



## Human Rights Law Clinic Papers 2019

Would it be desirable for article 3 (4) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography to be transposed into a Business and Human Rights Treaty?

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## i. List of Abbreviations

**ASEAN:** Association of Southeast Asian Nations

**BHR Treaty:** Business and Human Rights Treaty

**CoE:** Council of Europe

**CRC Committee:** United Nations Committee on the Rights of the Child

**ECPAT:** Every Child Protected Against Trafficking

**GRECO:** Group of States Against Corruption

**HRC:** United Nations Human Rights Council

**OAS:** Organisation of American States

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

## ii. Table of Legal Instruments

### International Treaties

African Union, 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (adopted 27 June 2014).

Council of Europe, Criminal Law Convention on Corruption (adopted 27<sup>th</sup> January 1999, entered into force 1<sup>st</sup> July 2002) ETS No.173.

Organisation of American States, Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law (adopted 24<sup>th</sup> May 1984, entered into force 9<sup>th</sup> August 1992) OAS no.63.

United Nations Committee on the Rights of the Child, *General Comment No.16 on State Obligations regarding the impact of the business sector on children's rights* 2013 CRC/C/GC/16.

United Nations General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25<sup>th</sup> May 2000, entered into force 18 January 2002) UNTS 2171 A/RES/54/263 (OPSC).

### National Legislation

Act No. 52 1999 on the Regulation and Punishment of Acts Relating to Child Prostitution and Child Pornography, and the Protection of Children (1999) (Japan).

Act on Regulatory Offences (1968) (Germany).

Anti-Trafficking in Persons Act of 2003 (the Philippines).

Children's Act 2005 (The Gambia).

Children's Act no. 38 of 2005 (South Africa).

Criminal Code of the Netherlands (1881).

Interpretation Act 1901 (Australia).

Interpretation Act (1867) (Canada).

Interpretation Act 1937 (Ireland).

Interpretation Act (1968) (Jamaica).

Interpretation Act 1999 (New Zealand).

Interpretation Act 1962 (Trinidad and Tobago).

Interpretation Act 1978 (United Kingdom).

Issuing the Law on Combatting Illegal Migration and Smuggling of Migrants Law no. 82 for 2016 (Egypt).

Labour Law State of Qatar No.3 1962 (amended 2004).

Law Determining Offences and Penalties in General No.68/2018 (Rwanda) (2018).

Law No. 80 2002 Promulgating the Anti-money Laundering Law (amended 2014) (Egypt).

Law Regarding Combatting Human Trafficking, No.64/2010 (Egypt).

Law Relating to the Prevention, Suppression and Punishment of Trafficking in Persons and Exploitations of Others No.51/2018 (Rwanda) (2018).

Organic Law Instituting the Penal Code No.01/2012 (Rwanda) (2012).

Penal Code (1994) (France).

Penal Code (1973) (Guatemala).

Penal Code 1860 (India).

Penal Code (1931) (Mexico).

Penal Code 1962 (Morocco).

Penal Code (1983) (Portugal).

Penal Code (2004) (Turkey).

Prevention and Suppression of Prostitution Act 1996 (Thailand).

Prevention of Trafficking in Persons Act 2009 (Uganda).

Proceeds of Crime Act 2002 (United Kingdom).

The Anti-Human Trafficking Act 2008 (Thailand).

Trafficking in Persons Act 2007 (Act no. 11 2007) (The Gambia).

## 1. Introduction

This paper will evaluate whether it is desirable to transpose the model of liability of legal persons under article 3(4) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography<sup>1</sup> (OPSC) into a concise Business and Human Rights Treaty (BHR Treaty). This memorandum has three primary aims. Firstly, to provide original analysis of the domestic legal frameworks that exist to hold legal persons liable for offences listed under article 3(1) OPSC. Secondly, to analyse the effectiveness of the sanctions enforceable against legal entities, and whether they are appropriate based on the circumstances. Thirdly, to analyse the advantages and disadvantages of the flexible approach afforded to States under article 3(4) OPSC. This paper begins by outlining and defining the scope of article 3(4) OPSC as well as general international trends of implementation. The main focus of this paper is presented in section three, which analyses the approaches taken by States in implementing article 3(4) OPSC into domestic law. This paper is limited to presenting 2-3 case studies from each region.<sup>2</sup> Section four will consider the advantages and disadvantages of a flexible approach and what affect this may have on a BHR Treaty.

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<sup>1</sup> UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25<sup>th</sup> May 2000, entered into force 18 January 2002) UNTS 2171 A/RES/54/263 (OPSC), art 3(4).

<sup>2</sup> It is not within the scope or ambition of this paper to present a fully comprehensive analysis of the approach of every State that has ratified the OPSC.

## 2. Scope of Article 3(4) and General International Trends

Article 3(4) OPSC requires States to establish the liability of legal persons for offences outlined in article 3(1) OPSC. While article 3(1) OPSC explicitly requires States to establish criminal liability for natural persons, States are afforded a flexible approach in determining the liability of legal persons with the options to use criminal, civil or administrative legislation.<sup>3</sup> There is no single uniform approach in holding legal persons liable in domestic legislation. Offences under article 3(1) OPSC include the sale of children for the purpose of sexual exploitation, the transfer of child organs for profit or for engaging in forced child labour, and adoption without consent, as well as offences involving child prostitution and child pornography.<sup>4</sup>

Before considering specific examples of how States have implemented article 3(4) OPSC domestically, there are several overarching trends that have been identified. Firstly, States have predominantly attempted to implement criminal legislation to hold legal persons liable for human rights offences, with very few examples of States using administrative sanctions to penalise legal persons. This is undoubtedly a positive, particularly considering the OPSC's overall aim to move towards the international criminalisation of such offences.<sup>5</sup> Despite this, a second identifiable trend is that domestic legislation is fragmented, often lacking a single succinct and complete piece of legislation establishing the liability of legal persons. As a result, a number of States, as this report will explore in more detail, have relied on establishing the liability of legal persons under the scope of pre-existing provisions, such as those concerning human trafficking.

The implementation of article 3(4) OPSC appears to have taken a reasonably uniform approach in common law States. While corporate liability in civil law countries may sometimes apply only with reference to certain statutory wrongs, common law systems are more likely to employ a general system of criminal liability for legal persons. The United Kingdom's handling of OPSC implementation is indicative of this approach to tackling corporate liability. UK law creates very little distinction between legal and natural persons when defining offences, with the UK's Interpretation Act holding that all references to 'persons' in UK law do not exclude legal persons unless explicitly stated.<sup>6</sup> The UK made numerous legislative changes in an

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<sup>3</sup> OPSC (n 1) art 3(4).

<sup>4</sup> *ibid*, art 3(1).

<sup>5</sup> Trevor Buck, ' "International Criminalisation and Child Welfare Protection": The Optional Protocol to the Convention on the Rights of the Child' (2008) 22 *Children & Society* 167, 167.

