Child sexual abuse in the digital era : Rethinking legal frameworks and transnational law enforcement collaboration

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PROEFSCHRIFT

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Sabine Katharina Witting
geboren te Berchtesgaden, Duitsland
in 1989

Promotores:	Prof. dr. J.J. Sloth-Nielsen Prof. dr. S. van der Hof
Promotiecommissie:	Prof. dr. T. Liefaard Prof. dr. J. E. Doek Prof. dr. E. Lievens (Ghent University, Belgium) Prof. dr. A. A. Gillespie (Lancaster University, UK) Prof. dr. J.M. ten Voorde

TABLE OF CONTENTS

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I. BACKGROUND

'Last year, tech companies reported over 45 million online photos and videos of children being sexually abused – more than double what they found the previous year […]. Twenty years ago, the online images were a problem; 10 years ago, an epidemic. Now, the crisis is at a breaking point' (The New York Times)[1]

With access to and usage of it increasing dramatically over the past 20 years, the Internet has become an emerging realm for human interaction. Spanning across country borders, this gateway to a globalised world has provided people from all walks of society with incredible opportunities to connect and interact with each other. But the Internet is not only a platform for producing, accessing, sharing and retrieving information – it offers a distinct forum for criminals to operate in spaces that are increasingly difficult for law enforcement agencies to penetrate.

Criminal offences committed online range from acts against the confidentiality, integrity and availability of computer systems, to computer-related acts for financial or personal gains, and to the production, dissemination and possession of child sexual abuse material[2] or hate speech.[3] While some forms of these offences were 'born' in the age of new technology, other offences such as child sexual abuse have always existed, but are now being committed in a different realm.[4] This change of realm does not necessarily alter the underlying causes of child sexual abuse, though it has an impact on the dynamics and the effects on the victims.[5] However, it is important to note that child sexual abuse is not committed either solely online or solely offline. As many cases involving child sexual abuse material begin with a contact offence, there is constant exchange and interaction between online and offline abuse, and between the digital and the analogue world.[6] Understanding this close interrelation between online and offline child sexual abuse is crucial, as it not only has an impact on the regulation, investigation and prosecution of such offences, but also makes it clear that the impact of child

[1] Michael H Keller/Gabriel J.X. Dance, *The Internet is overrun with images of child sexual abuse. What went wrong?*, New York Times, 28th September 2019, available at: https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html (accessed 20 October 2019).

[2] The term 'child pornography' has been widely criticised as it creates the impression that 'pornography' and 'child pornography' are closely related, hence suggesting that the child could give consent to the production of such material (see Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, A/HRC/28/56 (22 December 2014), para. 29; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015, pp. 9–10); in line with ECPAT, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, Bangkok 2016, and consistent with the language used in CRC Committee, *Guidelines regarding 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*, CRC/C/156 (10 September 2019), para. 5, this study recommends the use of the term 'child sexual abuse material' instead of 'child pornography'.

[3] UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, New York 2013, p. 16.

[4] UNICEF, *The State of the World's Children 2017*, New York 2017, p. 76; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, p. 8; UNICEF, *Child Safety Online. Global Challenges and Strategies*, New York 2012, p. 13.

[5] Victims of child sexual abuse material offences oftentimes face great difficulties in 'closing the chapter', as they are continuously exposed to abuse and exploitation through the circulation of their material, see Najat M'jid Maalla, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, A/HCR/12/23 (13 July 2009), pp. 10 *et seq.*; ITU, *Guidelines for Policy-makers on Child Online Protection*, Geneva 2009, p. 19; Alisdair A. Gillespie, *Child Pornography. Law and Policy*, London 2011, pp. 31–33; UNICEF, *The State of the World's Children 2017*, p. 76.

[6] Sonia Livingstone/Jessica Mason, *Sexual rights and sexual risks among youth online*, London 2015, p. 22; Daniel Kardefelt-Winther/Catherine Maternowska, *Addressing violence against children online and offline*, Nature Human Behaviour (2019).

sexual abuse and related material on the victim is always real and 'analogue', regardless of the realm in which it is committed.

To focus on the discourse on the regulation, investigation and prosecution of online child sexual abuse material, it seems reasonable to argue that there is a general consensus about the harmfulness of child sexual abuse whether committed online or offline. However, what is distinctive about the discourse on online child sexual abuse is that it is characterised by a set of dichotomies.

The first is the contrast between the global and national level. While online child sexual abuse is a global problem that requires a global response, a comprehensive legal framework needs to be in place at a national level. International law plays a crucial role in setting a minimum standard for national lawmakers. Given that the regulation at national level might be influenced by various factors, including constitutional rights, perceptions around sexuality, and other cultural and societal dynamics, there is an inherent risk that national legislation is not aligned with the international standard. This is particularly problematic as online child sexual abuse, much as with other offences committed online, is transnational in most cases. The alignment of national legislation across country borders is crucial to enable transnational law enforcement collaboration. Therefore, although the problem is global, central issues for enabling a global response are decided upon at a national level. Another dichotomy is between the discourse around sexual abuse, on the one hand, and sexual autonomy, on the other. While pornographic material clearly depicting child sexual abuse is an obvious case for criminalisation, the line between sexual abuse and sexual autonomy is less straightforward in cases where the causality between the material and the harm to children is less obvious.

Furthermore, there is a dichotomy between the need to develop binding legal standards, both nationally and internationally, and constantly evolving technical capacities. While the development of legal standards can be a cumbersome process at a national as well as international level, the technical environment is in constant expansion. This leads to an inherent risk of a wild goose chase in regulating cybercrime, as the legal framework might be outdated once enacted. Lastly, there is a dichotomy between child protection and the protection of the rule of law. There is a tendency, borne of the sheer horrendousness of child sexual abuse material, to justify the infringement of the rule of law and fair-trial principles if it assists – or at least seems to assist – the fight against online child sexual abuse. The ends therefore often times justify the means, notwithstanding the impact that deterioration of the rule of law has on criminal justice in the long run, including violence against children.

This study has been inspired by the ever-evolving interplay between upholding the rule of law and enforcing the principle of the best interests of the child in a context where there is an urgent need to conceptualise child sexual abuse in the digital era. Aiming to resolve the above dichotomies, the study seeks to bring together two competing discourses: that of the evolving cyberworld, with its ever-emerging forms of online child sexual abuse and complex *modus operandi* that challenge law as a regulatory instrument and the efficiency of law enforcement; and that of child protection interests, where the focus is on upholding of the best interests of the child whether in an analogue or digital context.

II. AIM AND RELEVANCE OF THE STUDY

The overall aim of this study is to critically analyse emerging aspects of the international and national regulation, investigation and prosecution of online child sexual abuse material from a child-rights and rule-of-law-based approach. With the abovementioned dichotomies guiding the investigation, the aim of this study is threefold.

First, it aims to investigate the regulation of online child sexual abuse material where the relation between the material and the harm to children is not patently clear and where child protection concerns need to be balanced with the protection of human rights such as freedom of expression and the maintenance of the rule of law. In the spirit of finding global answers for a global phenomenon, this study aims to analyse the legal considerations – with a focus on constitutional issues – from a comparative point of view, both with regard to national as well as international legal standards. While it has to be acknowledged that there are strong moral, religious and cultural dimensions to the regulation of a sexual offence such as the production, dissemination and possession of online child sexual abuse material, the regulation is further influenced by the complex interplay between international law and national legislation as well as the wild goose chase involved in drafting legislation and trying to keep up with technological development. Hereby, the study aims to stress the importance of considering children as actors and not as subjects in this discourse, considering that protection is not a purely passive concept for children. The review and analysis of national and international standards from different legal systems and regional contexts aims to complement the current, mainly national-centred, legal discourse with a transnational, interdisciplinary perspective.

Secondly, the study aims to investigate the difficulties of leveraging international law in order to strengthen the national legal framework relating to the criminalisation of online child sexual abuse material, which it does so by analysing the influence of international law on national legislation and the balancing of child-protection with rule-of-law concerns in that context. Given that the majority of legal research in the area of regulating online child sexual abuse material focuses on North American, European or Asian countries, this study draws attention to an African country in which children's safety online has emerged on the national child protection agenda over the past few years. While the comprehensive criminalisation of offences pertaining to child sexual abuse material is therefore a priority, specific consideration needs to be given to upholding the rule of law and fair-trial principles.

Thirdly, the study aims to examine the authority of law enforcement in investigating and prosecuting online child sexual abuse material, with the focus placed on the investigative powers given to law enforcement agencies both at national as well as transnational level. The study is informed by an acute awareness of the need for technology-savvy legislation that simultaneously serves the best interests of the child while upholding the rule of law as important modifier. On the one hand, when discussing investigative powers and transnational law enforcement collaboration in the context of cybercrime, the academic discourse largely omits to focus on the child as a highly vulnerable victim and to consider how this specific vulnerability impacts on investigations. Special child safeguarding mechanisms in regulating investigative powers are thus often missing. On the other hand, as is illustrated by the lack of concrete procedural provisions in the CRC Committee's Guidelines 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 (2019), the legal discourse led by child-rights scholars lacks the specialised cyber-specific awareness needed to investigate online child sexual abuse. Aspiring to marry cybercrime-specific issues with child protection expertise, this study aims to contribute to the development of standards and instruments that are efficient and effective in the cyber context yet always put the best interests of the child victim first.

III. PROBLEM STATEMENT AND RESEARCH QUESTIONS

Problem statement

As noted above, the overall aim of this study is to critically analyse emerging aspects of the international and national regulation, investigation and prosecution of online child sexual abuse material from a child-rights and rule-of-law-based approach. Therefore, the problem statement is as follows:

> *How can the international and national regulation, investigation and prosecution of emerging characteristics of online child sexual abuse material embrace the competing discourses of a cyber-specific yet child-sensitive offence?*

The regulation, investigation and prosecution of online child sexual abuse material is currently debated in two interlinked yet separate contexts. While the categorisation of online child sexual abuse material as a computer-content-related offence makes it part of the broader cybercrime discourse,[7] it is, due to the underlying contact offence, also discussed in the field of child protection and violence against children. However, the two discourses operate in disconnected realms, which significantly affects the relevance, efficiency and effectiveness of the approaches taken in the national and international regulation, investigation and prosecution of online child sexual abuse material.

In particular, with regard to the criminalisation of certain acts pertaining to online child sexual abuse material, it has to be recognised that such material touches not only on the core of child protection concerns but equally on internationally and nationally guaranteed human rights such as freedom of expression.[8] A similar tension manifests itself in the area of investigating and prosecuting online child sexual abuse material, where law enforcement, on the one hand, adopts swift, efficient and cyber-specific investigation and prosecution approaches that need, on the other hand, to be balanced against considerations of the rule of law, fair trial and the best interests of the child.

Research Questions

In line with the problem statement above, this study aims to answer three Research Questions. Given that this is a PhD by publication, they have been formulated with a view to being answered by specific Chapters, with the interconnectedness of the themes being acknowledged by means of cross-references between the Chapters. The Research Questions are set out below.

Research Question 1:

> *Can the criminalisation of emerging issues in online child sexual abuse material, such as the depiction of virtual children, pornographic material depicting persons made to appear as minors, and consensual sexting material produced amongst minors for their private use, be justified, given that the relation between the material and immediate harm to actual children is not inherently obvious?*

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[7] UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, p. 16.
[8] *Ibid.*, p. 109.

This Research Question is answered mainly by Chapter II ('The 'grayscale' of child sexual abuse material: Of *mangas*, avatars and schoolgirls') and Chapter III ('Regulating bodies: The moral panic of child sexuality in the digital era'). Aspects of this Research Question are discussed further in Chapter IV ('Leveraging international law to strengthen the national legal framework on child sexual abuse material in Namibia') and Chapter V (*'Do ut des*: Disseminating online child sexual abuse material for investigative purposes?').

Research Question 2:

> *Noting the important role that international law plays in guiding national legislators in the regulation of online child sexual abuse material, how can 'developing states' strengthen their national legal frameworks by leveraging international law?*

This Research Question focuses on the difficulties of leveraging international law to strengthen the national legal framework in 'developing countries', as exemplified by the Namibian law reform efforts in the field of online child sexual abuse material, and is addressed in Chapter IV ('Leveraging international law to strengthen the national legal framework on child sexual abuse material in Namibia'). Relevant aspects of Chapters II and V are integrated into the discussion in Chapter IV.

Research Question 3:

> *How can international and national legal frameworks governing investigation and prosecution mechanisms be strengthened to ensure that law enforcement responds effectively and efficiently to online child sexual abuse material in a child-sensitive manner?*

This Research Question is addressed primarily in Chapters V and VI ('Transnational by default: Contextualising cross-border law enforcement collaboration in online child sexual abuse cases'). Aspects of Chapters II and III have been included to answer the Research Question.

IV. METHODOLOGY

Three different methodologies were applied to answer these Research Questions. With the focus varying according to the topic of each Chapter, this PhD employs doctrinal legal research, comparative legal research (both in international and national law), and interdisciplinary legal research (chiefly involving psychology, sociology and feminist theory) as its methodologies.

A. Doctrinal legal research

Doctrinal legal research involves so-called 'black-letter law', and seeks to determine what the applicable laws are and interpret legal texts.[9] The law is considered 'an internal, self-sustaining

[9] Mike McConville, *Research Methods for Law*, Edinburgh 2007, p. 4.

set of principles'.[10] The aim of the methodology is to 'systemise, rectify and clarify' legal questions pertaining to a topic by adopting various analytical approaches to authoritative texts.[11] Ultimately, the aim is to identify improvements in the relevant normative framework.[12] Normative sources, such as statutory texts and binding case law, as well as other authoritative sources, such as scholarly writing and non-binding sources such as commentaries and *travaux préparatoires,* form the basis of the doctrinal legal research methodology applied here.

Normative sources for the various Chapters stem both from international law as well as national law. As for international law, the Chapters analyse and interpret various sources of international and regional law, including the UN Convention on the Rights of the Child (CRC)[13] and its Optional Protocol on the sale of children, child prostitution and child pornography (OPSC),[14] the Council of Europe Convention on Cybercrime (hereafter Budapest Convention),[15] the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (hereafter Lanzarote Convention),[16] and the African Union (AU) Convention on Cyber Security and Personal Data Protection (ACCS).[17] National legislation consists of statutory texts as well as case law from the US, Canada, Germany, Japan, South Africa, Namibia, Rwanda and the Democratic Republic of Congo (DRC). Each Chapter will explain why the sources of international and national law have been selected to answer the Research Question at hand. The selection of the abovementioned countries is also discussed in the section below on comparative legal analysis.

The review of scholarly writing has been an essential basis for formulating and answering the Research Questions at hand. As will be discussed below, the focus is not only on legal scholarly writing, but on research that embraces the interdisciplinary aspects of child sexual abuse. Other sources of interpretation and analysis of international law are General Comments from human rights treaty bodies, guidelines for interpretation of international law, the submissions of Special Rapporteurs and reports. Lastly, non-academic publications from international organisations such as UN agencies have been examined to complement legal academic discourse with global policy documents.

B. Comparative legal research

Today's globalised world is characterised by a high level of 'interlinkage and interdependence' across all levels of society.[18] A major example of such interlinkage, as well as of the difficulties of legal conceptualisation associated with it, is the Internet. Even though the physical infrastructure of the Internet is built upon states' territories,[19] it spans across country borders: cybercrime in general, and online child sexual abuse in particular, is not confined to a state's territory. Quite the opposite – due to the transnational nature of the Internet, online child sexual abuse is in most cases a transnational offence. Online child sexual abuse is hence a global

[10] *Ibid.;* see also Matyas Bodig, *Legal Doctrinal Scholarship and Interdisciplinary Engagement,* Erasmus Law Review, Vol. 8 (2015), p. 46.
[11] *Ibid*.
[12] Andria Naude Fourie, *Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research*, Erasmus Law Review, Vol. 3 (2015), p. 96.
[13] Adopted 20 November 1989, entered into force 2 September 1990.
[14] Adopted 25 May 2000, entered into force 18 January 2002.
[15] Adopted 8 November 2001, entered into force 1 July 2004.
[16] Adopted 25 October 2007, entered into force 1 July 2010.
[17] Adopted 27 June 2014, not yet entered into force.
[18] Kh N Bekhruz, *Comparative Legal Research in an Era of Globalization,* Journal of Comparative Law, Vol. 5 (2010), p. 94.
[19] Stephan Kolossa, *The charm of jurisdictions: a modern version of Solomon's judgment?,* Voelkerrechtsblog, 5 June 2019, available at: https://voelkerrechtsblog.org/the-charm-of-jurisdictions-a-modern-version-of-solomons-judgment/ (accessed 1 August 2019).

problem that requires a global answer. As will be discussed in depth in Chapter VI, the alignment of national legislation with an internationally agreed standard is prerequisite for enabling transnational law enforcement collaboration.

However, even if an internationally agreed standard exists, the nature of online child sexual abuse as a sexual offence might have a pronounced impact on the translation of such a standard into national legislation. Sexual offences are an area of law strongly influenced by the moral, cultural and religious factors peculiar to each national context.[20] This ultimately affects the translation of international law into national legislation, as the predominant national narrative on the 'right' approach to addressing child sexual abuse might not be in line with the international standard. Given that these arguments touch deeply on countries' considerations with regard to constitutional rights and principles, it is important to understand how they have been brought to bear in justifying the scope of protection in the respective country context. This serves a three-pronged objective: while it gives insight into the reasons for (non-) integration of an international standard into national law, it might also highlight national legislation which exceeds the international standard and can hence be used as best practice examples for other countries. Lastly, it provides insight into aspects of international standards that may be incompatible with the constitutional considerations in many country contexts and could hence put the spotlight on issues in urgent need of revision.

