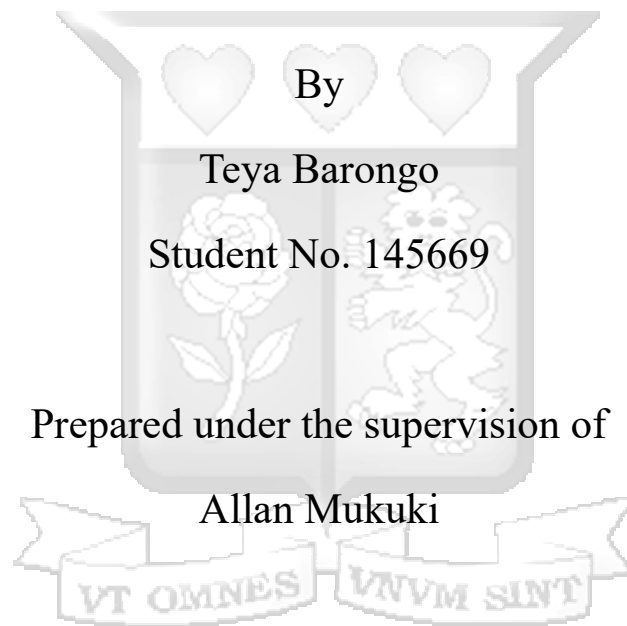


Addressing Transnational Online Child Sexual Abuse and Exploitation in Kenya: A Systems-Based Approach

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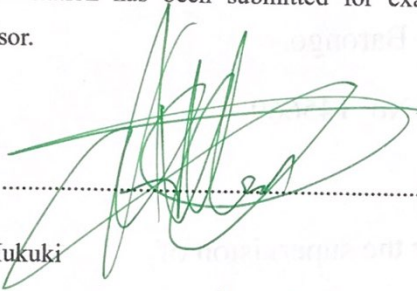
Declaration

I, TEYA BARONGO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 12/03/2025

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

Allan Mukuki

Date: 12/3/2025

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I am deeply grateful for the unwavering support of my family and friends throughout my research journey. This dissertation is dedicated to my father, who remains our greatest source of strength in his weakness; to my mother, whose steadfast motivation has been a constant inspiration; to my sister, who sets an exceptional standard and encourages us all to strive for excellence; and to my brother, who is navigating his path and discovering the world.

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List of Legal Instruments

African Charter on the Rights and Welfare of the Child

African Union Convention on Cyber Security and Personal Data (Malabo Convention)

Children Act (no.146 of 2022).

Child Welfare Society of Kenya Order Legal Notice 58 of 2014

Computer Misuse and Cybercrimes Act (no. 58 of 2018)

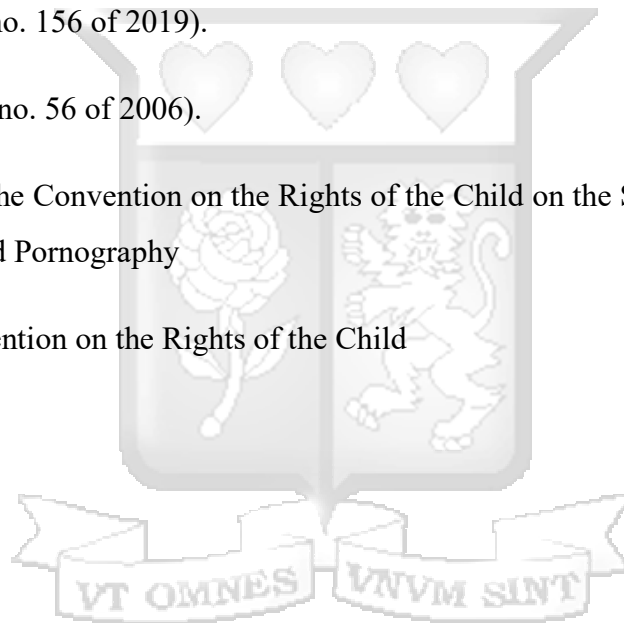
Constitution of Kenya 2010

Data Protection Act (no. 156 of 2019).

Sexual Offences Act (no. 56 of 2006).

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

United Nations Convention on the Rights of the Child



List of Cases

AD and Another v DW and Others (2007) Constitutional Court of South Africa

Bloggers Association of Kenya v Attorney General and 3 others (2020)

BO (Minor) & another v Independent Policing Oversight Authority & 2 others (2023).

CK (A CHILD) through Ripples International as her guardian and Next friend) and 10 others v The Commissioner of Police/ Inspector General of the National Police Service and 3 others (2012)

CK (A CHILD) through Ripples International as her guardian and Next friend) and 10 others v The Commissioner of Police/ Inspector General of the National Police Service and 3 others (2012)

GM (Suing as the father and next friend of JTM (Minor)) & another v Board of Management M High School & 3 others; Ministry of Education & 7 others (Interested Parties) (2022)

Joseph William Black Jr v Republic (2022) (Ruling)

JMM v JCN (2014)

MB v NB (2018) High Court of South Africa

MPEV and Others v Switzerland, ECtHR, 2014

M W K v another v Attorney General & 3 others (2017)

PMK v Inspector General of Police & 2 others (2019)

Republic v Bilali (2024)

Republic v Int'veld alias Teacher alias Dad alias Mzungu (2024) (Ruling)

Teachers Service Commission v WJ and 5 others (2020)

Thomas Msaberi Kademi v Republic (2020)

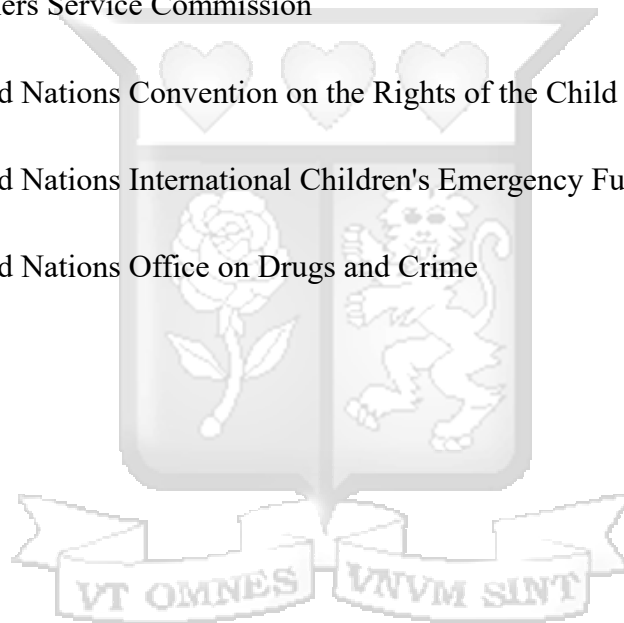
VCK v Republic (2023)

Wanuri Kiahua and Another v CEO Kenya Film Classification Board Ezekiel Mutua and 2 others (2020)

List of Abbreviations

ACRWC	- African Charter on the Rights and Welfare of the Child
AG	- Attorney General
AHTCPU	- Anti-Human Trafficking and Child Protection Unit
AMBER Alerts-	America's Missing: Broadcast Emergency Response Alerts
AU	- African Union
CA	- Communications Authority of Kenya
CERT	- Computer Emergency Response Team
CMCA	- Computer Misuse and Cybercrimes Act
CSAI	- Child Sexual Abuse Imagery
CSAM	- Child Sexual Abuse Material
CSOs	- Civil Society Organizations
CWSK	- Child Welfare Society of Kenya
DCS	- Directorate of Children Services
ECPAT	- Every Child Protected Against Trafficking
ECHR	- European Convention on Human Rights
ECtHR	- European Court of Human Rights
GST	- General Systems Theory
ICT	- Information and Communication Technology
IWF	- Internet Watch Foundation
KCIRT	- Kenya Computer Incident Response Team Coordination Centre

- NAP - National Plan of Action
- NCCS - National Council for Children Services
- NCMEC - National Centre for Missing and Exploited Children
- NGOs - Non-Governmental Organizations
- OCSEA - Online Child Sexual Exploitation and Abuse
- OPSC - Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography
- TSC - Teachers Service Commission
- UNCRC - United Nations Convention on the Rights of the Child
- UNICEF - United Nations International Children's Emergency Fund
- UNODC - United Nations Office on Drugs and Crime



Abstract

This research project examines the pervasive and evolving issue of OCSEA in Kenya, focusing on the legal, institutional, and technological frameworks designed to combat this transnational crime. The study's primary objectives are to explore the application of systems theory in strengthening child protection systems, investigate the role of the best interest of the child principle in addressing OCSEA, and evaluate Kenya's legal and institutional frameworks in combating this crime. The research employs a doctrinal legal methodology, analysing primary and secondary legal sources, including international treaties, national legislation, and institutional policies, to identify gaps and propose improvements.

The scope of the project encompasses the analysis of Kenya's legal framework, including the Children Act 2022, the Sexual Offences Act, the Computer Misuse and Cybercrimes Act, and the Data Protection Act, alongside institutional mechanisms such as the AHTCPU and the Communications Authority of Kenya. The study also evaluates the role of private ICT companies, such as Google and Meta, in combating OCSEA through technological innovations and content moderation policies.

The findings reveal significant gaps in Kenya's legal and institutional frameworks, particularly in addressing the transnational nature of OCSEA. Key challenges include the lack of ratification of critical international treaties like the OPSC and the Malabo Convention, fragmented institutional coordination, and the susceptibility of corporate policies to political pressures. Despite robust legislative provisions, underreporting, resource constraints, and the rapid evolution of digital technologies hinder effective enforcement.

The study concludes with recommendations for a holistic, child-centred approach to combating OCSEA. These include formalising and expanding the Technical Working Group on Child Online Protection, ratifying key international treaties, enhancing cross-border collaboration, and integrating the best interest of the child principle into corporate policies. By adopting a systems-oriented approach, Kenya can strengthen its child protection systems, enhance accountability, and create a safer digital environment for children.

Table of Contents

1	Chapter One	1
1.1	Part One: Introduction.....	1
1.1.1	Background.....	1
1.1.2	Statement of problem.....	4
1.1.3	Statement of objectives.....	4
1.1.4	Research question(s).....	4
1.1.5	Hypothesis.....	5
1.1.6	Justification/Significance of the study	5
1.1.7	Theoretical Framework.....	5
1.2	Part Two: Literature Review	6
1.3	Part Three: Research design.....	14
1.3.1	Research Design & Methodology.....	14
1.3.2	Assumptions.....	15
1.3.3	Limitations	15
1.3.4	Chapter Breakdown	15
2	Chapter Two: Systems Theory in Child Protection Systems	17
2.1	Introduction.....	17
2.2	General Systems Theory	18
2.3	Systems in Child Protection.....	21
2.3.1	Formal Elements	22
2.3.2	Informal Element	23
2.4	Advantages and Disadvantages of Systems Theory	23
2.5	Conclusion	24
3	Chapter Three: Best interest of the Child in Systems of Child Protection	26
3.1	Introduction.....	26
3.2	Functions of the Best Interest of the Child	27
3.2.1	Substantive Right.....	27
3.2.2	Interpretative Legal Principle	27
3.2.3	Rule of Procedure	28
3.3	Application of the Best Interest of the Child in Kenya.....	30
3.4	The Best Interest of the Child in Child Protection Systems	33
3.5	Conclusion	35
4	Chapter Four: Legal and Institutional Frameworks Combating OCSEA	37
4.1	Introduction.....	37

4.2	International Framework addressing OCSEA	38
4.2.1	United Nations Convention on the Rights of the Child	38
4.2.2	African Charter on the Rights and Welfare of the Child.....	40
4.2.3	African Union Convention on Cyber Security and Personal Data (Malabo Convention).....	42
4.3	National Legal Framework addressing OCSEA	44
4.3.1	Constitution.....	44
4.3.2	Children Act 2022	46
4.3.3	Sexual Offences Act.....	48
4.3.4	Cybercrimes and Computer Misuse Act	51
4.3.5	The Data Protection Act.....	52
4.3.6	Conclusion	53
4.4	Government Public Institutional Framework.....	53
4.4.1	Directorate of Children Services.....	54
4.4.2	National Council for Children Services	54
4.4.3	National Plan of Action to address OCSEA	55
4.4.4	Child Welfare Society of Kenya	56
4.4.5	Directorate of Criminal Services- Anti-Human Trafficking and Child Protection Unit.....	57
4.4.6	Communications Authority of Kenya	59
4.4.7	Conclusion	61
4.5	Private (Non-Social Welfare) Institutional Framework	61
4.5.1	Google	61
4.5.2	Meta	62
4.5.3	Arising Concerns	62
4.6	Conclusion	64
5	Chapter Five: Conclusion and Recommendations	66
5.1	Research Summary	66
5.2	Recommendations.....	69
5.2.1	Strengthening the Technical Working Group on Online Child Protection.....	69
5.2.2	Legislative Reforms and Institutional Strengthening in Addressing OCSEA .	70
5.2.3	Independent Oversight Mechanisms for Corporate Responsibility	70
5.2.4	Public Awareness and Education Initiatives	71
5.3	Conclusion	71
6	Bibliography	73

1 Chapter One

1.1 Part One: Introduction

1.1.1 Background

“Then, he started threatening me, saying, ‘Okay, fine if you not going to, I will post those nude pictures you sent me. I will post them all on Instagram and on Facebook and on Tik Tok, and I will also share them on my WhatsApp.’ I begged him. I said, ‘Please don’t do that to me, don’t do it, don’t put my photos on social media.’ Then he was like, ‘No, it’s too late...’”¹

This is but one of the testimonies of minors’ experiences in the realm of OCSEA. This term refers to the use of the internet as a means to sexually exploit juveniles.² The crime of OCSEA is often complex and has many nuances; while the name might suggest that it wholly occurs online, practical examples usually involve interactions online and in person.³ The online aspect is brought about by the misuse of ICT at different points during the continuum of the abuse.⁴ Another crucial element is the action of child sexual violence.⁵ The term sexual violence is an umbrella term that refers to actions amounting to sexual exploitation and sexual abuse.⁶

It is of grave importance to analyse the definitions of OCSEA, exercising caution on the use of specific terminologies so as not to criminalise or blame the victim.⁷ Additionally, as well articulated in the aphorism attributed to Socrates, ‘The beginning of wisdom is the definition of terms,’ it is good practice to define the scope of the decision.⁸ OCSEA may be categorised into two broad categories, which are disseminated into subcategories defining the specific

¹ ECPAT International, *Disrupting Harm – Conversations with Young Survivors about Online Child Sexual Exploitation and Abuse*. Global Partnership to End Violence against Children 2022, 34.

² Voziki V ‘Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children’s Dignity and Safety,’ International Hellenic University, Thessaloniki-Greece, 2021, 13.

³ *Disrupting Harm – Conversations with Young Survivors about Online Child Sexual Exploitation and Abuse*. Global, 6.

⁴ *Disrupting Harm – Conversations with Young Survivors about Online Child Sexual Exploitation and Abuse*. 6.

⁵ UN Committee on the Rights of the Child (CRC), General comment No. 13 (2011): The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13.

⁶ Voziki V ‘Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children’s Dignity and Safety’ 13.

⁷ Voziki V ‘Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children’s Dignity and Safety’ 13.

⁸ Philosophy <<https://philosophy.stackexchange.com/questions/45154/the-beginning-of-wisdom-is-the-definition-of-terms-socrates>> on 1 March 2024.

actions. The first category is the solicitation of children for sexual purposes.⁹ This includes acts such as online grooming in which the perpetrator creates a relationship with a minor using internet platforms facilitate online and offline sexual interactions with a child.¹⁰ Another associated act is sexual extortion, which is the blackmail of individuals using their self-generated images in order to extort benefits such as sexual favours or money from that individual.¹¹ This involves intimidation and coercion, quickly spreading over social media platforms. The other general classification is live online child sexual abuse.¹² This refers to child sexual violence in the way of prostitution and sexual performances to produce CSAM.¹³ In addition, live streaming transmits the data to the beholder in real-time. Once the livestreaming ends, the CSAM gets lost unless the perpetrator and/or beholder records it.¹⁴ This often would be a great challenge to post-event investigations.

Notably, CSAM may be self-generated by minors who take images and videos of themselves willingly. It often occurs among peers of minority age through sexting.¹⁵ It is important to note that CSAM generated in this means cannot be justified under the guise of consent because children cannot give consent. Soliciting the generation, possessing and distributing such CSAM is a crime. This is again not to say that the minor generating the material is guilty and culpable of OCSEA since it often entails coercive, abusive, or exploitative use of such data; thus, an assumption should be made for this fact to avoid criminalising the minor.¹⁶ The non-consensual activities of sexting, like the sharing or receiving undesirable sexual messages, photos or videos, are used to interact, threaten or groom the minor are what amount to

⁹ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety' 10.

¹⁰ ECPAT International, *Summary Paper on Online Sexual Exploitation*, 2020, 1-2,

¹¹ Interagency Working Group in Luxembourg, 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse', 28 January 2016, 4-5.

¹² Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety' 11.

¹³ CSAM embodies the notion of any representation, through whichever means, of a minor being part of real or simulated graphic sexual performances or any representation of the sexual parts of the child, for sexual purposes. ECPAT International, '*Child Sexual Abuse Material or Child Pornography*', SECO Manifestations 2.

¹⁴ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety' 11.

¹⁵ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety' 15.

¹⁶ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety' 15.

OCSEA.¹⁷ The child should never be held liable for producing CSAM but should be protected by police mechanisms responsible for the investigation and prosecution of the offenders.¹⁸

The internet expands offenders' resources in committing the crime of OCSEA.¹⁹ This is the most significant disruption in the fight against such sexual violence. With new ICT developing faster than law enforcement can respond, the creation of encrypted messaging and other innovations hinder the response to OCSEA.²⁰ The increased penetration of internet connectivity further exacerbates this issue. In Kenya, in 2019, an overwhelming ninety-nine per cent of the population gained internet connectivity through mobile subscriptions.²¹ Among children, sixty-seven per cent of 12–17-year-olds had some form of online access in the same year.²² This demonstrates an extensive penetration of the internet in Kenya, which exposes a significant portion of the adolescent population to these grave risks.²³ Indeed, cyber-facilitated interactions frame children's lives in many ways, primarily by creating a magnitude of opportunities; however, an array of risks is omnipresent, taking into account that their well-being and human rights are being steadily jeopardised.²⁴ Shockingly, thirty-seven per cent of sampled children reported exposure to sexual images online, further underscoring the urgent need for protective measures.²⁵

Recognising the escalating threat, the Kenyan government has responded with legislative measures to safeguard children in the digital realm. The Children Act of 2022, the Sexual Offences Act, and the Computer Misuse and Cybercrimes Act. There even exist specific policies to address OCSEA abiding by international standards, such as WeProtect Global Alliance and UNICEF.²⁶ Together, this forms the legal framework for addressing OCSEA. However, a critical gap persists—the transnational nature of the offence. Perpetrators, shielded

¹⁷ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety' 15.

¹⁸ ECPAT International, *Live Streaming of Child Sexual Abuse in Real-Time*, SECO Manifestations, 5.

¹⁹ Disrupting Harm- Conversations with Young Survivors about Online Sexual Exploitation and Abuse 26.

²⁰ ECPAT International, Summary Paper on Online Sexual Exploitation, 2020. 6-7.

²¹ ECPAT, INTERPOL. And UNICEF, *Disrupting Harm in Kenya Evidence on Online Child Sexual Exploitation and Abuse*, October 2021, 23.

²² *Disrupting Harm in Kenya Evidence on Online Child Sexual Exploitation and Abuse*, October 2021, 23.

²³ Kenya National Bureau of Statistics, *Analytical Report on Adolescents, and the Youth*, April 2022, 18.

²⁴ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety' 17.

²⁵ *Disrupting Harm in Kenya Evidence on Online Child Sexual Exploitation and Abuse*, October 2021, 23.

²⁶ WeProtect Global Alliance *Preventing and Tackling Child Sexual Exploitation and Abuse A Model National Response*, November 2022. National Plan of Action to Tackle Online Child Sexual Exploitation and Abuse in Kenya, 2022–2026.

by screens and operating from locations beyond the jurisdictional reach of local authorities, still pose a formidable challenge to effective law enforcement.

1.1.2 Statement of problem

Due to underreporting, the true extent of OCSEA remains elusive. Despite Kenya's robust legal framework and strategic plans, addressing transnational OCSEA remains a significant challenge. The interconnected nature of online threats necessitates a more detailed and transparent approach to cross-border collaboration. The lack of specific mechanisms for international cooperation in key legislation hinders effective response.

1.1.3 Statement of objectives

- 1) To explore the application of systems theory in understanding and improving child protection systems.
- 2) To investigate how the best interest of the child principle can strengthen child protection systems in addressing OCSEA by focusing on legislative gaps, implementation, coordination, and standards, while extending its application to regulate corporate responsibilities in the digital space.
- 3) To evaluate Kenya's legal and institutional frameworks in combating OCSEA, identify gaps in international cooperation and digital safety, and propose a systems theory-based approach integrating the best interests of the child principle to enhance coordination, accountability, and protection in addressing OCSEA.