<sup>6</sup> Interpretation Act 1978 (United Kingdom), sch 1.



attempt to cover article 3(1) OPSC, automatically extending liability to corporate entities.<sup>7</sup> It also follows from the Interpretation Act that any penalties (besides those related to imprisonment) that may be ascribed to natural persons may be ascribed to legal persons as well. The Proceeds of Crime Act also allows for criminal property confiscation. Additionally, The UK has also shown the capacity to revoke the operating licences of legal persons acting in breach of criminal law.<sup>8</sup> Beyond criminal penalties which may be imposed in domestic law, the UK also maintains a system, known as civil recovery, which allows civil claims to be made against violating corporations under the Proceeds of Crime Act 2002.<sup>9</sup>

Similar measures can be identified in other common law jurisdictions. Many common law States have their own Interpretation Acts, adopting the same definition of ‘persons’ as that of the UK, including Australia,<sup>10</sup> Canada,<sup>11</sup> and New Zealand,<sup>12</sup> Jamaica,<sup>13</sup> and Trinidad and Tobago.<sup>14</sup> India, which employs a hybrid common law system, applies the same broad definition of ‘persons’ through a provision of its Penal Code.<sup>15</sup> Ireland, one of the few common law States not party to the OPSC (and the only European State) employs the British definition of ‘persons’ as part of its own Interpretation Act.<sup>16</sup> This trend goes some way to explain why it has been uncontroversial for common law States to adopt criminal measures when dealing with 3(4) OPSC obligations.

Criminal liability for corporations is possible under US law and has been applied in certain cases where an employee commits a crime.<sup>17</sup> The most notable instance of US law enforcement tackling corporations has been against those involved in child pornography. For example, in 2010 the Webe Web Corporation of Florida was found guilty of child pornography offences following an FBI investigation. As part of Webe Web’s plea deal, it was fined \$1

<sup>7</sup> Committee on the Rights of the Child (CRC Committee), Consideration of reports submitted by States parties under article 12, paragraph 1 OPSC: United Kingdom of Great Britain and Northern Ireland (2012) CRC/C/OPSC/GBR/1, paras 94-105.

<sup>8</sup> Georgina Jones, ‘First UK company to be liable for modern slavery’ (Taylor Wessing, 30 June 2016) <<https://united-kingdom.taylorwessing.com/en/insights/corporate-crime-matters/first-uk-company-to-be-liable-for-modern-slavery?fbclid=IwAR1IGak1QBxeUkR5xAxkNueuCKrXmYVX1cXBBF3R5yWdJYOp4iJdVQuHCCg%3E>> accessed 28 April 2019.

<sup>9</sup> Proceeds of Crime Act 2002 (United Kingdom), s 240-316.

<sup>10</sup> Interpretation Act 1901 (Australia), s 2C.

<sup>11</sup> Interpretation Act (1867) (Canada), s 7.

<sup>12</sup> Interpretation Act 1999 (New Zealand), s 29.

<sup>13</sup> Interpretation Act (1968) (Jamaica), s 3.

<sup>14</sup> Interpretation Act 1962 (Trinidad and Tobago), s 16.

<sup>15</sup> Indian Penal Code 1860, art 11.

<sup>16</sup> Interpretation Act 1937 (Ireland), s 11(c).

<sup>17</sup> CRC Committee, ‘Consideration of reports submitted by States parties under article 12, paragraph 1 OPSC: Second periodic report of States parties due in 2010 and responses to the recommendations contained in the Committee’s concluding observations of 25 June 2008: United States of America’ (2011) CRC/C/OPSC/USA/2, para 239.

million and surrendered control of 19 domain names.<sup>18</sup> In addition to Webe Web's corporate criminal liability, various company officials received individual criminal sentences.<sup>19</sup> More recently, when the online company *Backpage* was seized by US law enforcement for charges related to facilitating child trafficking, the corporate entity was held liable in a separate criminal case to company representatives.<sup>20</sup>

Parallels can be drawn between article 3(4) OPSC and the corruption liability model. For example, both draw a very narrow focus in order to hold legal entities liable for violations.<sup>21</sup> The responses of common law jurisdictions have also been some of the most rigorous to issues relating to corporate liability for international crimes, demonstrating a commitment to tackling offences carried out by corporate entities. For example, this is most notable in the field of bribery, where the US-enacted Foreign Corrupt Practices Act has enabled US law enforcement to levy huge fines against corporate profiteers from corruption, many of which are non-American.<sup>22</sup> The UK followed suit with the Bribery Act 2010, labelled 'the toughest anti-corruption legislation in the world'.<sup>23</sup>

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<sup>18</sup> US Department of Justice, 'Florida Corporation Pleads Guilty to Transportation of Child Pornography and Conspiracy to Produce Child Pornography' (Justice News, 22 April 2010) <[https://www.justice.gov/sites/default/files/criminal-ceos/legacy/2015/05/26/NDAL\\_Webeweb\\_plea\\_20100422.pdf](https://www.justice.gov/sites/default/files/criminal-ceos/legacy/2015/05/26/NDAL_Webeweb_plea_20100422.pdf)> accessed 28 April 2019.

<sup>19</sup> US Department of Justice, 'Vice President of Florida Corporation Sentenced to 108 Months in Prison for Transporting Child Pornography' (Justice News, 17 December 2010) <<https://www.justice.gov/opa/pr/vice-president-florida-corporation-sentenced-108-months-prison-transporting-child-pornography>> accessed 28 April 2019.

<sup>20</sup> US Department of Justice, 'Backpage's Co-founder and CEO, As Well As Several Backpage-Related Corporate Entities, Enter Guilty Pleas' (Justice News, 12 April 2018) <<https://www.justice.gov/opa/pr/vice-president-florida-corporation-sentenced-108-months-prison-transporting-child-pornography>> accessed 28 April 2019.

<sup>21</sup> Anita Ramasastry, 'Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement' in Surya Deva & David Bilchitz (eds) *Human Rights Obligations of Business* (CUP 2013) 173.

<sup>22</sup> Richard L Cassin, 'With MTS in the New Top Ten, Just One U.S. Company Remains' (The FCPA Blog, 11 March 2019) <<http://www.fcpablog.com/blog/2019/3/11/with-mts-in-the-new-top-ten-just-one-us-company-remains.html>> accessed 28 April 2019.

<sup>23</sup> Brigid Breslin, Doron Ezickson, John Korocas, 'The Bribery Act 2010: Raising the Bar Above the US Foreign Corrupt Practices Act' (2010) 31 *The Company Lawyer* 362.

### 3. Domestic Implementation of Article 3(4) OPSC: Regional Analysis

#### 3.1. Europe

The civil law systems of States in Europe have not had the same propensity for imposing various types of liability (especially criminal) onto legal persons. However, this has not stopped European States in recent years altering their approaches to include criminal responsibility for legal persons. Anti-corruption-based liability is illustrative of this. For example, the Group of States against Corruption (GRECO), the Council of Europe's (CoE) anti-corruption body, began its second round of State evaluations in 2003 with one of its primary aims being to improve liability of legal persons. This was followed by measures being adopted by European States in the early to mid-2000s. Unlike the flexibility accorded by article 3(4) OPSC, GRECO's approach to tackling corruption is heavily focussed on criminal sanctions, with the GRECO Criminal Law Convention on Corruption (ratified by all CoE members) proclaiming 'Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for ... criminal offences'.<sup>24</sup> While this may be attributed to increased political will to tackle corruption, the readiness of European States to implement criminal liability with regards to corruption has paved the way for adoption of such liability in other areas.

Perhaps among the most effective approach taken in adopting criminal liability in the wake of GRECO's reviews is that of France. Act No. 2004-204 affected French adoption of criminal liability for legal persons and applies to all offences, including those under article 3(1) OPSC.<sup>25</sup> The effectiveness of France's system stems from its generality: inserting one article into its penal code that introduces criminal liability that applies generally to various offences. This allows for a full regime of sanctions, varying from fines to confiscation and business closure,<sup>26</sup> to be employed equally effectively across all crimes.<sup>27</sup> The Netherlands maintains a similar system to France, whereby a full range of sanctions may be applied to legal persons committing any criminal offences.<sup>28</sup> Both jurisdictions impose stringent fines on convicted legal persons. For instance, fines for legal persons in France may be five times those imposed on

<sup>24</sup> Council of Europe (CoE), Criminal Law Convention on Corruption (adopted 27<sup>th</sup> January 1999, entered into force 1<sup>st</sup> July 2002) ETS No.173, art 18(1).