It is against this background that comparative legal analysis has been selected as a suitable research methodology for this study. Given that online child sexual abuse requires not only a national but global response, understanding the underlying factors influencing national legislation is crucial. Overall, the selection of countries for the comparative legal analysis has been influenced by a variety of factors, including the relevance of the discourse in the national legal framework; the existence of supreme court or constitutional court cases on the topic; the discourse on the translation of international law into the respective legal frameworks; equal representation of common law, civil law and hybrid systems; and the need for equal representation of countries from different cultural, societal and development contexts. As noted, countries selected for comparative legal research include the US, Canada, Germany, Japan, South Africa, Namibia, Rwanda and the DRC.

C. Interdisciplinary legal research

Interdisciplinarity refers to approaches that combine research findings and methods from various disciplines.[21] Interdisciplinary legal research, more specifically, is research that acknowledges the relevance of other disciplines to particular questions and thus includes input from them to establish a legal argument.[22] It has to be recognised that the development, application and interpretation of a legal framework is constantly influenced by extra-legal information that impacts on its normative content.[23] Particularly in the area of sexual offences, the different interpretation of concepts such as sexual autonomy becomes apparent, and hence the contextual appreciation of such underlying dynamics is vital in order to be in a position to formulate a holistic response to these phenomena.

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[20] Joachim Renzikowski, *Primat des Einverständnisses? Unerwünschte konsensuelle Sexualitäten*, in Ulrike Lembke (edit.), *Regulierungen des Intimen. Sexualität und Recht im modernen Staat*, Wiesbaden 2017, p. 198.
[21] Fourie, *Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research*, p. 97.
[22] *Ibid*.
[23] Bodig, *Legal Doctrinal Scholarship and Interdisciplinary Engagement*, p. 49.

As mentioned, the regulation of child sexual abuse is strongly influenced by the moral, cultural and religious considerations predominant in a particular national context. To better understand the influence of these extra-legal factors on the normative framework,[24] sociological insights gleaned from the perspective of feminist theory have been incorporated into the Chapters of this study. These insights are centred on the notion that questions of power are inherent to the field of sexual offences,[25] either with regard to defining sexual deviancy or pertaining to acknowledging sexual autonomy of a certain group of people. Feminist theory is applied in order to identify how systems of power and oppression interact with each other and how they are produced and reproduced in the regulation of sexual offences. Applying feminist theory in this context does not necessarily entail looking only at structures of oppression in regard to girls and women; it entails considering all groups of people suffering under an imbalance of power, such as children.

Furthermore, with regard to both substantive and procedural law, it is necessary to consider the psychological impact of regulatory framework decisions as well as investigation techniques, jurisdictional conflicts and transnational law enforcement collaboration on the victim. This study infuses its legal argument with psychological research with a view to ensuring that the drafting and the application of the legal framework follows a victim-centred approach. This means in essence that the victim's experience of the criminal justice system should not lead to re-victimisation and secondary trauma but promote healing and closure.

Given the nature of child sexual abuse as a cross-cutting topic amongst various disciplines, the analysis of the regulatory framework is incomplete if it is restricted purely to doctrinal legal research. Embracing the concept of socio-legal research, this study adopts an interdisciplinary approach in the spirit of seeing the law as a 'parasitic discipline'.[26]

V. SCOPE AND LIMITATIONS

Bearing in mind the aim and questions of the study, this section highlights the scope and limitations of the research.

This study was undertaken between 1 September 2017 and 30 September 2019. Given that this is a PhD by publication and that the Chapters have been drafted and published consecutively, attention is drawn to the debate around the use of the term child pornography, 'child pornography' and child sexual abuse material. Although the term 'child pornography' has been widely criticised since 2014,[27] the CRC Committee has only in 2019 acknowledged that 'terms such as 'child pornography' and 'child prostitution', are gradually being replaced [as] these terms can be misleading and insinuate that a child could consent to such practices, undermining the gravity of the crimes or switching the blame onto the child'.[28] Accordingly, the CRC Committee, in its *Guidelines regarding 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*, CRC/C/156, 2019, officially recommended

[24] *Ibid.*, p. 44.
[25] Eleanor K Bratton, *The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, New Mexico Law Review, Vol. 17 (1987), p. 93.
[26] See Anthony Bradney, *Law as a Parasitic Discipline*, Journal of Law and Society, Vol. 25 (1998), pp. 71-84.
[27] See Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, A/HRC/28/56, para. 29; ECPAT, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, pp. 38 *et seq.*; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, pp. 9–10.
[28] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 5.

> pay[ing] attention to the Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse for guidance regarding the terminology to be used in the development of legislation and policies addressing the prevention of and protection from the sexual exploitation and sexual abuse of children.[29]

This 'gradual replacement' of the term is reflected in the different academic articles underlying the Chapters of this study, which – depending on their date of publication – have evolved from using the term child pornography as a matter of course, to placing it in inverted commas as 'child pornography' and, lastly, using the term 'child sexual abuse material'. This inconsistency therefore is a symptom of the evolving discourse on correct terminology, one that has been concluded by the CRC Committee's endorsement of the Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse, which recommend the term 'child sexual abuse material'.[30] During the compilation of this study as one comprehensive piece, it was decided to move away from plainly using the term child pornography, but to refer to 'child pornography' as well as child sexual abuse material instead. The reason why the terminology has not been completely revised after the CRC Committee Guidelines were published, is that the legislation analysed in this study uses the term 'child pornography'. Therefore, the term 'child pornography' is used in the context of the legal framework. However, when referring to child sexual abuse material outside a strictly legal context, this term is used instead.

With regard to the scope of the study, it has to be acknowledged that the production, dissemination, possession and accessing of child sexual abuse material is only one amongst various forms of online child sexual abuse and exploitation. Other forms include sexual harassment, sexual solicitation and grooming, sextortion and exploitation through prostitution[31], child trafficking and child-sex tourism.[32] Given the host of issues to be considered when discussing the regulation, investigation and prosecution of the abovementioned forms of online child sexual abuse and exploitation, this study elects to focus only on offences pertaining to child sexual abuse material. Further, it has to be noted that generic aspects of child sexual abuse material have already been comprehensively analysed both at an international and national level. As such, this study focuses on instances in which the causal connection between the material and the harm to actual children is not inherently obvious, on the regulation of child sexual abuse material in the Global South and transnational law enforcement collaboration.

Although this study examines international standards as well as the national legal frameworks in a variety of legal systems and cultural contexts, its primary focus is on Northern America, Europe and Africa. Given that in some countries and regions child sexual abuse material is not considered a distinct offence but is subsumed under a general prohibition of pornography, whether depicting adults or children,[33] these countries or regions do not lend themselves to answering the Research Questions of this study. Moreover, given the abundant academic discourse on online child sexual abuse in Northern America and Europe, and considering that the Budapest and Lanzarote Convention were drafted largely with the input from European states, the study draws upon the relevant academic discourse in these regions.

As for the focus on Africa, it serves a twofold objective. First, it is important to reflect on the challenges and opportunities pertaining to the regulation, investigation and prosecution of

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[29] *Ibid*.
[30] ECPAT, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, p. 40.
[31] 'Exploitation for prostitution' or 'exploitation in prostitution' is the preferred terminology to refer to 'child prostitution', see *ibid*., p. 30.
[32] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, pp. 8 *et seq*.
[33] See, for example, the League of Arab States Convention on Combating Information Technology Offences, 2010.

child sexual abuse material in the Global South.[34] With Internet usage in these countries having increased dramatically in the past 10 years,[35] appropriate legislation is only now being formulated, oftentimes while grappling with limited financial and technical capacity. At the same time, the narrative of child online safety is at risk of being hijacked in order to establish far-reaching investigative procedural powers in the area of cybercrime, which go far beyond a state's proclaimed interest in protecting children online. Shifting the focus to these dynamics often prevalent in the Global South is therefore important to reflect a truly international discourse. Secondly, Africa is a region which in the past few years has made considerable efforts to curb online child sexual abuse and exploitation. This is exemplified both by the adoption of the AU Convention on Cyber Security and Personal Data Protection on 27 June 2014 and by the AU's current project, 'Strengthen regional and national capacity and action against Online Child Sexual Exploitation in Africa'.[36] Given that Namibia recently ratified the latter convention,[37] it has been selected as a case study to showcase the complex relationship between international law and national legal standards in regulating child sexual abuse material in a developing context.

With regard to transnational law enforcement collaboration, it has to be acknowledged that issues such as jurisdictional conflicts, mutual legal assistance and extradition are discussed mainly in the broad context of cybercrime offences. Therefore, this study has selected emerging research aspects pertaining specifically to online child sexual abuse as a form of content-related cybercrime,[38] aiming to enrich the cybercrime discourse with a child-centred perspective. In this context, it also becomes apparent that the gravity of the offence has the potential to blind legislators and policy-makers and induce them into justifying considerable infringements of the rule of law and fair-trial principles in the name of child protection. This issue is explicitly dealt with a view to ensuring proportionality between child-protection concerns and the rule of law. With regard to jurisdictional conflicts, mutual legal assistance and extradition, this study concentrates only on relevant provisions in international treaties, in particular the OPSC, Budapest Convention and Lanzarote Convention.

VI. OUTLINE OF THE STUDY

The thesis is presented in seven Chapters, along with this introduction (Chapter I) and a conclusion (Chapter VII). All the substantive Chapters originated as individual articles that were either published or submitted for publication in academic journals. To answer the Research Questions above, the study follows the outline below.

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[34] Identifying a gap in research on children's rights in the digital era in the Global South, Sonia Livingstone/Monica E. Bulger, *A Global Agenda for Children's Rights in the Digital Era. Recommendations for Developing UNICEF's Research Strategy*, Florence 2013, p. 23.

[35] According to an ITU estimate available at: https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx (accessed 27 October 2019), 794 million people in 'developing countries' were using the Internet in 2008, a number which had risen to 2,868 billion by 2018.

[36] See official press release from the first Continental Consultation on Combatting Online Child Sexual Exploitation held on 6–7 March 2019 in Addis Abeba, available at: https://au.int/en/pressreleases/20190306/african-union-continental-consultation-combatting-online-child-sexual (accessed 24 October 2019).

[37] Ratified on 25 January 2019. For a full listing of the status of signatures, ratifications and accessions, see https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection (accessed 20 October 2019).

[38] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, p. 4.

Chapter II: **The 'grayscale' of child sexual abuse material: Of *mangas*, avatars and schoolgirls**[39]

Adopting a comparative legal approach utilising both international and national law, Chapter II explores the international and national response to the criminalisation of pornographic material depicting virtual children or persons made to appear as minors. A strong focus is on balancing freedom of speech and artistic freedom, on the one hand, and child protection concerns, on the other.

While the US and Japan defend the non-criminalisation of such material by arguing that there is no scientific evidence of immediate harm to actual children and hence that freedom of expression must prevail, Canada and South Africa deem such material potentially damaging for actual children and hence endorse its criminalisation. This study submits that scientific proof is barely ever unanimous in this complex area of research and thus not appropriate as a valuation standard. Using feminist theory in regard to the debate around criminalisation of adult pornography in the 1970s and 1980s, this article explores whether 'virtual' child sexual abuse material or material depicting persons made to appear as minors should be criminalised on the ground that it contributes to harmful societal attitudes towards children as sexual objects.

Chapter III: **Regulating bodies: The moral panic of child sexuality in the digital era**[40]

Chapter III examines international and national responses to the emerging phenomenon of consensually self-produced pornographic material (commonly referred to as 'sexting' material) between adolescents. With access to the Internet having increased, children's sexual explorative behaviour has expanded into the online space. While this has led to a global revival of the moral panic around child sexuality, such panic is often fuelled by concerns about children's sexual abuse and exploitation in the context of child sexual abuse material. In an attempt to protect children, consensual 'sexting' between minors is in some countries categorised as the production and dissemination of child sexual abuse material, leading to the prosecution of the children concerned as sex offenders. The right to be protected from sexual abuse and exploitation is hence the dominant narrative. By analysing legislation and case law from the US, Canada and Germany, this study investigates the need for a balance between child protection, on the one hand, and the child's right to privacy, on the other.

Chapter IV: **Leveraging international law to strengthen the national legal framework on child sexual abuse material in Namibia**[41]

Chapter IV discusses the difficulties in leveraging international law to strengthen the national legal framework, as exemplified by Namibian law reforms in the field of online child sexual abuse material in the context of the Child Care and Protection Act, No. 3 of 2015. Given the scarcity of academic literature on the regulation of online child sexual abuse material in the African context, this Chapter explores the challenges in balancing rule-of-law and child-protection considerations in a developing context.

Despite having ratified the OPSC, Namibia has so far failed to comprehensively criminalise the production, dissemination, possession and accessing of child sexual abuse material. Given the urgent need to rectify the situation, the Chapter considers how the OPSC can be leveraged to fill the gap in national legislation through direct application of the OPSC in national courts.

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[39] Originally published over two issues in the Computer and Telecommunications Law Review, Issue 3 (2018), pp. 61–66, and Computer and Telecommunications Law Review, Issue 4 (2018), pp. 73–81.
[40] Originally published in the Critical Quarterly for Legislation and Law, Vol. 1 (2019), pp. 5-34.
[41] Accepted for publication in the Comparative and International Law Journal of Southern Africa.

In view of Namibia's monist approach to international law, such direct application of international law is generally accepted. Drawing on the experience of Rwanda and the DRC in similar cases, this Chapter explores how the direct application of international law can be balanced against fair-trial and rule-of-law considerations in the Namibian context.

***Chapter V: Do ut des*: Disseminating online child sexual abuse material for investigative purposes?**[42]

Chapter V shifts the focus to procedural aspects of investigating online child sexual abuse. The infiltration of child sexual abuse fora on the dark web is a key investigation strategy in combating online child sexual abuse worldwide, the aim being to identify perpetrators and rescue children from ongoing abuse and exploitation. Following the *do ut des* principle ('I give, so that you may give'), the dissemination of child sexual abuse material is the currency required to gain access to these fora: new users are accepted only after they share child sexual abuse material with the forum administrators. Applying the *do ut des* principle serves a twofold objective. First, the administrators of the forum ensure confidentiality amongst the users, as every user has committed a criminal offence and disclosure would lead to self-incrimination. Secondly, it ensures that the prospective user is not a law enforcement officer: as most countries do not allow police to commit offences even during undercover operations, the *do ut des* principle creates an automatic filtering system warding against police infiltration.

Since 2018, Germany debated whether police should be legally authorised to disseminate child sexual abuse material in such cases. Proposals included the dissemination of virtual child sexual abuse material as well as actual child sexual abuse material, with the consent of the depicted child. Although such action contributes to the normalisation of child sexual abuse and potentially the continued traumatisation of the depicted child, police may thereby be able to save other children from abuse and exploitation. The Chapter considers whether, and under what circumstances, such interventions 'for the greater good' justify the damage caused to the depicted child and children in general, and if they can be aligned with the rule of law.

***Chapter VI:* Transnational by default: Contextualising cross-border law enforcement collaboration in online child sexual abuse cases**[43]

Chapter VI explores the efficiency and effectiveness of transnational law enforcement collaboration mechanisms in various international treaties. Both the determination of jurisdiction and the conduct of transnational law enforcement collaboration in online child sexual abuse cases are complicated affairs due to the architecture of cyberspace. As the Internet knows no borders, crimes are typically committed across numerous jurisdictions. Perpetrators can conceal their identities, and the evidence they leave behind (if any) is highly ephemeral and easily removed, altered or hidden. Efficient and effective transnational law enforcement collaboration is therefore crucial, which calls for a strong international legal framework that upholds the best interests of the child as primary consideration.

Against this background, the Chapter examines extra-territorial jurisdiction, jurisdictional conflicts, mutual legal assistance and extradition clauses in the OPSC, Lanzarote Convention and Budapest Convention, the aim being to assess their sufficiency in the transnational investigation of online child sexual abuse offences. The Chapter focuses on appropriate mechanisms in the cyber-context and the ability to uphold the principle of the best interests of the child at all times. Special attention is paid to the CRC Committee's recently published Guidelines on the implementation of the OPSC (2019).

[42] Originally published in the Journal for Universal Computer Science, Proceedings of the Central European Cybersecurity Conference 2018, art. 14.
[43] Submitted for publication in the International Journal of Children's Rights.

Chapter VII: **Conclusion**

Chapter VII answers the problem statement by distilling the key findings of Chapters II-VI and addressing the Research Questions. Lastly, some concluding remarks are made.

CHAPTER II: THE 'GRAYSCALE' OF CHILD SEXUAL ABUSE MATERIAL: OF *MANGAS*, AVATARS AND SCHOOLGIRLS

Abstract

This publication discusses child sexual abuse material in situations where the causal link and correlation between the material and the harm to children are not immediately obvious – that is, in virtual child sexual abuse material and in cases where persons are made to appear as minors. The criminalisation of child sexual abuse material which is manufactured and consumed without obvious direct harm to real children often comes into conflict with constitutional rights such as freedom of expression, artistic freedom and the right to privacy. Recognising that child sexual abuse material is a global problem requiring global answers, this publication brings together global and national perspectives by analysing international law as well as national legislation and case law from different legal systems and cultural backgrounds, the aim being to provide guidance on how to navigate this complex legal area.