1.1.4 Research question(s)

- 1) Whether systems theory can be effectively applied to strengthen child protection systems, particularly in addressing the challenges of OCSEA, and what are the potential advantages and limitations of this approach.
- 2) How can the best interest of the child principle be effectively applied to strengthen child protection systems, particularly in addressing the challenges of OCSEA, and what strategies can be developed to extend its application to regulate corporate responsibilities in the digital space.

- 3) How effective are Kenya's legal and institutional frameworks in addressing OCSEA, and how can a systems theory-based approach, integrating the best interests of the child principle, enhance coordination, accountability, and international cooperation to combat this transnational crime?

1.1.5 Hypothesis

Inefficient implementation of the best interest of the child principle in municipal laws and international law leads to significant gaps in protection against OCSEA. However, by enhancing the incorporation and application of this principle within legal frameworks at both municipal and international levels, particularly by considering the evolving nature of online threats and the necessity for adaptable strategies, there will be a notable improvement in safeguarding children's rights against OCSEA.

1.1.6 Justification/Significance of the study

This study examines the complex issue of OCSEA in Kenya, highlighting gaps in addressing its transnational nature despite existing legal frameworks and strategic initiatives. It underscores the evolving nature of online threats and the need for a more transparent and detailed approach to cross-border collaboration. The research contributes to existing knowledge by identifying significant research gaps and providing recommendations to enhance efforts in combating OCSEA, particularly in the Kenyan context.

1.1.7 Theoretical Framework

General Systems Theory (GST) is a groundbreaking framework that reshapes how we understand organised complexity. Unlike traditional scientific approaches that dissect phenomena into isolated components, GST adopts a holistic perspective, emphasising the interconnectedness of systems and the dynamic relationships that define them.²⁷ It focuses on the interactions and processes within and between systems, rather than merely analysing their individual parts.²⁸ By doing so, GST seeks to uncover the emergent properties that arise from the whole, offering a more comprehensive understanding of complex systems.

²⁷ Sutherland JW, 'General Systems Theory: Foundations, Developments, Applications Ludwig von Bertalanffy' *Departments of Mathematics and Psychology, University College, Rutgers University, New Brunswick*, 1972, 280.

²⁸ Ball RA, 'Sociology and General Systems Theory' 13(1) *The American Sociologist*, 1978, 65, 66. Bertalanffy, L, 'The History and Status of General Systems Theory' 15(4) *The Academy of Management Journal*, 1972, 408.

At its core, GST is built on several foundational principles. Interconnectedness highlights that the relationships between components are often more significant than the components themselves, while holism asserts that the whole system exhibits properties that cannot be understood by examining its parts in isolation.²⁹ Hierarchy and levels of organisation acknowledge that systems are structured into nested levels, each with its own emergent properties.³⁰ Open systems refer to those that exchange energy, matter, or information with their environment, and non-linearity underscores the complexity of systems that do not operate in simple cause-and-effect ways.³¹ Feedback loops, both positive and negative, play a critical role in regulating system behaviour, driving stability and change, and the principle of equifinality suggests that a system can achieve the same end state through multiple pathways and from different starting conditions.³²

GST's interdisciplinary nature has made it a versatile framework, applied across fields such as sociology, biology, engineering, psychology, political science, and management. In social work, it has been used to understand human social systems, incorporating ecological metaphors and family therapy models.³³ More recently, GST has integrated insights from chaos and complexity theory, which challenge linear, cause-and-effect thinking and highlight the potential for small interventions to create significant systemic change.³⁴ This integration underscores the adaptability and relevance of GST in addressing complex, dynamic systems across diverse disciplines.

1.2 Part Two: Literature Review

OCSEA is a pervasive and evolving global crisis. This literature review examines how various scholars conceptualise this problem, highlighting the unique challenges posed by the digital environment and the urgent need for effective countermeasures. Widely recognised among earlier scholarly work is the difficulties in accurately estimating the prevalence of OCSEA due to underreporting, the insidious nature of online grooming, and offenders' ability to manipulate

²⁹ Bertalanffy, L, 'The History and Status of General Systems Theory' 408.

³⁰ Sutherland JW, 'General Systems Theory: Foundations, Developments, Applications Ludwig von Bertalanffy' 280.

³¹ Warren K, Franklin C and Streeter CL, 'New Directions in Systems Theory: Chaos and Complexity' 43(4) *Social Work*, 1998, 357, 358.

³² Bertalanffy, L, 'The History and Status of General Systems Theory' 413. Ball RA, 'Sociology and General Systems Theory' 65.

³³ Sobeloff J Sann A, 'Systems Theory' 44(3) *Social Work*, 1999, 283-284.

³⁴ Warren K, Franklin C and Streeter CL, 'New Directions in Systems Theory: Chaos and Complexity' 360

victims into silence.³⁵ Regardless, increasing reports indicate a rise in online grooming and exploitation, mainly through social networking sites and webcams.³⁶ This highlighted the urgent need for research to understand the process of online grooming better and inform prevention and intervention strategies as the internet grows more popular.

Several sources underscore the internet's unique characteristics that facilitate OCSEA. Whittle mainly discusses the perception of anonymity and the phenomenon of "dissociative imagination"³⁷ that can embolden offenders online.³⁸ Others highlighted the internet's accessibility and affordability,³⁹ enabling individuals to engage in sexually motivated behaviours they might otherwise avoid.⁴⁰ The ease of access to potential victims creates a fertile ground for offenders to operate with a sense of impunity. This allows them to commit a range of online offending behaviours, including viewing, collecting, and disseminating CSAM, online grooming for sexual purposes (both online and offline), networking with other offenders, and participating in live streams of child sexual abuse.⁴¹ This is compounded by the inherent power imbalance in OCSEA such that the offenders, who are often adults, take advantage of the naivety of the children.⁴² Delving into the cognitive and motivational factors driving offenders, it was noted that offence-supportive beliefs, lack of victim empathy, and a range of motivations from seeking intimacy to fulfilling deviant sexual desires motivated offenders to continue causing harm.⁴³

³⁵ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 15(2) *Trauma, Violence and Abuse*, 2014, 126-139.

³⁶ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

³⁷ Dissociative imagination, a psychological phenomenon where individuals create a separation between their online and offline identities, can contribute to online child sex offending. This separation can reduce inhibitions, facilitate psychological distancing, and reinforce cognitive distortions, making it easier for offenders to engage in abusive behaviour online. The anonymity of the online environment further exacerbates this effect.

³⁸ Whittle HC, Hamilton-Giachritsis C, 'Offender Behaviour' in Brown J (ed), *Online Risk to Children: Impact, Protection and Prevention*, 1st ed, John Wiley & Sons, Incorporated, 2017, 11.

³⁹ The "Triple A Engine" (Cooper, 1998) explains how internet accessibility, affordability, and anonymity contribute to increased online sexual activity. These factors facilitate access to sexual content, lower barriers to entry, and disinhibit behaviour, potentially leading to both legal and illegal online sexual activities. This framework highlights how the internet's characteristics can make it easier for individuals with a sexual interest in children to access child pornography, connect with other offenders, and engage in grooming behaviours.

⁴⁰ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

⁴¹ Whittle HC, Hamilton-Giachritsis C, 'Offender Behaviour', 11.

⁴² Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety' 42.

⁴³ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

Additionally, the effects of the COVID-19 pandemic exacerbated OCSEA. Lockdowns and increased internet usage provided further opportunities for offenders, leading to a surge in child sexual exploitation complaints.⁴⁴ This occurrence underscores the dynamic interplay between societal events and online risks for children. Witting frames OCSEA as a transnational issue that may be solved through the harmonisation of laws.⁴⁵ The internet facilitates the production, distribution, and access to CSAM across borders, creating complexities in jurisdiction, mutual legal assistance, and extradition.⁴⁶

Mbaku provides a broader context of child exploitation in Africa, highlighting the roles of poverty, harmful traditional practices, weak governance, and external forces.⁴⁷ With this, he emphasises the need for comprehensive solutions that address the root causes of child vulnerability.⁴⁸ In the same vein, Sibanda identifies a gap between the opportunities offered by digital technologies in Africa and the lack of adequate protection for children's privacy online.⁴⁹ The paper argues that existing legal frameworks are insufficient to address the unique vulnerabilities of children in the digital sphere and calls for robust, child-specific measures.⁵⁰ This review presents the issue of OCSEA as multifaceted and with a complex nature enabled by borderless interactions on the internet, the anonymity of the offender coupled with an air of invisibility and hence invincibility while still being sensitive to social enabling factors

In assessing the problem, authors commonly apply established criminological theories, child rights perspectives, and socio-cultural analyses to illuminate the factors contributing to OCSEA and inform effective interventions.⁵¹ Among the criminology theories used is the Finkelhor's Precondition Model, which was developed initially to explain contact sexual offences. It is adapted to the online context and emphasises how the internet facilitates overcoming internal

⁴⁴ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety' 42.

⁴⁵ Witting SK, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders' 29(1) *The International Journal of Children's Rights*, 2021, 731-764.

⁴⁶ Witting SK, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders' 731-764.

⁴⁷ Mbaku JM, 'The Rule of Law and the Exploitation of Children in Africa' 42(2) *Hastings International and Comparative Law Review*, 2019, 287-452. Onyango PM, Kattambo WM, 'Kenya' in Schwartz-Kenney BM (ed), 1st ed, *Child Abuse: A Global View*, ABC-CLIO, LLC, 2000, 117-119.

⁴⁸ Mbaku JM, 'The Rule of Law and the Exploitation of Children in Africa' 287-452.

⁴⁹ Sibanda OM 'Towards a more effective and coordinated response by the African Union on children's privacy online in Africa' 6 *African Human Rights Yearbook* 2022 158.

⁵⁰ Sibanda OM 'Towards a more effective and coordinated response by the African Union on children's privacy online in Africa' 6 *African Human Rights Yearbook* 2022 158.

⁵¹ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

and external inhibitors to offending.⁵² The four preconditions – motivation, overcoming internal inhibitors, overcoming external inhibitors, and overcoming child resistance – are analysed concerning the internet's anonymity and ease of access, which help offenders overcome most of the inhibitors.⁵³ Another theory is the Routine Activity Theory, which posits that predatory criminal behaviour requires a motivated offender, a suitable target, and a lack of supervision. The authors argue that the internet provides all three elements, increasing the risk of child sexual abuse.⁵⁴ The online environment offers unprecedented access to potential victims and a perception of anonymity, emboldening potential offenders.

Many authors implicitly or explicitly adopt a rights-based approach, emphasising the child's rights to protection, safety, and well-being in the digital environment. This framework highlights the obligations of states to uphold these rights through legal frameworks, preventive measures, and victim assistance.⁵⁵ The "best interests of the child" principle is central to this approach, advocating for child-centered policies and interventions.⁵⁶ Several authors focus on the legal frameworks governing OCSEA, analysing international conventions and their provisions related to jurisdiction, extradition, and mutual legal assistance.⁵⁷ Similarly, a human rights framework is used to assess the problem of insufficient protection for children's privacy online in Africa.⁵⁸ The authors emphasise the universality of human rights and the need for explicit provisions addressing the unique challenges children face in the digital environment. They highlight the "digital divide" and its impact on children's access to their rights and freedoms. These different views display an interdisciplinary approach crucial for developing

⁵² Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

⁵³ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

⁵⁴ Whittle HC, Hamilton-Giachritsis C, 'Offender Behaviour' 15.

⁵⁵ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety' 42. Witting SK, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders' 29(1) *The International Journal of Children's Rights*, 2021, 731-764. Caballero SS, 'Towards a Uniform and Informed Interpretation of the Best Interests of the Child by the Judiciary: Inter-American and European Jurisprudence' 54-57.

⁵⁶ Caballero SS, 'Towards a Uniform and Informed Interpretation of the Best Interests of the Child by the Judiciary: Inter-American and European Jurisprudence' 54-57. Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety' 42. Witting SK, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders' 29(1) *The International Journal of Children's Rights*, 2021, 731-734.

⁵⁷ Witting SK, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders' 29(1) *The International Journal of Children's Rights*, 2021, 741-746.

⁵⁸ Rebhi T, Bouderbala I, 'Challenges and Prospects in Enforcing Legal Protection of Children from Online Sexual Exploitation' 2023(4) *Krytyka Prawa. Niezależne Studia and Prawem*, 2023, 21-33.

effective prevention strategies, legal frameworks, and interventions that prioritise the protection and well-being of children in the digital age.

Enforcing laws against OCSEA presents a formidable challenge for law enforcement and child protection agencies worldwide. As stated earlier, there exists a pervasive issue of underreporting in OCSEA cases.⁵⁹ Children may be unaware of the problem, reluctant to disclose abuse due to fear or manipulation, or unable to recognise online grooming behaviours, especially when sexual motives are not immediately apparent.⁶⁰ The authors argue that the similarities between online grooming and typical online interactions, such as relationship building and sexual exploration, can blur the lines and make it challenging to identify problematic behaviours.⁶¹ Kloess critiques the limitations of legislation that focuses primarily on criminalising the act of meeting a child following online grooming rather than the grooming process itself.⁶² This reactive approach fails to address non-contact offences where intent may be less explicit. The low number of convictions under such legislation underscores the challenges in enforcement.

Most scholars acknowledge the rapidly evolving nature of online communication, making it difficult for law enforcement to keep pace with new technologies and platforms used for sexual exploitation.⁶³ Offenders may utilise increasingly covert methods, hindering detection and enforcement. This necessitates continuous research and adaptation to address the specific challenges of enforcement across different platforms, such as social networking sites, gaming platforms, and the dark web.⁶⁴

⁵⁹ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

⁶⁰ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

⁶¹ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

⁶² Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

⁶³ Popa L, 'National and International Cooperation in Investigating Crimes of Child Sexual Abuse or Sexual Exploitation Committed by Using Information Technologies' 18(1) *AGORA International Journal of Juridical Sciences*, 2024, 102-111. Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139. Whittle HC, Hamilton-Giachritsis C, 'Offender Behaviour'. Rebhi T, Bouderbala I, 'Challenges and Prospects in Enforcing Legal Protection of Children from Online Sexual Exploitation' 21-33. Sibanda OM 'Towards a more effective and coordinated response by the African Union on children's privacy online in Africa' 6 *African Human Rights Yearbook* 2022 158.

⁶⁴ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139. Whittle HC, Hamilton-Giachritsis C, 'Offender Behaviour'.

As previously stated, anonymity and encryption play a role in facilitating OCSEA. The internet offers a sense of being unidentifiable, emboldening offenders to engage in behaviours they might avoid offline. Using pseudonyms, encryption software, and the dark web can make tracking and identifying perpetrators difficult.⁶⁵

The transnational nature of OCSEA complicates investigations and prosecutions. Perpetrators can operate from different countries, making it challenging to track them down and bring them to justice.⁶⁶ International cooperation is crucial but often hindered by differences in legal systems, investigative procedures, and resources.⁶⁷ This also manifests in challenges of proving intent and gathering evidence in online grooming cases.⁶⁸ Online communication's anonymous and ephemeral nature allows offenders to use pseudonyms and delete conversations, making it difficult to establish their identity and track their activities. Additionally, some victims, particularly adolescents, may willingly engage in sexual discussions or physical encounters, further complicating the legal landscape.⁶⁹

Popa emphasises the technical complexities involved in investigating OCSEA. Expertise in IT forensics is crucial for analysing digital devices and media and identifying and securing electronic evidence.⁷⁰ The rapid evolution of technology requires law enforcement agencies to update their skills and equipment continuously. Data encryption and anonymisation techniques used by offenders necessitate sophisticated investigative methods and collaboration with technology companies.⁷¹ Along with this are resource constraints law enforcement agencies face in many countries. Limited funding, inadequate infrastructure, and a shortage of skilled professionals, particularly in specialised units, hinder effective enforcement.⁷²

⁶⁵ Whittle HC, Hamilton-Giachritsis C, 'Offender Behaviour'. and Voziki

⁶⁶ Witting SK, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders' 29(1) *The International Journal of Children's Rights*, 2021, 731-764.

⁶⁷ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety'42. Witting SK, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders'731-764.

⁶⁸ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

⁶⁹ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety'42.

⁷⁰ Popa L, 'National and International Cooperation in Investigating Crimes of Child Sexual Abuse or Sexual Exploitation Committed by Using Information Technologies'102-111.

⁷¹ Popa L, 'National and International Cooperation in Investigating Crimes of Child Sexual Abuse or Sexual Exploitation Committed by Using Information Technologies'102-111. Onyango PM, Kattambo WM, 'Kenya' 117-130.

⁷² Rebhi T, Bouderbala I, 'Challenges and Prospects in Enforcing Legal Protection of Children from Online Sexual Exploitation' 21-33. Popa L, 'National and International Cooperation in Investigating Crimes of Child Sexual

Societal and cultural challenges also hinder the enforcement of OCSEA prevention laws. Cultural norms, taboos surrounding discussions of sex, fear of police involvement, and stigmatisation of sexual offences can prevent reporting and prosecution.⁷³ Additionally, public awareness about the risks and prevalence of OCSEA remains low, contributing to underreporting and a lack of support for prevention efforts.⁷⁴ Enforcing laws against OCSEA requires overcoming a complex web of challenges. This, coupled with the perception of impunity, often leads law enforcement to focus on convicting the offender rather than retrieving the illicit material, which is just as important.⁷⁵

Addressing these challenges necessitates a multi-faceted approach involving strengthening legal reforms, technological advancements, international cooperation, educational initiatives, and empowerment of children. Scholars emphasise the need for further research to understand better the dynamics of online grooming, victim behaviour, offender motivations, and the impact of evolving technologies.⁷⁶ This research is crucial for informing effective prevention and intervention strategies. They also advocate for refining legislation to address non-contact offenses and target the grooming process itself, rather than solely focusing on the act of meeting a child.⁷⁷ This proactive approach aims to prevent abuse before it escalates. The authors propose strategies for early detection and intervention in OCSEA cases, utilising a deeper understanding of grooming processes, offender motivations, and victim characteristics to identify potentially harmful online interactions and enable timely interventions. Raising awareness and educating children, parents, and educators about the risks of OCSEA is crucial. Initiatives promoting safe internet use and equipping individuals with the understanding and skills to recognise and respond to potential threats are essential for prevention.

Voziki highlights the importance of global adherence to and effective implementation of international instruments such as the UNCRC and its Optional Protocol, as well as regional

Abuse or Sexual Exploitation Committed by Using Information Technologies'102-111. Onyango PM, Kattambo WM, 'Kenya' 117-130.

⁷³ Rebhi T, Bouderbala I, 'Challenges and Prospects in Enforcing Legal Protection of Children from Online Sexual Exploitation' 21-33.

⁷⁴ Rebhi T, Bouderbala I, 'Challenges and Prospects in Enforcing Legal Protection of Children from Online Sexual Exploitation' 21-33.

⁷⁵ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety'42.

⁷⁶ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

⁷⁷ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

instruments.⁷⁸ Harmonising national laws with international standards is crucial to ensure that all forms of OCSEA are criminalised. Improved cooperation among national judicial authorities, as well as between states, is needed to overcome jurisdictional challenges and facilitate the extradition and prosecution of offenders.⁷⁹ Investing in specialised law enforcement units dedicated to combating OCSEA, equipped with the necessary technology, resources, and expertise, is essential.⁸⁰ Utilising international databases, such as Interpol's ICSE Database, can help identify victims, link cases, and share information among law enforcement agencies worldwide.⁸¹

The private sector, particularly ICT companies managing media platforms, plays a critical role in preventing, detecting, and reporting CSAM.⁸² Their collaboration with civil society organisations would strengthen prevention efforts, provide support to victims, and help advocate for policy changes. Raising awareness among children, parents, educators, and the public about the risks of OCSEA and promoting online safety practices is vital. Through intervention programs targeting both potential offenders and those who have already committed OCSEA offenses would reduce recidivism and rehabilitate offenders.⁸³ Similarly Empowering children and providing them with the tools and knowledge to protect themselves online, as well as ensuring their meaningful participation in developing and implementing policies and programs related to OCSEA, is crucial.

Witting suggests a shift from the focus on territoriality to the child's well-being by adopting a child-centred rule of reason that considers their identity, needs, and the child-friendliness of the criminal justice system when addressing jurisdictional conflicts.⁸⁴ Harmonising child protection principles with cybercrime expertise in international cooperation mechanisms is also

⁷⁸ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety'42.

⁷⁹ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety'42.

⁸⁰ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety'42.

⁸¹ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety'42.

⁸² Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety'42. Sibanda OM 'Towards a more effective and coordinated response by the African Union on children's privacy online in Africa' 6 African Human Rights Yearbook 2022 158.

⁸³ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety'42.

