Protocol Concerning the Sale of Children, Prostitution and Child Pornography 2000, and the need for a binding instrument to protect children's rights. The CRC was synthesised, its ambit and scope was pointed out, including in respect of the duty of state parties to implement the CRC. It was also queried whether the CRC's provisions are self-executing. In other words, it was evaluated what force the CRC provisions have in domestic law. The vexed topic of ensuring that state parties adopt all appropriate legislative, administrative and other measures for the implementation of the rights, as mandated by Article 4 of the CRC, was addressed. Various shortcomings which limit the effectiveness of these international treaties were pointed out, especially in relation to the CRC.

The fifth chapter dealt with the topic of monitoring the implementation of the CRC. The UPR mechanism was discussed and shortcomings were pointed out which result in monitoring being less effective. For instance, the UPR mechanism does not focus on child rights. Its recommendations are also very general. In this context, it was also briefly analysed whether the UAE had complied with UPR recommendations and it was pointed out that, to date, this is not the case. Also, Articles 19 and 34 of the CRC were especially scrutinised. The topic of monitoring through the CRC Committee but also other bodies, such as the CESCR, and other stakeholders, such as Save the Children, was discussed. It was observed that child engagement is currently lacking within the UN institutions. Problems with the CRC were criticised, including enforcing child rights.

The sixth chapter was the case study of the UAE. It identified that international law had been limited in ensuring that the UAE accords adequate protection to children and especially

protects them against sexual abuse and exploitation. The legal history and type of legal system was explained. It was highlighted that the fact that the UAE has a *Sharia* law based legal system which also employs civil law was an issue for realising full alignment with international law. It was also discussed how failings in adherence to the rule of law, including because of a failure to fully commit to human rights, limit the effectiveness of international law. Relevant provisions of the UAE constitutions were analysed in order to ascertain the position of international treaties within the legal framework of the UAE. It was observed that international treaties depend on a decree being adopted. In this context, the study explored whether Emirates judges must follow domestic law or provisions within international treaties. Three possible alternatives were identified. The constitutional structure was also evaluated in the context of child rights and it was stressed that no comprehensive child protection system has yet been created through legislative means. The way in which power and jurisdiction were allocated at the federal and local level by the Constitution was described. It was highlighted that each Emirate has considerable jurisdiction and power which necessitates that each pays attention to child sexual abuse. Obtaining a commitment from all Emirates is arguably a more challenging task. The federal institutions which make up the constitutional structure were described. In this context, it was argued that the creation of a modern state requires a commitment to ‘human rights, the rule of law and democracy’.¹³⁸⁶ It was further highlighted that the UAE’s moderate Constitution could be enhanced if the concept of rights was given more prominence. It was discussed that Islam is the key source for legislation and the problem this poses in the context of child sexual abuse. It was reviewed what status child rights have in the UAE in light of the UAE’s ratification of the CRC. The Penal Code was analysed, as well as the criminal justice system. Subsequently, it was scrutinised how child sexual abuse is addressed, including the question of sexual consent, child sexual molestation and child sexual exploitation. Statistics were presented about child sexual abuse cases and reports. The efforts of the UAE government to create national mechanisms to protect children rights were discussed. The role which NGOs and NHRIs can play was discussed. It was emphasised that the UAE in particular is lacking in this regard, also because of a failure to afford the political space to operate. The recently enacted Federal Law No. 3 of 2016 concerning Law of Child Rights (the Wadeema Law) was critically evaluated. It was urged that the implementing regulations are adopted for the law to enter into force. The lack of

¹³⁸⁶ UNGA (n 874) para 5 at 2.

provisions dealing with child sexual abuse and exploitation was pointed out as a significant shortcoming, alongside other issues.