This Chapter was originally published in two journal issues, namely Computer and Telecommunications Law Review, Issue 3 (2018), pp. 61–66, and Computer and Telecommunications Law Review, Issue 4 (2018), pp. 73–81. This Chapter was updated after publication and hence the content deviates from what was previously published.

I. WHEN TECHNOLOGY OUTPACES THE LAW: EMERGING ASPECTS OF CHILD SEXUAL ABUSE MATERIAL

UNICEF's State of the World's Children Report 2017, *Children in a Digital World*, has shed light on the emerging worldwide issue of online child sexual abuse and exploitation. Children and adolescents below the age of 18 years constitute one-third of Internet users worldwide,[1] and hence the Internet has availed an increasingly important realm for child-sex offenders.[2] However, as the report states, the Internet did not 'invent' crimes of child sexual abuse and exploitation but has facilitated 'common' forms as well as created wholly new ones.[3]

Since technology often outpaces legislative reform and law-making in the field of cybercrime, international and national legislation is at risk to inadequately address the newly emerging forms of online child sexual abuse and exploitation, and states are in many cases left without guidance on the appropriate criminalisation of these complex offences.[4] This development is in particular visible with regards to the regulation of emerging forms of child sexual abuse material where the question of right and wrong, of balance between public welfare and artistic freedom, and of reinforcement of or enticement into deviancy, pose complex problems for legislators at the international and national level. An example for this is virtual child sexual abuse material as well as material depicting persons made to appear as minors. As the production, dissemination and accessing of such material often operates in the grey areas of the law, virtual child sexual abuse material and material depicting persons made to appear as minors will be considered under the umbrella term of the 'grayscale' of child sexual abuse material for the purpose of this Chapter.

After setting the scene (II.), the focus will shift to the definition of 'child pornography' at the international, regional and national level. As child sexual abuse material is a global problem, it requires global solutions. Therefore, instead of focusing the discussion on only one country (or region), this publication aims to foster a global perspective by analysing international law (III.) and national legislation and case law from the US, Canada, Japan and South Africa (IV.). As it will be shown, international law does not provide sufficient answers for problems that are now arising, and hence clear international guidance is missing. This is particularly challenging for countries which are beginning to draft cybercrime legislation, as they often have limited capacity in this specialised field. As a result, the analysis seeks to enable countries to make informed decisions, in accordance with their constitutions and national legal frameworks, regarding the definition of 'child pornography' (V.).

II. WHAT CONSTITUTES HARM TO CHILDREN? OF OFFENCES WITHOUT IMMEDIATE VICTIMS

'Grayscale' child sexual abuse material involves content that is not as immediately linked to the harm of children as child sexual abuse material depicting 'real' children. The debate around the criminalisation of such material will be contextualised below.

The criminalisation of products where direct and immediate harm to children is disputable is not only an emerging issue for online child sexual abuse but has also been discussed in the

[1] UNICEF, *The State of the World's Children 2017*, New York 2017, p. 1.
[2] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015, p. 1.
[3] UNICEF, *The State of the World's Children 2017*, p. 76; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, p. 8.
[4] Ann Skelton/Benyam Mezmur, *Technology changing @ a Dizzying Pace: Reflections on Selected Jurisprudence of the UN Committee on the Rights of the Child and Technology*, Peace Human Rights Governance, Vol. 3 (2019), p. 278.

context of child-sex dolls. Heated debates arose when it became public that Shin Takagi, a Japanese businessman and owner of the company 'Trottla', manufactured and distributed child-sex dolls for customers worldwide. The anatomically correct dolls claim to help persons with a sexual interest in children to shift their sexual urges from actual children to dolls, and hence serve as a substitute for actual child sexual abuse.[5] While the production and possession of such child-sex dolls is legal in Japan, the Canadian Kenneth Harrison, who ordered such a doll from Japan, stood trial in Canada for possession of 'child pornography' material.[6] While Harrison challenged the constitutionality of the criminal provision on the grounds of freedom of expression,[7] he also stated that the doll delivered to his house was not the adult sex doll he actually ordered.[8] The Judge in his verdict delivered on 23 May 2019 stated that he accepted the expert witness' testimony that the doll delivered to Harrison's house was actually a child sex doll, but failed to determine whether a child sex doll would be considered 'child pornography' material under Canadian law and ultimately acquitted Harrison stating that the Crown failed to prove that the child-like sex doll was actually the doll Harrison ordered. In a similar case in Australia, a man was charged with possessing a child-like sex doll, an offence which was criminalised under new legislation in 2019.[9] Following the criminalisation of child-sex dolls in Australia and other countries, experts debate whether the possession of a child-sex doll should even be considered a crime, as no real child is harmed and the interaction with the doll may even reduce the risk of persons with a sexual interest in children committing sexual offences against real children by providing them with a substitute for their sexual preferences. By the same token, it is counterargued that the use of such dolls 'whets' the appetite for contact offences and thus stands to entice persons with a sexual interest in children into abusing actual children.[10]

Further, in 2016, the practices of the Montreal-based Institut Philippe-Pinel, a psychiatric hospital, sparked global debate on the potential treatment of paedophilia through virtual reality.[11] To determine whether a person has paedophilic tendencies, the Institute measures an individual's sexual arousal while showing him or her computer-generated imagery of naked children.[12] As much as virtual child sexual abuse material might be useful for the identification of sexual deviancies, it is also distributed worldwide for the sexual gratification of paedophiles and other persons interested in child sexual abuse material,[13] and might therefore – at least indirectly – harm children.

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[5] Roc Morin, *Can Child Dolls Keep Pedophiles from Offending?*, The Atlantic, 11 January 2016, available at: https://www.theatlantic.com/health/archive/2016/01/can-child-dolls-keep-pedophiles-from-offending/423324/ (accessed 18 February 2018).

[6] Rachael Revesz, *Canadian court to determine whether child sex doll constitutes child pornography*, Independent, 13 February 2017, available at: http://www.independent.co.uk/news/world/americas/canada-court-child-sex-doll-pornography-paedophilia-newfoundland-kenneth-harrison-a7578321.html (accessed 18 February 2018).

[7] Glenn Payette, *Lawyers argue rights violated in child sex doll case, ask for stay of charges*, CBC News, 2 June 2017, available at: http://www.cbc.ca/news/canada/newfoundland-labrador/sex-doll-st-john-s-harrisson-buckingham-pedophiles-child-porn-payette-1.4142926 (accessed 18 February 2018).

[8] Rosie Mullaley, *St. John's man accused of ordering child sex doll found not guilty,* The Chronicle Herald, 23 May 2019, available at: https://www.thechronicleherald.ca/news/provincial/st-johns-man-accused-of-ordering-child-sex-doll-found-not-guilty-314874/ (accessed 20 January 2020).

[9] Australian Associated Press, *Man charged with possessing a childlike sex doll and child abuse material in South Australia*, The Guardian, 16 January 2020, available at: https://www.theguardian.com/australia-news/2020/jan/16/man-charged-with-possessing-a-child-like-sex-doll-and-child-abuse-material-in-south-australia?utm_term=Autofeed&CMP=twt_gu&utm_medium=&utm_source=Twitter#Echobox=1579154662 (accessed 20 January 2020).

[10] Marie-Helen Maras/Lauren R. Shapiro, *Child sex dolls and robots: more than just an uncanny valley*, Journal for Internet Law, Vol. 21 (2017), p. 7.

[11] Olivia Solon, *Polygraph for pedophiles: how virtual reality is used to assess sex offenders,* The Guardian, 7 June 2017, available at: https://www.theguardian.com/technology/2017/jun/07/virtual-reality-child-sexual-abuse-pedophile-canada-research (accessed 18 February 2018).

[12] Patrice Renaud et al., *Virtual characters designed for forensic assessment and rehabilitation of sex offenders: standardized and made-to-measure,* Journal of Virtual Reality and Broadcasting, Vol. 7 (2010).

[13] Council of Europe, *Protecting children against sexual violence: The criminal law benchmarks of the Budapest and Lanzarote Conventions,* Strasbourg 2012, p. 19.

Similar considerations arise in the context of the sexual depiction of persons who are made to appear as minors. The people in the pornographic movies are adults who are made to appear as teenagers, so no actual harm is done to real children. Conversely, if the law accepts this kind of content, would it hamper prosecution in actual 'teen' pornography cases? As the victim is often not identified, it might be impossible for the prosecution to determine accurately the age of the person depicted in the material. Furthermore, if the law accepts such content as legal, does this not lead to a normalisation of sexual relationships with children?

These two incidents show that the criminalisation of child sexual abuse products which are manufactured and consumed without any direct harm being done to real children potentially conflicts with important constitutional rights such as freedom of expression, artistic freedom and right to privacy. In particular, when it comes to virtual child sexual abuse material and child sexual abuse material depicting persons who are made to appear as minors, states have struggled with the constitutional implications of the criminalisation of such content.

The term 'virtual child pornography' covers content ranging from computer-manipulated and -rendered images to ones that are purely computer-created. While any form of computer-manipulated or -rendered imagery is – as the terms suggest – based to some extent on a real image, computer-created images are solely 'drawn' by a computer. Only the last category will be considered virtual child sexual abuse material in this publication, as its production does not include any real children whatsoever.[14] Computer-created images could include Disney characters engaged in sexual interactions, Japanese *manga*[15] depicting child sexual abuse, or professionally developed material showing child avatars engaged in sexually explicit conduct.

With these different kinds of computer-created images, the questions raised are similar to the ones in the case of child-sex dolls. Is this content covered by freedom of expression or artistic freedom, respectively, and does it constitute a substitute for 'real' child sexual abuse material, or even contact offences against children? Can such material be used for grooming children and hence be criminalised on the grounds of child protection and public welfare? By producing or possessing virtual child sexual abuse material, no immediate harm is done to real children, so where is the justification for criminalising such behaviour, notwithstanding the perceived immorality of such content?

III. PERSPECTIVE(S) OF INTERNATIONAL LAW

International law, in particular in its criminal provisions, aims to set legally binding standards for the criminalisation of certain conduct and require member states to enact national legislation that domesticates them. This section offers brief orientation on the paradoxical yet crucial role of international law in the field of cybercrime, and then discusses the regulation of the 'grayscale' of child sexual abuse material in international and regional conventions, namely the Optional Protocol to the Convention on the Rights of the Child (CRC) on the sale of children, child prostitution and child pornography (OPSC),[16] Council of Europe Convention on Cybercrime (hereafter Budapest Convention),[17] Council of Europe Convention on the Protec-

[14] For an in-depth discussion of these categories, see Alisdair A. Gillespie, *Child Pornography. Law and Policy*, London 2011, pp. 98–100; arguing that even computer-created images can directly harm children if they depict a. the fictional sexual abuse of a real child or b. the actual sexual abuse of a real child, Suzanne Ost, *Criminalising fabricated images of child pornography: a matter of harm or morality?*, Legal Studies, Vol. 30 (2010), p. 232.
[15] The term *manga* can be translated as 'comic'. See Cory Lyn Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, Georgia Journal of International and Comparative Law, Vol. 44 (2015), p. 199.
[16] Adopted 25 May 2000, entered into force 18 January 2002.
[17] Adopted 8 November 2001, entered into force 1 July 2004.

tion of Children against Sexual Exploitation and Sexual Abuse (hereafter Lanzarote Convention),[18] and the African Union Convention on Cyber Security and Personal Data Protection[19] (ACCS).

A. The paradoxical role of international law in the field of cybercrime

International law is an important source of guidance for national legislators particularly in matters where an internationally comparable standard is crucial: in transnational crime.[20] Cybercrime is typically transnational crime, as it takes place in the borderless realm of the Internet. As 'child pornography' offences have largely shifted from the offline to the online sphere and hence are being categorised as content-related cybercrime,[21] an internationally comparable standard is a necessary precondition for successful transnational law enforcement collaboration.[22] As the so-called double criminality standard is a precondition for extradition or mutual legal assistance in many countries, it cannot be overemphasised how crucial aligned national legislation is for cybercrime offences such as 'child pornography'.[23]

Cybercrime is a rapidly developing field, and organised crime in particular reacts quickly to new legislation, identifying loopholes or 'safe havens' and shifting the business focus accordingly. Therefore, both national legislators and the international community should react equally quickly to these new 'trends' and ensure that the criminal law covers newly emerging forms of crime. Whilst national legislators already struggle to keep up with the pace with which the cybercrime scene develops, the erratic nature of cybercrime is an even stronger stumbling block for international law. International conventions take years to negotiate, and – due to the principle of international consensus in the drafting stage – are prone to political arbitrariness. This means that any international convention addressing cybercrime is most likely already outdated by the time of adoption.

An example is the non-criminalisation of the mere possession of 'child pornography' in the OPSC. Whether the mere possession of 'child pornography' is covered by the article 3(1)(c) OPSC, has been at the centre of a vivid debate since the enactment of the OPSC. Article 3(1)(c) reads as follows: 'Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography […]'. The main question is whether 'for the above purposes' refers to 'producing, distributing, disseminating, importing, exporting, offering, selling', or – as per the interpretation in the CRC Committee's Guidelines regarding 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 (hereafter the Guidelines) – to 'sexual exploitation'.[24] The Committee hereby seems to refer to 'sexual exploitation' as listed in article 3(1)(a)(i)a. Apart from the fact that such an interpretation is questionable

[18] Adopted 25 October 2007, entered into force 1 July 2010.
[19] Adopted 27 June 2014, not yet entered into force.
[20] According to art. 2 of the UN Convention on Transnational Organised Crime, 'an offence is trans-national in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part. of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.'
[21] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, p. 4.
[22] For in-depth discussion of transnational law enforcement collaboration in online child sexual abuse cases from an international perspective, see Chapter VI of this study.
[23] UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, pp. 60-63.
[24] CRC Committee, *Guidelines regarding 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*, CRC/C/156 (10 September 2019), para. 65; advocating for an interpretation of art 3(1)(c) which allows lawful exceptions to the possession of child sexual abuse material, e.g. for tlaw enforcement and medical professionals, ECPAT, *Explanatory Report to the Guidelines Regarding 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*, Bangkok 2019, p. 69.

from a legal interpretation methodology perspective[25], this would only make sense if the possession for the 'above purposes' would refer to *all* purposes listed under article 3 (1)(a)(i), as the norm refers to 'purposes', not just 'purpose'. As these other purposes include the 'transfer of organs of the child for profit' as well as the 'engagement of the child in forced labour', such an interpretation seems fairly far-fetched. Interestingly, the CRC Committee in its Guidelines seems to indirectly agree that mere possession is not covered, by recommending member states to criminalise the mere possession of child sexual abuse material.[26] Such an explicit recommendation only makes sense if the mere possession is not part of the binding legal standard of article 3(1)(c) in the first place.[27]

Coming back to the question at hand how the lack of criminalising the mere possession of child sexual abuse material in the OPSC does not respond to current developments, it has to be noted that as a consequence, the downloading of child sexual abuse material for private use, i.e. without the intent to further distribute the material, is not covered. This would obviously leave a considerable gap in the legal framework. However, it is important to keep in mind that the development of the OPSC started in 1990 with the appointment of the first Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, but it was adopted by the UN General Assembly only in 2000 and entered into force in 2002.[28] While in the 1980s and 1990s there was intense discussion of whether the mere possession of 'child pornography' should constitute an offence,[29] there seems to be consensus nowadays on its criminalisation, given that many cases dealing with the downloading of child sexual abuse material would not otherwise have been addressed. However, as the OPSC was developed mainly in the 1990s, it does not criminalise the mere possession of 'child pornography'. The CRC Committee in its Guidelines acknowledges the risk of rapidly changing online environments and hence encourages States parties to 'regularly assess and, when necessary, revise legislation and policies'.[30]

Thus, although international law is critical in setting an internationally comparable standard, it is, at the same time, limited by its nature. Against the background of the paradoxical role of international law in the field of cybercrime, it is not surprising that states seem to shift away from international law as a means of regulation and speak increasingly about 'norm development' in regard to cyber-related issues.[31] This argument is perhaps gaining traction given the growing importance of model legislation on cybercrime, which in many regions replaces binding international law altogether.[32]

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[25] Referring to a term in another subsection would usually require a direct reference such as 'for the above purposes such as set out in art. 3(1)(a)(i)'.

[26] See also ECPAT, *Explanatory Report to the Guidelines Regarding 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*, p. 69.

[27] Raising the interesting question whether downloading material which is stored in another jurisdiction amounts to 'importing' child sexual abuse material and hence falls under art. 3(1)(c) OPSC, Alisdair A. Gillespie, *Child pornography in international law* in: Ethel Quayle/Kurt M. Ribisl (eds.), *Understanding and Preventing Online Child Sexual Exploitation and Abuse*, Oxon 2012, p. 66.

[28] UNICEF Innocenti, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, Florence 2009, p. 3.

[29] UN Economic and Social Council, *Question of a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as the basic measures needed for their eradication*, E/CN.4/1998/103 (24 March 1998), para. 49; Gillespie, *Child Pornography. Law and Policy*, p. 98.

[30] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 19; stressing the importance of using broad language which makes it clear that any type of technological means are encompassed by the national law, ECPAT, *Explanatory Report to the Guidelines Regarding 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*, Bangkok 2019, p. 29.

[31] Kubo Mačák, *From Cyber Norms to Cyber Rules: Re-Engaging States as Law-Makers*, Leiden Journal of International Law, Vol. 30 (2017), p. 882.