<sup>25</sup> CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 12, Paragraph 1 OPSC: Initial Reports of States Parties Due in 2005: France' (2006) CRC/C/OPSC/FRA/1, para 37.

<sup>26</sup> French Penal Code (1994), arts 131-149.

<sup>27</sup> *ibid* art 121-2.

<sup>28</sup> CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 12, Paragraph 1, OPSC: Initial reports of States parties due in 2007: The Netherlands (2008) CRC/C/OPSC/NLD/1, paras 37-39.

natural persons.<sup>29</sup> In the Netherlands, article 3(1) OPSC offences are generally considered to be worthy of a Fifth Category fine (up to €82,000 (\$92,750)).<sup>30</sup> However, for offences committed by legal persons, the fine imposed is automatically one category higher. This results in a Sixth Category fine (up to €820,000 (\$927,600)) when legal persons commit the same offences.<sup>31</sup>

In contrast to this general approach taken in France and the Netherlands, other States have tied sanctions to specific provisions within their criminal code. For example, Turkey almost avoided the tension entirely by utilising a distinct category of punishments styled as ‘security precautions’<sup>32</sup> and distinguished from the standard criminal ‘punitive sanctions’.<sup>33</sup> This approach can, however, be said to be less effective than the French approach as the ad-hoc nature of tying security precautions to particular offences may lead to gaps in coverage. For example, while Turkey extends the security provisions to most of the article 3(1) OPSC offences, it does not cover Turkish penal offences related to forced labour. This is contrasted with the position of Portugal, where criminal liability has been established, but only for named offences.<sup>34</sup> However, these offences do include all of those listed in article 3(1) OPSC.

Despite the widespread adoption of criminal sanctions for legal persons in Europe, certain States have shown they remain uncomfortable applying criminal penalties to legal persons. In these States, the focus of a criminal prosecution will be on the agents of a legal person that commissioned the offence, while the fine placed upon the legal personality acts as an additional deterrence. For example, in Germany, there is no criminal liability for legal persons, despite much public debate on the issue.<sup>35</sup> While corporate agents are held criminally liable, administrative penalties are imposed against the legal entity itself for article 3(1) OPSC offences.<sup>36</sup> These are exclusively in the form of monetary sanctions. The size of a fine is determined by the culpability of the crime committed. The category of offence carrying the most onerous penalty, a criminal offence requiring intention, carries a maximum €10,000,000

<sup>29</sup> French Penal Code (n 27), art 131-38.

<sup>30</sup> Criminal Code of the Netherlands (1881), art 273f. Please note that currency conversions throughout this report were using at XE Currency Converter accurate as of April 2019 <<https://www.xe.com/currencyconverter/>> accessed 30<sup>th</sup> April 2019.

<sup>31</sup> *ibid* art 23(7).

<sup>32</sup> ‘Security Precautions’ refer to the punishments imposed by Turkish Criminal Law when characteristics of the defendant render the usual ‘punitive sanctions’ inappropriate. Classes which may receive security persons include legal persons, minors and ‘insane people’. Examples may be found in Arts 53-60 of the Turkish Penal Code (2004).

<sup>33</sup> Criminal Code of Netherlands (n 30), art 20(2).

<sup>34</sup> Portuguese Penal Code (1983), art 11(2). See also; Rui Patrício & João Matos Viana, ‘Criminal Liability of Corporate Entities under Portuguese Law’ *Criminal Law and Criminal Reform Newsletter* (Lisbon, 2007) 1.

<sup>35</sup> Anna Oehmichen, ‘Overview on anti-corruption rules and regulations in Germany’ (*Anti-Corruption in Europe*) <[http://www.ecba.org/extdocserv/projects/ace/20160126\\_ACE\\_CountryreportGermany.pdf](http://www.ecba.org/extdocserv/projects/ace/20160126_ACE_CountryreportGermany.pdf)> accessed 13 May 2019, 5.

<sup>36</sup> Act on Regulatory Offences (1968) (Germany) s 30.

(\$11,306,800) fine.<sup>37</sup> While Germany limits its options in punishing legal persons, it has at least provided for a system of comparatively heavy fines.

Russia has been the State most resolutely opposed to the increasing shift towards criminalisation. In response to its article 3(4) OPSC obligations, Russia has adopted a purely administrative legal regime.<sup>38</sup> This appears to be a trend in Russian domestic law. For example, Russia's adherence to administrative liability is further evidenced by its continued use of administrative sanctions in the field of corruption, where such liability falls short of various international standards including the GRECO Criminal Law Convention on Corruption.<sup>39</sup> GRECO has therefore been critical of Russia's refusal to adopt criminal sanctions<sup>40</sup> and the State's failure to comply with GRECO's requests that it does so.<sup>41</sup> Despite flexibility afforded by article 3(4) OPSC, the Committee on the Convention on the Rights of the Child (CRC Committee) has also challenged Russia on the use of administrative sanctions, urging Russia to adopt criminal liability for legal persons as recently as 2018.<sup>42</sup> It is important to highlight that this represents the CRC Committee attempting to engage more thoroughly with article 3(4) OPSC requirements than it has previously. This is notable for several reasons. Firstly, it suggests that the CRC Committee, departing from the purported flexibility of article 3(4) OPSC, has indicated criminal sanctions to be the most appropriate penalty for offences under article 3(1) OPSC. Secondly, this recent challenge illustrates that the CRC Committee potentially sees the future international standard of liability for legal persons to be criminal. Furthermore, the position adopted by the CRC Committee illustrates that administrative sanctions are not perceived as sufficiently dissuasive. This is a sensible stance to adopt. Indeed, while some criminal penalties may only take the form of monetary sanctions, they also carry an additional stigma and criminal label.<sup>43</sup> Despite the seeming international consensus that criminal punishments are appropriate both in the areas of child rights and corruption, Russia continues to stand out as a State committed to administrative sanctions whether afforded flexibility or mandated to criminalise.

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<sup>37</sup> Ibid.

<sup>38</sup> CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 12, Paragraph 1, OPSC: Reports of States parties due in 2013: Russian Federation' (2016) CRC/C/OPSC/RUS/1, para 231.

<sup>39</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia, 'Liability of Legal Persons for Corruption in Eastern Europe and Central Asia' (2015) 13.

<sup>40</sup> Group of States against Corruption (GRECO), 'Russian Federation Second Compliance Report, Third Round Evaluation' (2016) para 16.

<sup>41</sup> Ibid paras 120-123.

<sup>42</sup> CRC Committee, 'Concluding observations on the report submitted by the Russian Federation under article 12, paragraph 1 OPSC (2018) CRC/C/OPSC/RUS/CO/1, paras 29-30.

<sup>43</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia (n 39) 16.