⁸⁴ Witting SK, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders'731-764.

crucial to ensure that legal processes are sensitive to the needs and rights of child victims.⁸⁵ Incidental to this is establishing more precise legal definitions and criteria for the "best interests of the child" principle to guide judicial decision-making and reduce subjectivity. Encouraging courts to consistently refer to and apply international standards like the CRC and GC 14 in all cases concerning children can promote greater uniformity and predictability in legal decisions.⁸⁶ The recommendations made by scholars all seem to point to the need for a comprehensive and collaborative approach. By combining legal reforms, technological advancements, international cooperation, educational initiatives, and empowerment of children, perhaps we can create a safer digital world where children are protected from exploitation and abuse.

1.3 Part Three: Research design

1.3.1 Research Design & Methodology

This study will employ the doctrinal legal research methodology, which involves analysing the underlying legal principles of existing legal rules and formulating legal doctrines. The chosen methodology gathers data from primary legal sources and secondary sources, necessitating an analysis of legal doctrine. The researcher has opted for this methodology due to the reliance on library-based research for data collection. Moreover, the researcher will analyse how national and regional legal, policy, and practice norms define and criminalise OCSEA while considering the best interests of the child principle. Subsequently, the researcher will draw useful lessons to propose improvements to the Kenyan legal and regulatory framework for service providers to effectively address OCSEA. Relevant materials have been collected through online research using electronic data, e-books, academic journals, as well as international and African legal instruments. Additionally, relevant reports, working papers, and policy documents have been utilised to adequately illustrate the magnitude of the phenomenon, emphasise the importance of using appropriate terminology, and advocate for the effective implementation of available laws.

⁸⁵ Witting SK, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders' 731-764.

⁸⁶ Caballero SS, 'Towards a Uniform and Informed Interpretation of the Best Interests of the Child by the Judiciary: Inter-American and European Jurisprudence' 54-57.

1.3.2 Assumptions

The Study has operated under the assumption that children themselves are not culpable for the crime of OCSEA since they are the victims of the crime, even when they took part willingly such as through sexting or generated CSAM themselves. Consequently, perpetrators refer to adults of majority age.

1.3.3 Limitations

Limitations experienced in conducting this study include the unavailability of crucial court decisions on the Kenya Law Reporting portal. This has hindered the researcher from reaching an even more critical assessment of the law in its application. Another limitation is the absence of peer reviewed work about OCSEA in Kenya. Such secondary sources would have enabled the researcher to better understand the country's position on the enforcement of laws pertaining to OCSEA

1.3.4 Chapter Breakdown

1.3.4.1 *Chapter One: Introduction*

This chapter offers an overview of the research topic, OCSEA, providing background information on the issue and stating the problem it poses. It outlines the research objectives and aims, presenting the hypothesis and justification for the study. In essence, it serves as a summary of the research focus and rationale.

1.3.4.2 *Chapter Two: Systems Theory*

This chapter will introduce GST as a holistic framework for understanding complex systems, emphasising interconnectedness, feedback loops, and emergent properties. It explores GST's application in child protection, shifting focus from individual errors to systemic factors like policies, resources, and governance. The chapter examines formal and informal elements of child protection systems, highlighting collaboration, prevention, and child-centeredness. It concludes by discussing the advantages and challenges of applying systems theory to child protection.

1.3.4.3 *Chapter Three: Best Interest of the Child in Systems of Child Protection*

This chapter will explore the best interest of the child as a cornerstone of child protection systems, rooted in the international and national frameworks. It examines the principle's

threefold function as a substantive right, an interpretative legal principle, and a rule of procedure, ensuring children's well-being is prioritised in all decisions. It shall highlight its application in addressing legislative gaps, weak implementation, and poor coordination and discusses challenges, such as the lack of binding obligations on private non-social.

1.3.4.4 Chapter Four: Legal and Institutional Frameworks to Combat OCSEA

This chapter will evaluate Kenya's legal and institutional frameworks addressing OCSEA. While Kenya has robust laws gaps in implementation, underreporting, and limited international cooperation hinder effective responses. Key international instruments remain unratified, limiting cross-border collaboration. Public institutions leverage advanced technologies and partnerships to combat OCSEA, but fragmented efforts and resource constraints persist. Private ICT companies like Google and Meta employ tools to detect and remove exploitative content, but their policies are vulnerable to political pressures, undermining safeguards. The chapter concludes that a holistic, child-centred approach, integrating the best interests of the child principle within a systems theory framework, is essential to enhance coordination, adaptability, and accountability, in combating OCSEA.

1.3.4.5 Chapter Five: Conclusion and Recommendations

This chapter shall consolidate the findings of the research, concluding with a comprehensive analysis of the challenges and gaps in addressing OCSEA in Kenya. It highlights the complexities of OCSEA, including its transnational nature and the limitations of current legal and institutional frameworks. The chapter provides actionable recommendations, proposing a systems-oriented approach that integrates legal reforms, institutional strengthening, technological advancements, and public awareness initiatives. It emphasises the need to embed the best interests of the child principle across all sectors, formalise multi-stakeholder collaboration, and ensure ICT companies adopt child-centred policies.

2 Chapter Two: Systems Theory in Child Protection Systems

2.1 Introduction

Systems theory is an abstract framework utilised for understanding the intricate web of relationships that constitute complex systems.⁸⁷ It transcends disciplinary boundaries, offering a holistic perspective applicable to a wide range of phenomena. Rather than reducing systems to their individual components, it emphasises the interconnectedness and interdependence of these components, recognising that the whole possesses emergent properties not present in the isolated parts.⁸⁸ Central to systems theory are feedback loops which regulate system behaviour, driving stability and change.⁸⁹ This holistic perspective, transcending disciplinary boundaries, has been applied across diverse fields including social work and child protection.

OCSEA is a pervasive issue riddled with complexities that complicate prevention and intervention measures. While the internet is a useful tool, it greatly increases the chances of OCSEA because it can be anonymous, easily available and accessible and provides cross border access.⁹⁰ Online communication platforms have rapidly developed often increasing provisions on anonymity through more sophisticated encryption software.⁹¹ Offenders use these tools to conceal their identities and activities online thus posing a great challenge to enforcement endeavours. In addition to this, enforcement of existing measures is curtailed by underreporting of the crime.⁹² This is especially true in the African context where cultural beliefs such as the disdain for discussions on sex, coupled with resource related issues tied to weak governance increase the difficulty of addressing the issue.⁹³ Indeed, addressing the issue of OCSEA requires a multifaceted yet holistic approach of which may be found in the implementation of the systems theory.

⁸⁷ Ball RA, 'Sociology and General Systems Theory' 13(1) *The American Sociologist*, 1978, 65, 66. Bertalanffy, L, 'The History and Status of General Systems Theory' 15(4) *The Academy of Management Journal*, 1972, 408.

⁸⁸ Ball RA, 'Sociology and General Systems Theory' 67.

⁸⁹ Bertalanffy, L, 'The History and Status of General Systems Theory' 413. Ball RA, 'Sociology and General Systems Theory' 65.

⁹⁰ Witting SK, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders' 29(1) *The International Journal of Children's Rights*, 2021, 731-764.

⁹¹ Popa L, 'National and International Cooperation in Investigating Crimes of Child Sexual Abuse or Sexual Exploitation Committed by Using Information Technologies' 102-111.

⁹² Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 126-139.

⁹³ Rebhi T, Bouderbala I, 'Challenges and Prospects in Enforcing Legal Protection of Children from Online Sexual Exploitation' 21-33.

To this end this chapter shall set out the theoretical framework to be utilised in the research as the systems theory. First it shall expound on its development, proponents and utility in various disciplines. Then it shall explore its particular application in child protection systems which is the subject matter of interest in this research. Finally, it shall weigh the advantages and disadvantages of the application of the system before drawing a conclusion.

2.2 General Systems Theory

GST is considered a groundbreaking framework that has reshaped how we understand organised complexity across a wide range of scientific disciplines. Unlike traditional scientific approaches that often dissect phenomena into isolated components, GST represents a shift toward a more holistic perspective.⁹⁴ It emphasises the interconnectedness of system and the dynamic relationships that define them, focusing on the interactions and processes within and between systems rather than merely analysing their individual parts.⁹⁵ By doing so, GST seeks to uncover the emergent properties that arise from the whole, offering a more comprehensive understanding of complex systems.

The roots of systems thinking can be traced back to ancient philosophical inquiries, such as the Greek concept of Kosmos, which explored the idea of order and harmony in the universe.⁹⁶ Over centuries, thinkers like Nicholas of Cusa, with his concept of ‘coincidentia oppositorum’, and Leibniz, with his ideas of a ‘mathesis universalis’ and a hierarchy of monads, laid the groundwork for modern systems theory.⁹⁷ However, it was in the 20th century that GST emerged as a formalised field of study, driven resolution of the limitations of mechanistic and reductionist approaches.⁹⁸ Classical science, which sought to explain complexity by breaking it down into elementary parts, proved inadequate for understanding living organisms and other intricate systems.⁹⁹ Thus GST arose as a response, offering a new lens to study the interconnected and dynamic nature of systems.

⁹⁴ Ball RA, ‘Sociology and General Systems Theory’ 65.

⁹⁵ Sutherland JW, ‘General Systems Theory: Foundations, Developments, Applications Ludwig von Bertalanffy’ *Departments of Mathematics and Psychology, University College, Rutgers University, New Brunswick*, 1972, 280.

⁹⁶ Bertalanffy, L, ‘The History and Status of General Systems Theory’ 15(4) *The Academy of Management Journal*, 1972, 407.

⁹⁷ Bertalanffy, L, ‘The History and Status of General Systems Theory’ 15(4) *The Academy of Management Journal*, 1972, 408.

⁹⁸ Ball RA, ‘Sociology and General Systems Theory’ 65.

⁹⁹ Sutherland JW, ‘General Systems Theory: Foundations, Developments, Applications Ludwig von Bertalanffy’ 280.

The development of GST owes much to several key figures. Ludwig von Bertalanffy, often regarded as the ‘father of general systems theory’, who introduced foundational concepts such as the ‘open system’, which interacts continuously with its environment. His work emphasised the importance of studying the organisation of living systems and identifying universal principles that apply across different types of systems.¹⁰⁰ His theory of open systems has found applications in fields ranging from chemistry to physiology. Other contributors include Köhler, who extended gestalt theory toward systems thinking, and Lotka, whose work on differential equations became a cornerstone of dynamical system theory. Ashby independently developed system equations that paralleled von Bertalanffy's work while Kenneth Boulding, who approached systems theory from the perspective of economics and social sciences, arrived at conclusions that also aligned with von Bertalanffy's ideas. This generally confirms the viability and applicability of Bertalanffy's findings.

At its core, systems theory is built on several foundational principles. These include a focus on relationships over elements, recognising that the interactions between components are often more significant than the components themselves.¹⁰¹ The principle of holism asserts that the whole system exhibits properties that cannot be understood by examining its parts in isolation.¹⁰² It also emphasises hierarchy and levels of organisation, acknowledging that systems are organised into nested levels, each with its own emergent properties.¹⁰³ The concept of open systems highlights systems that exchange energy, matter, or information with their environment, while non-linearity underscores the complexity of systems that do not operate in simple cause-and-effect ways.¹⁰⁴ Feedback loops, both positive and negative, play a critical role in amplifying or regulating changes within a system, and the idea of equifinality suggests that a system can achieve the same end state through multiple pathways and from different starting conditions.¹⁰⁵

GST is an interdisciplinary framework that finds application across a wide range of disciplines, demonstrating its versatility and capacity to address complex systems. In sociology, it is used

¹⁰⁰ Sutherland JW, ‘General Systems Theory: Foundations, Developments, Applications Ludwig von Bertalanffy’ 280.

¹⁰¹ Ball RA, ‘Sociology and General Systems Theory’ 65

¹⁰² Bertalanffy, L, ‘The History and Status of General Systems Theory’ 408.

¹⁰³ Sutherland JW, ‘General Systems Theory: Foundations, Developments, Applications Ludwig von Bertalanffy’ 280.

¹⁰⁴ Warren K, Franklin C and Streeter CL, ‘New Directions in Systems Theory: Chaos and Complexity’ 43(4) *Social Work*, 1998, 357, 358.

¹⁰⁵ Warren K, Franklin C and Streeter CL, ‘New Directions in Systems Theory: Chaos and Complexity’ 357-372.

to study social organisations, cultural dynamics, and the interplay of factors like religion and economics, offering solutions to issues such as reification and reductionism.¹⁰⁶ In biology, it provides a foundation for understanding open systems, metabolism, and morphogenesis, emphasising properties like wholeness, growth, and equifinality.¹⁰⁷ Engineering leverages it to optimise designs for communication, control systems, and data processing, while psychology employs it to explore the connections between individuals and society, as well as cognitive and developmental processes.¹⁰⁸ In political science, it aids in understanding political structures and international relations while management and organisational studies use it to examine complex adaptive systems, bureaucracies, and educational institutions.¹⁰⁹ The widespread use of GST across these fields highlights its ability to provide a common language and set of principles for understanding the interconnected and dynamic nature of complex systems.

Systems theory has also gained popular application in social work to understand human social systems, incorporating ecological metaphors and family therapy models, and more recently, integrating chaos and complexity theory.¹¹⁰ In this way it can serve as a powerful tool for social change by offering a framework that challenges traditional, linear ways of thinking and provides new perspectives on complex social issues. In essence chaos and complexity theory challenge linear, cause-and-effect thinking, acknowledging that social change is often non-linear and unpredictable.¹¹¹ Incorporating insights from these theories highlights the potential for small strategic interventions to create significant shifts within systems, particularly during periods of instability.¹¹² This perspective encourages adaptability and responsiveness in designing interventions. Ultimately, this shifts the focus from a mechanistic view of society to a relational and dynamic one, empowering social actors to identify new opportunities for intervention and fostering positive, systemic change.

Systems theory, given its features of versatility and its commitment to a holistic approach, has been used in child protection systems to provide a comprehensive framework by emphasising interconnectedness, collaboration, and prevention. This chapter shall continue to assess how it

¹⁰⁶ Bertalanffy, L, 'The History and Status of General Systems Theory' 410.

¹⁰⁷ Sutherland JW, 'General Systems Theory: Foundations, Developments, Applications Ludwig von Bertalanffy' 280.

¹⁰⁸ Shaw L, 'System Theory' 149 (3687) *Science*, 1965, 559-560.

¹⁰⁹ Bertalanffy, L, 'The History and Status of General Systems Theory' 410.

¹¹⁰ Warren K, Franklin C and Streeter CL, 'New Directions in Systems Theory: Chaos and Complexity' 360.

¹¹¹ Warren K, Franklin C and Streeter CL, 'New Directions in Systems Theory: Chaos and Complexity' 360.

¹¹² Sobeloff J Sann A, 'Systems Theory' 44(3) *Social Work*, 1999, 283-284.

shifts focus from individual errors to systemic factors, analysing components like policies, resources, and governance while addressing gaps and power dynamics. It shall also feature how it fosters multi-sector collaboration and prioritises early intervention by targeting root causes rather than merely reacting to violations. Ultimately, it avers that systems theory offers a holistic approach that strengthens child protection systems, promoting resilience, continuous improvement, and long-term effectiveness in safeguarding children's well-being.

2.3 Systems in Child Protection

A child protection system, viewed through the lens of systems theory, comprises a network of interconnected components, including laws, government agencies, families, communities, and children themselves.¹¹³ Each element is critical in influencing a child's well-being, and changes in one part of the system can have ripple effects throughout the entire structure.¹¹⁴ Notably the relationship and the interaction between the actors in the system, who are often adults acting on children's behalf, are also important.¹¹⁵ The outcomes of these interactions may compromise the system. Therefore, collaboration among different sectors, such as education, health, and social services, is important to create a seamless safety net for children.¹¹⁶ To this end it emphasises the need for prevention and response, indeed a strong child protection system not only addresses existing harm but also actively works to prevent it.¹¹⁷

A systems approach recognises children as rights-holders and active participants in their own protection.¹¹⁸ This necessitates listening to children, understanding their needs, and empowering them to contribute to creating a safer world. This application also requires adaptability and a willingness to meet the specific needs and circumstances of each community and country. However, the core principles of collaboration, prevention, and child-centeredness

¹¹³ United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021, 3,4.

¹¹⁴ Forbes B, Luu D, Oswald E and Tutnjevic, 'A Systems Approach to Child Protection' World Vision International, 2011, 4-< <https://www.wvi.org/child-protection/publication/systems-approach-child-protection> >on 21 January 2025.

¹¹⁵ United Nations Children's Fund, United Nations High Commissioner for Refugees, Save the Children and World Vision, *A Better Way to Protect ALL Children: The Theory and Practice of Child Protection Systems*, 2013, 3.

¹¹⁶ Terre Des Hommes, 'Enhancing Child Protection Systems' 18April/2023, 4.

¹¹⁷ United Nations High Commissioner for Refugees, *A Framework for the Protection of Children*, 2012, 2.

¹¹⁸ United Nations Children's Fund, United Nations High Commissioner for Refugees, Save the Children and World Vision, *A Better Way to Protect ALL Children: The Theory and Practice of Child Protection Systems*, 2013,17. Terre Des Hommes, 'Enhancing Child Protection Systems' 18 April 2023, 4. United Nations High Commissioner for Refugees, *A Framework for the Protection of Children*, 2012, 4.

remain paramount.¹¹⁹ To this end there exists dual elements to the application of the theory in child protection, formal elements as well as informal aspects which coexist and interact.¹²⁰

Formal elements constitute the codified structures, procedures, and institutions mandated by governmental authority, while informal elements encompass the socio-cultural norms, community values, and familial support networks that contribute to a child's overall development and protection.¹²¹

2.3.1 Formal Elements

The formal elements provide the essential framework upon which a robust child protection system is built. This framework is often derived from international human rights law, regional agreements, and national legislation, which establish clear standards, guidelines and mechanisms for child protection, ensuring adherence to fundamental principles and best practices.¹²² The various mechanisms ensure seamless implementation of child protection policies and legislation through delineated responsibilities, inter-sectoral collaboration, and decentralised service provision, thereby optimising resource allocation and impact.¹²³

In a proper system a comprehensive array of services, encompassing healthcare, education, and psychosocial support, must be accessible to all children, irrespective of their socio-economic background or geographical location.¹²⁴ To this end states ought to invest in a skilled workforce of trained professionals and establish sustainable funding mechanisms for the operational efficiency and long-term viability of the child protection system.¹²⁵

To facilitate feedback, systematic data collection analysis is important to enable the monitoring of progress, identification of systemic gaps, and evaluation of program efficacy.¹²⁶ This would contribute to evidence-based decision-making and continuous improvement. Ultimately, well defined referral pathways and response protocols would ensure that concerns regarding child

¹¹⁹ United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021, 2.

¹²⁰ United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021, 5.

¹²¹ Forbes B, Luu D, Oswald E and Tutnjevic, 'A Systems Approach to Child Protection' World Vision International, 2011, 4 -< <https://www.wvi.org/child-protection/publication/systems-approach-child-protection> >on 21 January 2025.

¹²² United Nations Children's Fund, United Nations High Commissioner for Refugees, Save the Children and World Vision, *A Better Way to Protect ALL Children: The Theory and Practice of Child Protection Systems*, 2013, 7.

¹²³ United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021, 5.

¹²⁴ CRC General comment No. 14, 3,14. Vandenhoele W *et al*, *Routledge International Handbook Children's Rights Studies*, 43. United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021, 4.

¹²⁵ United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021, 5.

¹²⁶ Terre Des Hommes, 'Enhancing Child Protection Systems' 18 April 2023, 2, 5, 6.

safety are reported, investigated, and addressed in a timely and appropriate manner, minimising delays and ensuring child-centred interventions.

2.3.2 Informal Element

Informal elements are embedded within the social and cultural fabric of a community. It plays a critical role in fostering a protective environment for children. Spearheaded by NGOs and CSOs, it operates outside formal government structures to provide localised support for child protection through leveraging community knowledge and resources.¹²⁷ Therefore, prevailing social norms and cultural values significantly influence societal attitudes towards children and can either reinforce or undermine child protection efforts.¹²⁸ Thus the need for culturally sensitive interventions and community engagement to promote positive social change is critical.

Strong family bonds, extended kinship networks, and supportive community relationships provides a crucial safety net for children. It offers emotional support, practical assistance, and informal monitoring to safeguard children within their social environment.¹²⁹ Yet active engagement of CSOs, NGOs and advocacy groups is essential for promoting child rights, providing specialised services, and empowering communities to participate in child protection initiatives. Recognising and fostering children's agency and providing avenues for their meaningful participation in decisions affecting their lives is paramount for ensuring child-centred protection and promoting their overall development.¹³⁰

2.4 Advantages and Disadvantages of Systems Theory

Systems theory offers significant advantages for understanding and improving child protection systems, but it also presents notable challenges. On the positive side, its holistic perspective enables a comprehensive view of child protection, moving beyond isolated issues to address the interconnected needs of all children. By emphasising prevention, it encourages proactive strategies that target root causes, such as family support and community engagement, rather

¹²⁷ Forbes B, Luu D, Oswald E and Tutnjevic, 'A Systems Approach to Child Protection' World Vision International, 2011, 71-74 -< <https://www.wvi.org/child-protection/publication/systems-approach-child-protection> >on 21 January 2025.