[32] See, for example, model law on cybercrime for the Caribbean (HIPCAR): https://www.itu.int/en/ITU-D/Cybersecurity/Documents/HIPCAR%20Model%20Law%20Cybercrimes.pdf (accessed 20 January 2020), Sub-Saharan Africa

While an in-depth examination of the role of international law in combating cybercrime exceeds the scope of this publication, it is important to keep the paradoxical role of international law in mind when contemplating improvement of internationally comparable criminal provisions. Therefore, a UN Convention on Cybercrime might – contrary to popular belief – not be the panacea for the worldwide scourge of cybercrime.

B. The regulation of the 'grayscale' in conventions on 'child pornography'

As mentioned, the international conventions to be scrutinised with regard to the regulation of the 'grayscale' are the OPSC, Budapest Convention, Lanzarote Convention and ACCS. These instruments have been chosen as focal points as they all provide a definition of the term 'child pornography' and hence contribute to the research question at hand. Other international conventions addressing the issue of 'child pornography', but not defining the term, have therefore been omitted.[33]

The definitions in these conventions generally refer to three elements of 'child pornography', namely the material (visual, written, oral material), the subject (real child, virtual child, person who is made to appear as minor) and the conduct (real or simulated sexually explicit conduct, representation of genitalia). As the question of virtual 'child pornography' concerns the second element, i.e. the subject of the offence, this will be the focus of the following discussion.

1. OPSC

Article 2(c) of the OPSC defines 'child pornography' as 'any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes'. The term 'child' is not defined in the OPSC, but as it is an optional protocol to the CRC, article 1 of the CRC applies, which defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. Therefore, only real children are covered by the definition of the term 'child'.

It could be argued that the term 'simulated explicit sexual activities' suggests that the interactions of computer-created children or persons made to appear as minors are covered by the definition.[34] However, it has to be noted that the terms 'real or simulated' describe the sexual activity, not the child (that is, 'real or simulated explicit sexual activity', rather than a 'real or simulated child'). Whether certain conduct is 'real' or 'simulated' thus does not substantiate the subject of the conduct, but rather the nature of the conduct at hand. In conclusion, only the term 'child' can expand the scope of the definition of 'child pornography' to include virtual 'child pornography' and persons who are made to appear as minors. This interpretation is in line with the CRC Committee's Guidelines, in which the Committee 'encourages States parties to include in their legal provisions regarding child sexual abuse material (child pornography)

(HIPSSA): https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_data_protection.pdf (accessed 20 January 2020), and the Pacific Islands Countries (ICB4PAC): https://www.itu.int/en/ITU-D/Cybersecurity/Documents/ICB4PAC%20Skeleton%20Electronic%20Crime.pdf (accessed 20 January 2020).

[33] In particular, the League of Arab States Convention on Combating Information Technology Offences, 2010; ILO Convention No. 182 (Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour); and the African Charter on the Rights and Welfare of the Child, 1989.

[34] Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, p. 227.

representations of non-existing children or of persons appearing to be children, in particular when such representations are used as part of a process to sexually exploit children'[35].

Therefore, article 2(c) of the OPSC does not cover virtual 'child pornography'[36] or persons who are made to appear as minors.

2. Budapest Convention

The Budapest Convention,[37] a treaty on cybercrime and international collaboration in this field, was initiated and drafted by members of the Council of Europe and is open for signature and ratification by its member states. However, it is also open for signature or ratification by non-member states that participated in its elaboration (Canada, Japan, South Africa and the US) and for accession by other non-member states. The Convention has been ratified or acceded to by 64 States,[38] including key global cyberspace players such as the US and Canada, and is therefore the most important international cybercrime convention.

Article 9(2) of the Budapest Convention defines 'child pornography' as 'pornographic material that visually depicts (a) a minor engaged in sexually explicit conduct; (b) a person appearing to be a minor engaged in sexually explicit conduct; (c) realistic images representing a minor engaged in sexually explicit conduct'.

The wording clearly includes cases of adults who are made to appear as minors. Article 9(2)(c) addresses virtual 'child pornography'; however, it is limited to realistic images. As a consequence, the definition only covers cases of real-looking child avatars[39] but not so cases of images that clearly can be distinguished from real children, for example *mangas* or 'child pornography' depicting famous child animation characters in sexual interactions.[40] According to the Explanatory Report, the rationale behind article 9(2)(b) and (c) is that such material 'might be used to encourage or seduce children into participating in such acts, and hence form part of a subculture favouring child abuse'.[41]

The Budapest Convention therefore comprehensively criminalises persons who are made to appear as minors, but restricts the criminalisation of virtual 'child pornography' to 'realistic images'.[42] Further, it is important to note that, according to article 9(4), states may reserve not to apply article 9(2)(b) and (c), and hence exclude themselves from the definition of 'child pornography'; if they do not explicitly make a reservation with regard to the broad definition of

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[35] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 63; see also ECPAT, *Explanatory Report to the Guidelines Regarding 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*, p. 68, which stresses that 'the OPSC is not only an instrument for the protection of an individual child but also for enhancing the understanding of the child as a human being with human rights, including the rights to dignity and to respect for privacy'.

[36] ITU, *Understanding cybercrime: Phenomena, challenges and legal responses*, Geneva 2012, p. 170; Bart W. Schermer et al., *Legal Aspects of Sweetie 2.0*, Leiden / Tilburg: Center for Law and Digital Technologies (eLaw) / Tilburg Institute for Law Technology and Society (TILT), Leiden 2016, p. 20.

[37] Official title: Council of Europe Convention on Cybercrime.

[38] See status of ratifications/accessions here: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures (accessed 20 January 2020).

[39] An avatar is the graphical representation of a person.

[40] See, for example, the Australian case *McEwans v Simmons & Anor* [2008] NSWSC 1292, where material of the child members of the 'The Simpsons' family portrayed as being engaged in sexual acts was categorised as child pornography.

[41] Council of Europe, *Explanatory Report to the Convention on Cybercrime*, Budapest 2001, para. 102.

[42] Schermer et al., *Legal Aspects of Sweetie 2.0*, p. 20.

'child' in article 9(2), the definition remains as it is.[43] The US and Japan have both exercised their rights under article 9(4), the underlying reasons for which are explained below.[44]

3. Lanzarote Convention

The Lanzarote Convention[45] is an international treaty which requires criminalisation of all kinds of sexual offences against children. It is open for signature and ratification by Council of Europe member states, and open for accession by non-Council of Europe member states.

Article 20(2) of the Lanzarote Convention defines 'child pornography' as 'any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes'. According to article 3(a), 'child' shall mean any person under the age of 18 years. Therefore, only real children are covered by the definition. Similar to the Budapest Convention, article 20(3) allows state parties to reserve the right not to apply the offences of producing and possessing 'child pornography' to material that consists exclusively of simulated representations or realistic images of a non-existent child.[46] While the first aspect of this seems to address persons who are made to appear as minors, the second covers virtual 'child pornography'.

This 'reservation' mechanism is interesting for two reasons. First, in contrast to the Budapest Convention, article 3(a) of the Lanzarote Convention defines 'child' as any persons below the age of 18 years, meaning that article 20(2) covers only pornographic material depicting 'real' children as a general rule. Hence, article 20(3) is *de lege lata* not a reservation mechanism, as it effectively does not change the definition of 'child pornography'. Even if a state invokes its right under article 20(2), it does not narrow the scope of the definition of the term 'child', as according to article 3(a), virtual 'child pornography' or persons who are made to appear as minors are not covered anyway. This seems not have been the objective of the drafters: the Exploratory Report encouraged states to restrain from making a reservation with regard to article 20(3), as the rapid developments in technology allow extremely lifelike images of 'child pornography' to be produced where in reality no child was involved.[47]

In conclusion, the term 'child pornography' does not cover virtual 'child pornography' or persons who are made to appear as minors, even if the reservation under article 20(2) is not exercised.

4. ACCS

The AU adopted its Convention on Cyber Security and Personal Data Protection (ACCS) on 27 June 2014. Fifteen AU member states must ratify the Convention before it enters into force.[48] Currently, the Convention has been ratified by five and signed by fourteen member states.[49]

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[43] A reservation needs to be submitted as written notification at time of ratification, acceptance, approval or accession, art. 42 BC.
[44] Other member states which have exercised their right under art. 9(4) are: Andorra (art. 9(2)(b), (c)), Chile (art. 9(2)(b), (c)), Denmark (art. 9 (2)(b)), France (art. 9 (2)(b)), Hungary (art. 9 (2)(b)), Israel (art. 9 (2)(b)), Montenegro (art. 9 (2)(b)), Switzerland (art. 9 (2)(b)), UK (art. 9 (2)(b)).
[45] Official title: Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse.
[46] Gillespie, *Child Pornography. Law and Policy*, p. 104.
[47] Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para. 144.
[48] Article 36 of the African Union Convention on Cyberspace Security and African Union Protection of Personal Data.
[49] See African Union 'List of countries which have signed, ratified/acceded to the African Union Convention on Cyber Security and Personal Data Protection' 24/07/2017, available at: https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection {accessed 20 January 2020}.

Article 1 of the ACCS defines 'child pornography' as 'any visual depiction, including any photograph, film, video, image, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where a) the production of such visual depiction involves a minor; […] c) such visual depiction has been created, adapted, or modified to appear that a minor is engaging in sexually explicit conduct'. A visual depiction created to make it appear that a minor is engaging in sexually explicit conduct includes both persons who are made to appear as minors as well as virtual 'child pornography'.[50] The terms 'adapted' and 'modified' refer to the broader definition of virtual 'child pornography', which – as mentioned above – is not part of this study.[51] Computer-created images, which are at the core of this publication, are covered by the term 'created'. It has to noted that only visual depictions, not written material, are covered by the definition. A possible explanation for this limitation is that written material is considered less powerful and hence less harmful. Furthermore, due to its proximity to 'literature', such material could be seen as more closely related to freedom of expression than visual material; thus, it may have been excluded to avoid excessive impact on these rights.

Therefore, the ACCS includes both virtual 'child pornography' and persons who are made to appear as minors, albeit that this is restricted to visual depictions.

5. Conclusion

The analysis of the most important international conventions governing the criminalisation of 'child pornography' shows that there is no consistent approach to virtual 'child pornography' and persons who are made to appear as minors. While the most ratified convention on children's rights, the OPSC, does not include this 'grayscale' at all, the most ratified cybercrime convention, the Budapest Convention, includes these dimensions at least partly but leaves member states with some discretion through its reservation mechanism. Despite its apparent objective, the Lanzarote Convention does not cover this kind of material at all, while the ACCS, which provides for the criminalisation of visual depictions of the 'grayscale', is not in force yet due to an insufficient number of ratifications.

Seen against this background, international law seems to fail its purpose in providing states with clear guidance on a globally comparable standard for the criminalisation of the 'grayscale' material.

IV. FREEDOM OF EXPRESSION AND RIGHT TO PRIVACY VS. PUBLIC WELFARE AND CHILD PROTECTION: NATIONAL RESPONSES TO THE 'GRAYSCALE'

The situation at the national level is as inconsistent as it is at the international. This section examines the 'grayscale' of child sexual abuse material in national legislation, in particular with regard to constitutional considerations, to help give legislators a clearer understanding of the various positions and thereby enable them to make informed decisions about the scope and extent of criminalisation of child sexual abuse material.

This section follows a comparative legal analysis approach. To provide insight into a variety of cultural and legal contexts, the case studies deal with the US, Canada, Japan and South Africa. With the US and Japan supporting the decriminalisation of the 'grayscale', and Canada

[50] For a different interpretation, see Council of Europe, *Comparative analysis of the Malabo Convention of the African Union and the Budapest Convention on Cybercrime*, Strasbourg 2016, p. 10.
[51] As explained by Gillespie, *Child Pornography. Law and Policy*, pp. 98–100, 'modified' or 'adapted' child sexual abuse material would be considered computer-manipulated material. This means that the content is based on a real picture of a child, which is then manipulated in a way that presents the child in a sexualised manner, e.g. the face of a child is digitally superimposed on a photograph of an adult in a sexual situation.

and South Africa endorsing its criminalisation, the arguments will be set out on the basis of these different legal systems and cultural contexts. Although many other countries have also criminalised virtual 'child pornography' and persons who are made to appear as minors, there has been notable academic and political discussion of these issues in the US, Canada, Japan and South Africa, which deliberated on the reasoning for the criminalisation in ways that went beyond questions of moral taste.

A. The American perspective: *Ashcroft v Free Speech Coalition, 535 US 234 (2002)*

In its landmark decision *Ashcroft v Free Speech Coalition*, 535 US 234 (2002), the US Supreme Court declared several provisions of the Child Pornography Prevention Act of 1996 (hereafter CPPA) unconstitutional as they violate freedom of speech. The CPPA expanded the definition of 'child pornography' to include 'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture [that] is, or appears to be, of a minor engaging in sexually explicit conduct'.[52] The Court held that the Act was unconstitutional as it was overbroad in criminalising a substantial extent of protected speech.[53]

It was held that the CPPA is inconsistent with both the *Miller* and the *Ferber* standard. Under *Miller v California*, 413 US 15 (1973), the Court held that lewd and obscene speech does not receive First Amendment protection because obscenity serves no crucial role in the exposition of ideas and has little social value. To be considered 'obscene', the work as a whole must appeal to the prurient interest, must be patently offensive in view of community standards, and lack serious literary, artistic, political, or scientific value.[54] The Court reasoned that the CPPA did not regulate obscenity because it extended to material involving 'virtual' or 'made to appear as' minors engaged in sexual activity without regard to the *Miller* requirements. The question of whether the material at hand is obscene according to above requirements is not posed in each and every case, as the CPPA instead prohibits any material falling under the definition of 'child pornography'.[55] Hence, the CPPA was considered overbroad. In *New York v Ferber*, 458 US 747 (1982), the Court held that 'child pornography' involving actual children is a category of speech not protected by the Constitution[56] and that such depictions may be prohibited despite the fact that they might not be obscene: obscenity has not been considered a necessary criterion when it comes to 'child pornography' provisions.[57] As the CPPA criminalises content that does not depict real children, it also fails to comply with the *Ferber* standard.[58]

Further, the Court held that despite the fact that the CPPA was inconsistent with both *Ferber* and *Miller*, other justifications brought forth by the government were also insufficient to justify the prohibition. The government submitted four main grounds of justification for a comprehensive criminalisation of 'child pornography'. First, it argued that 'pedophiles might use virtual child pornography to seduce children'. The Court rejected that argument, stating that other things too could be used to seduce children, such as 'cartoons, video games, and candy', and that this risk of misuse would not be considered sufficient for a prohibition.[59] Secondly, the government stated that 'virtual child pornography whets the appetite of pedophiles and encourages them to engage in illegal conduct'. However, the Court overruled this argument by arguing that 'the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it'.[60] Thirdly, the government argued that in order to eliminate the market

[52] § 2256 (8) (B) CPPA.
[53] *Ashcroft v Free Speech Coalition,* 535 US 234, at 256.
[54] *Miller v California,* 413 US 15, at 24.
[55] *Ashcroft v Free Speech Coalition*, 535 US 234, at 246–247.
[56] *New York v Ferber*, 458 US 747, at 764.
[57] *New York v Ferber*, 458 US 747, at 747.
[58] *Ashcroft v Free Speech Coalition*, 535 US 234, at 240.
[59] *Ashcroft v Free Speech Coalition*, 535 US 234, at 251.
[60] *Ashcroft v Free Speech Coalition*, 535 US 234, at 253.

for 'real' 'child pornography', a prohibition of virtual images is necessary as well. The Court did not agree with this argument: if virtual and real images were indistinguishable, producers of 'child pornography' would focus solely on the production of the substitute instead of risking prosecution by producing 'real' 'child pornography'.[61] Lastly, the government put forward that 'the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children'. Therefore, it would be necessary to ban both types of 'child pornography' so as to avoid the defence argument that the images at hand were solely computer-generated. The Court found that this argument turns the First Amendment upside down: 'The Government may not suppress a lawful speech as the means to suppress unlawful speech.'[62]

In particular, the last arguments show that the government tried to argue that the mere risk that virtual 'child pornography' could increase (online) child sexual abuse or have a negative impact on the prosecution of cases of 'real' 'child pornography' is sufficient to justify the prohibition of such content. Conversely, the Court argued that as long as the connecting chain between content and harm is not proven, freedom of speech must be safeguarded from any interference.

B. *R v Sharpe 2001* SCC 2, in Canada: Visual works of the imagination as reasoned apprehension of harm to children

One year before *Ashcroft v Free Speech Coalition*, the Canadian Supreme Court had to decide on a similar case, one in which the accused challenged the constitutionality of a provision criminalising the possession of 'child pornography', as it was deemed to cover an unjustifiable range of material.[63] The Court had to examine the constitutionality of a prohibition of the possession of 'child pornography', while incidentally assessing whether the definition of 'child pornography' is overbroad. In *R v Sharpe 2001* SCC 2, it held that the infringement of the accused's right to freedom of expression is justifiable.