### 3.2. Central and Southern Africa

A relatively high proportion of States from this region are yet to ratify the Optional Protocol, namely Cameroon, Ghana, Kenya, Zambia and Liberia.<sup>44</sup> Of course, this is not necessarily revealing of 'good' human rights compliance, as poorly performing States may be as likely as other States to ratify human rights instruments.<sup>45</sup> However, it reveals that there exists no binding influence on a large number of States in this region. Perhaps it is therefore unsurprising that Cameroon, Ghana and Kenya have previously been identified as some of the States with the highest instances of trafficking of children for sexual exploitation.<sup>46</sup> Nevertheless, there appears to be a regional shift in attempts to legislate for the criminal liability of legal persons at a supranational level. For instance, once established, the African Criminal Court hopes to create criminal liability for legal persons without precluding the liability of natural persons.<sup>47</sup> Domestic legislation in several States appears to follow this model, with few States failing to establish liability for legal persons in any capacity.<sup>48</sup>

One identifiable trend in this region is a reactive approach to combatting thematic issues regarding the OPSC. In particular, child sex tourism and child trafficking are prevalent issues in various States. As such, some States have incorporated liability of legal persons via the introduction or amendment of other legislation, often relying on human trafficking provisions.<sup>49</sup> Consequently, definitions of the offences under article 3(1) OPSC are often incomplete or fail to apply to legal persons explicitly, despite criminal liability being established in domestic legislation.<sup>50</sup> The CRC Committee highlighted this issue in Rwanda.<sup>51</sup> Amended legislation makes explicit reference to the criminal liability of legal persons for article 3(1) OPSC offences under Law No. 68/2018.<sup>52</sup> This law outlines a variety of criminal sanctions in place for legal persons ranging from the use of fines, confiscation of the objects used or intended for use in

<sup>44</sup> See United Nations Treaty Collection, OPSC  
<[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11-c&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&clang=_en)> accessed 28<sup>th</sup> April 2019.

<sup>45</sup> Buck (n 5) 176.

<sup>46</sup> Patchareeboon Sakulpitakphon, 'African Tourism Development and the Commercial Sexual Exploitation of Children' in Every Child Protected Against Trafficking International (ECPAT International), *Confronting the Commercial Sexual Exploitation of Children in Africa* (2007) 6.

<sup>47</sup> African Union, 'Protocol on Amendments to the Statute of the African Court of Justice and Human Rights' (adopted 27<sup>th</sup> June 2014) art 46(c).

<sup>48</sup> For example See CRC Committee, 'Concluding Observations on the Report Submitted by the Democratic Republic of the Congo Under Article 12 Paragraph 1 OPSC' (2017) CRC/C/OPSC/COD/CO/1, para 31.

<sup>49</sup> Mike Dottridge, 'Child Trafficking for Sexual Purposes: A Contribution of ECPAT International to the World Congress III Against Sexual Exploitation of Children and Adolescents' (2008) 23.

<sup>50</sup> For example see CRC Committee, 'UN Committee on the Rights of the Child: Concluding Observations Sudan' (2007) CRC/C/OPSC/SDN/CO/1, para D4 (a); (b); (c).

<sup>51</sup> CRC Committee, 'Concluding Observations on the Initial Report of Rwanda Submitted under Article 12 Paragraph 1 OPSC Adopted by the Committee at its Sixty-third Session' (2013) CRC/C/OPSC/RWA/CO/1, para 27.

<sup>52</sup> Law Determining Offences and Penalties in General No.68/2018 (Rwanda) (2018) art 88.

the commission of a crime, publication of the penalty imposed, dissolution, and judicial supervision.<sup>53</sup> Further details of these sanctions are provided for in Law No. 01/2012.<sup>54</sup> The Rwandan government recently introduced further changes to the law on the prevention, suppression and punishment of trafficking in persons under Law No. 51/2018,<sup>55</sup> imposing criminal sanctions on legal persons in the form of a fine of no less than 50,000,000 and no more than 100,000,000 Rwandan francs (\$55,270 and \$110,540).<sup>56</sup> However, establishing criminal liability of legal persons does not preclude the individual liability of company representatives and accomplices.<sup>57</sup> This means a private company may receive a substantial fine, while not preventing the prosecution and imprisonment of company representatives or management.

The Gambia has been commended for the implementation of the Children's Act 2005, which clarifies the domestic legal position of offences outlined in article 3(1) OPSC.<sup>58</sup> Firstly, criminal liability for legal persons is established under the Children's Act sections 65 and 236 for offences of procuring children for the purpose of prostitution, production of pornographic materials or pornographic performance,<sup>59</sup> organising or supporting travel that promotes child prostitution,<sup>60</sup> and the buying or selling of children for an immoral purpose.<sup>61</sup> Rwandan and Gambian domestic legislation share the feature of not precluding the individual criminal liability of directors, managers or other employees, as well as anyone purporting to act in such a capacity.<sup>62</sup> However, overall there remains an absence of clarity regarding the sanctions applicable to legal persons in Gambian legislation. For example, the liability of legal persons will only be enforced in circumstances 'where practicable'.<sup>63</sup> This is problematic because the sanctions for these offences rely on imprisonment ranging from 10 to 14 years *without* an option for a fine.<sup>64</sup> Despite providing clarity of the meaning of the offences under this act, there is little reference to the sanctions that can be imposed specifically against legal entities. Of course, prison sanctions will be applicable in the individual criminal liability of directors and managers, but the sanctions in place are insufficient to incur financial or structural punishment

<sup>53</sup> *ibid* art 25. See also CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 12 (1) of the OPSC: Initial Report of Rwanda' (2011) CRC/C/OPSC/RWA/1, para 123.

<sup>54</sup> Organic Law Instituting the Penal Code No.01/2012 (Rwanda) (2012), art 32 (1)-(10).

<sup>55</sup> Law Relating to the Prevention, Suppression and Punishment of Trafficking in Persons and Exploitations of Others No.51/2018 (Rwanda) (2018), arts 19, 21-24.

<sup>56</sup> *ibid* art 28.

<sup>57</sup> Law No.68/2018 (n 52) art 88.

<sup>58</sup> Njundu Drammeh, 'The Gambia's Children's Act 2005 – A Model of Good Practice to Protect Children from Sexual Exploitation' in ECPAT International, *'Commercial Sexual Exploitation of Children'* (n 46) 49.

<sup>59</sup> Children's Act 2005 (The Gambia), s 31(1).

<sup>60</sup> *ibid* s 32(1).

<sup>61</sup> *ibid* s 37(1); 38(b); 38(e); 38(f).

<sup>62</sup> *ibid* s 65.

<sup>63</sup> *ibid* s 65 and 236.

<sup>64</sup> *ibid* s 31; 37; 38.

on the corporation itself, which is perhaps needed to combat issues such as commercial sexual exploitation of children and child sex tourism. Similar provisions for the criminal liability of legal persons are outlined in the Gambian Trafficking in Persons Act 2007,<sup>65</sup> providing for offences of the sale of children and exploitation for the purpose of prostitution.<sup>66</sup> Unlike the Children's Act, this legislation provides for a combination of fines, ranging from 50,000 to 500,000 dalasis (\$1,000 to \$10,100), and life imprisonment for offences involving children.<sup>67</sup>

States have taken similar approaches elsewhere. For example, the Ugandan Prevention of Trafficking in Persons Act 2009 addresses several offences under article 3(1) OPSC, but again, fails to address all offences. For example, this legislation establishes offences for trafficking in persons who engage children in prostitution, pornography, sexual exploitation, and forced labour.<sup>68</sup> For such offences, legal persons are liable to a criminal fine equal to 20,000,000 Ugandan shillings (\$5,450), as well as temporary or permanent closure, dissolution or disqualification from practice.<sup>69</sup> Criminal sanctions revoking the licences of natural persons, rather than the legal entity itself, can be found in South Africa.<sup>70</sup> This shows further evidence of a lack of engagement with OPSC article 3(4) requirements.