¹²⁸ United Nations Children's Fund, United Nations High Commissioner for Refugees, Save the Children and World Vision, *A Better Way to Protect ALL Children: The Theory and Practice of Child Protection Systems*, 2013, 114.

¹²⁹ United Nations High Commissioner for Refugees, *A Framework for the Protection of Children*, 2012, 2-5.

¹³⁰ United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021, 4.

than merely reacting to violations.¹³¹ The theory fosters collaboration across sectors like education, health, and social policy, promoting multi-level coordination for more effective interventions. Additionally, it highlights the importance of data-driven improvement, adaptability, and sustainability, ensuring systems can evolve to meet changing needs.¹³² Systems theory also empowers children as active participants, integrating their voices into decision-making processes.¹³³

However, the approach is not without limitations. Its abstract nature can make practical application challenging, particularly in defining and measuring system components.¹³⁴ The complexity and dynamic nature of child protection systems complicate efforts to predict outcomes or establish clear cause-and-effect relationships, which may deter practitioners accustomed to linear approaches.¹³⁵ Implementing a systems approach can be resource-intensive, requiring significant time and long-term commitment, which may be difficult in low-resource contexts.¹³⁶ There is also a risk of uneven development or systemic harm, where certain groups, such as ethnic minorities or children with disabilities, may be neglected or further marginalised.¹³⁷ Addressing power dynamics and ensuring cultural sensitivity are critical but often challenging aspects of this approach.¹³⁸ Furthermore, measuring the performance of prevention efforts and balancing formal and informal elements of child protection systems remain persistent difficulties.¹³⁹

2.5 Conclusion

In conclusion, systems theory provides a robust and holistic framework for addressing the multifaceted challenges of regulating OCSEA. By emphasising interconnectedness, feedback

¹³¹ United Nations Children's Fund, United Nations High Commissioner for Refugees, Save the Children and World Vision, *A Better Way to Protect ALL Children: The Theory and Practice of Child Protection Systems*, 2013.

¹³² United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021.

¹³³ Forbes B, Luu D, Oswald E and Tutnjevic, 'A Systems Approach to Child Protection' World Vision International, 2011, -<<https://www.wvi.org/child-protection/publication/systems-approach-child-protection>> on 21 January 2025.

¹³⁴ Sutherland JW, 'General Systems Theory: Foundations, Developments, Applications Ludwig von Bertalanffy' 280.

¹³⁵ Munro E, 'Improving Practice: Child Protection as a Systems Approach' *LSE Research Articles Online*, 2005, -<<http://eprints.lse.ac.uk/archive/00000359>> on 21 January 2025.

¹³⁶ United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021.

¹³⁷ Terre Des Hommes, 'Enhancing Child Protection Systems' 18 April 2023

¹³⁸ Munro E, 'Improving Practice: Child Protection as a Systems Approach' *LSE Research Articles Online*, 2005, -<<http://eprints.lse.ac.uk/archive/00000359>> on 21 January 2025.

¹³⁹ Forbes B, Luu D, Oswald E and Tutnjevic, 'A Systems Approach to Child Protection' World Vision International, 2011 -<<https://www.wvi.org/child-protection/publication/systems-approach-child-protection>> on 21 January 2025

loops, and dynamic relationships, systems theory enables a comprehensive understanding of the complex web of factors that sustain OCSEA, including technological, social, cultural, and institutional dimensions. Its focus on prevention encourages proactive strategies that target root causes, such as strengthening families, promoting community engagement, and addressing cultural taboos that hinder reporting. The theory's emphasis on collaboration across sectors such as law enforcement, education, health, and technology facilitates coordinated responses to the cross-border and anonymous nature of OCSEA, which traditional, siloed approaches often fail to address.

Moreover, systems theory's adaptive and data-driven approach allows for continuous improvement and responsiveness to emerging threats, such as advancements in encryption software and online communication platforms. By integrating the voices of children as active participants, it ensures that interventions are child-centred and culturally sensitive, addressing the unique vulnerabilities of marginalised groups. However, the application of systems theory is not without challenges. Its abstract nature and the complexity of child protection systems can make practical implementation difficult, particularly in resource-constrained contexts. The dynamic and unpredictable nature of OCSEA further complicates efforts to measure outcomes and establish clear causal relationships. Additionally, addressing power dynamics and ensuring cultural sensitivity remain critical yet challenging aspects of this approach.

Despite these limitations, systems theory offers a transformative lens for tackling OCSEA, promoting resilience, adaptability, and long-term effectiveness in safeguarding children's well-being. By balancing its strengths with an awareness of its challenges, stakeholders can leverage systems theory to develop innovative, sustainable, and inclusive strategies for combating OCSEA in an increasingly interconnected digital world. Ultimately, systems theory underscores the importance of viewing child protection as a dynamic, evolving system, where collaboration, prevention, and continuous learning are key to creating a safer environment for all children.

3 Chapter Three: Best interest of the Child in Systems of Child Protection

3.1 Introduction

The steadfast foundation of the best interest of the child is the UNCRC which asserts that it is a primary consideration in all matters concerning children.¹⁴⁰ It is among the four core principles of the UNCRC that enforce child welfare provisions as binding obligations on member states.¹⁴¹ It is a complex, multifaceted concept that serves as a substantive right, an interpretative principle, and a rule of procedure.¹⁴² This threefold nature seeks to ensure comprehensive protection and consideration of children's well-being in all contexts.

While the UNCRC solidified the best interest of the child principle as a binding legal obligation, the concept's origins can be traced back to earlier welfare frameworks and declarations, including the 1959 Declaration of the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.¹⁴³ These instruments laid the groundwork for recognising children's distinct needs and the state's role in protecting their well-being. The UNCRC transformed this principle into a rule to examine whether a state party has acted proportionately when considering the best interests of the child.¹⁴⁴

It is thus the cornerstone of modern child welfare and legal frameworks. It represents a significant shift in societal and legal thinking about children, moving away from viewing them as possessions, and towards recognising them as rights-holders with unique needs and perspectives.¹⁴⁵ In this respect it can be utilised to improve child protection systems by bridging legislative gaps, reinforcing weak implementation, rectifying poor coordination, and streamlining unclear standards. To illustrate this, the chapter will begin by outlining the functions of the best interest of the child principle. It will then examine its application within Kenya's legal framework, using this foundation to propose how the principle can be effectively

¹⁴⁰ Article 3, *United Nations Convention on the Rights of the Child* 1989 27531 UNTS 1577. Kalra PPK Mahapatra M, 'Critical Analysis of the Best Interest of Child Theory,' 4 *International Journal of Law Management & Humanities*, 2021, 382.

¹⁴¹ Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function,' 18(4) *International Journal of Children's Rights*, 2010, 483.

¹⁴² CRC General comment No. 14, on the Right of the Child to have His or Her Best Interests Taken as a Primary Consideration, 29 May 2013, 4.

¹⁴³ CRC General comment No. 14, 3. Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function,' 484.

¹⁴⁴ Article 3, *United Nations Convention on the Rights of the Child*.

¹⁴⁵ Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function,' 483,484, 493.

integrated into child protection systems. The discussion will conclude by synthesising key insights and observations.

3.2 Functions of the Best Interest of the Child

3.2.1 Substantive Right

The principle of the best interest of the child is a fundamental right in itself. It guarantees that children have the right to have their best interests assessed and taken as a primary consideration in all actions concerning them.¹⁴⁶ This right is intrinsic to the dignity of a child and can be invoked in court, thus creating an obligation for states to actively protect and enforce it.¹⁴⁷ States are mandated to implement mechanisms to ensure that the child's best interests are considered. This includes enacting legislation that requires decision-makers to consider the best interests of the child.¹⁴⁸ It may also empower child protection systems to address cultural concerns that impact a child's well being by utilising informal initiatives, such as grassroots education forums that would teach the inherent dignity of the child.

The substantive nature of this right has been reinforced by the jurisprudence of the ECtHR. For instance, in *MPEV and Others v Switzerland*, the ECtHR found a violation of Article 8 of the ECHR because national authorities had failed to reference the child's best interests in their decision-making process.¹⁴⁹ This case underscores the obligation of states to not only recognise the best interest principle as a substantive right but also to actively incorporate it into their legal and administrative frameworks.

3.2.2 Interpretative Legal Principle

The principle also acts as a guide for interpreting laws and policies related to children. When a law or provision has multiple interpretations, the one that most effectively serves the child's best interests should be chosen.¹⁵⁰ This aims at ensuring all legal and policy decisions affecting children are guided by this principle to promote the child's well-being. The UNCRC rights set the framework for interpretation.¹⁵¹ Thus, provisions in the UNCRC and its Optional protocols

¹⁴⁶ CRC General comment No. 14, 3. Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function,' 485-487.

¹⁴⁷ CRC General comment No. 14, 5. Sormunen M, 'Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights,' 752

¹⁴⁸ Article 3, United Nations Convention on the Rights of the Child 1989, 27531 UNTS 1577. Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function,' 497.

¹⁴⁹ *MPEV and Others v Switzerland*

¹⁵⁰ Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function,' 486.

¹⁵¹ CRC General comment No. 14, 5.

are the minimum standard of what is in the best interest of the child. This function is important in situations where the child's rights can be maximised or when two rights or interests of the same child compete against each other.¹⁵² A burgeoning example in this respect is their right to information as well as their right to privacy as against the right to be protected from child abuse including online child abuse. The burden is on decision makers to make the appropriate considerations in balancing these rights.

In bridging the gap of interpretation national legislation requires practitioners to evaluate key factors such as the child's age, maturity, stage of development, gender, background, and specific needs, including those arising from disabilities or chronic ailments.¹⁵³ These considerations ensure decisions are tailored to the child's unique circumstances, while also accounting for their relationships with parents or guardians and, where appropriate, their own views. To ensure a consistent and comprehensive interpretation of the child's best interests, courts should connect these considerations to the factors outlined in local legislation and align them with the CRC Committee's General Comment No. 14.¹⁵⁴ This integrated approach would strengthen decision-making processes, ensuring they are both thorough and aligned with international child protection standards, ultimately safeguarding the holistic well-being of children.

3.2.3 Rule of Procedure

Any decision-making process affecting a child must include an evaluation of the potential positive or negative impacts of that decision on the child.¹⁵⁵ This involves employing procedural guarantees to assess and determine the best interests of the child, including clearly explaining how those interests have been defined, the criteria used, and how the child's interests have been weighed against other considerations. As emphasised in *MB v NB*, legal technicalities should not hinder the quest to determine the best interests of a child.¹⁵⁶ Echoing the sentiment expressed by Sachs J in *AD and another v DW and others*, a child's best interests must not be mechanically sacrificed on the altar of jurisdictional formalism.¹⁵⁷ Instead, the process must prioritise the child's welfare above procedural rigidities. This function has four

¹⁵² Kalra PPK Mahapatra M, 'Critical Analysis of the Best Interest of Child Theory,' 384.

¹⁵³ First Schedule, *Children Act* (Act no.146 of 2022).

¹⁵⁴ Chitha MF, 'Malawi's Legislative Integration and the Court's Interpretation and Application of 'The Best Interest of the Child' vis a vis International and Regional Standards'

¹⁵⁵ Kalra PPK Mahapatra M, 'Critical Analysis of the Best Interest of Child Theory,' 384.

¹⁵⁶ *MB v NB* (2018) High Court of South Africa.

¹⁵⁷ *AD and Another v DW and Others* (2007) Constitutional Court of South Africa.

major subcomponents, the first being conducting a proper assessment. Decisions ought to be based on comprehensive assessments of the child's situation and needs and often involves input from experts.¹⁵⁸ Incidental to this is the need to ensure due process by adhering to standards of fairness, impartiality, and transparency in legal and administrative procedures.¹⁵⁹ Decision makers also ought to consider the alternatives by evaluating all options and selecting the least detrimental outcome for the child.¹⁶⁰ Finally, a fair hearing should be conducted by ensuring that their voice is heard and given due weight in legal proceedings.¹⁶¹

These functions notwithstanding, scholars and practitioners have criticised the best interest of the child principle due to its perceived vagueness and subjectivity. It may be considered subjective in two ways, first is collective subjectivity which reflects a society's view of what is in a child's best interest at a given time and second, in personal subjectivity, that is, the views of parents, caregivers, the child, and decision-makers.¹⁶² Determining what constitutes a child's best interests can be challenging, since there is no universal agreement, and cultural and socio-economic factors can influence perceptions.¹⁶³ While the best interest principle is relative to space and time, dependent on scientific knowledge and theories, it cannot be undermined by cultural relativism which justifies negative impacts on the child's rights.¹⁶⁴

Balancing the interests of children with those of their parents or the state also presents complex dilemmas.¹⁶⁵ Regardless, this subjectivity may also be an advantage which allows its application in diverse situations. In fact, it would be useful in navigating the complexities of OCSEA. In some respects, a subjective interpretation of the best interest of the child can expand the scope of its application from a state obligation to a conjunctive global mandate of all states. It also requires consideration of the short, medium, and long-term perspectives of the child as a developing human being.¹⁶⁶ Indeed, it is an evolving concept that must adapt to new knowledge and jurisprudence.

¹⁵⁸ Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function,' 494.

¹⁵⁹ Sormunen M, 'Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights,' 748.

¹⁶⁰ Sormunen M, 'Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights,' 761, 762.

¹⁶¹ CRC General comment No. 14, 11, 12.

¹⁶² Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function,' 494.

¹⁶³ Mureithi PN, 'The Court's Interpretation and Application of the Best Interest Principle in Child Custody Cases in Kenya' Published LLM Thesis, University of Nairobi, Nairobi, 2020, 11.

¹⁶⁴ Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function,' 495.

¹⁶⁵ CRC General comment No. 14, 20.

¹⁶⁶ UNICEF Innocenti Research Centre, *The Evolving Capacities of the Child*, 2005, 15.

3.3 Application of the Best Interest of the Child in Kenya

In Kenya, the best interest of the child is protected under the Constitution and the Children Act. In conjunction they provide it to be of paramount importance¹⁶⁷ and the primary consideration¹⁶⁸ in all matters relating to children. ‘All matters’ refers to all actions concerning children as conducted by public and private social welfare institutions, courts of law, administrative authorities, or legislative bodies.¹⁶⁹ These actions ought to be directed at safeguarding, conserving, and securing the child guidance necessary for the welfare of the child. In addition to this it provides that the views of the child ought to be considered in accordance with the evolving capacities of the child.¹⁷⁰

The First Schedule further outlines several key factors that must be evaluated. These include the child’s age, maturity, stage of development, gender, background, and any other relevant characteristics, which help contextualise the child’s needs and vulnerabilities.¹⁷¹ Special attention is given to children with distinct needs arising from chronic ailments or disabilities, ensuring they receive appropriate support and accommodations.¹⁷² The child’s relationships with parents, guardians, and other significant individuals are also assessed, as these relationships play a critical role in their emotional and psychological well-being.¹⁷³ A child having sufficient age and maturity, must have their preferences considered, thus acknowledging their right to participate in decisions affecting their lives.¹⁷⁴

The stability and adequacy of the child’s current and proposed living arrangements are critical considerations. Maintaining continuity in living arrangements is often essential for a child’s sense of security, while proposed changes must be evaluated for their potential to provide a safe and nurturing environment.¹⁷⁵ The motivation and capacities of caregivers to provide love, affection, and guidance are also assessed, as these factors directly impact the child’s development and well-being. Additionally, the child’s adjustment to their present home, school, and community is examined to determine whether their current environment supports their growth.

¹⁶⁷ Article 53, *Constitution of Kenya* (2010).

¹⁶⁸ Section 8(1)(a), *Children Act* (Act no.146 of 2022).

¹⁶⁹ Section 8(1), *Children Act* (Act no.146 of 2022).

¹⁷⁰ Section 8(2)(3), *Children Act* (Act no.146 of 2022).

¹⁷¹ First Schedule (1), *Children Act* (Act no.146 of 2022).

¹⁷² First Schedule (2), *Children Act* (Act no.146 of 2022).

¹⁷³ First Schedule (3), *Children Act* (Act no.146 of 2022).

¹⁷⁴ First Schedule (4), *Children Act* (Act no.146 of 2022).

¹⁷⁵ First Schedule (5)(6), *Children Act* (Act no.146 of 2022).

Parental dynamics are another important consideration. The capacity of each parent or guardian to facilitate frequent and continuing contact with the other parent, as well as their ability to cooperate in child upbringing, is evaluated.¹⁷⁶ Methods for resolving disputes and promoting cooperation are also considered, alongside the potential impact of granting sole authority over the child's upbringing to one parent or guardian. The presence of domestic abuse, whether past or present, and its effect on the child's emotional stability and physical safety are critical factors in safeguarding the child from harmful environments. Similarly, any history of child abuse by a parent, guardian, or household member is taken into account to prevent further harm.¹⁷⁷ Finally, any other factors that may directly or indirectly affect the child's physical and psychological well-being are considered, ensuring a comprehensive assessment of their circumstances.

These considerations are applied across all decisions involving children, whether judicial, administrative, or by social welfare institutions. In *CK v The Commissioner of Police*, the court interpreted the best interest of the child as requiring not only the establishment of protective laws but also their proper enforcement by state agencies.¹⁷⁸ The court found that the police's failure to act on complaints of defilement violated the child's rights under Article 53 of the Constitution. The case also highlights the state's obligation to ensure that laws aimed at protecting children are effectively implemented, reinforcing the principle that the best interest of the child must guide all actions concerning children.

Similarly, in *BO and another v Independent Policing Oversight Authority & 2 others*, the court emphasised the paramount importance of the child's best interests in a case involving a fourteen-year-old victim of sexual abuse.¹⁷⁹ The court upheld the trial court's decision to place the child in protective custody, citing her vulnerability, history of truancy, and exposure to harmful influences. The court's ruling underscored the need to prioritise the child's safety and well-being over other considerations, demonstrating the practical application of the best interest principle in safeguarding children from harm.

For children in conflict with the law, courts have also emphasised the importance of the best interest principle. For example, in *VCK v Republic*, the court noted that imprisonment should

¹⁷⁶ First Schedule (9-12), *Children Act* (Act no.146 of 2022).

¹⁷⁷ First Schedule (14), *Children Act* (Act no.146 of 2022).

¹⁷⁸ *CK (A CHILD) through Ripples International as her guardian and Next friend) and 10 others v The Commissioner of Police/ Inspector General of the National Police Service and 3 others* (2012) eKLR.

¹⁷⁹ *BO (Minor) & another v Independent Policing Oversight Authority & 2 others* (2023) eKLR.

be a last resort for children and that their holistic well-being must be considered before imposing custodial sentences.¹⁸⁰ This approach aligns with the constitutional requirement to prioritise the child's best interests, even in criminal proceedings. Similarly, in *PMK v Inspector General of Police*, the court declared that maintaining permanent criminal records for minors violated their rights and was contrary to their best interests.¹⁸¹ The court's decision underscored the need for special protections of children in conflict with the law, as outlined in the Children Act.

The best interest principle also extends to cases involving cultural practices and education. In *Council of Imams and Preachers of Kenya v Attorney General*, the court rejected arguments that a sixteen-year-old girl was mature enough for marriage under religious customs, emphasising that early marriages are not in the best interest of the child.¹⁸² The court's decision reinforced the legal protections against harmful cultural practices that undermine children's rights. Similarly, in *GM v Board of Management M High School*, the court ruled that a school's decision to exclude a student without considering his right to education and fair administrative action violated his best interests.¹⁸³ The court ordered the student's readmission and compensation for lost learning, highlighting the importance of ensuring that educational institutions act in the best interest of the child.

In custody disputes, the best interest principle is central to determining the most suitable arrangements for the child. In *JMM v JCN*, the court emphasised the paramount importance of the child's welfare and ordered a DNA test to determine paternity, ensuring that the child's best interests were prioritised in resolving the custody dispute.¹⁸⁴ Similarly, in *Republic v Bilali*, the court considered the welfare of the accused's children when sentencing him for manslaughter.¹⁸⁵ Recognising that the children would be adversely affected if their only surviving parent was given a custodial sentence, the court opted for a non-custodial sentence to enable the father to provide parental support.

The flexibility of the best interest framework allows for a nuanced approach, recognising that each child's situation is unique and requires tailored solutions. This is evident in cases such as

¹⁸⁰ *VCK v Republic* (2023) eKLR.

¹⁸¹ *PMK v Inspector General of Police & 2 others* (2019) eKLR.

¹⁸² *Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others* (2015) eKLR.

¹⁸³ *GM (Suing as the father and next friend of (JTM Minor) & another v Board of Management M High School & 3 others; Ministry of Education & 7 others (Interested Parties)* (2022) eKLR.

¹⁸⁴ *JMM v JCN* (2014) eKLR.

¹⁸⁵ *Republic v Bilali* (2024) eKLR.

M W K v Attorney General,¹⁸⁶ where the court awarded damages to a minor whose rights were violated during a strip search, and *Wanuri Kiahua v Kenya Film Classification Board*, where the court considered the best interest of children in balancing freedom of expression with the need to protect children from harmful content.¹⁸⁷ These cases illustrate the broad application of the best interest principle across diverse contexts, ensuring that the child's welfare remains the primary consideration in all decisions affecting them.