In its analysis, the Court stated firstly that the range of freedom of expression is broad and includes 'unpopular or even offensive speech',[64] hence generally protecting 'child pornography' as speech under the Charter. While the right to freedom of expression is not absolute,[65] there is a need to scrutinise whether society's interest in protecting children from harm is sufficient justification for the infringement of freedom of expression.[66]

Elaborating on the interpretation of the term 'person' depicted in the pornographic material, the Court held that this kind of explicit sexual material involving children can be harmful whether they depict a real person or not, and that due to advanced technology, it might indeed be difficult to differentiate between real and virtual persons.[67] On these grounds, the Court argued that Parliament aimed to criminalise behaviour that poses a reasoned risk of harm to children.[68] Further, the Court held that a person who is 'depicted' as being under the age of 18 years needs to be interpreted from the perspective of a reasonable observer. If a reasonable observer were to confirm this perception with regard to concrete material, the latter would be considered 'child pornography' under the Canadian Criminal Code.[69]

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[61] *Ashcroft v Free Speech Coalition*, 535 US 234, at 254.
[62] *Ashcroft v Free Speech Coalition*, 535 US 234, at 254–255.
[63] *R v Sharpe* 2001 SCC 2, para. 5.
[64] *R v Sharpe* 2001 SCC 2, para. 21.
[65] *R v Sharpe* 2001 SCC 2, para. 22.
[66] *R v Sharpe* 2001 SCC 2, para. 28.
[67] *R v Sharpe* 2001 SCC 2, para. 38.
[68] *R v Sharpe* 2001 SCC 2, para. 74.
[69] *R v Sharpe* 2001 SCC 2, para. 43.

However, the Court remained concerned about self-created, privately held expressive materials, as it touches private expression excessively, while the risk of harm is comparably low.[70] In order to determine whether the criminalisation of any possession of material violates the freedom of expression, the Court applied the so-called *Oakes* (*R v Oakes*, [1986], 1 SCR 103) test, which follows a proportionality-based approach to interpret the limitation clause in section 1 of the Canadian Charter of Rights and Freedoms.

The Court identified the attitudinal harm to society at large as a pressing and substantial reason to broadly criminalise the possession of 'child pornography'.[71] As the first step of the proportionality test, the Court discussed the same arguments as the US Supreme Court in *Ashcroft v Free Speech Coalition* to assess a reasonable connection between the law and its goal, namely:

> (1) child pornography promotes cognitive distortions; (2) it fuels fantasies that incite offenders; (3) prohibiting its possession assists law enforcement efforts to reduce the production, distribution and use that result in infractions; (4) it is used for grooming and seducing victims; and (5) some child pornography is produced using real children.[72]

Regarding the first argument, the Court acknowledged the lack of scientific proof for linking cognitive distortions to increased rates of offending, but still accepted the argument that by 'banalizing the awful and numbing the conscience, exposure to child pornography may make the abnormal seem normal and the immoral seem acceptable'.[73] The Court took the same approach to the second argument, stating that the scientific evidence for an increased offending rate is not unanimous. However, this unanimity in scientific evidence was not decisive for the Court: 'Complex human behaviour may not lend itself to precise scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of.'[74]

Shifting the constitutional valuation standard from unanimous scientific proof to 'reasoned apprehension of harm', the Court concluded that there is indeed a rational connection between the criminalisation of possession of 'child pornography' and the reduction of harm to children.[75] With regard to the third argument, the Court left it open whether an offence abridging a charter right can be justified solely on the basis that it aids in the prosecution of other offences, but stated that the fact that it might assist in prosecuting those who produce and distribute 'child pornography' is a positive side-effect.[76] The fourth argument on the potential benefit of 'child pornography' in grooming and seducing children was simply acknowledged by the Court.[77] Lastly, as possession of 'child pornography' might increase the demand for such material, and children are abused and exploited in its production, the Court stated that the criminalisation of the possession of 'child pornography' may reduce the market and hence the related abuse and exploitation of children.[78] On the basis of these arguments, the Court held that there is indeed a rational connection between the criminalisation of possession of 'child pornography' and the increased risk of child sexual abuse.[79]

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[70] *R v Sharpe* 2001 SCC 2, para. 75; another group of materials regarded as concerning are 'privately created visual recording of lawful sexual activity made by or depicting the person in possession and intended only for private use', *R v Sharpe* 2001 SCC 2, para. 76. Whether this kind of material should be excluded from the range of criminal provisions on 'child pornography' will be discussed in Chapter III.
[71] *R v Sharpe* 2001 SCC 2, para. 82.
[72] *R v Sharpe* 2001 SCC 2, para. 86.
[73] *R v Sharpe* 2001 SCC 2, para. 88.
[74] *R v Sharpe* 2001 SCC 2, para. 89.
[75] *R v Sharpe* 2001 SCC 2, para. 89.
[76] *R v Sharpe* 2001 SCC 2, para. 90.
[77] *R v Sharpe* 2001 SCC 2, para. 91.
[78] *R v Sharpe* 2001 SCC 2, para. 92.
[79] *R v Sharpe* 2001 SCC 2, para. 94.

To assess whether the law only minimally impairs the disputed right, the Court stated that it is impossible for Parliament to draft a law that does not also affect certain materials that do not pose harm to children,[80] and hence stressed that the law must be tailored 'reasonably' to its objectives.[81] In general, the Court relied on the argumentation regarding the definition of 'child pornography' as discussed earlier, and held that this 'proper' interpretation of the law ensures that it is tailored to its objectives.[82]

With regard to the final step of the proportionality inquiry, that is, 'whether the benefits the law may achieve in preventing harm to children outweigh the detrimental effects of the law on the right of free expression',[83] the Court held that the impairment of the right to free expression is outweighed by its purpose of reducing the risk of harm to children.[84] However, this does not hold true for the category of self-created written or visual works of imagination, which are produced solely for private use by the creator.[85] As this material is by nature much more closely related to self-fulfilment and self-actualisation, and hence touches upon the core of freedom of expression while only posing a minimal risk of harm to children,[86] its criminalisation borders on 'a state attempt to control thought or opinion'.[87]

All in all, the Court concluded that the limits which the criminalisation of possession of 'child pornography' imposes on free expression are justified by the law's purpose to protect children from sexual abuse and exploitation. However, the law was not deemed proportionate and hence constitutional in the case of self-created materials, which are produced and possessed solely for private purpose – these are considered the articulation of one's thoughts, with the result intended only for the producer's own eyes.[88] To uphold the overarching constitutional provision while taking into account the unconstitutional scenarios discussed above, the Court read into the law an exclusion of these problematic applications.[89]

In comparing the Canadian and American Supreme Court judgments, it becomes clear that the arguments are identical, albeit with a very different outcome in each instance. While the US Supreme Court seems to accept only clear scientific evidence of a link between a certain expression and potential harm to children as a basis for justifying the criminalisation of such expression, the Canadian Supreme Court acknowledges that in the field of child sexual abuse in particular, there is insufficient scientific evidence, let alone unanimous scientific evidence, and that it hence cannot be considered the appropriate valuation measurement. In regard to the extent to which the criminal provisions touches upon freedom of expression, the Canadian Supreme Court takes a more differentiated approach to balancing freedom of expression and child protection concerns.

C. Japan: Of *mangas* and schoolgirls

In Japan, a sexual preference for virtual child sexual abuse material and persons who are made to appear as minors is often not considered a deviant sexual tendency. Because the sexualisation of (prepubescent) schoolgirls is overtly present in Japan's everyday life, it plays a key role in the immensely popular *manga* and *anime* scene. As such, this section will give a short overview of the position of manga in contemporary Japanese culture, before discussing, first, an

[80] *R v Sharpe* 2001 SCC 2, para. 95.
[81] *R v Sharpe* 2001 SCC 2, para. 96.
[82] *R v Sharpe* 2001 SCC 2, para. 98; one of the limiting interpretations concerns e.g. the exclusion of 'casual intimacy, such as depictions of kissing or hugging'; *R v Sharpe* 2001 SCC 2, para. 49.
[83] *R v Sharpe* 2001 SCC 2, para. 102.
[84] *R v Sharpe* 2001 SCC 2, para. 102.
[85] The constitutionality of the second group of materials ('privately created visual recording of lawful sexual activity made by or depicting the person in possession and intended only for private use') will be discussed in Chapter III.
[86] *R v Sharpe* 2001 SCC 2, para. 107.
[87] *R v Sharpe* 2001 SCC 2, para. 108.
[88] *R v Sharpe* 2001 SCC 2, para. 110.
[89] *R v Sharpe* 2001 SCC 2, para. 114, 129.

important Supreme Court decision addressing the issues of *manga*, virtual child sexual abuse material and obscenity, and, secondly, recent legislative reform in Japan.

1. The position of *manga* in contemporary Japanese culture

Manga is a mirror of social phenomena: the sexualisation of children in *manga* and *anime* reflects a dominant theme in Japanese culture in general.[90] After the turmoil of the post-World War II period, Japan experienced a boom of consumerism in the 1970s and became a rising economy on the world stage. It is against this background that the ideal emerged of *shojo* (literally, 'young woman'), an ideal embodying romantic notions of innocence, cuteness, and the 'illusion of beauty'.[91] This grew into a cultural obsession with increasingly younger, even prepubescent, girls.[92] Based on the *shojo* ideal, the so-called *Lolicon* depictions emerged as a *manga* subgenre.[93] Evolving from the nude pictures of *shojo* girls found in the first works of *Lolicon* – works intended as a parody of the eroticisation of comics – into a *manga* genre with a large fanbase that finds it sexually stimulating, *Lolicon* developed into a substantial pornographic genre, one that also encompasses depictions of violent sexual acts including those against children.[94]

After the *shojo* and *Lolicon* boom in the 1970s and 1980s, the pervasive presence of sexualised images of children in the media led to a moral panic in the late 1980s and early 1990s. This backlash was closely related to rising concerns about the so-called *otaku* generation, whose typical characteristics were an obsession with *manga*, social awkwardness and a predilection for pornography.[95] The countermovement followed promptly, claiming that *manga* should be recognised as a form of art and declaring that any censorship of it would equate to censorship of literature.[96] This shows that the conflict between freedom of expression and artistic freedom, on the one hand, and child protection and public welfare concerns, on the other, governs the debate around the regulation of *Lolicon*.[97]

2. The *Misshitsu* Trial (2007)

The 2007 *Misshitsu* trial is a landmark decision by the Japanese Supreme Court, as it was the first obscenity case involving *manga*. At the centre of the case is a *manga* featuring the work of the artist Beauty Hair, which contains clear depictions of genitalia and sexual intercourse, all drawn in a realistic and detailed manner.[98]

The 1907 Criminal Code prohibits the distribution or display of any obscene writing, or other object, but does not clearly define the term 'obscene'. The term has been further concretised in the *Koyama v Japan* Supreme Court decision, which provides a threefold test to assess the obscenity of particular material. This involves considering whether the content arouses sexual

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[90] Kinko Ito, *A History of Manga in the Context of Japanese Culture and Society*, The Journal of Popular Culture, Vol. 38 (2005), p. 456.
[91] Patrick Galbraith, *The Reality of 'Virtual Child Pornography' in Japan*, Image & Narrative, Vol. 12 (2011), pp. 84-86.
[92] Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, p. 202.
[93] Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, p. 202.
[94] Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, p. 203; Galbraith, *The Reality of 'Virtual Child Pornography' in Japan*, pp. 83-85.
[95] Galbraith, *The Reality of 'Virtual Child Pornography' in Japan*, pp. 103-105; Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, p. 204.
[96] Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, p. 206.
[97] Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, p. 207.
[98] Patrick Galbraith, *The Misshitsu Trial: Thinking Obscenity with Japanese Comics*, International Journal of Comic Art, Vol. 16 (2014), p. 130.

desire, offends a common sense of modesty or shame, and violates proper notions of sexual morality.[99]

The Court found the material to be obscene because of its potential harmful effects, given that it might not only reach adults as an audience but could fall into the hands of children, and because the graphic depiction of violent sexual acts with women could turn Japanese youth into sex offenders.[100] From a constitutional perspective, it was found that the censorship of obscene material such as that in question does not violate freedom of expression, as the Japanese constitution allows this right to be limited by the public welfare doctrine.[101] Furthermore, the Court augmented its arguments by referring to international norms requiring the criminalisation of virtual 'child pornography', in particular the Budapest Convention, of which Japan was a signatory at the time of the trial.[102]

However, the Court discussed not only the obscenity of the specific material but the functioning of *manga* as a medium – comic books were understood as consisting of 'moving images, or images with the capacity to move'.[103] The defendant's argument that *manga* mitigates sexual stimulation rather than inducing it was rejected due to the nature of *manga*, which involves, inter alia, storytelling through sequential images and the use of speech bubbles and onomatopoeia. Although the image is not 'real', it has still the power to evoke real emotional reactions. This is reinforced by the fact that the reader of a comic book has to fill in the blanks that connect the panels, a situation that invites imaginary participation.[104]

In conclusion, the *Misshitsu* trial suggests that in the case of *manga*, obscenity does not derive only from the depicted content but also from the use of *manga* as a medium. The notion of 'content beyond content' is at the core of this landmark ruling, which was delivered a few years before the Japanese government embarked on its 2014 amendment to the Act on Punishment of Activities Relating to Child Prostitution and Child Pornography, and the Protection of Children, Law No. 52, 1999, (hereafter Child Pornography Statute).

3. The 2014 Amendment – a success for the publishing industry

In 2014, Japan closed an important loophole in its legislative framework by criminalising the mere possession of 'child pornography'. However, the amendment deliberately excluded the criminalisation of virtual 'child pornography' in graphic materials such as *manga* and *anime*.[105]

During the legislative process, legislators found that there is not sufficient evidence of a causal link between virtual 'child pornography' and human rights violations.[106] As pointed out above, *manga* depicting sexual acts between minors is part of the mainstream comic scene, in addition to which the sexualisation of pubescent and prepubescent girls is not considered sexual deviancy in general. Against this background, it is not surprising that the legislators did not deem

[99] Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, p. 214.
[100] Galbraith, *The Misshitsu Trial: Thinking Obscenity with Japanese Comics*, p. 135.
[101] Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, p. 214.
[102] Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, pp. 216 -217.
[103] Galbraith, *The Misshitsu Trial: Thinking Obscenity with Japanese Comics*, p. 126.
[104] Galbraith, *The Misshitsu Trial: Thinking Obscenity with Japanese Comics*, pp. 139–140.
[105] Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, p. 197.
[106] Mayuko Watanabe, *An Analysis of the Japanese viewpoint on regulatory policy of virtual child pornography*, Conference Paper presented at the 14th International Telecommunications Society (ITS) Asia-Pacific Regional Conference: 'Mapping ICT into Transformation for the Next Information Society', Kyoto, 24-27 June 2017, p. 8.

this material harmful. Given the considerable influence of the Japanese *manga* lobby, it is unlikely that virtual 'child pornography' will be criminalised in the near future.[107]

However, the amendment might seem surprising, given the arguments of the Supreme Court in the *Misshitsu* trial. Bearing in mind the Court's remarks on the potentially harmful effects of virtual 'child pornography' on minors and its recognition of the risk of increased sexual offending, it would have been a logical next step to criminalise virtual 'child pornography' altogether. That these encouraging words would not be followed by action became clear once Japan finally ratified the Budapest Convention. While the Convention criminalises both virtual 'child pornography' and persons who are made to appear as minors, it allows states to make a reservation for these very components of the definition of 'child pornography' (art. 9(4) Budapest Convention). Indeed, when Japan ratified the Budapest Convention in July 2012, it stated that it reserves not to apply article 9(2)(b) and (c) in its domestic Child Pornography Statute.[108]

Therefore, virtual 'child pornography' in Japan is not generally criminalised, although content may be considered illegal under the obscenity laws, such as happened in the *Misshitsu* trial.

D. South Africa: Expression 'on the periphery of the right'

South African legislation addresses 'child pornography' extensively, as this is criminalised under both the Films and Publications Act 65 of 1996 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter Sexual Offences Act). The Film and Publications Act covers the entire 'grayscale' of 'child pornography', since it criminalises 'any image, however created, or any description of a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being under the age of 18 years'. This shows clearly that both virtual 'child pornography' and persons who are made to appear as minors are included in the definition. The same applies to the Sexual Offences Act, as its definition includes 'any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years'.

Whether such a broad definition of the term 'child pornography' violates constitutional rights such as freedom of expression and rights to privacy is a question that has been discussed in the Constitutional Court case *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & others [2003] ZACC 19; 2004 (1) SA 406 (CC)* (hereafter *De Reuck v DPP)*. In this case, the applicant stated that the definition of 'child pornography' in the Film and Publications Act was overbroad and vague and that the limitation of his constitutional rights to privacy and freedom of expression could thus not be justified.[109]

First, the Court assessed the scope of the definition of 'child pornography' and held, inter alia, that the term 'person' indeed covers imaginary depictions of a child.[110] When assessing the constitutionality of the provision in question, the Court said that 'child pornography' is indeed protected under freedom of expression[111] and that the 'criminalisation of the creation, production, importation, distribution and possession of the material that falls within the definition of

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[107] Takeuchi, *Regulating Lolicon: Toward Japanese Compliance with Its International Legal Obligations to Ban Virtual Child Pornography*, p. 235.
[108] See Japan's reservations and declarations for the Budapest Convention here: https://www.coe.int/web/conventions/full-list/-/conventions/treaty/185/declarations?p_auth=2Wj895iM&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=JAP&_coeconventions_WAR_coeconventionsportlet_codeNature=2 (accessed 17 May 2020).
[109] *De Reuck v DPP*, para. 5.
[110] *De Reuck v DPP*, para. 23.
[111] *De Reuck v DPP*, para. 48.

child pornography […] limits the right to freedom of expression'.[112] Similarly, the Court was of the opinion that the right to privacy is impacted on by the provision in question.[113]

In a next step, the Court had to decide whether the limitation of these rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[114] Taking into account the nature of the expression and the extent of the limitation, it held that the expression in question here is of little value, as it is found on the 'periphery of the right'.[115]Conversely, the purpose of the legislation was to curb 'child pornography', on the basis that, apart from the actual abuse of children, there is also 'harm to the dignity and perception of all children when a society allows sexualised images of children to be available'.[116]

Furthermore, the Court opined that although there is no unanimous evidence to prove that 'child pornography' is used to 'groom' children, that it reinforces sexual distortions or that it could increase the risk of contact offences, it is 'common sense that these effects will occur on some cases'. Cognisant of the weakness of this argument, the Court stated that a reasonable risk to harm is sufficient to limit constitutional rights.[117] Acknowledging the difficulty of regulating the area of 'child pornography', it found that the relatively narrow infringement of freedom of expression is outweighed by the legislative purpose.[118] The Court came to the same conclusion with regard to the right to privacy, noting that while most child sexual abuse, online and offline, happens in the private sphere, the intrusion into the private sphere by the law is justified.[119]

V. STRIKING THE BALANCE

It becomes clear that the criminalisation of child sexual abuse material poses complex constitutional questions for both national legislators and the international community. Taking into account the different paths taken by the US, Canada, Japan and South Africa, and using the various approaches and arguments as a starting-point, this section sets out a concrete proposal for the regulation of virtual child sexual abuse material and persons who are made to appear as minor – a proposal that aims to assist in striking a balance between constitutional rights such as freedom to speech and right to privacy, on the one hand, and child protection and public welfare concerns, on the other.