Chapter Seven looked at how international law is unable to address the underlying factors and consequences of child sexual abuse. It was discussed how estimating child sexual abuse is fraught with difficulties. The factors which are associated with child sexual abuse and exploitation, such as poverty, lack of education and birth registration, were explored. In this context, it was pointed out how international law is, for example, incapable of remedying deeper underlying issues, eg, poverty. The pressing issue of gender discrimination, particularly in cultures and societies which deny the occurrence of child sexual abuse, was investigated, as well as factors which heighten the risk of abuse. The issue of non-disclosure – ie the silence of child sexual abuse victims – was explained, including cultural and religious values (eg, shame, taboos, modesty and obligatory violence) which impede disclosure. The chapter then proceeded to study how child sexual abuse is dealt with in the Arab world. For this purpose, recourse was made to relevant studies and reports which investigate the topic in the UAE, Jordan, Kuwait, Iraq and Saudi Arabia.

The final chapter discussed child sexual abuse in Islam and the conceptual issues which exist which leave child victims insufficiently protected. It was stressed that the *Quran* does not specifically mention child sexual abuse and that this has arguably given rise to some confusion. Child victims are treated as if they committed *zina* offences whereas they are the ones who have been harmed. Additionally, the honour ideology has further resulted in this crime being driven into the shadows. The penultimate sections discussed how the Islamic *maslahah* and *maslahah mursalah* principles offer possible solutions to ensure that Islamic law accords with the needs of the modern Muslim world in which child sexual abuse is rife. Use of these Islamic principles could overcome the problems which have been caused by a ‘narrow interpretation of Islamic texts’.¹³⁸⁷

9.0 Recommendations

A. Ensuring *Sharia* remains relevant in the context of child sexual abuse

As discussed, the *Quran* does not specifically mention child sexual abuse. Nonetheless, it is clear that child sexual abuse and exploitation are not accepted by Islam. *Sharia* must

¹³⁸⁷ CRC Committee (n 567) 2.

therefore be interpreted flexibly to uphold the moral content of Islam which clearly is premised on promoting human welfare (*maslahah*) and the public good (*maslahah mursalah*). In other words, Islamic texts cannot be narrowly interpreted, as also stressed by the CRC Committee.¹³⁸⁸ Child sexual abuse has serious repercussions for the entire community, as discussed in Chapter Seven. The prevention of individual harm (*maslahah shakhsiyyah*) in the form of child sexual abuse and exploitation clearly falls within this overall Islamic goal of improving the conditions of human life. Consequently, the *maslahah mursalah* concept must be utilised to ensure that the harm which emanates from child sexual abuse and exploitation is prevented. Child sexual abuse causes *fitna* (social chaos) and these acts therefore constitute *hiraba* and *hadd* crimes. Harsh retributive punishments must be adopted and it can no longer be tolerated that the victims of child sexual abuse and exploitation face the risk of punishment. Hence, children must be exempted from the *zina* offences and *hudud* punishment. The necessary Islamic jurisprudence must therefore be developed by scholars in order to foster the public good, as mandated in Quranic verse 5:33.

B. Adoption of a protection for children from sexual offences law

The adoption of the Wadeema Law is only the first step to promote children rights; it is insufficient in respect of protecting children against sexual abuse and exploitation. The legislators ought to therefore enact a comprehensive protection of children from sexual offences law. Such a law must criminalise the various different forms of sexual offences which are committed against children. Additionally, reporting procedures must be spelled out. Procedures must also be created, eg, to ensure the statements of children are recorded and medical examinations conducted. Special courts must be established to ensure that cases are heard promptly. No overly onerous burden of proof should be established, especially not the one currently used under *Sharia*. Instead, a reverse burden of proof which requires the accused to prove his innocence appears more appropriate. The legal proceedings must also be child-friendly and courts should be empowered to ensure this. A different legal approach must also be adopted when children perpetrate child sexual abuse. Guidelines must be published for relevant stakeholders such as public health authorities.

¹³⁸⁸ *ibid* 2.