3.4 The Best Interest of the Child in Child Protection Systems

Child protection, particularly in the context of OCSEA, faces significant challenges such as legislative gaps, weak implementation, poor coordination, and unclear standards. The best interest of the child principle offers a robust foundation to address these issues. Through its application, states and stakeholders can strengthen child protection systems, guiding legislative development, ensuring accountability, fostering multi-sectoral coordination, and establishing child-centred standards. In contexts like OCSEA, where emerging threats demand adaptive responses, the principle serves as a critical tool to safeguard children's rights, prioritise their well-being, and address their vulnerabilities effectively.

A significant challenge in child protection, particularly concerning OCSEA, is the lack of comprehensive legislation.¹⁸⁸ Some states lack specific laws criminalising OCSEA-related activities such as online grooming and livestreaming of CSAM, thus hindering protection measures. However, the best interest of the child mandates that states prioritise children's well-being in all legislative actions, creating obligations for the state and its organs to protect children.¹⁸⁹ This principle can be invoked to guide action and inform legal development, even in the absence of specific OCSEA laws. By applying this principle, legislators and other actors can ensure that children's rights are protected, and their needs are met in the digital age. For instance, the principle requires that all actions concerning children, be directed at safeguarding, conserving, and securing the child's welfare.¹⁹⁰ This includes considering the child's views, age, maturity, stage of development, gender, and background.¹⁹¹ These considerations ensure

¹⁸⁶ *M W K v another v Attorney General & 3 others* (2017) eKLR.

¹⁸⁷ *Wanuri Kiahua and Another v CEO Kenya Film Classification Board Ezekiel Mutua and 2 others* (2020) eKLR.

¹⁸⁸ United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021, 7.

¹⁸⁹ CRC General comment No. 14, 3. *Draft articles on state responsibility for internationally wrongful acts*, ILC 53rd Report, 2001, UN Doc A/56/10.

¹⁹⁰ Section 8(1), *Children Act* (Act no.146 of 2022).

¹⁹¹ First Schedule (4), *Children Act* (Act no.146 of 2022).

that legislative and policy responses are tailored to the unique vulnerabilities of children in the digital space.

Despite robust legislation, weak implementation can hinder child protective efforts.¹⁹² For instance, even with laws against CSAM, poor enforcement and limited resources can hinder investigations and prosecutions, allowing the crime to persist. The best interest of the child mandates its consistent application in all legal and administrative proceedings concerning children.¹⁹³ This obligates all levels of government to establish and maintain accessible mechanisms for complaints and redress.¹⁹⁴ In this way, the principle provides legal recourse to challenge inadequate implementation, thus strengthening its protective power. Where enforcement mechanisms fail to meet required standards, the principle can be invoked to demand accountability and improved implementation.

Poor coordination among stakeholders also hinders effective child protection.¹⁹⁵ A lack of clear protocols for information sharing between social workers, law enforcement, internet service providers, and even medical personnel in OCSEA cases can hinder intervention and allow abusers to evade justice. The best interest principle promotes holistic consideration of all potential impacts on children through effective coordination and collaboration among stakeholders.¹⁹⁶ To this end, states may formalise multi-sectoral coordination mechanisms to ensure a unified approach to child protection. This aligns with the principle's emphasis on assessing the child's relationships with parents, guardians, and other significant individuals, as well as their adjustment to their home, school, and community.¹⁹⁷ By fostering collaboration, stakeholders can better address the child's holistic well-being, ensuring that no aspect of their protection is overlooked.

This principle also strengthens monitoring and review mechanisms in child protection. States are obligated to establish processes for reviewing and revising decisions concerning children, particularly when these appear inconsistent with the principle.¹⁹⁸ This includes accessible

¹⁹² United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021, 7.

¹⁹³ CRC General comment No. 14, 3. Sormunen M, 'Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights,' 757.

¹⁹⁴ ILC, *Draft articles on state responsibility for internationally wrongful acts*.

¹⁹⁵ United Nations Children's Fund, United Nations High Commissioner for Refugees, Save the Children and World Vision, *A Better Way to Protect ALL Children: The Theory and Practice of Child Protection Systems*, 2013, 4-6.

¹⁹⁶ CRC General comment No. 14, 4-8.

¹⁹⁷ First Schedule, *Children Act* (Act no.146 of 2022).

¹⁹⁸ Article 37, *United Nations Convention on the Rights of the Child*.

appeal mechanisms, ensuring children have recourse when their best interests are not prioritised. This reinforces accountability by requiring decision-makers to justify their actions in relation to the child's well-being. In cases of abuse, courts evaluate factors such as parental dynamics, the presence of domestic abuse, and the child's own preferences to ensure that decisions align with the child's best interests. This comprehensive assessment ensures that all decisions are child-centred and rights-based.

The absence of clear and comprehensive standards of operating procedure can hinder effective child protection.¹⁹⁹ To exemplify, without these standards, frontline professionals may fail to recognise or respond appropriately to abuse. The principle provides a framework for developing consistent child-centred and rights-based standards.²⁰⁰ This ensures that all procedures prioritise the child's safety, well-being, and development, fostering consistency in service provision. An illustration of this is the first schedule of the Children Act, by embedding these considerations into standard operating procedures, frontline workers can better identify and respond to risks, ensuring that the child's best interests are always prioritised.

Finally, fragmented and uncoordinated responses hinder effective child protection.²⁰¹ If agencies working on online child protection operate in silos, it can lead to duplicated efforts and missed opportunities for intervention. The principle of the best interest promotes integrated services and inter-agency coordination.²⁰² By guiding decision-makers to consider the least detrimental alternative, it fosters a collaborative, holistic approach that prioritises the child's overall well-being. This includes evaluating the child's current and proposed living arrangements, the motivation and capacities of caregivers, and the child's adjustment to their environment. By ensuring that all stakeholders work together, the principle helps create a unified response that addresses the child's needs comprehensively, safeguarding their physical and psychological well-being.

3.5 Conclusion

This chapter has explored the best interest of the child principle as a cornerstone of child protection systems, emphasising its threefold function as a substantive right, an interpretative

¹⁹⁹ United Nations Children's Fund, *Child Protection Systems Strengthening*, September 2021, 14.

²⁰⁰ Sormunen M, 'Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights,' 748.

²⁰¹ United Nations Children's Fund, United Nations High Commissioner for Refugees, Save the Children and World Vision, *A Better Way to Protect ALL Children: The Theory and Practice of Child Protection Systems*, 2013, 3,4.

²⁰² CRC General comment No. 14, 12.

legal principle, and a rule of procedure. Rooted in the UNCRC and reinforced by national instruments, the principle mandates that children's well-being be the primary consideration in all actions affecting them. It provides a robust foundation for addressing gaps in legislation, weak implementation, poor coordination, and unclear standards, particularly in the context of OCSEA. By prioritising the child's age, maturity, background, and unique needs, the principle ensures that child protection systems are tailored to safeguard their rights and well-being.

However, significant challenges remain in applying the principle effectively, especially in the digital age. While the best interest of the child is frequently invoked in legislative and judicial proceedings, its application often falls short in the implementation of private corporate projects and initiatives. ICT corporations like Meta and Google, which play a central role in enabling OCSEA through their internet platforms, are not explicitly bound by the legal obligations imposed on private social welfare institutions. This creates a critical gap in enforcement, as the internet remains the primary tool for facilitating OCSEA. The lack of binding obligations on corporations undermines efforts to protect children in the digital space, highlighting the need for stronger regulatory frameworks that hold these entities accountable.

This paper will attempt to address these challenges by applying the best interest of the child principle to child protection systems within both national and international legal and institutional frameworks. It will explore how the principle can be extended to regulate corporate responsibilities and ensure that private entities prioritise children's well-being in their operations. By bridging the gap between legal obligations and corporate accountability, the paper aims to strengthen child protection systems and create a safer digital environment for children. The evolving nature of the best interest principle, coupled with its adaptability to diverse contexts, makes it a vital tool for addressing the complexities of OCSEA and ensuring that children's rights are upheld in all spheres of society.

4 Chapter Four: Legal and Institutional Frameworks Combating OCSEA

4.1 Introduction

Kenya has one of the highest internet penetration rates in Africa. As of 2020, over 41.5 million Kenyans, out of a population of 47.6 million, were active internet users, a number that has continued to rise.²⁰³ While this digital expansion has brought immense opportunities for education, communication, and economic growth, it has also opened the door to new forms of exploitation, OCSEA. The internet, once a tool for empowerment, has become a double-edged sword, enabling perpetrators to exploit vulnerable children with alarming ease.

The rise in OCSEA cases in Kenya is a stark reminder of the darker side of technological advancement. With the proliferation of social media platforms, messaging apps like WhatsApp and Telegram, and the anonymity they provide, offenders have found new ways to groom, recruit, and sexually exploit children.²⁰⁴ For instance, Edda Wakesho, a house help in Mombasa, was sentenced to life imprisonment for filming herself defiling a four-year-old boy and sharing the video online for financial gain.²⁰⁵ Similarly, Thomas, a 74-year-old German national, was convicted to 81 years in prison for defiling underage boys and distributing child pornography to overseas contacts.²⁰⁶ These cases highlight the disturbing reality of how technology is being weaponised to perpetrate heinous crimes against children.

The availability of internet-enabled devices, often intended for educational purposes, has inadvertently exposed children to predators. John, a young boy from Mombasa, was given a mobile phone for online studies, only for his mother to discover explicit chats and requests for nude photos from an adult male.²⁰⁷ Similarly, Sharon, a Class 8 graduate, was lured into posting sexually explicit content on social media by an older friend who promised financial rewards.²⁰⁸

²⁰³ Damji M, 'Online sexual abuse: Girls advertised then abducted' The Star News, 07 December 2021- <<https://www.the-star.co.ke/sasa/lifestyle/2021-12-18-online-sexual-abuse-girls-advertised-then-abducted>> on 17 February 2025.

²⁰⁴ Damji M, 'Online sexual abuse: Girls advertised then abducted'.

²⁰⁵ Bwana J Maid gets life sentence for filming herself defiling four-year-old boy <<https://www.standardmedia.co.ke/coast/article/2001439170/maid-gets-life-sentence-for-filming-herself-defiling-four-year-old-boy>> on 25 February 2025.

²⁰⁶ *Disrupting Harm in Kenya Evidence on Online Child Sexual Exploitation and Abuse*, 34. Munguti R, 'German 74, to serve 81 years for defilement, child pornography', Nation <<https://nation.africa/kenya/news/german-74-to-serve-81-years-for-defilement-child-pornography--4330346>> on 25 February 2025.

²⁰⁷ Kwamboka R, 'Nairobi, Kiambu record highest child sex predators online' Nation, 2023- <<https://www.standardmedia.co.ke/national/article/2001438679>> on 17 February 2025.

²⁰⁸ Kwamboka R, 'Nairobi, Kiambu record highest child sex predators online'.

Children are vulnerable to in this digital age where the lines between opportunity and exploitation are increasingly blurred.

Laws and policies aimed at protecting children in Kenya are nothing short of robust. However significant gaps remain in their implementation. Victims often face stigma, disbelief, and bureaucratic hurdles when reporting abuse, while law enforcement agencies struggle with limited training and resources to investigate and prosecute online crimes.²⁰⁹ The lack of awareness among caregivers and the reluctance to report such incidents further exacerbate the problem. For instance, less than 5% of children who experience OCSEA report it to the authorities, often due to fear of shame or retribution.²¹⁰ Moreso these issues are exacerbated by the transnational nature of the crime especially where there is no scheme for international cooperation.

The Kenyan government has taken steps to address this crisis, including the establishment of specialised units like the Anti-Human Trafficking and Child Protection Unit and the development of training manuals for law enforcement and social workers.²¹¹ However, the fight against OCSEA requires a collective effort from all stakeholders, digital service providers included, to create a safer online environment for children.²¹² This chapter will evaluate the existing frameworks designed to address OCSEA, examining them on a global level, a national public level, and an institutional private level for ICT companies, before reaching conclusions.

4.2 International Framework addressing OCSEA

4.2.1 United Nations Convention on the Rights of the Child

The text of the UNCRC has no explicit provision against crimes of OCSEA aside from the general prohibition of sexual abuse. Instead, states sought to incorporate such provision through its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (hereinafter the OPSC). This protocol addresses the proliferation of CSAM on

²⁰⁹ 'Laws against child sexual abuse exist in Kenya. But there are gaps', 23 October 2019, <<https://theconversation.com/laws-against-child-sexual-abuse-exist-in-kenya-but-there-are-gaps-124649>> on 17 February 2025.

²¹⁰ Laws against child sexual abuse exist in Kenya. But there are gaps.

²¹¹ Kwamboka R, 'Nairobi, Kiambu record highest child sex predators online'

²¹² Kagero A, 'Excessive online time of children can lead to various negative consequence', 12 February 2025, <<https://www.kenyanews.go.ke/excessive-online-time-of-children-can-lead-to-various-negative-consequences/>> on 17 February 2025.

the internet and other technologies, emphasising the need for cooperation between governments and the internet industry to combat this crime.²¹³

It criminalises the production, distribution, dissemination, importation, exportation, offering, selling, or possession of child pornography, whether committed domestically or transnationally, individually or as part of organised crime.²¹⁴ The protocol promotes a holistic approach, addressing underlying factors such as poverty, underdevelopment, and lack of education that contribute to child exploitation.²¹⁵ It mandates public awareness and prevention efforts, including education and training, and prohibits the production of material advertising such offenses.

The protocol also seeks to strengthen international cooperation through multilateral, regional, and bilateral arrangements for the prevention, detection, investigation, prosecution, and punishment of offenders.²¹⁶ It emphasises victim protection, requiring measures to safeguard the rights and interests of child victims throughout the criminal justice process, including providing support services, protecting their privacy, and avoiding unnecessary delays. Notably, offenses related to child pornography are included as extraditable offenses through mutual legal assistance in extradition treaties, and States Parties are required to establish jurisdiction over such offenses when committed in their territory, on registered ships or aircraft, or involving their nationals or habitual residents.²¹⁷ These measures collectively aim to combat CSAM in the international sphere by providing a framework for international cooperation on such matters.

This Optional Protocol has garnered widespread global acceptance, with 178 states having ratified it,²¹⁸ thereby enabling its broad application in addressing the escalating issue of CSAM. While the protocol may lack some contemporary definitions, it establishes a critical framework for international cooperation in combating such offenses. Notably, Kenya has only signed the Optional Protocol and has not yet ratified it, meaning it is not a full party to the instrument. While signing demonstrates the state's intent to comply with the protocol's provisions,

²¹³ Preamble, *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to the Convention on the Rights of the Child*, 25 March 2000, UNTS 54/263.

²¹⁴ Article 9, *OPSC* (2000).

²¹⁵ Article 10(3), *OPSC* (2000).

²¹⁶ Article 10(1), *OPSC* (2000).

²¹⁷ Article 4, *OPSC* (2000).

²¹⁸ UNTS Depository < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&clang=en#7 > on 26 February 2025.

ratification is necessary for its formal application within Kenya's jurisdiction, even in a monist legal system.²¹⁹ Consequently, the provisions of the protocol do not currently apply to Kenya, highlighting a gap in the country's legal framework for addressing CSAM through this international instrument.

If ratified the OPSC would significantly benefit Kenya in combating OCSEA. First, it would strengthen its legal framework, aligning with international standards to criminalise the production, distribution, and possession of CSAM.²²⁰ The National Centre for Missing and Exploited Children through its cyber tipline reported over 12,000 occurrences of OCSEA in each year from 2017 to 2019 in Kenya.²²¹ This underscores the need to enhance Kenya's ability to prosecute offenders and address the transnational nature of the crime through improved international cooperation with other agencies like EUROPOL, and to further entrench access to tools such as the INTERPOL ICSE database for cross-border investigations.²²² This would also provide an avenue for capacity-building for law enforcement by providing specialised training and investigative tools to detect and combat OCSEA effectively.²²³ Ratifying the OPSC would position Kenya within a global consensus, granting access to technical assistance, resources, and best practices, ultimately strengthening its efforts to protect children from exploitation and ensure justice for victims.

4.2.2 African Charter on the Rights and Welfare of the Child

Under the ACWRC, State Parties are obligated to take steps to protect children from all forms of sexual exploitation and abuse. These measures include preventing the inducement, coercion, or encouragement of children to engage in any sexual activity.²²⁴ Additionally, States are required to safeguard children from being used in prostitution, other sexual practices, or pornographic activities, performances, and materials.²²⁵ To supplement this the African Union has developed a Continental Strategy and Plan of Action to strengthen regional and national capacities in combating OCSEA across Africa. This strategy aims to establish a comprehensive and coordinated effort to mobilise member states, stakeholders to partner in prevention,

²¹⁹ UNTS Glossary, < https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml > on 26 February 2025.

²²⁰ ECPAT, *Summary Paper on Online Child Sexual Exploitation*, 3,4.

²²¹ *Disrupting Harm in Kenya Evidence on Online Child Sexual Exploitation and Abuse*, 38-40.

²²² UNICEF Innocenti Research Centre, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, 2009, 2.

²²³ ECPAT, *Summary Paper on Online Child Sexual Exploitation*, 14.

²²⁴ Article 16, *African Charter on the Rights and Welfare of the Child*, 11 July 1990.

²²⁵ Article 27, *African Charter on the Rights and Welfare of the Child* (1990).

protection, and prosecution of the crime. It recognises OCSEA as an emerging child protection issue in Africa, emphasising that State Parties to the ACRWC are obligated to protect children from such exploitation.²²⁶

The strategy was formulated in response to several factors, including rapidly increasing internet connectivity, limited regulation, the impact of the COVID-19 pandemic, low awareness of OCSEA, and poverty.²²⁷ It adopts a multi-pronged approach centred on prevention, protection, prosecution, and partnership to achieve its vision of an Africa where all children enjoy their rights and welfare daily.²²⁸

The strategy's implementation is guided by the WeProtect Model National Response, a framework designed to help countries establish coordinated national responses to OCSEA.²²⁹ It outlines six categories of focus; policy and governance, criminal justice, victim support, societal efforts, industry engagement, and media and communication.²³⁰ By leveraging this model Kenya can strengthen its capabilities across these six areas to scale on a continental level. It would help the State address systemic issues such as underreporting, cultural acceptance of abuse, and limited law enforcement capacity. For instance, the criminal justice focus would address investigative limitations and judicial delays by providing resources for training law enforcement, improving forensic capabilities, and enhancing cross-border cooperation to combat online abuse.²³¹

On the front of victim support, Kenya has the need to provide specialised and long-term assistance to child victims to ensure their protection throughout the legal process. This support is crucial to address the current gaps that often result in victims disengaging from court proceedings.²³² The societal and media and communication components of the strategy would help combat cultural acceptance of abuse and raise public awareness, fostering a societal shift in attitudes toward child protection. Furthermore, the strategy's emphasis on industry engagement would encourage collaboration with the private sector to develop technological

²²⁶ African Union Initiative on; Strengthening Regional and National Capacity and Action against Online Child Sexual Exploitation and Abuse in Africa Strategy and Plan of Action 2020 – 2025, 2.

²²⁷ African Union Initiative on; Strengthening Regional and National Capacity and Action against OCSEA, 5.

²²⁸ African Union Initiative on; Strengthening Regional and National Capacity and Action against OCSEA, 3, 6.

²²⁹ African Union Initiative on; Strengthening Regional and National Capacity and Action against OCSEA, 6.

²³⁰ African Union Initiative on; Strengthening Regional and National Capacity and Action against OCSEA,

²³¹ Orji UJ, 'Multilateral Legal responses to Cyber Security in Africa: Any Hope for Effective International cooperation?' *African Centre for Cyber Law and Cybercrime Prevention*, 2015, 110,111.

²³² Davenport L, Mutisya M, 'Policing Child Abuse in Kenya—Perspectives from the Frontline' *Journal of Policy and Practice*, 2024, 6,7.

solutions and employ best interest of the child considerations to prevent and combat OCSEA, By adopting the AU strategy, Kenya can also enhance international cooperation, access technical assistance,²³³ and align with regional efforts to combat OCSEA, ultimately creating a more coordinated and effective national response to protect children from exploitation and abuse.

4.2.3 African Union Convention on Cyber Security and Personal Data (Malabo Convention)

States in Africa further attempt to regulate cross border crime through the Malabo Convention on data protection. To this end it criminalises child pornography, promotes international cooperation and the harmonisation of cybersecurity systems. Child pornography is criminalised as a content related offence of which production, procurement and possession are prohibited. State Parties are required to adopt legislative and regulatory measures to curtail access to child pornography through computer systems.²³⁴

Importantly the convention also emphasises international cooperation, urging State Parties to adopt measures that strengthen the principle of double criminality and to enter into mutual legal assistance agreements to combat cybercrime.²³⁵ However the instrument is silent on the means of application of such measures thus raising questions pertaining to issues such as extradition.²³⁶ Furthermore, it highlights the need for the harmonisation of cybersecurity systems among member states, requiring each State Party to establish institutional mechanisms for cybersecurity governance.²³⁷ These measures aim to foster strong leadership and commitment across State Party institutions to enhance cybersecurity and combat online child exploitation effectively.