A. Scientific proof or reasonable apprehension of harm – the power of the valuation standard

To determine whether the criminalisation of the 'grayscale' of child sexual abuse material is justified in order to protect children from harm, the US and Canada in particular have considered various arguments that try to connect the decriminalisation of the 'grayscale' to direct harm to children. The arguments are that even 'grayscale' material can be used to groom and seduce children; that it could entice viewers to access 'real' child sexual abuse material or even commit contact offences; that criminalisation is necessary to eliminate the market for 'real' child sexual abuse material; and that decriminalisation vitiates the chances of a successful prosecution, as every defence lawyer will attempt to argue that the content in question depicts imaginary children.

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[112] *De Reuck v DPP*, para. 50.
[113] *De Reuck v DPP*, para. 53.
[114] *De Reuck v DPP*, para. 56.
[115] *De Reuck v DPP*, para. 59.
[116] *De Reuck v DPP*, para. 63.
[117] *De Reuck v DPP*, para. 65 and 66.
[118] *De Reuck v DPP*, para. 70.
[119] *De Reuck v DPP*, para. 47.

As has been pointed out by the US Supreme Court and various authors, the problem with these arguments is that there is no scientific proof that verifies them. Even though some research has been undertaken on the connection between accessing child sexual abuse material and sexual offending, there is no, or at least no unanimous, research that confirms any of the abovementioned arguments (or disconfirms them either, for that matter). Therefore, there is no unanimous scientific proof of the correlation between the 'grayscale' of child sexual abuse material and its harm to children.[120] Due to this lack of scientific evidence, both Japan and the US voted against the criminalisation of such material. It seems that any infringement of freedom of speech could in this case only have been justified with unanimous scientific evidence. Besides the fact that scientific evidence is barely ever unanimous and that this valuation standard could be used to block any legislative initiative, the sensitive nature of child sexual abuse and exploitation and the complexity of producing scientific evidence in this regard present an insurmountable obstacle to any criminalisation of such material.

It is against this background that the Canadian Supreme Court and South African Constitutional Court use a different valuation standard: rather than requiring unanimous scientific evidence, reasonable harm for children suffices for the purpose of criminalising certain material. As noted above, the Canadian Supreme Court explicitly acknowledges that 'complex human behaviour may not lend itself to precise scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of'. Therefore, a reasonable apprehension of harm to children seems to be an appropriate valuation standard in the under-researched field of online child sexual abuse and exploitation.

B. A feminist critique of child sexual abuse material as normalisation of sexual violence against children

Taking the abovementioned arguments into account, this section aims to demonstrate that the only reasonable justification for the criminalisation of any form of child sexual abuse material is not to be found in disputable facts that are open to scientific proof but in the normalisation of sexual exploitation and abuse of children, which are perpetuated if such content is considered legal by national legislators and the international community. Therefore, it is argued that any form of child sexual abuse material, whether depicting real children or not, contributes to harmful societal attitudes towards children as sexual objects. The criminalisation is hence not based on the particular content but on the harmful impact on society as a whole and children in particular.

It is arguable that any form of child sexual abuse material glorifies and sexualises violence against children, contributing to cultural acceptance of child sexual abuse and exploitation. The basis for this argument can be drawn from the feminist critique of adult pornography in the 1970s and 1980s, which asserts that pornography is harmful to all women, not only the ones depicted in the material.[121] Most pornography exemplifies a sexist and patriarchal ideology, as it depicts the man as the penetrator and the woman as the penetrated object. The woman in pornography is by nature inferior and subordinate, and it is this distribution of roles at the centre of any pornographic material that reflects and reproduces the narrative of the inequality of the sexes.[122] An analysis of trends in the pornography business over the last few

[120] Gillespie, *Child Pornography. Law and Policy*, pp. 107–113.
[121] For a summary of the debate, see Meagan Tyler, *Harms of production: theorising pornography as a form of prostitution,* Women's Studies International Forum, Vol. 48 (2015), pp. 114–115; Max Waltmann, *Rethinking Democracy: Legal Challenges to Pornography and Sex Inequality in Canada and the United States*, Political Research Quarterly, Vol. 63 (2010), pp. 221–223.
[122] Walter DeKeserdy, *Critical Criminological Understandings of Adult Pornography and Woman Abuse: New Progressive Directions in Research and Theory*, International Journal for Crime, Justice and Social Democracy, Vol. 4 (2015), p. 6; Neil Levy, *Virtual child pornography: The eroticization of inequality*, Ethics and Information Technology, Vol. 4 (2002), p. 321.

years shows that content becomes increasingly more violent, thereby degrading and objectifying women.[123] Depictions of rape scenes and sexual violence in general are prevalent in mainstream pornography. When customers reach a saturation point in their consumption of violent content and find that it does not sufficiently stimulate their sexual desires anymore, more extreme, more brutal and more degrading content needs to be obtained to counter the sexual disinhibition.[124] The eroticisation of inequality produced in pornography not only has a negative effect on the sexuality of both men and women but could also affect their overall interactions. As Kate Millet describes it, sex does not occur in a vacuum but 'is set so deeply in within the larger context of human affairs that it serves as a charged microcosm of the variety of attitudes and values to which culture subscribes'.[125]

Similar mechanisms of exploitation and hierarchy also apply to child sexual abuse material, albeit that the depiction of children in such material is more complex than in the adult form. A child is indeed unequal to adults, as his or her mental and physical capacities are still in development. This observation is not intended to be condescending of children or their capabilities, but is instead a statement of the core premise of child protection: children are inherently a vulnerable group, as they are not fully capable of defending themselves and ensuring their own well-being. Child sexual abuse material turns this understanding upside down by giving children the status of sexual objects and hence putting them on par with adults: it is not the eroticisation of societal inequality that is at the core of child sexual abuse material but the sexualisation of a constructed equality. Child sexual abuse material produces the child as full-grown sexual subject with consenting powers, and thus negates the differences between adults and children in terms of sexual development. At the same time, certain material follows the same pattern of eroticising inequality, as in adult pornography, when the child is depicted not as enjoying the sexual activity and hence as an equal sexual partner, but as someone exposed to forced sexual interaction, extreme violence and torture. According to the 2018 Annual Report of the Internet Watch Foundation, this type of material makes up 23 per cent (declining from 33 per cent in 2017) of analysed content.[126] This shows that, in contrast to adult pornography, the eroticisation of inequality is only one aspect in child sexual abuse material, as material depicting the child as enjoying sexual activity is rooted in a constructed equality.

One could argue that while this sexualisation of children in (virtual) child sexual abuse material may indeed affect the perception of children as sexual objects, child sexual abuse material content is only accessed by people with a paedophilic tendency and that the sexualisation of children is produced and reproduced only within this closed group of paedophiles – and that it hence has no effect on the general public. However, it is important to note that it is a common myth that all viewers of child sexual abuse material qualify as paedophiles and hence have a (solely) sexual interest in children.[127] Sexual abuse and exploitation of children is considered sexually arousing not only by people with a distinct sexual interest in children but by a larger group of people too.[128] Hence, its normalisation through legal acceptance could affect the public perception of children as sexual objects on a larger scale.

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[123] Catherine A. MacKinnon, *Women's lives – men's laws*, Boston 2007, p. 300.
[124] DeKeserdy, *Critical Criminological Understandings of Adult Pornography and Woman Abuse: New Progressive Directions in Research and Theory*, p. 6.
[125] Kate Millet, *Sexual Politics*, New York 2016, p. 23.
[126] Internet Watch Foundation, *Once upon year: Annual Report*, Cambridge 2018, available at: https://www.iwf.org.uk/sites/default/files/reports/2019-04/Once%20upon%20a%20year%20-%20IWF%20Annual%20Report%202018.pdf, p. 28.
[127] United States Sentencing Commission, *2012 Report to the Congress: Federal Child Pornography Offenses*, Washington 2012, p. 75.
[128] See the child sex offender typology in Gina Robertiello/Karen J. Terry, *Can we profile sex offenders? A review of sex offender typologie*s, Aggression and Violent Behavior, Vol. 12 (2007), pp. 512 – 513; Laurence Miller, *Sexual offenses against children: Patterns and motives*, Aggression and Violent Behavior, Vol. 18 (2013), pp. 507 - 508, describing the situational child molester as an offender who does not have a preferential interest in children, but will molest them as

In conclusion, the main argument for the criminalisation of any form of child sexual abuse material is that by accepting the legality of this content, the sexualisation of children gains legitimacy. Child sexual abuse and its depiction are therefore normalised and child sexual abuse material does not only reflect this societal attitude but reproduces this narrative. There is no need to prove harm to a concrete child: the sexual objectification of children, whether real or virtual, through the eroticisation of inequality or a constructed equality is a sufficient argument to acknowledge the harm caused to children *in abstracto*.[129]

C. Thoughts are free – no matter what the quality of the thought

To balance competing interests, the scope of criminalisation should be determined by harm-based rather than strictly idealistic criteria. This means that, in view of the fundamentally important value of freedom of speech in a democratic society, criminalisation of speech can be justified only where there is a close connection to harm. As the potential harm of the 'grayscale' of child sexual abuse material lies in the normalisation of the sexualisation of children, criminalisation needs to be linked to this potential harm. The danger of the criminalisation of mere thought is an inherent factor in the debate. As the Canadian Supreme Court put it in *R v Sharpe*,

> [t]he distinction between thought and expression can be unclear. We talk of 'thinking aloud' because that is often what we do: in many cases, our thoughts become choate only through their expression. To ban the possession of our own private musings thus falls perilously close to criminalizing the mere articulation of thought.[130]

In speaking about the normalisation of a belief, it is crucial to distinguish between having and sharing this belief. A person's thoughts can only be considered influential, and hence a contributor to a certain societal viewpoint, if they are shared with others. Communication is thus the catalyst of harmful thought. As such, the criminalisation of the 'grayscale' of child sexual abuse material can only be justified when the focus is on the communication of such thought to others. Furthermore, it cannot make a difference whether a person's thoughts are materialised through words or visualised through drawings or any other form of visual embodiment – they remain the person's thoughts, and if not shared with others, do not contribute to the societal normalisation of child sexual abuse.

Therefore, the criminalisation of the 'grayscale' of child sexual abuse material is only justified when the content is shared with others. The mere production and possession of such self-produced content do not contribute to the objective of the criminalisation, and hence need to be excluded from the range of criminal law. The difference in treatment of the same content is hence justified on the basis of its potential harm to the normalisation of the sexualisation of children: where it is a matter of mere thoughts, whether materialised or not, this is where criminal law reaches its boundary. Thoughts need to be free – no matter what the quality of the thought. Only through such a differentiation can freedom of speech and child protection be balanced with each other.

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targets of opportunity if other sexual outlets are unavailable. Same applies for online child sex offenders, with one category being described as offenders who view child sexual abuse material out of curiosity, without a specific sexual preference for children.

[129] See Argyro Chatzinikolaou/Eva Lievens, *Towards a Legal Qualification of Online Sexual Acts in which Children are Involved: Constructing a Typology*, European Journal of Law and Technology, Vol. 10 (2019), arguing that the outcome of the act and the intent/underlying motive of the actor prove the harm caused to children *in abstracto*; justifying the criminalization of virtual child sexual abuse material on the basis of legal moralism by arguing that it depicts 'unresponsive, passive, imposed, unembodied and thus non-reciprocal, unequal sex acts' which leads to the material being 'morally objectionable', Litska Strikwerda, *Virtual acts, real crimes? A legal-philosophical analysis of virtual cybercrime,* Enschede 2014, pp. 125 et seq.

[130] *R v Sharpe 2001 SCC 2,* para. 108.

When drafting such an exemption clause in a legal provision, it is crucial that the wording is not overbroad. This is particularly dangerous when it comes to the 'possession' of such material. If the text of the provision merely excludes the 'production and possession' of virtual child sexual abuse material, the latter can be misinterpreted as excluding the possession of *any* virtual child sexual abuse material from criminalisation, whether self-produced or downloaded from the Internet. The exclusion of the possession of downloaded material would, however, contravene the objective of the law, as the person who possesses such material would be at the receiving end of the content and hence partake in a harmful communication.[131] Therefore, it is important to ensure that only the production and possession of self-generated are excluded. A concrete suggestion would be to exclude the 'production and possession of the produced material solely for private use' by law.

D. Age-determination of fairies – limitations for the virtual 'child'?

As was described above, the eroticisation of inequality or of constructed equality with regards to children justifies the criminalisation even of virtual child sexual abuse material. However, the depictions of a virtual 'child' differ vastly, and it is necessary to examine the extent to which a depiction has to resemble an actual child to justify the criminalisation of such content.

This question arises in particular with regard to material which depicts the fictional abuse of a fictional child. In general, one would argue that even in such a case the harm for children *in abstracto* is still present, as the material turns children into sexual objects. However, it has to be acknowledged that depictions of a virtual 'child' exist on a scale with life-like, realistic images of fictional children which are hardly identifiable as being virtual on the one end, and the depiction of child-like cartoon characters like fairies on the other end. In this context, the question arises to what extent the virtual subject of the pornographic performance needs to resemble the human features of an actual child, or whether any remotely child-like subject fulfils the definition of virtual child sexual abuse material.[132] This question can only be answered by referring back to the initial reason for the criminalisation of such material: the sexual objectification of children. Based on this rationale, material which only remotely resembles the human features of a child, such as fairies, is less likely to contribute to the eroticisation of inequality/constructed equality, as the similarities between the virtual subject and a real child are not close enough. Referring back to the previously mentioned scale with realistic yet virtual depictions of actual children on the one end, and 'child-like', clearly non-human subjects on the other end, it is suggested that the more we move towards the latter, artistic end of the scale, the more likely the freedom of expression/artistic freedom aspects of the depiction prevail. As the depicted subject has limited resemblance with a 'child' in terms of recognisable human features, one could argue that this is not even a depiction of a 'child' anymore, because the term 'child' might require at least human-like features.[133]

As the harm described as the eroticisation of inequality/constructed equality in the context of children falls away in such cases, and therefore the initial justification for the criminalisation

[131] In contrast, Ost, *Criminalising fabricated images of child pornography: a matter of harm or morality?*, pp. 243-244, arguing that the possessor of virtual child sexual abuse material does not contribute to the sexual objectification of children, and hence only the creation and dissemination of virtual child sexual abuse material should be criminalised.
[132] In order to clarify the term 'child', the UK Coroners and Justice Act 2009 clarified that virtual child sexual abuse images are criminalised even if 'some of the physical characteristics shown are not those of a child', see Alisdair A. Gillespie, *Cybercrime. Key Issues and Debates*, Oxon 2019, p. 254.
[133] *Ibid.*; this might also be the reason for the formulation in the Budapest Convention as discussed in III. B. 2 and in the German legal framework as discussed in Chapter V, II.

of such material is not applicable, material depicting virtual 'child-like', non-human subjects should be excluded from the term virtual child sexual abuse material.

VI. CONCLUSION

Virtual child sexual abuse material and persons who are made to appear as minors pose difficult constitutional questions and touch on the core of freedom of speech, child protection and public welfare. The lack of coherent international guidance complicates the drafting of appropriate 'child pornography' legislation at a national level.

As has been shown, the criminalisation of the 'grayscale' of child sexual abuse material can only be based on the idea that the dissemination of such content contributes to the normalisation of the sexualisation of children. To do justice to freedom of speech and 'freedom of thought', the mere production and the possession of this self-produced material needs to be excluded from the scope of criminal law, as well as depictions of virtual 'child-like', non-human subjects.

The definition of the term 'child pornography' is under constant development, as child protection in the digital era needs to respond quickly to technological innovation and hence behavioural change on the part of perpetrators. While the digital era produces ever-new avenues for the sexual abuse and exploitation of children, making rapid response from legislators and the criminal justice sector crucial, the debate around the 'grayscale' of child sexual abuse material shows that the responses nonetheless need to be carefully balanced within the framework of freedom of speech and right to privacy. The unlimited infringement of these rights in the name of child protection is as dangerous for society as the evil it aims to fight.