C. Strengthening of domestic human rights, including child rights

Islam focuses on imposing duties rather than promoting rights in order to promote the public good. Yet, in modern times, these duties could be further strengthened by the deployment of human rights. The ACHR highlights that it is possible for Islamic states to adopt human rights. However, compared with the ECHR, human rights could be further developed in the Middle East, including in the UAE. This is also important so that children can invoke them in appropriate cases as they can do under the ECHR. A stronger human rights commitment could be demonstrated through the ratification of the ICCPR and the ICESCR, as well as the withdrawal of reservations to the CRC and Optional Protocols to the CRC. An independent NHRI must be created. Such an institution should be responsible for advancing and defending human rights, including child rights. Ideally, such an institution should be in charge of a wide range of cases and resemble a human rights commission rather than an ombudsman. In other words, such an institution should have a wide remit to deal with many different matters, including child rights and protecting children against sexual abuse and exploitation. NGOs should also be granted political space as long as they offer constructive criticism. In this context, civil society activism is also important, especially to reduce cultural barriers such as shame and guilt associated with sexual abuse and to combat the honour ideology.

D. Combating gender discrimination

Federal Law No. 2 of 2015 against Discrimination and Hatred does not proscribe sex discrimination. There therefore exists a gap within the protective coverage for women, including female children. Patriarchal interpretations of *Sharia* due to cultural values and religious custom have resulted in women and female children not enjoying the same rights to equality as in Western states. A link must therefore be made with the conditions which facilitate child sexual abuse, ie the various expressions of gender discrimination.

Discriminatory Islamic laws, especially adultery and indecency, must be reformed in accordance with the *maslahah* and *maslahah mursalah* principles and Quranic verse 5:33, as discussed in Chapter Eight. In the context of child sexual abuse and exploitation, it must be made easier to establish gender-based sexual abuse. Public awareness must be raised about the relationship between child sexual abuse and gender discrimination. Efforts must also be made to reduce social barriers which make it more difficult for

female child victims to access justice. For instance, media campaigns and schools must inform about the procedures to report child sexual abuse cases, such as the confidential hotline number to report cases anonymously.

E. The adoption of a national child rights strategy and creation of a national child protection system

A national child rights strategy must be adopted which also addresses how children can be more effectively protected against child sexual abuse and exploitation. Only this can ensure that coordination efforts become more effective. In this context, it is important to clarify the mandate of the Supreme Council for Motherhood and Childhood.¹³⁸⁹

Adequate resources must be made available to the Supreme Council for Motherhood and Childhood and any other newly created bodies such as the proposed NHRI.¹³⁹⁰ It must also be tracked how national funds are allocated for the purpose of promoting the best interests of children.¹³⁹¹ New capacities must be developed and resources allocated for training on children rights and the prevention of child sexual abuse and exploitation and care for victims. It must be assessed how funds are allocated, including to combat child sexual abuse. The social needs of higher risk children must be taken into account. Accountability must be guaranteed, including through data collection.¹³⁹² Data should particularly be collected about child sexual abuse and exploitation cases. Children must also be empowered to voice their opinions and to make suggestions in respect of the national child protection system.

The government of the UAE has taken some very crucial steps in eliminating child sexual abuse from the country but increasing numbers of reported cases show that much more still needs to be done. The government has to adopt a proactive role towards the complete eradication of child sexual abuse. This could be made possible by increasing the implementation of child protection policies. First and foremost, the government officials involved in child protection measures should be trained properly on a regular basis. These government officials should be well aware of how to handle all kinds of situations when they encounter incidents of child sexual abuse. All the trained officials should be

¹³⁸⁹ CRC Committee (n 567) 3.

¹³⁹⁰ *ibid.*

¹³⁹¹ *ibid.*

¹³⁹² *ibid.*

competent enough to detect the perpetrators of child sexual abuse, as and when they enter the country. Programmes and workshops for police officers on the technique and methods to encounter this crime should continue on a regular basis. They should be trained in techniques for counselling victims. The prosecutors should be well-equipped to investigate and prosecute child sexual abuse cases. Communication channels with the public, other governments and international agencies should be kept open to discuss the success of anti-child sexual abuse operations and to monitor these efforts.

9.1 Final conclusions

The findings from the various chapters clearly confirm the research hypothesis that international law is limited in according adequate protection to the rights of children. This limitation is particularly evident from the lack of protection of children from sexual abuse. The core issues which result in international law being limited in protecting children against sexual abuse are given below.