Regrettably, the Malabo Convention has not achieved widespread adoption compared to other international instruments. To date, only 16 States have ratified the convention, with 21 States having signed it.²³⁸ Notably, Kenya has not taken any formal steps toward signing or ratifying this convention. Similar to the OPSC, the Malabo Convention provides a critical framework

²³³ ECPAT, *Summary Paper on Online Child Sexual Exploitation*, 14.

²³⁴ Article 29(3), *African Union Convention on Cyber Security and Personal Data*, 27 June 2014.

²³⁵ Article 28, *African Union Convention on Cyber Security and Personal Data*, 2014.

²³⁶ Orji UJ, 'Multilateral Legal responses to Cyber Security in Africa: Any Hope for Effective International cooperation?' 108.

²³⁷ Article 27, *African Union Convention on Cyber Security and Personal Data*, 2014.

²³⁸ African Union, *African Union Convention on Cyber Security and Personal Data Status List*, <<https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection>> on 25 February 2025.

for international cooperation in combating cybercrime and online child sexual exploitation. However, its limited ratification significantly hinders both national and international efforts to effectively address OCSEA, undermining the potential for a unified and coordinated response to this global issue.

Ratification of the Convention would increase the Kenya's ability to combat OCSEA. First the criminalisation of child pornography would provide an international legal basis for prosecuting offenders and dismantling OCSEA networks thus improving child protection. Ratification would also strengthen international cooperation by encouraging mutual legal assistance and adherence to the principle of double criminality, enabling Kenya to collaborate with other AU Member States on cross-border investigations, evidence sharing, and extradition of offenders.²³⁹

The convention's emphasis on harmonising cybersecurity systems would help Kenya align its frameworks with regional standards, enhancing its capacity to detect, prevent, and respond to cyber threats and crimes.²⁴⁰ It also mandates the establishment of institutional mechanisms for cybersecurity governance, which could involve creating specialised agencies and national Computer Emergency Response Teams (herein CERT) to coordinate responses to cyber incidents.²⁴¹ Participation in regional initiatives, such as a regional CERT, would further improve Kenya's ability to address OCSEA through information sharing and capacity building.

By ratifying the convention, Kenya would continue to demonstrate leadership in combating OCSEA, inspiring other AU Member States to follow suit and fostering a unified regional response. Additionally, Kenya could advocate for an additional protocol to address gaps in extradition and mutual assistance, further strengthening its ability to combat OCSEA. In essence, ratification would enhance Kenya's legal, institutional, and collaborative frameworks, positioning it as a leader in addressing cybercrime and protecting children from online exploitation.

²³⁹ Orji UJ, 'Multilateral Legal responses to Cyber Security in Africa: Any Hope for Effective International cooperation?' 110.

²⁴⁰ African Union Initiative on; Strengthening Regional and National Capacity and Action against OCSEA, 6.

²⁴¹ Orji UJ, 'Multilateral Legal responses to Cyber Security in Africa: Any Hope for Effective International cooperation?' 107.

4.3 National Legal Framework addressing OCSEA

From the preceding discussion, it is evident that while Kenya is a party to major international conventions regulating child protection, it is not bound by the OPSC or the Malabo Convention. These instruments are critical for fostering international cooperation through mechanisms such as mutual legal assistance and harmonised cyber monitoring systems, which are essential for addressing the transnational nature of OCSEA. Given the cross-border reach of the crime in Kenya, the absence of these frameworks poses significant challenges to the State's ability to effectively combat this crime. This section will evaluate Kenya's Constitution and key legislative instruments to determine whether they provide sufficient mechanisms to address the transnational dimensions of OCSEA, despite the lack of ratification of these critical international instruments.

4.3.1 Constitution

The Constitution of Kenya lays the foundation for the protection of children, including those vulnerable to OCSEA. Central to this framework is the child's definition as an individual below the age of eighteen.²⁴² This definition establishes a clear legal threshold for the application of child-specific protections. Moreover, it recognises children as a vulnerable group and obligates the State and public officers to address their needs and shall enact and implement legislation to meet its international obligations to respect human rights.²⁴³ This provision underscores the government's obligation to implement measures that safeguard children from harm, particularly in the context of emerging threats such as online exploitation.

Article 53 specifically focuses on the rights of children, offering explicit protections relevant to online sexual abuse. It recognises every child's right to be shielded from abuse, neglect, violence, and inhuman treatment, which encompasses the digital realm where such abuses increasingly occur.²⁴⁴ Furthermore, it affirms that the best interests of the child must be the primary consideration in all decisions affecting them.²⁴⁵ As seen in previous chapters, this principle is particularly significant in cases of OCSEA, as it mandates that interventions and legal responses prioritise the child's welfare and recovery. Finally, Article 48 guarantees the right of all persons, including children, to access justice.²⁴⁶ This provision ensures that children

²⁴² Article 260, *Constitution of Kenya* (2010).

²⁴³ Article 21, *Constitution of Kenya* (2010).

²⁴⁴ Article 53(1), *Constitution of Kenya* (2010).

²⁴⁵ Article 53(2), *Constitution of Kenya* (2010).

²⁴⁶ Article 48, *Constitution of Kenya* (2010).

who fall victim to online sexual abuse and exploitation have legal avenues for redress, thereby reinforcing their protection and enabling the pursuit of accountability for perpetrators.

The constitutional appeal of *Teachers Service Commission v WJ & 5 others* State's asserts the States role in protecting children from sexual abuse.²⁴⁷ It addressed allegations of sexual abuse by a deputy head teacher, against two minor students. The issues questioned whether the TSC could be held vicariously liable for the teacher's actions and whether it had failed in its duty to protect the students. The minors therein alleged that the teacher had defiled LN and attempted to defile WJ, with the abuse occurring under the guise of housework and school activities. Although the teacher was acquitted in criminal court, the minors pursued a civil case against the TSC, the school, and the Attorney General arguing that the TSC had failed to enforce protective measures.

The High Court found that the TSC had inadequately enforced its circulars and code of ethics, failing to protect the minors' rights to dignity, health, and education. It held the TSC, the State, and the school vicariously liable for the teacher's actions. On appeal, the TSC argued it had fulfilled its mandate by dismissing the teacher, while the AG claimed the State had no direct liability. The minors, supported by the Centre for Reproductive Rights, contended that the TSC had a duty to prevent such abuses and had failed to implement effective safeguards.²⁴⁸

The Court of Appeal upheld the High Court's decision, ruling that the TSC's measures were insufficient and that the teacher's actions were closely tied to his role. The court emphasised the TSC's duty to supervise employees and ensure a safe learning environment, noting its failure to mitigate risks despite being aware of the prevalence of sexual abuse in schools. It also affirmed the State's non-delegable duty to protect children where law provides them as matters of paramount importance.²⁴⁹ The appeal and cross-appeal were dismissed and the minors' awarded damages. This case underscores the judiciary's role in enforcing institutions' responsibilities to protect children and implement robust measures to prevent sexual abuse as a constitutional mandate.

The Constitution of Kenya provides an appropriate foundation to address child exploitation abuse by recognising children as a vulnerable group and imposing a non-delegable duty on the

²⁴⁷ (2020) eKLR.

²⁴⁸ *Teachers Service Commission v WJ and 5 others* (2020) eKLR.

²⁴⁹ *Teachers Service Commission v WJ and 5 others* (2020) eKLR.

state to protect their rights.²⁵⁰ The judiciary has reinforced this constitutional mandate through decisions, which affirmed the state's obligation to implement protective measures and hold institutions accountable for failing to safeguard children.²⁵¹ Legislative actions, such as the Children Act 2022, further operationalise these constitutional provisions by creating specific provisions to combat OCSEA. Moreover, it provides a mechanism for integrating global standards into the domestic legal framework by allowing ratified international laws and treaties to form part of the laws of Kenya.²⁵² However, the hindrance of non-ratification of critical international instruments, such as OPSC and the Malabo Convention, remains a significant hurdle in fostering international cooperation and addressing the transnational dimensions of OCSEA effectively. Ratifying these instruments would enhance the State's capacity to combat this crime.

4.3.2 Children Act 2022

The Children Act (herein referred to as the Act) expounds on the Constitution by outlining specific definitions, prohibitions, and penalties to safeguard children in the digital space. It aligns itself with the aforementioned definition of the child and asserts the best interest of the child as elaborated in the previous chapter.²⁵³ In the ambit of OCSEA, it defines child abuse to encompass the use or exposure of a child on electronic or online platforms for purposes of prostitution, pornography, or any other unlawful sexual practices.²⁵⁴ This definition also includes the use of a child's images for pornography or sexual gratification, as well as the dissemination of material that promotes, induces, condones, or normalises sexual activity involving children. The Act further addresses online abuse, harassment, and exploitation by criminalising actions such as proposing or soliciting meetings with a child for sexual activities, transmitting obscene material to children, and subjecting children to abuse through social networks, online games, or mobile devices.²⁵⁵ These provisions cover the specific forms of online abuse such as grooming, solicitation, cyber enticement, cyber stalking and cyber bullying.

²⁵⁰ Article 21, *Constitution of Kenya* (2010).

²⁵¹ *Teachers Service Commission v WJ and 5 others* (2020) eKLR.

²⁵² Article 21, *Constitution of Kenya* (2010).

²⁵³ Section 2, 8, *Children Act* (no. 146 of 2022).

²⁵⁴ Section 2, *Children Act* (no. 146 of 2022).

²⁵⁵ Section 22, *Children Act* (no. 146 of 2022).

The Act also provides the establishment and operation of child rescue centres.²⁵⁶ These rescue centres are established by the Cabinet Secretary in consultation with the National Council for Children's Services. They are mandated to be set up in every county to offer temporary care for children in need of protection while awaiting placement in alternative care or other interventions. Placement in a rescue centre occurs when no alternative care options are available, however, this function is severely curtailed by the lack of resources since only five state owned rescue centres exist to serve this purpose.²⁵⁷ Privately owned centres while many are not properly monitored and suffer poor management hence are subject to the entrapments of child trafficking and other crimes.²⁵⁸

In addition to rescue centres, the Act mandates the Inspector-General to establish child protection units that are designated by gender in every police station.²⁵⁹ These units are designed to provide a safe and non-threatening environment for children in conflict with the law on a temporary basis. The Secretary is empowered to inspect these units to ensure compliance with the standards applicable to children's institutions.²⁶⁰ Laudably, the State has also created the Anti Human Trafficking and Child Protection Unit which addresses specific child related crimes.²⁶¹ The functions and impact of this unit is later discussed this chapter.

Notably the Act also provides for international cooperation, specifically in the context of inter-country adoptions by empowering the Cabinet Secretary to enter into agreements with other countries to facilitate the care and placement of children.²⁶² Such international cooperation does not extend these mechanisms to address transnational occurrences of crimes against children. This limitation in the Act's scope enables a gap in protection, as it does not provide for cross-border collaboration in investigating, prosecuting, or preventing such crimes. While the Act's focus on inter-country adoptions reflects a commitment to protecting children's welfare in specific contexts, the absence of provisions addressing transnational crimes against children leaves a critical area of child protection unaddressed.

²⁵⁶ Section 63, *Children Act* (no. 146 of 2022).

²⁵⁷ Directorate of Children Services < [²⁵⁸ Government to Establish Public Children Rescue Centres, 30 September 2025 < \[²⁵⁹ Section 64 \\(1\\), *Children Act* \\(no. 146 of 2022\\).\]\(https://www.capitalfm.co.ke/news/2023/09/govt-to-establish-public-children-rescue-centres/> on 17 February 2025.</p></div><div data-bbox=\)](https://www.socialprotection.go.ke/about-dcs#:~:text=The%20Directorate%20manages%2030%20Statutory%20Institutions%20for%20Children,Centres%20and%20One%20%281%29%20Child%20%E2%80%93%20Helpline%20116.> on 17 February 2025.</p></div><div data-bbox=)

²⁶⁰ Section 64 (2), *Children Act* (no. 146 of 2022).

²⁶¹ National Plan of Action to Tackle Online Child Sexual Exploitation and Abuse in Kenya 2022–2026, 34.

²⁶² Section 168, *Children Act* (no. 146 of 2022).

In essence the Act proves useful in explicitly defining child abuse to include nuanced forms of OCSEA such as livestreaming using electronic means, online grooming and any interaction with CSAM. Furthermore, it establishes mechanisms like child rescue centres and child protection units to safeguard vulnerable children. However, the Act falls short in two critical areas: it lacks provisions for international cooperation to combat the transnational nature of OCSEA, and it limits the application of the best interests of the child principle to public and private social welfare institutions, excluding private ICT companies from this obligation. The latter gap could be addressed by adopting the African Union's Continental Strategy, which emphasises industry engagement with the private sector to develop technological solutions and integrate child protection considerations. The former gap as discussed can be bridged by ratification of international treaties that provide avenues for international cooperation in combating OCSEA thus better safeguarding children in the digital age.

4.3.3 Sexual Offences Act

The Sexual Offences Act (herein referred to as the Act) addresses OCSEA through a series of provisions that define and penalise various offenses, aiming to prevent and punish such crimes, in this way it supplements the provisions of the Children Act. These provisions cover a wide range of activities, including the creation, distribution, and consumption of child pornography, sexual communication with a child, and the facilitation of child sex tourism.

Regarding CSAM, colloquially also known as child pornography, the Act criminalises the possession, display, sale, distribution, or public exhibition of indecent photographs of children, as well as the import, export, or conveyance of obscene materials involving children.²⁶³ It also prohibits businesses that produce or circulate such materials, and advertising activities related to these offenses.²⁶⁴ Penalties for these crimes include imprisonment for at least six years or a fine of not less than five hundred thousand shillings, or both, with harsher penalties for subsequent convictions. Similarly, the Act prohibits the manufacture, distribution, or display of articles intended to promote sexual offenses with children, with penalties including imprisonment for at least five years or, for juristic persons, a fine of not less than five hundred thousand shillings.²⁶⁵

²⁶³ Section 16, *Sexual Offences Act* (no. 56 of 2006).

²⁶⁴ Section 16(f), *Sexual Offences Act* (no. 56 of 2006).

²⁶⁵ Section 12, *Sexual Offences Act* (no. 56 of 2006).

The Act also addresses sexual communication with a child, which is the provision that most closely resembles the concept of online grooming. However, it specifically criminalises such conduct only when the communication becomes sexual in nature. It is an offense for any person aged eighteen or older to knowingly engage in sexual communication with a child or to encourage the child to communicate in a sexual manner.²⁶⁶ A communication is considered sexual if it relates to sexual activity or if a reasonable person would perceive any part of it as sexual.²⁶⁷ This offense carries a penalty of at least five years' imprisonment or a fine of not less than five hundred thousand shillings, or both. While this provision addresses a key aspect of online grooming, its scope is limited to instances where the communication explicitly turns sexual, leaving other forms of grooming behaviour unaddressed unless they meet this criterion.

Furthermore, the Act tackles child sex tourism by criminalising the organisation of travel arrangements to facilitate sexual offenses against children, regardless of whether the offense is ultimately committed.²⁶⁸ It also prohibits printing, publishing, or disseminating information intended to promote such activities, as well as facilitating contact with others under the guise of tourism to promote child sexual exploitation.²⁶⁹ Those convicted of promoting child sex tourism face imprisonment for at least ten years, while juristic persons are liable to a fine of not less than two million shillings.

The *Thomas Msaberi* case demonstrates the difficulties faces in trial of CSAM cases. The appellant was charged with multiple counts under the Act, including child pornography, child prostitution, and promotion of sexual offenses with a child. The prosecution alleged that the appellant knowingly showed audio-visual pornographic material to two 12-year-old children, intending to encourage them to engage in sexual acts.²⁷⁰ The case came to light after a missing child was found among a group of children arrested from the streets, revealing that they had been visiting the appellant's house to watch pornography and imitate sexual acts under his instructions. However, during the investigation, no pornographic CDs were found in the appellant's house, and the testimonies of the children contained inconsistencies.²⁷¹

²⁶⁶ Section 16(A)(1), *Sexual Offences Act* (no. 56 of 2006).

²⁶⁷ Section 16(A)(2), *Sexual Offences Act* (no. 56 of 2006).

²⁶⁸ Section 14, *Sexual Offences Act* (no. 56 of 2006).

²⁶⁹ Section 14(b), *Sexual Offences Act* (no. 56 of 2006).

²⁷⁰ *Thomas Msaberi Kademi v Republic* (2020) eKLR.

²⁷¹ *Thomas Msaberi Kademi v Republic* (2020) eKLR.

The trial court initially convicted the appellant on all charges and sentenced him to imprisonment. However, on appeal, the High Court re-evaluated the evidence and raised concerns about the identity of the complainants and inconsistencies in their testimony. The court found that while the appellant had exposed the children to pornography, the prosecution failed to prove that he did so with the intent to encourage or enable them to engage in sexual intercourse. The court distinguished between child pornography and the promotion of sexual offenses, noting that Section 12 of the Act refers to items specifically made to promote sexual offenses with children, which was not proven in this case. Ultimately, the High Court quashed the conviction for child pornography and substituted it with a conviction for an indecent act with a child under Section 11(1) of the Act, sentencing the appellant to five years' imprisonment.²⁷²

This case highlights the challenges in prosecuting child pornography offenses under the Act, particularly in proving the mens rea required for a conviction. While the Act criminalises the possession, display, sale, distribution, or public exhibition of indecent photographs of children, as well as the import, export, or conveyance of obscene materials involving children, the prosecution must demonstrate that the accused acted with the intent to exploit or abuse children. These issues are only exacerbated when considered on the larger scale of transnational crimes thus underscoring the vitality of international cooperation.

The Act's efficiency is limited by several critical gaps. First, the Act makes no provision for international cooperation, which is essential for addressing the transnational nature of OCSEA, particularly in cases involving cross-border evidence sharing, extradition, and coordinated investigations. Second, its scope is insufficient to handle nuanced aspects of OCSEA, such as grooming that does not involve explicit sexual content or discussions, and live streaming, which occurs instantaneously and leaves no recorded material like other forms of CSAM. These limitations hinder the Act's effectiveness in comprehensively combating modern forms of online exploitation. Furthermore, the efficiency of law enforcement in prosecuting OCSEA cases could be significantly improved through technical training and the exchange of sophisticated investigative tools, which are often facilitated by international cooperation. This underscores the need for enhanced international cooperation and updated legislative provisions to address the evolving complexities of OCSEA.

²⁷² *Thomas Msaberi Kademi v Republic* (2020) eKLR.

4.3.4 Cybercrimes and Computer Misuse Act

The Computer Misuse and Cybercrimes Act specifically addresses CSAM with the aim of protecting children from OCSEA. It criminalises the intentional publication of child pornography through a computer system, which includes producing, downloading, distributing, transmitting, disseminating, circulating, delivering, exhibiting, lending, exchanging, bartering, selling, or making such material available via telecommunications.²⁷³ Additionally, possessing child pornography on a computer system or data storage medium is also deemed an offense. Penalties for these offenses are severe, with convicted offenders facing fines of up to twenty million shillings, imprisonment for up to twenty-five years, or both.²⁷⁴ However, the act allows such publication if it is for the public good, such as for purposes related to science, literature, learning, or other matters of general concern.²⁷⁵

The constitutionality of Section 24 of the CMCA, which concerns child pornography, was upheld in the *Bloggers Association of Kenya v Attorney General* case.²⁷⁶ The court found that Section 24 does not amount to an unreasonable or unjustifiable limitation of freedom of expression or the right to a fair trial. Court recognised that section serves the legitimate objective of curbing child pornography. It emphasised that the state's pursuit of this objective is proportional, as the means used are not broader than necessary, and the limitations on rights are justifiable. While terms like 'erotic,' 'lewd,' or 'designed to arouse sexual interest' are not explicitly defined, the court noted that their interpretation depends on context and will be determined on a case-by-case basis.²⁷⁷

Fortunately, this act provides a framework for international cooperation which can be strategically leveraged to combat transnational CSAM. The mechanisms for mutual legal assistance, including expedited preservation and disclosure of data, real-time collection of traffic data, and interception of content data, are particularly pertinent in cross-border CSAM investigations.²⁷⁸ Given the digital borderless nature of CSAM dissemination, the ability to rapidly secure and exchange electronic evidence across different territorial jurisdictions is critical. The Act's emphasis on around the clock point of contact within the investigating agency further facilitates swift responses to time-sensitive requests, ensuring that international

²⁷³ Section 24, *Computer Misuse and Cybercrimes Act* (no. 58 of 2018).

²⁷⁴ Section 24, *Computer Misuse and Cybercrimes Act* (no. 58 of 2018).

²⁷⁵ Section 24(2), *Computer Misuse and Cybercrimes Act* (no. 58 of 2018).