CHAPTER III: REGULATING BODIES: THE MORAL PANIC OF CHILD SEXUALITY IN THE DIGITAL ERA

Abstract

With access to the Internet increasing, children's sexual explorative behaviour has expanded to the online space. This has led to a revival of the moral panic around child sexuality, in particular due to the increasing phenomenon of consensual 'sexting' between minors. This moral panic is fuelled by concerns about children's sexual abuse and exploitation in the context of child sexual abuse material. In an attempt to protect children, consensual 'sexting' between minors is in some countries categorised as the production and dissemination of 'child pornography', leading to the prosecution of involved children as sex offenders. The right to be protected from sexual abuse and exploitation is hence the dominant narrative. This Chapter argues that the criminalisation of children for consensual sexual exploration in the online space is counterproductive to the objective of child protection. Instead, countries should take a rights-based approach to consensual 'sexting' between minors, and balance autonomy and child protection concerns through an exclusion of consensual 'sexting' between minors from the scope of 'child pornography' provisions.

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I. INTRODUCTION

The regulation of sexual offences is the regulation of bodies. What is considered sexually 'deviant', which practices and preferences cross the line into the socially unacceptable, which body enjoys which degree of sexual autonomy – sexual offences are informed by society's understanding of normative sexuality.[1] As Butler puts, '[the] regulation of gender has always been part of the work of heterosexist normativity'.[2] As society changes over time, so do sexual offences. A good example for this development is the criminal offence of 'sodomy', which originally criminalised a wide range of non-procreative sexual activity, including oral sex, same-sex sexual activity or masturbation.[3] Regardless of the use of force or abusive authority, any non-procreative sexual activity was considered a criminal offence. The meaning of sodomy has changed in the last decades, focusing on men having sex with men, while decriminalising non-procreative sexual activity between heterosexual partners. Even sodomy laws in the current form are under development, with India and Botswana being amongst the latest countries to declare its sodomy laws unconstitutional.[4]

However, the sexual offences discourse has been until today hampered by a misunderstanding of intimacy and sexualised violence, which becomes obvious with regard to the criminalisation of sodomy and the decriminalisation of rape within marriages.[5] It shows that, on the one hand, consensual sexual activity between same-sex partners is criminalised simply because it is perceived as sexually deviant intimacy and harmful to society as a whole; on the other hand, non-consensual sexual activity within a marriage is not criminalised, as it is based on the oppression of the female body and hence socially acceptable.

Another contested area of sexual rights concerns the sexuality of children.[6] While the age of consent to sexual activity differs greatly around the world, the most common age of consent is set at 16 to 18 years.[7] It has to be noted, however, that the age of consent varies greatly between boys and girls, as well as for hetero- and homosexual children.[8] While the regulation of a minimum age of consent to sexual activities aims to protect children from sexual abuse and exploitation by adults,[9] it can create legal challenges regarding consensual sexual activities between children. As sexual exploration, ranging from hugging to kissing to sexual intercourse, is part

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[1] Joachim Renzikowski, *Primat des Einverständnisses? Unerwünschte konsensuelle Sexualitäten*, in: Ulrike Lembke (edit.), *Regulierungen des Intimen. Sexualität und Recht im modernen Staat*, Wiesbaden 2017, p. 198.
[2] Judith Butler, *Undoing Gender*, New York 2004, p. 186.
[3] Katherine Crawford, *European Sexualities 1400–1800*, Cambridge 2007, p. 156.
[4] Kanad Bagchi, *Decriminalising Homosexuality in India as a Matter of Transformative Constitutionalism*, Verfassungsblog, 9 September 2018, available at: https://verfassungsblog.de/decriminalising-homosexuality-in-india-as-a-matter-of-transformative-constitutionalism/ (accessed 3 October 2018); Gautam Bhatia, *Section 377 Referred to a Constitution Bench: Some Issues*, Indian Constitutional Law and Philosophy, 8 January 2018, available at: https://indconlawphil.wordpress.com/2018/01/08/section-377-referred-to-a-constitution-bench-some-issues/ (accessed 3 October 2018); Alan Yuhas, *A Win for Gay Rights in Botswana Is a 'Step Against the Current' in Africa*, New York Times, 11 June 2019, available at: https://www.nytimes.com/2019/06/11/world/africa/botswana-gay-homosexuality.html (accessed 20 January 2020).
[5] Ulrike Lembke, *Sexualität und Recht: Eine Einführung*, in Ulrike Lembke (ed.), *Regulierungen des Intimen. Sexualität und Recht im modernen Staat*, Wiesbaden 2017, p. 5.
[6] Arguing that child sexuality has always been an indicator and an instrument to manage the moral health of a nation, Murray Lee et al., *'Let's Get Sexting': Risk, Power, Sex and Criminalisation in the Moral Domain*, International Journal for Crime and Justice, Vol. 2 (2013), p. 41; highlighting that the 'idealized concept of the heterosexual nuclear family is at the core' of the age of consent debate in Canada, Carol L. Dauda, *Sex, Gender, and Generation: Age of Consent and Moral Regulation in Canada*, Politics & Policy, Vol. 38 (2010), p. 1161.
[7] SRHR Africa Trust (SAT), TrustLaw, Arnold & Porter Kaye Scholer LLP, *Age of Consent: Global Legal Review*, Johannesburg 2017, p. 12; arguing that statutory rape laws did not aim to protect children from forced sexual activity but were primarily designed to protect a girl's virginity, Henry F. Fradella/Jennifer M. Summer, *Sex, Sexuality, Law and (In)Justice*, New York 2016, p. 201.
[8] SRHR Africa Trust (SAT), TrustLaw, Arnold & Porter Kaye Scholer LLP, *Age of Consent: Global Legal Review*, p. 12.
[9] Belinda Carpenter et al., *Harm, Responsibility, Age, and Consent*, New Criminal Law Review: An International and Interdisciplinary Journal, Vol. 17, No. 1 (2014), p. 27.

of the normal sexual development of teenagers, the age of consent law is at risk of criminalising consensual sexual activities between minors.[10] As the laws which aim to protect children should not punish them for developmentally normal sexual activity, many countries have enacted so-called Romeo-and-Juliet clauses, which – dependent on the country-context – exempt sexual activity between teenagers from prosecution if the partners are not more than two or more years apart in age.[11] This age gap is considered close enough to minimise the risk of abuse of power or authority by the older partner and to ensure that both partners can make an informed and autonomous decision on whether to engage in sexual activity.

While contact sexual activity between children is nowadays widely acknowledged within the abovementioned framework, the sexual exploration of children through the use of information and communication technologies has revived the moral panic around child sexuality. Children and adolescents below the age of 18 years constitute one-third of Internet users worldwide.[12] In 104 countries, more than 80 per cent of the youth population are online.[13] In so-called 'developed' countries, 94 per cent of young people aged 15-24 use the Internet, compared with 67 per cent in 'developing' countries and only 30 per cent in 'Least Developed' Countries.[14] It is therefore not surprising that sexual exploration has expanded to the Internet.[15]

A common form of such online sexual exploration is 'sexting'. The term is a portmanteau of the words 'sex' and 'texting', and describes self-produced sexually suggestive or explicit images and texts that are distributed by cell phone messaging, Internet messenger, social networks and the like.[16] Further, there is a distinction between 'primary sexting', which describes material produced and possessed with the consent of the depicted person(s), and 'secondary' sexting, which describes the further dissemination of such material without the consent of the depicted person(s).[17] Apart from such (at least initially) consensually produced and shared material between teenagers, there is a massive amount of child sexual abuse material available online, depicting the sexual abuse and exploitation of children in all age groups.[18]

With teenage sexting material and 'child pornography' objectively depicting the same behaviour, i.e. sexual activity involving a minor, the law in most countries does not differentiate between the circumstances under which the material was produced but criminalises the production, dissemination and possession of both groups of materials as 'child pornography' offences. As 'primary' sexting material is produced and shared with the consent of the depicted person(s), without use of force or abuse of authority, it does not depict the sexual abuse and exploitation of a child. The CRC Committee in its Guidelines regarding the implementation of

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[10] A good example is the previous South African legislation that in most circumstances criminalised all forms of sexual interaction among children below the age of 16 years and which was declared unconstitutional in 2015. See *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35, further discussed in IV. A.

[11] Fradella/Summer, *Sex, Sexuality, Law and (In)Justice*, p. 202; Carpenter et al., *Harm, Responsibility, Age, and Consent*, pp. 36–37.

[12] UNICEF, *The State of the World's Children 2017*, New York 2017, p. 1.

[13] ITU, *ICT Facts and Figures in 2017*, https://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2017.pdf (accessed 3 October 2018).

[14] *Ibid.*

[15] Jane Bailey/Hanna Mouna, *The Gendered Dimensions of Sexting: Assessing the Applicability of Canada's Child Pornography Provision*, Canadian Journal of Women and the Law, Vol. 23 (2011), p. 413.

[16] UNICEF, *Regulation of Child Online Sexual Abuse. Legal Analysis of International Law & Comparative Legal Analysis*, Windhoek 2016, p. 16.

[17] *Ibid.*, pp. 37–38.

[18] Sixty per cent of material analysed by the Internet Watch Foundation, a UK-based NGO combating child sexual abuse material on the Internet, depicts children between 11 and 15 years, while fourty per cent depicts children between 0 and 10 years, of which one per cent depicts children between 0 and 2 years (Internet Watch Foundation, *Once upon year: Annual Report*, Cambridge 2018, p. 28, available at: https://www.iwf.org.uk/sites/default/files/reports/2019-04/Once%20upon%20a%20year%20-%20IWF%20Annual%20Report%202018.pdf (accessed 16 January 2020)); stating that girls and Caucasian children figure disproportionately in child sexual abuse material, UNICEF, *Child Safety Online. Global Challenges and Strategies*, New York 2012, p. 15.

the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (hereafter the Guidelines) seems to share this viewpoint, by stating that 'this conduct in and of itself is not necessarily illegal or wrongful'.[19] However, there is an inherent risk for sexting material to become more widely available than initially intended.[20] As the depicted person(s) naturally loses control of the material once shared, he or she has to rely on the confidentiality and integrity of the receiver. Such trust is often broken when the relationship ends and the material is widely circulated to embarrass the former partner.[21] This risk proves to be a reality when looking at the number of self-produced sexting material available on child sexual abuse material websites, which has been increasing over the past couple of years.[22] In short, the same picture, depending on the context it is available in and depending upon the person who accesses it, can become abusive towards the child, although the initial production was non-abusive.

This poses a pivotal question for the legislator: due to the risk of abuse and exploitation inherent in self-produced material, should such material be categorised as 'child pornography' from the beginning, and hence should anyone – irrespective of the context – who produces, disseminates and possesses it be considered a 'child pornography' offender? Or does the law have to find a way of addressing 'primary' sexting and 'child pornography' differently? This Chapter aims to investigate the criminal response to 'primary' sexting from a comparative perspective and through a constitutional lens. As the regulation of teenage sexting touches upon core questions of teenage sexuality, the private sphere as well as freedom of expression (II.), this discussion examines how the US, Canada, and Germany have addressed the topic of teenage sexting (III.), after which it proposes a solution to this complex question (IV. and V.).

II. *O TEMPORA, O MORES!*: TEENAGE SEXUALITY AND DIGITALISATION

This section provides an introduction to the intersection of teenage sexuality in the digital era as well as to teenage sexting and child sexual abuse material.

A. Teenage sexuality in the digital era

Sexuality, identity, intimacy, and interpersonal connection are matters of interest to teenagers in their journey of identity exploration and construction. While these areas have been traditionally explored and constructed in offline interactions between the self and others, an increasingly important realm for such activities is the Internet.[23]

Online sexual exploration is becoming a significant component of teenagers' sexuality.[24] In this regard, it has to be noted that online and offline sexual exploration do not co-exist in silos but are interconnected and hence need to be analysed in a holistic manner.[25] Due to the specific means of interaction in the online space, 'these online behaviors might be similar, exaggerated,

[19] CRC Committee, *Guidelines regarding 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*, CRC/C/156 (10 September 2019), para. 42.
[20] *Ibid*.
[21] Alisdair A. Gillespie, *Child Pornography. Law and Policy*, pp. 31–33; UNICEF, *The State of the World's Children 2017*, pp. 220-221.
[22] UK National Crime Agency, *National Strategic Assessment of Serious and Organised Crime 2018*, London 2018, p. 10; Internet Watch Foundation, *Once upon year: Annual Report*, p. 28.
[23] David Smahel/Kaveri Subrahmanyam, *Adolescent Sexuality on the Internet: A Developmental Perspective* in: Fabian M. Saleh/Albert J. Grudzinskas/Abigail M. Judge, *Adolescent sexual behavior in the digital era*, Oxford 2014, p. 62.
[24] Noting that teenagers increasingly consider sexting to be 'normal', CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 42.
[25] Smahel/Subrahmanyam, *Adolescent sexual behavior in the digital era*, p. 63.

or even reversed from their offline counterparts'.[26] Important factors which, among others such as accessibility and affordability of online services, are characteristic for adolescent online behaviour, are disinhibition and self-disclosure.[27] Being able to interact with others in an (at least perceived) anonymous manner might lead adolescents to be much bolder and more open and courageous than in offline face-to-face interactions. Taking into account the role that peer-to-peer exchange plays in building one's sexuality in adolescence, technology is the medium of choice, as it makes such exchange nearly effortless.[28]

The various ways in which adolescents explore their sexuality online include searching for information about sexuality and sexual health, constructing and presenting a sexual identity, engaging in sexual interactions online, as well as accessing sexually explicit content.[29] Regarding sexual interaction with others online, this may entail sexualised conversations, as well as activities such as direct visual interaction via webcams, including masturbation or other sexual activities.[30]

Similar to contact sexual exploration, digital sexual exploration comes with potential risks for teenagers. These risks can – if not detected and managed properly – turn into harm. However, it has to be acknowledged that sexual exploration, whether in direct contact or through information and communication technology, is in itself not harmful, as it is part of the normal sexual development of children. Digital exploration poses risks for children, such as unwanted dissemination of material, which can – potentially, not inevitably – turn into harm. The differentiation between harm and risk is crucial in guiding the debate around teenage sexting.[31] It will be shown in section III. that this differentiation is unfortunately often times blurred.

B. Child sexual abuse material and teenage sexting – two sides of the same coin?

To understand the difficulties around child sexual abuse material and teenage sexting, it is crucial first to elaborate on the legislative content of child sexual abuse material, before engaging with the discourse on its relationship to teenage sexting.

With regard to the definition of the term 'child pornography', it has to be noted that it varies greatly between national legislations and within international law. While material covers text, audio and/or visuals, the subject can include actual children, persons who are made to appear as minors and/or virtual 'child pornography'.[32] The criminalised conduct ranges from production, dissemination and possession to the mere accessing of such material.[33]

However, most 'child pornography' provisions have one element in common, which is that the consent of the depicted child is always considered invalid – hence, the lack of consent is

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[26] *Ibid.*
[27] *Ibid.*
[28] April Gile Thomas/Elizabeth Cauffman, *Youth Sexting as Child Pornography? Developmental Science Supports Less Harsh Sanctions for Juvenile Sexters*, New Criminal Law Review: An International and Interdisciplinary Journal, Vol. 17 (2014), p. 642.
[29] Smahel/Subrahmanyam, *Adolescent sexual behavior in the digital era*, p. 65.
[30] *Ibid.*, p. 71.
[31] Stating that risk refers only to the probability of harm, and that children need to be exposed to risk in order for them to become resilient adults, Sonia Livingstone/Brian O'Neill, *Children's Rights Online. Challenges, Dilemmas and Emerging Directions* in: Simone van der Hof/Bibi van den Berg/Bart Schermer (eds.), *Minding Minors Wandering the Web: Regulating Online Child Safety*, The Hague 2014, p. 25; see also UNICEF, *Child Safety Online. Global Challenges and Strategies*, p. 26.
[32] For an in-depth discussion on virtual child sexual abuse material from a comparative perspective, see Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 1*, Computer and Telecommunications Law Review, Issue 3 (2018), pp. 61 *et seq.*; and Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 2*, Computer and Telecommunications Law Review, Issue 4 (2018), pp. 73 *et seq.*
[33] For a comparative analysis of child pornography legislation in Botswana, South Africa, the Philippines, Uganda, Germany and Canada, see UNICEF, *Regulation of Child Online Sexual Abuse. Legal Analysis of International Law & Comparative Legal Analysis*.

not a relevant element of 'child pornography' offences. This is in line with the CRC Committee's stance that 'children can never consent to any form of their own sale, sexual exploitation or sexual abuse'.[34] The rationale for this is twofold. First, the perceived consent of the child should not be a valid defence in court for the accused. It is a common misperception that all child sexual abuse material depicts the use of force or violence and that the child victim always looks distressed or is in pain or crying. However, such material does not invariably depict 'obvious', 'visual' harm to the child.[35] Children might be depicted as if they enjoy or are at least compliant with the sexual activity. This is, however, a result of a grooming process or the child's way of accepting the abuse, rather than an expression of informed consent. Therefore, the mere expression or conduct of the child does not give any further indication of the child's actual level of consent. Secondly, and even more importantly, 'child pornography' provisions seem to operate on the presumption that the depicted act is unlawful anyway and that there is hence no reason to consider the consent of the child if he or she could not consent to the depicted act in the first place.

While this may be true for the vast majority of material, it is indeed more complex for the self-generated material discussed in this Chapter. How this fundamental difference causes a contradiction within the legal system will be discussed in the next sections.