### 3.3. North Africa and The Middle East

Common concerns raised by the CRC Committee include the validity of collected data in this region and poor OPSC reporting mechanisms.<sup>71</sup> Additionally, a range of North African and Middle Eastern States have been identified as having a significant growth in tourism, political instability, and implementing domestic legislation that fails to conform to OPSC standards.<sup>72</sup> While not the only State,<sup>73</sup> Morocco provides an example of incomplete domestic legislation.<sup>74</sup> For instance, the Moroccan Penal Code outlines in some detail the liability of legal persons for offences concerning child prostitution and child pornography, although explicit liability for legal

<sup>65</sup> Trafficking in Persons Act 2007 (Act no. 11 2007) (The Gambia) s 41.

<sup>66</sup> *ibid* s 28(3(a)) and (b). See also s 28(5) for clarification of the offences relating to children.

<sup>67</sup> *ibid* s 28 (4) and (5).

<sup>68</sup> Prevention of Trafficking in Persons Act 2009 (Uganda) s 3(1)(b) and 5.

<sup>69</sup> *ibid* s 3(2).

<sup>70</sup> Children's Act no. 38 of 2005 (South Africa) s 284(1) and 284(4).

<sup>71</sup> Mark Erik Hecht with Omar Albitar and Melody Burke, 'Global Study on Sexual Exploitation of Children in Travel and Tourism: Regional Report Middle East and North Africa: ECPAT International' (2016) 12 and 18. See also CRC Committee, 'Concluding Observations on the Combined Fourth and Fifth Periodic Report of Lebanon' (2017) CRC/C/LBN/CO/4-5, para 48.

<sup>72</sup> *ibid* 11-13.

<sup>73</sup> CRC Committee, 'Concluding Observations on the Report Submitted by Iraq Under Article 12 Paragraph 1 OPSC' (2015) CRC/C/OPSC/IRQ/CO/1, 20.

<sup>74</sup> CRC Committee, 'Concluding Observations on the Report Submitted by Morocco Under Article 8 Paragraph 1 OPSC' (2006) CRC/C/OPSC/MAR/CO/1, para 15-17. See also CRC Committee 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Morocco' (2014) CRC/C/MAR/CO/3-4, para 22 and 40(c).



persons is not established for the sale of children or forced labour.<sup>75</sup> While prison sanctions apply to individuals, sanctions for legal persons are imposed in the form of a fine of 10,000 to 3,000,000 dirhams (\$1,050 to \$312,670) for prostitution and pornography offences.<sup>76</sup> An area of concern is that the sanctions vary in scope enormously, and little detail is provided regarding how the severity of the fine is determined. For example, Penal Code articles 497-503 suggest that there may be certain ‘aggravating’ factors that may lead to a more substantial fine, such as offences concerning multiple child victims, or those committed by guardians.<sup>77</sup> However, ambiguity remains as to how fines would be calculated. For instance, it is uncertain whether a larger fine could be determined based on the value of the legal entity, or simply based on measuring ‘severity’. This is particularly problematic, as article 3(1) OPSC concerns very serious human rights violations. A more comprehensive legislative framework would have clear and precise guidelines detailing the circumstances when the most severe sanctions would apply. This is important issue to clarify to ensure that sanctions are effective and appropriate.

The exploitation of children for the purpose of forced labour is another area of concern in Morocco.<sup>78</sup> Such concerns are present elsewhere in the region. For instance, Qatar has faced criticism over human trafficking for the purpose of forced labour (including child labour) leading up to the 2022 World Cup.<sup>79</sup> The sale of children for labour in camel racing is also considered a longstanding issue in the State with a severe lack of enforcement mechanisms to hold employers liable.<sup>80</sup> Indeed, legal persons may be held liable for recruiting others without a licence under Qatar labour law, and sanctions in the form of fines or closure of the premises may be applied in some circumstances.<sup>81</sup> However, the primary concern is the lack of legislation that specifically addresses offences involving children. This is particularly concerning given the prevalence of child labour in the State, and ultimately demonstrates insufficient OPSC compliance. Similarly, in Moroccan legislation, it is unclear whether the representatives of the legal entity will face individual sanctions on top of those in place for the company for forced labour offences. Indeed, Human Rights Watch have commented that this is an issue where law enforcement has been very weak.<sup>82</sup> Rather simply, the effectiveness of

<sup>75</sup> Penal Code 1962 (Morocco) arts 497-503. *See also* arts; 467-1; 467-2.

<sup>76</sup> *ibid* art 501-1.

<sup>77</sup> *ibid* art 499(3); 499(4); 503-2.

<sup>78</sup> Bureau of International Labor Affairs, ‘Child Labour and Forced Labour Reports - 2017 Findings on the Worst Forms of Child Labour: Morocco’ (United States Department of Labor) <<https://www.dol.gov/agencies/ilab/resources/reports/child-labor/morocco>> accessed 28<sup>th</sup> April 2019.

<sup>79</sup> Plamena Solakova, ‘Qatar 2019 and 2022: Human Trafficking in Disguise’ (Future Foreign Policy, 6 August 2015) <<http://www.futureforeignpolicy.com/qatar-2019-2022-human-trafficking-disguise/>> accessed 28<sup>th</sup> April 2019.

<sup>80</sup> *ibid*.

<sup>81</sup> Labour Law State of Qatar No.3 1962 (amended 2004), article 29 and 145.

<sup>82</sup> Human Rights Watch, ‘Lonely Servitude: Child Domestic Labor In Morocco’, (November 2012) 42.

monetary sanctions depends on whether the fines imposed have the potential to substantially impact the legal entity involved and sufficiently deter similar offences.<sup>83</sup> There are similar concerns regarding the rising prevalence of child sex tourism and sexual exploitation of children online.<sup>84</sup> Despite attempts in domestic legislation to outline the liability of legal persons, there appears to be a lack of effective enforcement for offences falling under the scope of article 3(1) OPSC.<sup>85</sup> Of particular concern, the sanctions enforceable against legal persons are ambiguous, and fall short in areas that have been highlighted as underdeveloped.<sup>86</sup>

There is evidence of similar practice in Egypt, as well as concerns regarding the social acceptance of child labour and prevalence child sex tourism.<sup>87</sup> Equally, ineffective implementation of sanctions is likely to perpetuate the corporate culture or social acceptance of offences concerning children.<sup>88</sup> The liability of legal persons is often of secondary that of natural persons, with many article 3(1) OPSC offences being covered under trafficking legislation. For example, Law No. 64 2010 establishes joint liability of legal persons for offences including the sale and sexual exploitation of children.<sup>89</sup> Fines ranging from 50,000 to 200,000 Egyptian pounds (\$2,900 to \$11,500) are consequently shared between legal persons and natural persons representing the company.<sup>90</sup> A key element of this legislation is that the acts have to be committed in the name or benefit of the company in order to establish the liability of the legal person itself.<sup>91</sup> Such a requirement has the potential to set a high threshold to establish liability for legal persons. Further evidence of this can be found in Law No. 82 2016, concerning the illegal smuggling of migrants (including children for profit).<sup>92</sup> This imposes a fine between 200,000 and 500,000 Egyptian Pounds (\$11,500 to \$28,800) on legal persons if the offence was committed for the benefit of the company.<sup>93</sup> This appears to be a consistent approach in Egypt's domestic legislation. Much like in Morocco, these examples of Egyptian legislation provide evidence that sanctions have the potential to vary in scope dramatically. However, Egyptian legislation does add that the fine can be within a specified range or 'equal to the value of the profit gained, whichever is greater'.<sup>94</sup> Egyptian legislation

<sup>83</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia (n 39) 36.

<sup>84</sup> CRC Committee, 'Concluding Observations Morocco 2014' (n 74) para 40(c).