The CRC is incapable of determining the age of the child since domestic law suggests otherwise. In other words, the failure to adopt a clear definition for a child in international law has enabled many states to set a lower age than 18 years. Hence, in case a domestic law sets the age of majority lower than 18 years, the implication is that the age group that is older than the set age of majority will not be regarded as children and thus will not be covered by the Convention. The adoption of a somewhat flexible definition of childhood has thus permitted abuse of that flexibility. Consequently, the safety net created by the various child rights provisions has been substantially weakened.

Furthermore, the UDHR does not spell out children rights but only refers to providing special care and help for children. The normative status of the UDHR is also shrouded in uncertainty. The Declaration of the Rights of the Child 1959 does not obligate state parties to adopt any measures and fails to stipulate child rights. It is therefore no more than aspirational. Both the ICCPR and the ICESCR do not deal with the topic of child sexual abuse and exploitation. The HRC and the CESCR therefore cannot supervise whether states prevent child sexual abuse. Convention 138 on the Minimum Age for Admission to Employment 1973 also fails to directly address the problem of child commercial sexual exploitation.

Moreover, international law is weak since no clearly established norms have been created to combat child sexual abuse and exploitation. The reason for this is that the CRC does not cover all the aspects of child sexual abuse, as is also apparent from the discussion in Chapter Three, sections 3.2 and 3.3. Another significant weakness is that no strong enforcement mechanisms have been established to ensure compliance with Articles 19 and 34 of the CRC and the CRC in general. As a result, it is not ensured that the minimum standards stipulated in the CRC have been guaranteed,¹³⁹³ let alone that additional measures are adopted which are more conducive to realising the rights of the child. Whilst state parties must submit reports to the CRC Committee which detail the measures which they have adopted to give effect to their obligations under the treaty, there is no follow-up mechanism as is the case with other core instruments of the UN. The CRC Committee's Concluding Observations have therefore no immediate impact, thus highlighting the limitations of this international convention. States thus do not feel pressured into full compliance. Equally, the Optional Protocol Concerning the Sale of Children, Prostitution and Child Pornography 2000 only requires state parties to furnish a report to the CRC Committee. State parties can thus pay lip-service to their obligations without fear of repercussions. Another issue is that the CRC does not make clear which rights constitute progressive rights. It follows that the available resource argument can be deployed more frequently to justify the failure to create a comprehensive national child protection system.

Moreover, the laws at the domestic level are limited since the *Quran* does not specifically mention child sexual abuse. Instead, legislation based on Islamic criminal and family law has not shown an understanding of the child sexual abuse paradigm but has rather reinforced the honour ideology. In most Muslim majority states, the age of maturity for boys is fifteen years, including for criminal responsibility. However, *Sunni* and *Shiite* Muslims have a lower age of maturity for girls than for boys. Female children are therefore discriminated against when it comes to being accorded child rights to the same extent, ie the same period, ideally until they reach 18 years of age. Gender discrimination therefore acts as another barrier which hinders realisation of child rights and undermines the protection against child sexual abuse and exploitation. However, the UAE could take steps to heighten protection of children against sexual abuse, despite the weaknesses in international law.

¹³⁹³ See CRC (n 21) art 41.

It is hoped that this study will provide the impetus for more intensive studies on child sexual abuse protection due to the importance of the topic and its tremendous impact on UAE society. When studying in the field of child protection law, it is obvious that both private and public law contribute to this core aspect of child protection. This includes most branches of the legal system (eg, criminal law, family law, juvenile law, special laws for the protection of children from sexual abuse, etc). This fact leads to the conclusion that more research should be devoted to other subjects related to child protection law, such as fields that do not yet exist and need to be examined (eg, disabled child sexual abuse, safe and effective modes of investigation in child sexual abuse cases, comparative study between child sexual abuse and child sexual exploitation).

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Appendix



Map of the UAE¹³⁹⁴

¹³⁹⁴ OnTheWorldMap, 'UAE Road Map' <<http://ontheworldmap.com/uae/uae-road-map.html>> accessed 27 January 2018.