²⁷⁶ (2020) eKLR.

²⁷⁷ *Bloggers Association of Kenya v Attorney General and 3 others* (2020) eKLR.

²⁷⁸ Part V, *Computer Misuse and Cybercrimes Act* (no. 58 of 2018).

cooperation is efficient and effective in addressing the global challenge of CSAM.²⁷⁹ By utilising these provisions, Kenyan authorities can collaborate with international partners to trace, apprehend, and prosecute individuals involved in the production, distribution, and possession of CSAM, thereby extending the Act's protective reach beyond national borders.

Indeed, the CMCA is laudable on providing mechanisms for international cooperation to address CSAM. However, the Act's efficiency is significantly constrained by its exclusive focus on CSAM, neglecting other forms of OCSEA such as online grooming, live-streamed abuse, and the facilitation of child sex tourism. This limitation hampers a comprehensive approach to combating the multifaceted nature of online child exploitation. This restricted scope necessitates supplementary legislative measures and the ratification of international instruments to fully address the spectrum of OCSEA and enhance Kenya's capacity for effective cross-border collaboration.

4.3.5 The Data Protection Act

The Data Protection Act also plays a vital role in preventing OCSEA. It addresses the processing of personal data related to children, prioritising the protection of their rights and best interests.²⁸⁰ Processing includes any operations performed on personal data such as collection, recording, storage, adaptation, dissemination, and destruction among other actions.²⁸¹ Data processors are required to obtain consent from the child's parent or guardian before processing the child's personal data. Additionally, any processing of a child's data must be conducted in a manner that safeguards and promotes the child's rights and best interests.²⁸²

To ensure compliance, data controllers or processors are mandated to implement appropriate mechanisms for age verification and consent, considering factors such as available technology, the volume of data processed, potential risks of harm to the child, and other criteria specified by the Data Commissioner. Data processors that exclusively offer counselling or child protection services to a child are exempted from this provision.²⁸³

The Act's inclusion of provisions requiring data processors to act in the best interests of the child is a significant and commendable step towards safeguarding children in the digital age.

²⁷⁹ Section 65, *Computer Misuse and Cybercrimes Act* (no. 58 of 2018).

²⁸⁰ Section 33, *Data Protection Act* (no. 156 of 2019).

²⁸¹ Section 2, *Data Protection Act* (no. 156 of 2019).

²⁸² Section 33, *Data Protection Act* (no. 156 of 2019).

²⁸³ Section 33(3)(4), *Data Protection Act* (no. 156 of 2019).

However, the concept of best interests of the child, while fundamental, remains inherently subjective and open to varying interpretations. To enhance the Act's efficacy and provide clearer guidance to data processors, the legislation could benefit from incorporating specific, context-driven considerations. These considerations might include detailed guidelines on age verification mechanisms, data minimisation principles, default privacy settings, and the types of data processing that pose heightened risks to children. By providing more concrete parameters, the Act can ensure consistent and robust protection of children's data, mitigating the potential for exploitation and abuse in the digital sphere, and thereby strengthening its practical application.

4.3.6 Conclusion

In sum Kenya has a robust constitutional foundation that recognises children's vulnerability and mandates state protection. This has been affirmed by judicial precedent and operationalised through legislations that define OCSEA and establishes protective mechanisms. However, significant gaps persist through the lack provisions for international cooperation in the Children and Sexual Offences Acts, hindering the ability to address transnational OCSEA. Even where it is provided for in the CMCA it suffers a restrictive scope. Furthermore, the Children's Act's limited application of the best interests of the child principle, excluding private ICT companies, and the vague nature of this principle in the Data Protection Act, underscore the need for more explicit guidelines and industry engagement. To fully address the complex and evolving nature of OCSEA, Kenya should ratify key international instruments to strengthen legislative provisions to encompass all forms of online child exploitation, and provide clearer, context-specific guidance for data processors, thus enhancing both national and international efforts to safeguard children online.

4.4 Government Public Institutional Framework

Building upon the established legal framework for combating OCSEA, which recognises children's vulnerability and mandates state protection, this section delves into the government's public institutional framework. While Kenya's legislative foundation, as demonstrated by the provides definitions and protective mechanisms, significant gaps persist, including the sparse provision for international cooperation provisions in key legislation. This section will assess whether the existing institutional framework, effectively mitigates these gaps. Specifically, it will evaluate the extent to which these institutions address transnational crimes and ensure comprehensive protection for children in the digital space, considering the limitations of

current legislative provisions and the need for enhanced industry engagement and international collaboration.

4.4.1 Directorate of Children Services

This is a public service office established under the children act as the Secretary of Children Services. The Secretary oversees the regulation, coordination, and supervision of children's officers and child protection initiatives.²⁸⁴ It establishes and maintains child protection centres, rehabilitation schools, and remand homes; maintains records and data on children's services; and investigating, monitoring, and reporting cases of children facing hardship, including abuse or exploitation.²⁸⁵ The Secretary develops programs to mitigate such hardships, assists vulnerable children, and ensures their access to medical treatment and safe accommodation. Additionally, the Secretary safeguards the welfare of children under care orders, intervenes in cases requiring removal to safety, and promotes family reconciliation.

Indeed, the DCS contributes to a foundational layer of protection. However, its functions, while vital for direct child welfare, are primarily domestic in scope and do not explicitly address the legislative gap in international cooperation for transnational OCSEA cases. Furthermore, while the DCS manages records and data, the text does not detail its capacity to address the sophisticated digital dimensions of OCSEA, thus indicating a potential gap in directly mitigating the legislative deficiencies concerning digital space exploitation. Therefore, while essential to the broader child protection landscape, the DCS's functions primarily address direct service delivery rather than directly compensating for the legislative gaps in international and digital spheres relevant to OCSEA.

4.4.2 National Council for Children Services

Established under the Children Act, the NCCS advises the Cabinet Secretary on child protection matters, develops policies, and monitors the enforcement of international treaties related to children's rights.²⁸⁶ It formulates and evaluates programs to raise public awareness of children's rights, including those addressing OCSEA, and regulates child welfare programs, including those run by charitable institutions.²⁸⁷ The NCCS maintains a comprehensive

²⁸⁴ Section 37, *Children Act* (no. 146 of 2022).

²⁸⁵ Section 38, *Children Act* (no. 146 of 2022). Directorate of Children Services <<https://www.socialprotection.go.ke/dcs-mandate>> on 25 February 2025.

²⁸⁶ Section 41, *Children Act* (no. 146 of 2022).

²⁸⁷ Section 42, *Children Act* (no. 146 of 2022).

database of children in Kenya, which aids in tracking and protecting vulnerable children. It also collaborates with state agencies, monitors social programs, and provides technical support to organisations involved in child welfare. Additionally, the NCCS establishes and oversees County and Sub-County Children Advisory Committees, ensuring coordinated efforts at all levels of government to safeguard children's rights.²⁸⁸ The guiding policy on combating OCSEA created by the NCCS is the National Plan of Action to Address OCSEA for the years 2022 to 2026.

4.4.3 National Plan of Action to address OCSEA

The NAP acknowledges OCSEA as a transnational crime which requires international collaboration due to its complex nature, often involving multiple perpetrators, URLs, and victims across different countries. It emphasises collaboration with international actors, including industry and criminal justice entities, and highlights the crucial role of the AHTCPU that works with organisations like Interpol.²⁸⁹ It also recognises the justice system's need for international cooperation to prosecute offenders, particularly in accessing online evidence from platforms such as Facebook.²⁹⁰

The plan highlights the need for multi sectoral collaboration in curbing OCSEA noting that successful implementation requires engagement across various stakeholders.²⁹¹ The NCCS is mandated to oversee and coordinate the implementation of the plan, ensuring quality and streamlining efforts across national and county levels. A Technical Working Group on Child Online Protection, comprising diverse cross-sector representatives, has been established to guide these efforts. Stakeholders, including the NCCS, Communications Authority, Directorate of Children Services, and National Police Service, are assigned roles and responsibilities aligned with their mandates.²⁹²

The plan promotes joint coordination through terms of reference for the Technical Working Group, memoranda of understanding for collaboration, and agreed-upon annual deliverables with accountable reporting mechanisms.²⁹³ Such harmonisation is also recommended at the county level and in other related plans such as the NPA on Sexual Exploitation and the draft

²⁸⁸ Section 54, 55, *Children Act* (no. 146 of 2022).

²⁸⁹ National Plan of Action to Tackle Online Child Sexual Exploitation and Abuse in Kenya 2022–2026, 34.

²⁹⁰ National Plan of Action to Tackle Online Child Sexual Exploitation and Abuse in Kenya 2022–2026, 26.

²⁹¹ National Plan of Action to Tackle Online Child Sexual Exploitation and Abuse in Kenya 2022–2026, 40.

²⁹² National Plan of Action to Tackle Online Child Sexual Exploitation and Abuse in Kenya 2022–2026, 66-68.

²⁹³ National Plan of Action to Tackle Online Child Sexual Exploitation and Abuse in Kenya 2022–2026, 66.

Violence Against Children National Prevention and Response Plan. Additionally, the plan advocates for the development of information-sharing systems, institutionalised referral mechanisms, and formalised coordination with industry stakeholders to address emerging threats.

In essence the NCCS demonstrates a more strategic approach to mitigating legislative gaps through its policy and coordination mandates. Its monitoring role on implementation of international treaties directly address the need for a comprehensive and internationally aligned approach to child protection. Similarly, its mandate of policy formulation has reached into regulation of the industries concerned through the NAP. This plan acknowledges OCSEA as a transnational crime requiring international collaboration and the need for a proactive institutional response. Furthermore, the NCCS's role in establishing County and Sub-County Children Advisory Committees suggests an effort to decentralise and coordinate child protection efforts across all levels of governance, which is essential for a nationally cohesive response to OCSEA.

4.4.4 Child Welfare Society of Kenya

The CWSK serves as the national emergency response and rescue organisation for children, dedicated to ensuring the welfare of children and vulnerable young persons. As the national adoption society, it focuses on strengthening families and providing care for separated children, those at risk of separation, and children without appropriate care.²⁹⁴ This is achieved through family empowerment, rehabilitation, local and international tracing and reunification, guardianship, foster care, custody, adoption, and other suitable means. It develops and reviews standards and guidelines on child welfare, care, protection, and control, and establishes temporary places of safety, including childcare facilities, group homes, foster care homes, rescue centres, and protection units. It rescues, receives, and provides care for lost, abandoned, or referred children, offering family tracing, mediation, and reunification services.

The Society ensures rapid response to children in distress, providing psychosocial support and urgent rescue interventions. It advises on adoption, fostering, and guardianship procedures, develops educational and training materials, and provides education, vocational training, and skill-building for children and vulnerable young persons.²⁹⁵ Additionally, the Society conducts

²⁹⁴ Section 2, *Child Welfare Society of Kenya Order*, Legal Notice 58 of 2014.

²⁹⁵ Section 6, *Child Welfare Society of Kenya Order*, Legal Notice 58 of 2014.

research, maintains records, and establishes information systems to link knowledge with stakeholders. It implements mechanisms to combat sexual exploitation and child labour, builds the capacity of children and duty bearers, and establishes programs for orphans and vulnerable children.²⁹⁶

In summation the CWSK plays vital role in providing direct support and protection to vulnerable children. Its functions in emergency response, family tracing, rehabilitation, and providing temporary places of safety are crucial for children affected by various forms of exploitation. While the CWSK's mandate is primarily operational and service-oriented, it indirectly mitigates the impact of legislative gaps by providing essential care and protection for victims. Its role as the national adoption society also contributes to long-term solutions for children who may be vulnerable to exploitation. However, the CWSK's functions do not directly address the legislative gaps in international cooperation or the digital space. Its strength lies in providing essential direct services and strengthening the child protection ecosystem, thereby indirectly supporting the broader framework combating OCSEA, but not as a direct legislative gap mitigator.

4.4.5 Directorate of Criminal Services- Anti-Human Trafficking and Child Protection Unit

The AHTCPU is a specialised unit dedicated to safeguarding children from abuse, exploitation, and trafficking.²⁹⁷ Established in 2016 with support from the UK National Crime Agency's Child Exploitation Online Protection, the AHTCPU was created to address complex cases of child sexual exploitation, particularly those involving transnational crimes.²⁹⁸ This initiative was sparked when British intelligence through mutual legal assistance sought to investigate their national, Simon Harris, who frequented the country and was suspected of child sexual abuse. This inquiry resulted in his arrest and subsequent charge of defilement of Kenyan street children on multiple accounts,²⁹⁹ thus underscoring the need for a specialised unit to address crimes of such nature. The unit initially trained 12 officers and has since expanded to 37 officers across Nairobi and Mombasa, with capacity-building support from international partners like the British High Commission, UNODC, and UNICEF.³⁰⁰

²⁹⁶ Section 6(p), *Child Welfare Society of Kenya Order*, Legal Notice 58 of 2014.

²⁹⁷ National Plan of Action to Tackle Online Child Sexual Exploitation and Abuse in Kenya 2022–2026, 34.

²⁹⁸ *Disrupting Harm in Kenya Evidence on Online Child Sexual Exploitation and Abuse*, 9.

²⁹⁹ Njoroge G, 'Simon Harris: Kenyan Boys Recall How Briton Abused Them, BBC News, 26 February 2015 <<https://www.bbc.com/news/uk-england-31602129>> on 26 February 2025.

³⁰⁰ Simon Harris: Kenyan Boys Recall How Briton Abused Them.

The AHTCPU's mandate focuses on preventing child victimisation, protecting children from harm, and holding perpetrators accountable. Its investigative priorities include combating OCSEA, child trafficking, abduction, and sexual exploitation.³⁰¹ A key innovation is its forensic section, which specialises in OCSEA investigations, leveraging advanced digital tools and partnerships with Interpol, the NCMEC, and the Internet Watch Foundation.³⁰² These collaborations enable the AHTCPU to access global databases, analyse child exploitation imagery, and take down harmful online content.

The unit emphasises child participation, ensuring children's voices are heard in decisions affecting their protection, and adheres to principles of do no harm and non-discrimination to prevent secondary victimisation. It provides victim support by rescuing and placing children in safe custody, offering therapeutic counselling, and facilitating reintegration.³⁰³ Additionally, the unit coordinates with national and international partners to address emerging threats, conducts research on evolving trends in crimes against children, and implements preventive measures through public awareness campaigns and educational programs.³⁰⁴

The AHTCPU has been useful in intercepting offenders from leaving the country. The case of *Black Jr v Republic*³⁰⁵ demonstrates this as the accused, Joseph William Black Jr., a US citizen and theology teacher in Kenya, was arrested at Jomo Kenyatta International Airport while traveling to the United States. He was charged with possessing child pornography on a computer, violating the CMCA. Contending the review of denied bail terms the prosecution contended that he was a flight risk since he had a similar ongoing case in the USA, and he had a history of entering Kenya through porous border points. They also expressed concerns about his proximity to children at Bishop Makarios Seminary where he resided. The court dismissed the application for review on technicality and referred the matter back to the trial court for a hearing and determination of the bail application. Despite this, the case demonstrate the combined efforts to the unit and law enforcement to address transnational OCSEA when the offender is still within the State's jurisdiction.

³⁰¹ Directorate of Criminal Investigations < [Anti Human Trafficking And Child Protection Unit | Directorate of Criminal Investigations](#) > on 26 February 2025.

³⁰² *Disrupting Harm in Kenya Evidence on Online Child Sexual Exploitation and Abuse*, 38.

³⁰³ Directorate of Criminal Investigations < [Anti Human Trafficking And Child Protection Unit | Directorate of Criminal Investigations](#) > on 26 February 2025.

³⁰⁴ *Disrupting Harm in Kenya Evidence on Online Child Sexual Exploitation and Abuse*, 72-74.

³⁰⁵ *Joseph William Black Jr v Republic* (2022) (Ruling) eKLR.

In another case, *Republic v Int'veld*,³⁰⁶ Jan Int'veld, a Dutch national was charged with multiple sexual offenses against children, including committing an indecent act with a child, sexual communication with a child, child pornography, and child abuse. Similarly, he was arrested while attempting to leave Kenya. The trial court granted him bail, which the prosecution challenged, arguing that Int'veld was a flight risk with an expired tourist visa, had no fixed abode, and was likely to interfere with witnesses, who were vulnerable children known to him.³⁰⁷ The High Court overturned the trial court's decision, citing that being a flight risk as its paramount reason, especially considering Int'veld's expired tourist visa and previous attempt to leave the country.³⁰⁸ This ruling demonstrates a stricter approach to bail in cases involving child sexual offenses, especially when the accused is a foreign national. It reinforces the AHTCPU mission of protecting children, witnesses and victims included.

The AHTCPU is an institution that is explicitly designed to mitigate the legislative gaps related to transnational OCSEA. It directly confronts the legislative limitations concerning international cooperation through its forensic section, equipped with advanced digital tools and international partnerships which enhances Kenya's capacity to investigate and prosecute OCSEA cases that transcend national borders. Thus, the AHTCPU serves as a critical institutional instrument directly mitigating the legislative gaps.

4.4.6 Communications Authority of Kenya

The CA, is the regulatory body overseeing the communications sector, including telecommunications, broadcasting, cybersecurity, and e-commerce.³⁰⁹ It plays a pivotal role in preventing OCSEA through the National Kenya Computer Incident Response Team Coordination Centre (herein KCIRT), a multi-agency framework launched in 2014.³¹⁰ This centre operates round the clock to detect, prevent, and respond to cyber threats, including those targeting children. It collaborates with local and international stakeholders, including law enforcement and ICT service providers, to investigate and prosecute cybercrimes.³¹¹

The CA's responsibilities in combating OCSEA include implementing national cybersecurity policies, raising awareness, and providing early warnings and technical advisories on cyber

³⁰⁶ *Republic v Int'veld alias Teacher alias Dad alias Mzungu* (2024) (Ruling) eKLR.

³⁰⁷ *Republic v Int'veld alias Teacher alias Dad alias Mzungu* (2024) (Ruling) eKLR.

³⁰⁸ *Republic v Int'veld alias Teacher alias Dad alias Mzungu* (2024) (Ruling) eKLR.

³⁰⁹ Communications Authority of Kenya < <https://www.ca.go.ke/who-we-are> > on 26 February 2024.

³¹⁰ Communications Authority of Kenya, Cybersecurity Report. July- September 2024, 2.

³¹¹ Communications Authority of Kenya National KE-CIRT/CC < <https://ke-cirt.go.ke/> > on 26 February 2024.

threats.³¹² It also coordinates responses to cyber incidents, develops cybersecurity research, and manages critical internet resources. The enactment of the CMCA and subsequent regulations in 2024 further strengthened the CA's role, establishing the Cyber Security Operations Centre for the ICT sector.

The CA also provides industry guidelines that require companies to establish internal procedures to ensure compliance with local and international laws targeting CSAM. Service providers must also explicitly prohibit the upload, transmission, storage, or sharing of CSAM in their terms and conditions, clearly outlining the consequences of such misuse.³¹³ Additionally, the guidelines mandate the development of clear reporting structures for identifying and removing inappropriate content that violates child online protection policies.³¹⁴ Companies are further required to collaborate with law enforcement agencies by capturing evidence and fully cooperating in investigations when illegal content, such as CSAM, is discovered or reported.³¹⁵ These measures ensure that service providers actively contribute to combating OCSEA, fostering a safer online environment for children while holding perpetrators accountable.

The CA, through its regulatory role in the communications sector and the operation of the KCIRT, actively mitigates the legislative gaps in addressing OCSEA. Its establishment as a multi-agency framework for detecting, preventing, and responding to cyber threats directly addresses the challenges posed by the digital nature of OCSEA. Furthermore, the CA's mandate to implement national cybersecurity policies, raise awareness, and provide industry guidelines that compel service providers to take proactive measures against CSAM demonstrate a comprehensive institutional approach to fostering a safer online environment for children. By requiring service providers to establish internal procedures, prohibit CSAM, and cooperate with law enforcement, it directly employs the industry engagement which is a necessary component to overcome legislative limitations. Therefore, the CA acts as a significant institutional mitigator of legislative gaps pertaining to the digital dimensions of OCSEA and the imperative for industry involvement.

³¹² Communications Authority of Kenya National KE-CIRT/CC < <https://ke-cirt.go.ke/> > on 26 February 2024.

³¹³ Communications Authority of Kenya, *Industry Guidelines for Child Online Protection and Safety in Kenya* June 2023, 6.

³¹⁴ *Industry Guidelines for Child Online Protection and Safety in Kenya*, 6.

³¹⁵ *Industry Guidelines for Child Online Protection and Safety in Kenya*, 7.

4.4.7 Conclusion

In conclusion, the institutional framework in Kenya demonstrates a concerted effort to address OCSEA, establishing bodies like the NCCS, AHTCPU, and CA, each playing a direct role in mitigating the limitations of existing legislation, particularly in areas of international cooperation and digital safety. While these institutions individually contribute valuable functions, their efforts often remain fragmented rather than fully coordinated into a seamless national response. This incoordination hinders the overall effectiveness of combating transnational OCSEA. Thus, consistent and coordinated efforts are still needed to ensure a comprehensive and robust system capable of effectively protecting children from online sexual exploitation and abuse.