<sup>85</sup> *ibid* para 10(a).

<sup>86</sup> Save the Children, 'Child Rights Situation Analysis: For Middle East and North Africa Region' (2008) 81.

<sup>87</sup> *ibid* 32. See also CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention - Concluding Observations: Egypt' (2011) CRC/C/OPSC/EGY/CO, para 27.

<sup>88</sup> Kai Ambos, 'International Economic Criminal Law' (2018) 29 *Crim. L. Forum* 499, 523 and 527.

<sup>89</sup> Law Regarding Combatting Human Trafficking, No.64/2010 (Egypt), art 11.

<sup>90</sup> *ibid* art 5.

<sup>91</sup> *ibid* art 11.

<sup>92</sup> Issuing the Law on Combatting Illegal Migration and Smuggling of Migrants Law no. 82 for 2016 (Egypt) art 3.

<sup>93</sup> *ibid* art 14.

<sup>94</sup> Law No.64/2010 Egypt (n 89) art 5. See also Law no. 82 for 2016 Egypt (n 92) art 6.

therefore provides a rare example of sanctions being linked to financial advantage gained rather than a pre-determined, potentially limiting range of fines.

A similar domestic model of criminal liability applies to anti-money laundering legislation, albeit with very different sanctions.<sup>95</sup> Importantly, the increase in the severity of fines was justified as an attempt to stop the rise of terror offences.<sup>96</sup> Fines for legal entities for money laundering range from 100,000 to 5,000,000 Egyptian Pounds (\$5,770 to \$288,300), significantly higher than even the most severe fines for trafficking.<sup>97</sup> Indeed, the largest fine for money laundering is ten times that for smuggling children for profit. This reflects a belief that substantial fines can be effective. This example illustrates that where the political will exists, States have the potential to implement fines that are large enough to be sufficiently discouraging. Nevertheless, based on the gravity of the offences under article 3(1), the current fines appear to be inappropriate.

### 3.4. Latin America

There is a clear trend in Latin America that States have failed to successfully incorporate article 3(4) into domestic legislation. Despite all States in South and Central America being party to the OPSC, article 3(4) has been almost universally ignored or fundamentally misunderstood. However, this is not to suggest that there have been no efforts at a regional level to more precisely establish liability for legal persons. In fact, an OAS-based treaty does establish that legal persons exist ‘separately and distinctly from those of its members or organizers’.<sup>98</sup> However, only 4 of the 35 OAS member States have ratified this treaty, showing a lack of commitment to the standards set out by article 3(4) OPSC. Guatemala provides an example of how a State may misinterpret the requirements of article 3(4). For instance, article 38 of the Guatemalan Penal Code holds representatives and agents working on behalf of legal persons individually liable, rather than the legal entity itself.<sup>99</sup> Moreover, it is particularly problematic that the State cited article 38 specifically as evidence of the ways in which domestic legislation conforms to article 3(4) OPSC requirements and holds legal persons

<sup>95</sup> Law No. 80 2002 Promulgating the Anti-money Laundering Law (amended 2014) (Egypt) art 16.

<sup>96</sup> George Sadek, ‘Egypt: Presidential Decree Amending the Law on Money Laundering to Combat Terrorism’ (Library of Congress, 20<sup>th</sup> May 2014) <<http://www.loc.gov/law/foreign-news/article/egypt-presidential-decree-amending-the-law-on-money-laundering-to-combat-terrorism/>> accessed 28<sup>th</sup> April 2019.

<sup>97</sup> Law No. 80 2002 (Egypt) (n 95) art 16.

<sup>98</sup> Organisation of American States (OAS), Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law (adopted 24<sup>th</sup> May 1984, entered into force 9<sup>th</sup> August 1992) OAS no.63, art 1.

<sup>99</sup> Guatemalan Penal Code (1973) art 38.

criminally liable, when in fact this is not the case.<sup>100</sup>

Mexico provides an example of a State having attempted to conform to article 3(4) OPSC, while being ineffective in its approach. To illustrate, the Mexican Penal Code allows judges to dissolve corporations when agents are found guilty of certain offences.<sup>101</sup> This approach lacks the flexibility evident in several other domestic legal frameworks. In fact, the approach is one that is seemingly relies on either enforcing total dissolution or no liability at all. Indeed, the sanction of dissolution has been considered ‘the corporate equivalent of capital punishment’.<sup>102</sup> While the presence of *some* sanction may be regarded as a positive, it is unlikely large corporations, particularly those with strong economic influence, would be dissolved, and would as such potentially result in no punishment for criminal activity. This is unusual as the sanction of dissolution is often considered to be reserved only for corporations whose primary function involves illegal activity.<sup>103</sup> Also, Mexico’s approach falls short of genuine corporate liability, as corporate entities are not held liable separately from natural persons. As such, the CRC Committee concluded that Mexican legislation had failed to adequately meet article 3(4) OPSC requirements.<sup>104</sup>

Many States in Latin America have failed to establish any liability for legal persons whatsoever. For example, Colombia confirmed that ‘legal entities are not criminally liable in Colombian law’.<sup>105</sup> It is notable that even as the State acknowledged its failure to implement criminal corporate liability, it has nevertheless failed to take measures in any capacity (criminal, civil or administrative) to conform to OPSC requirements. It must be noted that attempts have been made to introduce a code of conduct for corporations operating in the hotel and tourism industry.<sup>106</sup> The significant disadvantage with such codes of conduct is that they rely on voluntary actions by corporations and therefore lack the same weight as law. For example, while this may have a positive impact on influencing behaviour and conduct of legal persons, there is no legal influence or sanctions that can be used to effectively penalise corporations. Again, this is concerning given the gravity of article 3(1) OPSC offences. Moreover, such codes of conduct are isolated to very specific industries and do not apply to legal persons

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<sup>100</sup> CRC Committee, ‘Consideration of Reports Submitted by States Parties Under Article 12, Paragraph 1 OPSC: Reports of States parties due in 2004: Guatemala’ (2006) CRC/C/OPSC/GTM/1, para 143.

<sup>101</sup> Mexican Penal Code (1931) art 11.

<sup>102</sup> Ronald C Slye, ‘Corporations, Veils, and International Criminal Liability’ (2008) 33 Brooklyn Journal of International Law 955, 972.

<sup>103</sup> *ibid* 971.

<sup>104</sup> CRC Committee, ‘Consideration of Reports Submitted by States Parties under article 12, paragraph 1 OPSC: Mexico’ (2010) CRC/C/OPSC/MEX/CO/1, paras 31-32.

<sup>105</sup> CRC Committee, ‘Consideration of Reports Submitted by States Parties Under Article 12, Paragraph 1 OPSC: Reports of States parties due in 2005: Colombia’ (2009) CRC/C/OPSC/COL/1, para 189.

<sup>106</sup> *ibid* para 373.

throughout the State more generally. Such an approach typifies the hesitance of Latin American States in adopting any kind of regime that treats corporate entities as fully realised legal personalities. While unsatisfactory, this is a trend that appears to be relevant to this region specifically.

### 3.5. Asia and the Pacific

Two of the primary challenges to child rights in the Asia and the Pacific region are online sexual exploitation and child sex tourism. There has been evidence of a concerted effort within the Association of Southeast Asian Nations (ASEAN) framework to address such issues, as well as commercial sexual exploitation of children generally.<sup>107</sup> While not entirely effective, there is a clear awareness of the pressing need to adapt legislation to better protect children, and comply with international treaties. Internet facilitated sexual exploitation of children adds to existing challenges of regulation. For instance, it is estimated that 95% of commercial sexual exploitation in South Korea is carried out online.<sup>108</sup>

Thailand provides a good example of a State implementing a number of legislative changes in order to conform better to OPSC requirements, despite a number of domestic challenges surrounding the commercial and sexual exploitation of children.<sup>109</sup> However, inconsistencies in definitions of offences and sanctions imposed on legal persons remain. This is evident with pornography offences under the Computer Control Act 2007.<sup>110</sup> The weakness of this legislation is the lack of explicit reference to 'child' pornography, instead referring only to generic offences of obscenity.<sup>111</sup> Similarly, the Prevention and Suppression of Prostitution Act 1996 imposes penalties on the owner or manager of a prostitution business in the form of prison sentences and fines ranging from 60,000 to 300,000 baht (\$1,900 to \$9,400), but fails to make explicit reference to the liability of the legal entity itself.<sup>112</sup> Failing to distinguish between the conduct of natural and legal persons demonstrates an insufficient engagement with OPSC requirements. Thailand has consequently adopted the same approach as many other States, integrating OPSC article 3(1) offences into human trafficking legislation, providing for offences of the sale of children, prostitution and pornography (although once

<sup>107</sup> Deanna Davy, 'ECPAT Regional Overview: Sexual Exploitation of Children in Southeast Asia' (September 2017) 78.

<sup>108</sup> Angela Hawke, Alison Raphael, 'Offenders on the Move: Global Study on Sexual Exploitation of Children in Travel and Tourism' (May 2016) 27.

<sup>109</sup> ECPAT International, 'Alternative Report: Following the Initial Report From Thailand on the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (July 2011) 16.

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.* 19.

<sup>112</sup> Prevention and Suppression of Prostitution Act 1996 (Thailand) art 11.

again without specific reference to ‘child’ offences).<sup>113</sup> Sanctions imposed on legal persons range from 200,000 to 1,000,000 baht (\$6,300 to \$31,400), mirroring the sanctions imposed on legal persons for money laundering offences.<sup>114</sup> Indeed, the 2017 amendment to this law has now increased the maximum potentially penalty to 5,000,000 baht (\$157,100), providing evidence of a growing commitment to challenging the commercial exploitation of children.<sup>115</sup> It is, yet again, concerning that OPSC offences are provided for indirectly through trafficking legislation. Moreover, amended legislation has still failed to provide adequate definitions of prostitution and pornography. It is quite revealing that amended sanctions have been brought to the level of money laundering, suggesting that the State deems monetary sanctions to be more appropriate. It is nevertheless evident that offences relating to child prostitution and child pornography appear to have been poorly defined, and considered a lower priority based on the sanctions imposed within specific legislation.

Very similar concerns have been identified with Japanese legislation.<sup>116</sup> For instance, sanctions applicable to legal persons for such offences do not reflect the ‘zero tolerance’ stance on the trafficking of children for the purpose of child prostitution and child pornography.<sup>117</sup> Both offences are provided for in one specific legislative act, using a dual criminal liability model to hold both individuals and the company criminally liable.<sup>118</sup> Legal entities themselves are subject only to fines between 3,000,000 to 5,000,000 yen (\$26,800 to \$44,700) for child pornography offences, and 5,000,000 to 10,000,000 yen (\$26,800 to \$89,350) for child prostitution.<sup>119</sup> Sanctions for both of these offences vary substantially and suggests that the State perceive offences of child prostitution to be of graver concern. It is also concerning that fines are the only sanctions applicable to legal persons, rather than the prospect of dissolving corporation or revoking licences either permanently or temporarily.

A lack of compliance with the OPSC requirements for child pornography offences appears to be a trend in the region.<sup>120</sup> For example, the Philippines has been identified as having the most completely defined, OPSC compliant child pornography legislation in Southeast Asia.<sup>121</sup> However, it appears ineffective in practice. For instance, a prevalence of ‘organised cybersex’

<sup>113</sup> The Anti-Human Trafficking Act 2008 (Thailand) s 53.

<sup>114</sup> *ibid* art 61. See also art 5; 7; 8; 9.

<sup>115</sup> Liberty Asia, ‘Legal Analysis of Human Trafficking in Thailand’ (June 2017) 10.

<sup>116</sup> CRC Committee, ‘Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Japan’ (2019) CRC/C/JPN/CO/4-5, para 46(b) and (c).

<sup>117</sup> United Nations Human Rights Council (HRC), ‘Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography on her Visit to Japan’ (2016) A/HRC/31/58/Add.1, para 16(3).

<sup>118</sup> Act No. 52 1999 on the Regulation and Punishment of Acts Relating to Child Prostitution and Child Pornography, and the Protection of Children (1999) (Japan) arts 5; 6; 7(2)-(8); 8; 11.

<sup>119</sup> *ibid* art 5; 6; 7.

<sup>120</sup> Deanna Davy (n 107) 69 and 88.

<sup>121</sup> *ibid* 96-97.

or 'webcam child sex tourism' has been identified.<sup>122</sup> This is a rather unique issue in the region, and one that is facilitated by the reliance on the informal sector, where companies may operate with close to no accountability.<sup>123</sup> Of course, this is not isolated to child sex offences. For example, UNICEF have identified the ways in which socio-economic issues such as State violence, poverty, and labour migration may contribute to the circumstances of commercial exploitation of children.<sup>124</sup> Equally, evidence of this can be seen in what is becoming the routine use of child labour in the Philippines, often in unregulated and dangerous circumstances.<sup>125</sup> As a result, trafficking legislation has been used to supplement provisions of child exploitation and forced labour in order to comply with OPSC offences.<sup>126</sup> As such, it is unlawful for natural or legal persons to commit trafficking offences, however monetary sanctions between 1,000,000 and 2,000,000 pesos (\$19,300 and \$38,600) are only applicable to the managing or responsible participant, rather than the legal entity directly.<sup>127</sup> It is therefore unlikely that such sanctions will have the affect of addressing factors that have contributed to the commercial exploitation of children.<sup>128</sup>

This can be contrasted with East Timor, a State that has previously shown a lack of conformity with the OPSC.<sup>129</sup> However, amended human trafficking legislation extends criminal liability for a range of OPSC article 3(1) offences to legal persons. However, sanctions are far more comprehensive, including fines, dissolution, and asset forfeiture.<sup>130</sup> Unusually, there is also the option for additional compensation to be paid directly to victims of the offences.<sup>131</sup> East Timor therefore provides a rare example of a State adopting civil sanctions, in this case with the potential to provide compensation to victims involved in such offences. This combination of sanctions could provide a more comprehensive and appropriate means of penalising legal persons. Not only are legal persons held criminally liable for article 3(1) OPSC offences, but sanctions can also have the effect of impairing the business financially, as well as being put back into communities to help address root problems. However, there is no guarantee that an isolated monetary sanction would effectively provide for this.<sup>132</sup> Indeed, article 3(1) OPSC covers very serious human rights offences, which need to be effectively countered and should

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<sup>122</sup> Angela Hawke, Alison Raphael (n 108) 43.

<sup>123</sup> UNICEF, 'A Systematic Literature Review of the Drivers of Violence Affecting Children: the Philippines' (October 2016) 100-101.

<sup>124</sup> *ibid* 66.

<sup>125</sup> Human Rights Watch, 'What... if Something Went Wrong?: Hazardous Child Labor in Small-Scale Gold Mining in the Philippines' (2015) 6-8.

<sup>126</sup> Anti-Trafficking in Persons Act of 2003 (the Philippines).

<sup>127</sup> *ibid* art 10.

<sup>128</sup> UNICEF (n 123) 67.