4.5 Private (Non-Social Welfare) Institutional Framework

ICT companies like Google and Meta play a pivotal role in combating OCSEA through advanced technologies, proactive policies, and global collaborations. Both companies employ a combination of machine learning, hash-matching technologies, and stringent reporting mechanisms to identify, remove, and report exploitative content, demonstrating a level of commitment to child safety and transparency.

Companies owe their first duty to their shareholders to make profits from their investments. This characteristic of company operations raises concerns on the consistency and enforcement of institutional policies as they are likely to be malleable to pressures that favour their bottom line. This section shall briefly outline some policies and exemplify the above concern in recent modifications made to content moderation by major companies. Ultimately the assessment will beckon to increased vigilance of law enforcement and the possibility of increased regulation of ICT companies.

4.5.1 Google ³¹⁶

Google leverages machine learning classifiers and hash-matching technology to detect and report CSAM. By creating unique digital fingerprints for images and videos, Google compares them against known CSAM databases and reports detected content to the NCMEC which collaborates with law enforcement agencies worldwide. Google also blocks CSAM-related search results and displays warnings to users, directing them to reporting options and resources

³¹⁶ Fighting Child Sexual Abuse Online, Google, <<https://protectingchildren.google/#fighting-abuse-on-our-own-platform-and-services>> on 28 February 2025.

from organisations like the IWF. On YouTube, machine learning systems and human reviewers work together to detect and remove exploitative content, with additional safeguards such as restricting live streaming and comments on videos featuring minors. Google's transparency is evident in its CSAM Transparency Report, which details its efforts, including the number of reports made to NCMEC and the hashes shared to prevent CSAM recirculation. Furthermore, Google develops and shares tools like the Content Safety API and CSAI Match, enabling organisations to classify and prioritise potential abuse content for review, thereby enhancing global efforts against OCSEA.

4.5.2 Meta³¹⁷

Similarly, Meta enforces a zero-tolerance policy against OCSEA, utilising photo and video-matching technologies to identify and remove exploitative content. These tools, open-sourced since 2019, allow other companies to adopt similar measures, fostering industry-wide collaboration. Meta's search interventions reduce malicious searches for exploitative content, akin to Google's efforts, and its Community Standards Enforcement Report provides transparency on actions taken against violative content. Meta collaborates with global experts, NGOs, and industry partners through coalitions like the Technology Coalition and Project Protect, mirroring Google's involvement in initiatives such as the WeProtect Global Alliance. Meta also introduces innovative features like AMBER Alerts on Instagram and Facebook to locate missing children and restricts suspicious adults from interacting with teen accounts. Its Take It Down portal, developed with NCMEC, uses hash values to detect and remove explicit images of minors without the content leaving the user's device, aligning with Google's hash-matching technology.

4.5.3 Arising Concerns

Institutional policies are often malleable and influenced by the shifting political landscapes of the world. This creates significant gaps in the regulation and enforcement of measures to protect children online. For instance, Meta's recent announcement of sweeping changes to its content moderation policies, including ending its third-party fact-checking program and lifting restrictions on certain content areas, reflects the company's adaptation to political pressures,

³¹⁷ Online Child Protection, Meta <<https://about.meta.com/actions/safety/onlinechildprotection/>>.

particularly following recent election victories for the political right in the U.S. and globally.³¹⁸ These changes, while framed as promoting individual choice and free expression, shift the responsibility for content moderation away from platforms and onto users and advertisers, potentially weakening systemic safeguards against harmful content, including OCSEA.

Granted, Meta decided to focus automated enforcement on high-severity policy areas like child safety, terrorism, and fraud, this still creates challenges in enforcement due to the fragmented system maintaining consistent protections.³¹⁹ By raising the confidence threshold for automated systems and requiring users to report violative content, Meta risks allowing more harmful material to slip through the cracks, increasing the burden on victims of harassment or abuse to flag such content. This reactive approach, coupled with relaxed content policies, may inadvertently create an environment where exploitative content proliferates, undermining efforts to combat OCSEA.³²⁰

The broader trend of platforms tailoring their policies to align with regional political and regulatory pressures further exacerbates these challenges.³²¹ For example, Meta's strategy to partner with the U.S. government to resist restrictive laws in other jurisdictions may lead to fragmented user experiences and inconsistent enforcement of child safety measures across regions.³²² This lack of uniformity creates loopholes that can be exploited by perpetrators of OCSEA, particularly in regions with weaker regulatory oversight.

A solution that is easily entertained at face value is the imposition of binding obligations on the companies to act accordingly. While could theoretically enhance accountability, they may not fully address the root issue of political interference and inconsistent enforcement. Laws can also be subjected to political misuse. Thus, such encroachment on shareholder rights does not proportionately balance against protections that might be misused by the state. Instead, a more balanced approach is needed—one that combines corporate responsibility with independent oversight mechanisms to ensure that child safety remains a priority, free from political manipulation. This could include the establishment of international standards for content

³¹⁸ Asim BN, 'Meta Shifts to Community-Driven Content Moderation, Abandoning Fact-Checking Program', Digital Information World, 8 January 2025 <<https://www.digitalinformationworld.com/2025/01/meta-shifts-to-community-driven-content.html>> 28 February 2025.

³¹⁹ Asim BN, 'Meta Shifts to Community-Driven Content Moderation, Abandoning Fact-Checking Program'.

³²⁰ Wright G, 'Big Tech's Shift Away From Content Moderation Changes Everything' Alliance, 24 February 2025 < <https://www.alliancemagazine.org/blog/big-techs-shift-away-from-content-moderation-changes-everything/>> on 28 February 2025.

³²¹ Meta's Content Moderation Overhaul; A Bold Move with Broad Implications, CEO Today, 7 January 2025.

³²² Wright G, 'Big Tech's Shift Away From Content Moderation Changes Everything'.

moderation, enforced by neutral regulatory bodies that operate independently of political influences and encourage multi-stakeholder collaboration.

Ultimately, the solution lies in creating a holistic, child-centred system that prioritises prevention, protection, and accountability, while mitigating the risks posed by political pressures. By embedding the best interest of the child principle into both corporate policies and regulatory frameworks, and ensuring that enforcement mechanisms are transparent, consistent, and free from political interference, we can build a safer digital environment for children. This approach would not only address the immediate challenges of OCSEA but also foster long-term resilience against emerging threats in an ever-evolving digital landscape.

4.6 Conclusion

In conclusion, Kenya has made significant strides in addressing OCSEA through robust legal frameworks, such as the Children Act 2022, the Sexual Offences Act, the CMCA, and the Data Protection Act, which criminalise various forms of online exploitation and provide mechanisms for child protection. However, critical gaps remain, particularly in international cooperation, as Kenya has yet to ratify key treaties like the OPSC and the Malabo Convention, which are essential for addressing the transnational nature of OCSEA. While the CMCA provides a framework for international cooperation, its scope is limited to CSAM, leaving other forms of OCSEA, such as live-streamed abuse and non-explicit grooming, inadequately addressed. Institutionally, bodies like the AHTCPU, CA, and NCCS play pivotal roles in mitigating legislative gaps through advanced forensic tools, multi-agency collaboration, and policy coordination. However, their efforts are often fragmented, and resource constraints hinder their effectiveness.

The private sector, represented by ICT companies like Google and Meta, employs advanced technologies to combat OCSEA, but their policies remain susceptible to political pressures, which can undermine systemic safeguards. To address these challenges, Kenya must adopt a holistic, child-centred approach that integrates the best interests of the child principle into both legal and institutional frameworks, ensuring greater coordination, adaptability, and accountability. This approach should include ratifying key international treaties, enhancing cross-border collaboration, and fostering multi-stakeholder partnerships to create a unified, resilient system capable of effectively protecting children from OCSEA in an evolving digital landscape.

This paper posits that the solution lies in embedding the best interests of the child principle within a systems theory framework, which emphasises interconnectedness and holistic integration. Such an approach would ensure that all stakeholders, governments, law enforcement, social workers, educators, parents, and ICT companies, work cohesively to prioritize children’s well-being. By integrating this principle into systems theory, child protection systems can achieve greater coordination, adaptability, and accountability, enabling them to dynamically address emerging threats like OCSEA through technological advancements and international cooperation. This framework would also extend corporate responsibility by holding ICT companies accountable through binding legal obligations to detect and remove exploitative content, while fostering global-local synergy through the alignment of international treaties. Ultimately, this integrated approach would create a unified, child-centred response, ensuring the safeguarding of children’s rights in an ever-evolving digital landscape.



5 Chapter Five: Conclusion and Recommendations

5.1 Research Summary

This research examines the pervasive issue of OCSEA. As defined in chapter one, it is a complex crime that encompasses both online and offline interactions facilitated by the misuse of ICT platforms.³²³ It includes acts such as online grooming, sexual extortion, and live streaming of child sexual abuse, and involves the production, possession and distribution of CSAM.³²⁴ The internet plays a critical role in enabling OCSEA providing offenders with anonymity, accessibility, and affordability, the triple A factor.³²⁵ These factors embolden perpetrators, creating a sense of invincibility. Moreover, internet platforms do not have any territorial borders thus further complicating law enforcement efforts. This transnational nature of OCSEA coupled with the rapid evolution of ICT, further exacerbates the challenges in addressing this crime, as offenders often operate beyond jurisdictional boundaries, shielded by encryption and pseudonymity.³²⁶

The problem statement averred that OCSEA remains a critical challenge in Kenya despite its established legal framework and strategic plans. Factors curtailing effective law enforcement include the anonymity afforded by the internet, encryption technologies, the transnational operation of perpetrators, and underreporting all of complicate investigations and prosecutions.³²⁷ These issues necessitate a holistic response from all stakeholders.

Aimed at crafting a solution, the paper explores systems theory in the second chapter. GST offers a holistic perspective that emphasises interconnectedness, dynamic relationships, and emergent properties within complex systems.³²⁸ Unlike reductionist approaches, it focuses on the interactions and processes within and between systems, making it a versatile tool across disciplines such as sociology, biology, psychology, and

³²³ ECPAT International, *Summary Paper on Online Sexual Exploitation*, 2020, 1-2,

³²⁴ Voziki V 'Cyber-Enabled Child Sexual Exploitation and Sexual Abuse: Fighting for Children's Dignity and Safety,' 13.

³²⁵ Whittle HC, Hamilton-Giachritsis C, 'Offender Behaviour' 11.

³²⁶ Kloess J, Beech AR, Harkins L, 'Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics' 127.

³²⁷ Witting SK, 'Transnational by Default: Online Child Sexual Abuse Respects No Borders' 733.

³²⁸ Sutherland JW, 'General Systems Theory: Foundations, Developments, Applications Ludwig von Bertalanffy' 280.

social work. In child protection, it shifts the focus from individual errors to systemic factors, fostering multi-sector collaboration, prevention, and child centred interventions. Through chaos and complexity theory, GST also highlights the potential for small, strategic interventions that can create significant systemic change.³²⁹

This focus on a holistic approach would enable a comprehensive understanding of the interconnected elements that influence a child's well-being. It promotes proactive strategies, data-driven decision-making, and the empowerment of children as active participants in their protection.³³⁰ On the other hand, the abstract nature of GST can complicate practical implementation, particularly in resource-constrained contexts since implementation is a resource intensive endeavour. The dynamic and unpredictable nature of child protection systems, coupled with the need to address power dynamics and cultural sensitivities, further complicates its application.³³¹

To fill the gaps in systems theory the paper posits that the application of the principle of the best interest of the child, that mandates children's well-being be the primary consideration in all actions affecting them. As a substantive right, it obligates states to actively assess and prioritise children's interests, while as an interpretative principle, it guides the application of laws and policies to maximise children's welfare.³³² Procedurally, it requires transparent, child-centred decision-making processes that consider the child's views, needs, and circumstances.³³³ In the context of OCSEA, the principle can provide a framework for addressing legislative gaps, and systemic gaps such as weak implementation, and poor coordination.

The application of the best interest principle also faces challenges. While it is frequently invoked in legislative and judicial contexts, its enforcement falls short in regulating private corporations, such as ICT platforms, which play a central role in enabling cross

³²⁹ Warren K, Franklin C and Streeter CL, 'New Directions in Systems Theory: Chaos and Complexity' 357, 358.

³³⁰ United Nations Children's Fund, United Nations High Commissioner for Refugees, Save the Children and World Vision, *A Better Way to Protect ALL Children: The Theory and Practice of Child Protection Systems*, 2013 3-5.

³³¹ Munro E, 'Improving Practice: Child Protection as a Systems Approach' *LSE Research Articles Online*, 2005, <<http://eprints.lse.ac.uk/archive/00000359>> on 21 January 2025.

³³² CRC General comment No. 14, 3-5.

³³³ Kalra PPK Mahapatra M, 'Critical Analysis of the Best Interest of Child Theory,' 384.

border OCSEA. These entities are not explicitly bound by the same legal obligations as public or private welfare institutions, creating a significant gap in accountability. To address this, the principle ought to be extended to apply to all entities ensuring that private actors also prioritise children's well-being in their operations. This approach would not only safeguard children's rights but also promote a safer digital environment, ensuring that their best interests remain paramount in all decisions concerning them.

Turning to a more specific context, chapter 4 analyses the legal and institutional framework in place in Kenya. This state has established a robust legal foundation through instruments such as the Constitution, the Children Act, the Sexual Offences Act, the CMCA, and the Data Protection Act. These laws criminalise various forms of OCSEA, including child pornography, online grooming, and sexual communication with minors, while also providing mechanisms for child protection, such as child rescue centres and specialised police units. The judiciary has reinforced these protections through creating precedent that affirms the State's obligation to safeguard children's rights.³³⁴ Additionally, the CMCA facilitates international cooperation through mechanisms for mutual legal assistance, real-time data collection, and cross-border investigations, addressing the transnational nature of OCSEA.³³⁵

However, significant gaps remain, for instance the CMCA's scope is restricted to CSAM, leaving other forms of OCSEA, such as live-streamed abuse and non-explicit grooming, inadequately addressed. Kenya has yet to ratify other critical international instruments, the OPSC and the Malabo Convention, that would provide for more holistic cross-border collaboration. Institutionally, bodies like the AHTCPU and the CA play pivotal roles in mitigating this legislative gap through international partnerships and multi-agency collaboration, advanced forensic tools, and provisions for industry engagement. However, their efforts are often fragmented, and resource constraints hinder their effectiveness. Notably private ICT companies like Google and Meta have implemented policies and advanced technologies to combat OCSEA and its transborder

³³⁴ *Teachers Service Commission v WJ and 5 others* (2020) eKLR.

³³⁵ Part V, *Computer Misuse and Cybercrimes Act* (no. 58 of 2018).

nature. Not being bound by the best interest of the child, these policies are malleable to political pressures thus potentially undermine systemic safeguards.

In light of these findings, it is evident that addressing OCSEA in Kenya requires a comprehensive and integrated approach that transcends traditional legal and institutional frameworks. The evolving digital landscape, coupled with the challenges of enforcement and accountability, necessitates innovative and adaptive strategies that prioritise child protection. Building on these insights, the paper shall make recommendations that propose a multi-faceted approach to strengthen Kenya's response to OCSEA. It shall emphasise legal reforms, institutional capacity-building, technological policy advancements, and community engagement to create a safer digital environment for children.

5.2 Recommendations

5.2.1 Strengthening the Technical Working Group on Online Child Protection

Address the transnational issue of OCSEA in Kenya requires, a multi-faceted and systems-oriented approach that would integrate legal, institutional, technological, and educational reforms. Central to this approach is the formalisation and strengthening of the Technical Working Group on Child Online Protection, as established under the National Plan of Action on OCSEA. This group, currently chaired by the Communications Authority of Kenya with the Directorate of Children Services as its secretariat, brings together a diverse range of stakeholders, including government agencies, international organisations, and non-governmental entities.³³⁶ However, the lack of transparency and official reporting on the group's progress over the past three years raises questions of its effectiveness. To remedy this, the mandate and structure of the Technical Working Group should be formalised through regulations under the Children Act. These regulations should expand the group's representation to include ICT company representatives and regional liaisons, such as delegates from the African Union, to leverage technological expertise and align with regional efforts. Additionally, the regulations should empower the group to develop best interest considerations for the prevention, detection, and response to OCSEA, and provide tools for mutual legal assistance to enhance international cooperation in investigating and prosecuting transnational cases.

³³⁶ National Plan of Action to Tackle Online Child Sexual Exploitation and Abuse in Kenya 2022–2026, 66-68.

5.2.2 Legislative Reforms and Institutional Strengthening in Addressing OCSEA

Legislative enhancements are equally critical to address gaps in Kenya's legal framework. While existing laws provide a solid foundation, they fail to comprehensively address emerging forms of OCSEA, such as online grooming and the livestreaming of child sexual abuse. Legislative amendments should explicitly criminalise these activities and extend the application of the 'best interests of the child' principle to all public and private entities that interact with children, including ICT companies. This broader application would ensure that child protection is prioritised across all sectors, holding corporations accountable for safeguarding children's rights.

Furthermore, Kenya should prioritise the ratification of key international treaties, such as the OPSC and the Malabo Convention, to strengthen cross-border collaboration and harmonise efforts to combat OCSEA. These legal reforms should be complemented by institutional strengthening, including increased funding and resources for law enforcement agencies, specialised training in digital forensics, and the establishment of a centralised task force dedicated to combating OCSEA.

5.2.3 Independent Oversight Mechanisms for Corporate Responsibility

On the technological front, ICT companies play a pivotal role in combating OCSEA through advanced technologies and proactive policies. To address the challenges posed by political pressures and inconsistent enforcement in combating OCSEA, the ICT industry must adopt a balanced approach that combines corporate responsibility with independent oversight mechanisms. Binding legal obligations alone are insufficient, as they may be subject to political misuse; instead, ICT companies should be guided by international standards for content moderation, enforced by neutral regulatory bodies operating free from political influence. These bodies should facilitate multi-stakeholder collaboration to ensure consistent and transparent enforcement of child safety measures.

ICT companies should also prioritise the best interests of the child principle by, implementing robust content moderation, leveraging advanced technologies for proactive detection of OCSEA-related content, and establishing clear reporting mechanisms. By embedding child-centred policies into their operations and aligning with independent oversight frameworks, the ICT industry can create a safer digital environment, ensuring accountability and resilience against evolving threats while mitigating the risks of political interference.

5.2.4 Public Awareness and Education Initiatives

Simultaneously, public awareness and education initiatives are crucial to address the informal dimensions of OCSEA. The state should take a more active role in integrating OCSEA education into school curricula and community programs, equipping both children and adults with the knowledge and tools to recognise and report instances of exploitation. NGOs and civil society organisations, which currently play a significant role in raising awareness, should be supported and integrated into these efforts to foster a culture of vigilance and reduce the stigma associated with reporting such crimes.

These recommendations would increase the efficiency of Kenya's frameworks in safeguarding children against OCSEA. They would lead the State to enhance coordination and accountability, foster international cooperation, mitigate political interference, and empower communities to combat exploitation. By prioritising the best interests of the child in its systems, Kenya can build a safer digital environment and ensure resilience against evolving threats thus protecting children's rights effectively.

5.3 Conclusion

This research has provided a comprehensive theoretical assessment of the legal and institutional frameworks addressing OCSEA in Kenya, grounded in doctrinal research methodologies. While the study has identified critical gaps in the existing legal framework and proposed recommendations for strengthening Kenya's response to OCSEA, it is important to acknowledge the inherent limitations of a purely doctrinal approach. The reliance on theoretical analysis of legal sources, which are themselves often limited in scope and applicability, restricts the ability to fully capture the practical realities of institutional systems and their operational challenges. Empirical research, involving fieldwork and data collection from key stakeholders, would yield more practical and accurate insights into the effectiveness of current mechanisms and the barriers to implementation. Furthermore, as a desktop study, this research has relied on primary and secondary legal sources, which are subject to the author's subjective interpretation. Although efforts were made to mitigate this limitation by consulting multiple sources, the absence of empirical data means that the findings and recommendations remain largely theoretical.

Another significant challenge lies in the rapidly evolving nature of ICT platforms and policies, which directly influence the proliferation of OCSEA and the ability of law enforcement to

adapt. The dynamic digital landscape necessitates continuous research to address emerging threats and gaps that this study may not have fully captured. Additionally, while the research highlights the importance of the best interests of the child principle, it does not sufficiently explore its implementation within specific contexts, such as addressing cultural and social barriers, integrating child protection into education systems, or examining the role of the media in combating OCSEA. Further research is needed to develop guidelines on how the best interests of the child can be effectively integrated into corporate responsibility frameworks and how this principle can be used to balance children’s rights in the decision-making process. Ultimately, while this study contributes to the discourse on OCSEA and provides a foundation for systemic reforms, it underscores the need for ongoing, context-specific research to address the multifaceted and evolving nature of this global challenge.



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