<sup>129</sup> CRC Committee, 'Consideration of Reports Submitted by States Parties Under Article 12(1) OPSC: Timor-leste' (2007) CRC/C/OPSC/TLS/1, paras 17; 19; 45.

<sup>130</sup> United States Department of State, 'Trafficking in Persons Report' (2018) 419.

<sup>131</sup> *ibid*.

<sup>132</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia (n 39) 32.

certainly not be underestimated. Criminal sanctions are indeed the most appropriate both to label legal persons as criminal and establish guilt, something that has been advocated for in other models of liability.<sup>133</sup>

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<sup>133</sup> *ibid* 14-16.



#### 4. Effective and Appropriate Sanctions: Affording States Flexibility

The perceived “overlegalization” of human rights law may lead States to re-evaluate their commitment to an international framework if requirements are overly stringent.<sup>134</sup> A model that affords flexibility therefore promotes State participation and increases the likelihood of ratification.<sup>135</sup> This may be necessary to achieve incremental harmonisation in domestic law and more comprehensive human rights compliance overall.<sup>136</sup> Moreover, a flexible approach may also allow State practice to be evaluated, contributing to the gradual realisation of a robust rights framework.<sup>137</sup> Having afforded a flexible approach, it is easier to question States on the effectiveness of domestic legislation. For instance, the approach taken by the CRC Committee towards Russia makes it clear that administrative sanctions are considered inappropriate in the context of article 3(1) OPSC. Of course, the disadvantage of this approach is that administrative liability is effectively recognised as less appropriate than criminal liability, yet is still acceptable under international human rights law. This is problematic because States do not evidence a uniform approach to determine the liability of legal persons. Nevertheless, a flexible approach may be more effective to promote commitment to human rights practices overall.<sup>138</sup> One possible solution to this would’ve been the addition of a clause in Article 3(4) OPSC, mandating a clear standard by which the CRC Committee could judge national sanctions. For example, that sanctions be commensurate with harm caused or profit gained.

Establishing criminal liability does not guarantee that sanctions against legal persons will be appropriate. However, criminal sanctions certainly are an effective way of labelling a legal person’s guilt.<sup>139</sup> Moreover, the effective deterrence of legal persons’ actions requires a systematic use of sanctions, something criminal liability is more likely to provide for.<sup>140</sup> For example, establishing criminal liability will provide more investigatory tools, and more effective State cooperation.<sup>141</sup> Indeed, the latter point may be particularly important when considering

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<sup>134</sup> Laurence R Helfer, ‘Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes’ (2002) 7 *Crim. L. Rev.* 1832, 1832;1833.

<sup>135</sup> Of course, this is very difficult to measure, particularly as the OPSC (and indeed the CRC) is close to universal ratification.

<sup>136</sup> Chiara Macchi, ‘A Treaty on Business and Human Rights: Problems and Prospects’ in Jernej Letnar Čerňič and Nicolás Carillo-Santarelli (eds) *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018) 75.

<sup>137</sup> Anita Ramsastry (n 21) 173.

<sup>138</sup> Jill I Goldenziel, ‘Regulating Human Rights: International Organizations, Flexible Standards, and International Refugee Law’ (2014) 14 *Chicago J. Int. L.* 453, 455-457.

<sup>139</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia (n 39) 14.

<sup>140</sup> Ronald C Slye (n 102) 955, 960.

<sup>141</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia (n 39) 14-15.

the increasingly global nature of the legal persons and industries specifically highlighted in the OPSC Preamble.<sup>142</sup>

States that hold legal persons criminally liable in domestic legislation have taken very different approaches. Currently, the clear trend is a reliance on criminal fines in some capacity. The challenge is that a fine must be considered sufficiently severe to be dissuasive rather than 'just one additional cost of doing business'.<sup>143</sup> One clear trend among States is that when fines are applicable, very specific minimum and maximum amounts are indicated. One exception to this is Egypt, where a link to the financial advantage gained is explicitly made in domestic legislation. However, very few States appear to have adopted the same approach. This approach has advantages and disadvantages. Firstly, a fine based on the relative economic strength of a corporation will ensure that if a fine is applied it will have a substantial impact on a corporation as it is linked to profit. On the other hand, this could also result in substantial variations of fines for potentially identical offences.<sup>144</sup> There is therefore no guarantee that sanctions will have the potential to address consistent malpractice of legal entities.<sup>145</sup>

There appears to be very little justification as to how fines are calculated in domestic legislation, especially given the gravity of article 3(1) OPSC offences. There must equally be an element of flexibility in the possible sanctions that may be applied to legal persons, rather than fines alone. For example, domestic legislation, which allows for legal persons and the representatives of those companies to both be held liable but face separate sanctions appear to be most comprehensive. Equally, there are advantages and disadvantages of each type of sanction, from fines, prison sentences for representatives, dissolution, injunctions, re-distribution of company shares, and seizure of company property, as Slye highlights.<sup>146</sup> Accordingly, those domestic legal systems with a variety of sanctions are in a better position to effectively and appropriately punish legal persons as well as adapt to the large range of offences encompassed under article 3(1) OPSC.

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<sup>142</sup> UN High Commissioner of Human Rights, 'State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations' Core Human Rights Treaties: Individual Report on the UN CRC OPSC' Report no.6 (July 2007) para 182.

<sup>143</sup> Ronald C Slye (n 102) 955, 970

<sup>144</sup> *ibid.*

<sup>145</sup> *ibid* 963.

<sup>146</sup> *ibid* 973.

## 5. Conclusion

Evidence suggests that establishing the liability of legal persons under article 3(4) OPSC has been considered an afterthought for some States. The CRC Committee has only in recent years began to demonstrate suitable engagement with States that have insufficiently developed and implemented legislation that meets this provision. Nevertheless, despite the flexibility afforded to States to determine how legal persons are held liable for offences, this project has concluded that the majority have attempted to establish *criminal* liability. This is undoubtedly a positive. Indeed, our research suggests that the recent stance expressed by the CRC Committee has indicated a growing preference for criminal liability of legal persons.<sup>147</sup> Despite the advantages of the flexibility afforded to States, the article 3(4) OPSC model of liability is disadvantaged due to a lack of explicit attention paid to matters concerning legal persons by both the CRC Committee and a number of States. While there is no 'silver bullet solution' to this challenge, this is something a BHR Treaty would have the potential to overcome.<sup>148</sup> A mechanism that prioritises issues in the field of business and human rights would naturally have a tighter focus on the actions and liability of legal persons as well as greater resources to ensure States' legal person liability regimes meet basic standards.<sup>149</sup> For example, a BHR Treaty Body would have more expertise on corporate accountability, and such concerns would form a fundamental part of its periodic review process. This is not to suggest that transposing article 3(4) OPSC into a BHR Treaty would be without problems. For instance, the OPSC is already widely supported and presents issues such as the sale of children and child sexual exploitation. A BHR Treaty on the other hand presents potentially less emotive issues surrounding tackling corporate human rights abuses more generally.<sup>150</sup> Flexibility therefore may still be integral to reassure States they are able to determine which offences concerning legal persons will face criminal, civil or administrative sanctions.

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<sup>147</sup> CRC Committee, 'Concluding observations Russian Federation 2018' (n 42) paras 29-30.

<sup>148</sup> HRC, 'Report on the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie' (2008) A/HRC/8/5, paras 5 and 6

<sup>149</sup> Lee McConnell, 'Assessing the feasibility of a Business and Human Rights Treaty' (2017) 66 Intl. and Comparative L. Q 143, 167.

<sup>150</sup> *ibid* 179-180.

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