III. TEENAGE SEXTING ACROSS THE WORLD: USA, CANADA, GERMANY

This section discusses the approach taken to teenage sexting and 'child pornography' in the US, Canada, and Germany. While the US's approach of strictly subsuming sexting under 'child pornography' might have changed in 2010, Canada describes teenage sexting in a landmark Supreme Court decision on 'child pornography' as an area which raises constitutional concerns if such behaviour is criminalised. Germany, in recent law reforms, has incorporated an exemption clause in its juvenile pornography provision, aligning it with European frameworks on 'child pornography'.

A. USA: non-protected speech in the name of child protection

As for the broader regulation of 'child pornography', three Supreme Court decisions, namely, *Miller v California*, 413 US 15 (1973), *New York v Ferber*, 458 US 747 (1982) and *United States v Stevens*, 559 US 460 (2010), set the framework in which the constitutionality of the criminalisation of sexting between minors has to be discussed.

1. *Miller v California*, 413 US 15 (1973)

In *Miller v California*, 413 US 15 (1973), the Court held that lewd and obscene speech does not receive First Amendment protection because obscenity serves no crucial role in the exposition of ideas and has little social value. In order to be considered 'obscene', the work as a whole must appeal to the prurient interest, must be patently offensive in the light of community standards, and lack serious literary, artistic, political, or scientific value.[36] In line with this approach, many states in the US drafted 'child pornography' provisions which included the obscenity of the material as a necessary element of 'child pornography' offences. However, some states, including New York, went further and criminalised 'any performance which includes

[34] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 72.
[35] Gillespie, *Child Pornography. Law and Policy*, pp. 22-23.
[36] *Miller v California* 413 US 15 (1973), at 24.

sexual conduct by a child less than sixteen years of age', regardless of the obscenity of the material in question.[37]

2. *New York v Ferber*, 458 US 747 (1982)

In *New York v Ferber*, 458 US 747 (1982), the Court held that 'child pornography' is a category of speech not protected by the Constitution[38] and that such depictions may be prohibited regardless of their obscenity: obscenity has not been considered a necessary criterion when it comes to 'child pornography' provisions.[39] First, the Court set out that it had a compelling interest in protecting the physical and psychological integrity of minors.[40] It confirmed that 'the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child'.[41] Further, the production of 'child pornography' material is 'intrinsically related to the sexual abuse of children [….] [T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation'.[42] Their artistic value is to be considered 'modest, if not *de minimis*'.[43]

3. *United States v Stevens*, 559 US 460 (2010)

Today, all states in the US have enacted 'child pornography' legislation, and the federal Sex Offender Registration and Notification Act requires mandatory sex offender registration if the convicted defendant is over the age of 14.[44] Therefore, courts across the country have been faced with the question of whether the considerations with regard to 'child pornography' set out in *Ferber* also cover teenage sexting material. In cases where the conduct was confirmed as falling under the definition of 'child pornography', the legal consequences ranged from diversion and plea bargaining to convictions.[45] In the prominent case of *Ab. H v State* 949 So. 2d 234 (2007), the 16-year-old A.H. and her 17-year-old boyfriend J.G.W. were charged as juveniles under the 'child pornography' laws. The charges were based on digital photos A.H. and J.G.W. took of themselves naked and engaged in sexual behaviour. The state alleged that, while the photos were never shown to a third party, A.H. and J.G.W. emailed the photos to another computer from A.H.'s home. A.H. was convicted for 'producing, directing or promoting a photograph or representation that she knew to include the sexual conduct of a child'.[46]

Looking at the arguments put forward in *Ferber* to justify the exclusion of 'child pornography' from First Amendment protection, it is arguable whether the intention behind such exclusion is equally applicable to teenage sexting cases. First, there is no evidence that consensual teenage sexting causes physical, emotional or mental harm to the child.[47] As discussed above, 'sexting' can be considered to form part of a child's sexual exploration using the means of technol-

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[37] Frederick Schauer, *Codifying the First Amendment: New York v Ferber*, The Supreme Court Review, Vol. 1982 (1982), p. 290.
[38] *New York v Ferber*, 458 US 747 (1982), at 764.
[39] *New York v Ferber*, 458 US 747 (1982), at 747.
[40] *New York v Ferber*, 458 US 747 (1982), at 757.
[41] *New York v Ferber*, 458 US 747 (1982), at 758.
[42] *New York v Ferber*, 458 US 747 (1982), at 759.
[43] *New York v Ferber*, 458 US 747 (1982), at 762.
[44] Julia H. McLaughlin, *Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship*, University of Michigan Journal of Law Reform, Vol. 45 (2012), p. 320.
[45] Joanna R. Lampe, *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*, University of Michigan Journal of Law Reform, Vol. 46 (2013), p. 710.
[46] Lampe, *A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting*, pp. 709–710; for an in-depth discussion of the case, see Antonio M. Haynes, *The Age of Consent: When is Sexting No Longer Speech Integral to Criminal Conduct*, Cornell Law Review, Vol. 97 (2012), pp. 385 – 387.
[47] McLaughlin, *Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship*, p. 324.

ogy. Further, it has to be stressed that in contrast to 'child pornography' material, teenage sexting material does not depict child sexual abuse but lawful sexual activity.[48] Unfortunately, this fundamental difference has been rejected in the Illinois Supreme Court case *People v Hollins*, 2012 IL 112754, and led to the absurd result that a 32-year-old man can legally have sex with his 17-year-old girlfriend (the age of consent in Illinois is 17 years), but is convicted as 'child pornography' offender because they produced photographic material of their sexual acts. The defendant's argument that 'he was in the same position as anyone who photographs his or her legal, consenting sex partner [and] […] it is not reasonable or fair for the legislature to prohibit the sex partners of such people from photographing such otherwise lawful, private, sexual activity', was turned down by the Court.[49]

In the dissenting opinion, two justices argued that the Court in its analysis failed to consider *United States vs Stevens, 559 US 460 (2010),* which, in their opinion, has a significant impact on the assessment of the case at hand.[50] In *United States vs Stevens,* the Supreme Court of the United States clarified that the exclusion of 'child pornography' from First Amendment protection is not based on a mere cost-benefit analysis, and that such an analysis is not sufficient for creating new categories of exempted speech.[51] Rather, the Court argued that *Ferber* grounded its analysis in a 'previously recognised, long-established category of unprotected speech',[52] quoting *Giboney v Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949) in *Ferber*: '[T]he constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.'

Following *Stevens*, the dissenting opinion in *Hollins* stressed that *Ferber* did not create a new category of exception to First Amendment protection for 'child pornography' material[53] and hence that 'child pornography' is not exempted from First Amendment protection per se, only in cases where 'the photograph [is] an integral part of conduct in violation of a valid criminal statute' (internal quotation marks omitted).[54] As *Stevens* is a binding authority for the Illinois Supreme Court, the dissenting opinion therefore concluded that the material at hand does not constitute 'child pornography' as defined by the Supreme Court in the context of First Amendment considerations.[55]

4. Assessment

While the shift from *Ferber* to *Stevens* has to be generally welcomed with regard to teenage sexting cases, it might leave in a grey area a range of material that does not obviously depict sexual abuse of a child. An example of such material could be a child posing in a sexually suggestive manner or masturbating, as nudity or masturbation per se are not criminal offences. Assuming that *Stevens* did not intend to preclude such material from the First Amendment exemption, further specification is required in determining which conduct exactly constitutes the sexual abuse: the interaction with the child itself, or photographing a child in a sexualised

[48] *Ibid.*, p. 324.
[49] *People v Hollins*, 2012 IL 112754, para. 39–42.
[50] *Ibid.*, para. 47.
[51] *United States v Stevens*, 559 US 460 (2010), pp. 8-9.
[52] *Ibid.*, p. 8.
[53] *People v Hollins*, 2012 IL 112754, para. 67.
[54] *Ibid.*, para. 66.
[55] *Ibid.*, para. 68, 70.

position.[56] If the latter is considered the underlying criminal act,[57] then sexual abuse and speech are one identical act. This line of argument creates the offence 'sexual abuse through the act of photographing', which seems quite artificially constructed.

Regardless of the challenges of the interrelation of underlying criminal act and speech, it has to be awaited if the Supreme Court actually goes as far as accepting that age-of-consent and 'child pornography' provisions need to be stringently aligned to prevent online and offline sexual activity from being treated differently.

B. Canada: Balancing 'right to document' and potential harm to children

Canada has since 2001 worked on balancing child protection and freedom of expression concerns in sexting cases. Starting with a private use exception for certain categories of 'child pornography' developed in the landmark decision *R v Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, several court decisions have further developed the range of the private use exception.

1. *R v Sharpe*, 2001 SCC 2

In its landmark decision *R v Sharpe*, 2001 SCC 2, the Canadian Supreme Court had to decide whether Canadian law, which criminalises the possession of 'child pornography', is unconstitutional because it violates freedom of expression as guaranteed under the Canadian Constitution.[58] The key question therefore was whether Canadian law criminalises the possession of an unjustifiably broad range of 'child pornography' material.[59] The Court held that the infringement of the accused's right to freedom of expression is justifiable.

First, it started by setting out the values at stake: freedom of the expression, on the one hand, and prevention of harm to children, on the other.[60] It stressed that children are in the need of protection from the harmful effects of any form of child sexual abuse and exploitation and should not be considered appropriate sexual partners.[61] However, the importance of freedom of expression demands a clear legal framework as to what constitutes 'child pornography'.[62] When delving into the exact meaning of the term 'person' as used in section 163(1) of the Canadian Penal Code, the Court stated that 'person' includes auto-depictions of teenagers, and that teenagers could hence be charged and convicted for taking and keeping photos of themselves engaged in sexual activity.[63] While the current defence of public good as contained in section 163(1) could theoretically be applied in such cases, by arguing that the public good is served by possessing materials that promote the expressive and psychological well-being or enhance one's sexual identity in ways that do not involve any harm to others, the Court noted

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[56] MacKenzie Smith, *You Can Touch, But You Can't Look: Examining the Inconsistencies in Our Age of Consent and Child Pornography Laws*, Southern California Law Review, Vol. 87 (2014), p. 870; in Haynes, *The Age of Consent: When is Sexting No Longer Speech Integral to Criminal Conduct*, p. 395, Haynes argues that on the basis of *Stevens*, most teenage sexting activities should enjoy First Amendment protection, because 'neither nudity, masturbation, nor even large amounts of teenage sext are illegal'. However, he fails to acknowledge that a nude child or a child masturbating is also not a criminal offence per se, but it can be assumed there is no intent to also decriminalise the depiction of such sexual activity.

[57] Smith, *You Can Touch, But You Can't Look: Examining the Inconsistencies in Our Age of Consent and Child Pornography Laws*, p. 870.

[58] *R v Sharpe* [2001] SCC 2, para. 1.

[59] *Ibid.*, para. 5.

[60] *Ibid.*, para. 29.

[61] *Ibid.*, para. 34.

[62] *Ibid.*

[63] *Ibid.*, para. 40–41.

that such defence might not be sufficient to exclude each case of teenage sexting from the criminal justice system.[64]

Therefore, the Court raised concerns that the current legal framework catches material which is at the centre of a person's self-fulfilment but which poses little to no harm to others. The Court developed two categories of material: first, private journals, writings or other works of the imagination, which are created and kept exclusively for oneself,[65] and secondly, 'privately created visual recordings of lawful sexual activity made by or depicting the person in possession and intended only for private use',[66] such as teenage sexting material.

In order to determine whether the limitation of freedom of expression imposed by section 163(1) is justified under the Constitution, the Court identified the reduction of child exploitation and the prevention of harm to children as a pressing and substantial legislative objective. With regard to the proportionality between the limitation to freedom of expression and the benefits of the law, the Court found that there is a rational connection between the law and the pursued purpose, by arguing, inter alia, that 'child pornography' promotes cognitive distortions, fuels fantasies that could incite offenders, or can be used to groom or seduce children.[67]

Further, in order to determine whether the law only minimally impairs freedom of expression, the Court stressed that it suffices if the law is reasonably tailored to its objectives and impairs the concerned right not more than reasonably necessary.[68] The Court averred that the second category of material as defined previously presents only a small risk of causing harm to children, as the material was initially produced by him- or herself and hence the risk of negative attitudinal changes is not expected to be significant.[69] Following this line of argument, the law might be overbroad. However, the Court postponed the final determination of this issue to the final stage of the proportionality test, i.e. the final balance.[70] The Court therefore had to determine whether the benefits of the law in achieving prevention of harm to children outweigh the impact of the law on freedom of expression.[71]

In this context, the law recognised that such material might be relevant for teenagers' self-fulfilment, self-actualisation and sexual exploration and identity, and could even assist in building 'loving and respectful relationships through erotic pictures of themselves engaged in sexual activity'.[72] If such acts were criminalised, the impact on freedom of expression could not be justified through the potential benefits of the law in preventing harm to children. While generally holding that the 'child pornography' provisions contained in section 163(1) are constitutional, the Court ruled that in the two previously identified categories, the infringement on freedom of expression cannot be justified. Particularly with regard to teenage sexting, the Court states:

> It further prohibits a teenager from possessing, again exclusively for personal use, sexually explicit photographs or videotapes of him- or herself alone or engaged with a partner in lawful sexual activity. The inclusion of

[64] *Ibid.*, para. 71.
[65] *Ibid.*, para. 75; for an in-depth analysis of the constitutionality of the inclusion of the first category of material, see Chapter II, or Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 1* and Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 2*.
[66] *R v Sharpe* [2001] SCC 2, para. 76.
[67] *Ibid.*, para. 86.
[68] *Ibid.*, para. 95–96.
[69] *Ibid.*, para. 100.
[70] *Ibid.*, para. 101.
[71] *Ibid.*, para. 102.
[72] *Ibid.*, para. 109.

> these peripheral materials in the laws' prohibition trenches heavily on freedom of expression while adding little to the protection the law provides children.[73]

Summarising the elements of second-category material, the Court states that auto-depictions taken by a child of him- or herself alone, kept in strict privacy and intended for private use only should be excluded. Further, recordings of lawful sexual activity are exempted, if the person possessing the recording has either personally recorded it or participated in the sexual activity, if the sexual activity is lawful, ensuring consent of all parties and precluding abuse or exploitation of the depicted child, and if the parties have consented to the recording.[74] These exemptions apply both to the possession as well as the production of such material.[75]

The Court therefore concluded that it upholds section 163(1) of the Criminal Code, but while reading two exceptions into it:

> (a) The first exception protects the possession of expressive material created through the efforts of a single person and held by that person alone, exclusively for his or her own personal use. This exception protects deeply private expression, such as personal journals and drawings, intended solely for the eyes of their creator.
>
> (b) The second exception protects a person's possession of visual recordings created by or depicting that person, but only where these recordings do not depict unlawful sexual activity, are held only for private use, and were created with the consent of those persons depicted.[76]

In the dissenting opinion, the justices claimed that the Court had applied a formalistic and rigid approach and not taken the factual and social context into account.[77] Further, the dissenting opinion stressed that 'the more distant the expression from the core values underlying the right, the more likely action restricting it can be justified'.[78] It stated that with regard to 'child pornography', the value of the expression is limited, and only pursues basic needs of physical arousal.[79] The same low level of expression was allocated to teenagers who produce sexually explicit material. Such activities are considered 'harmful self-indulgence supporting unhealthy attitudes towards oneself and others'.[80] It was argued that authorship and intention are irrelevant when it comes to 'child pornography' if Parliament's pursued objective, i.e. prevent the harm which flows from the very existence of such material, is to be achieved.[81] Submitting that there does exist a very real harm to teenagers, the dissenting opinion pointed out that it is impossible to determine whether the adolescent depicted in a certain picture has been exploited in its production.[82] Further, presenting statistics that 30 per cent of sex offenders in Canada are below the age of 18 years, it is stressed that even auto-depictions by teenagers could be used to groom other children, and hence that such auto-depictions indeed have the potential to be used to for exploitative purposes.[83] In general, society needs to be protective of the state of childhood, which is considered 'as a time, firstly, for the enjoyment of innocence and, then, gradually for the development out of innocence'.[84] Even though children might have the capacity to legally consent to sexual activity, they are not considered capable of foreseeing

[73] *Ibid.*, para. 110.
[74] *Ibid.*, para. 116.
[75] *Ibid.*, para. 117.
[76] *Ibid.*, para. 128.
[77] *Ibid.*, para. 154.
[78] *Ibid.*, para. 181.
[79] *Ibid.*, para. 185.
[80] *Ibid.*, para. 212.
[81] *Ibid.*, para. 215, 217.
[82] *Ibid.*, para. 229.
[83] *Ibid.*, para. 230.
[84] *Ibid.*, para. 231.

the consequences of creating a permanent record of them engaging in such activity.[85] In conclusion:

> Any deleterious effect on the self-fulfilment of teenagers who produce permanent records of their own sexual activity in an environment of mutual consent is, therefore, by far outweighed by the salutary effects on all children resulting from the prohibition of the possession of child pornography.[86]

In the majority and dissenting opinion, it is clear that the former considers teenage sexting as valuable speech which impacts on the final balance in favour of freedom of speech, whereas the latter denies teenage sexting any higher value and hence argues in favour of (perceived) child protection concerns.

2. *R v Dabrowski*, 2007 ONCA 619

The range of the private use exception created in *Sharpe* has been further specified in Ontario Court of Appeal's *R v Dabrowski*, 2007 ONCA 619. In this case, a 28-year-old man had a sexual relationship with a 14-year-old girl. They decided to videotape some of their sexual activity. When the relationship ended, the accused gave the videotapes to a friend for 'safekeeping',[87] but allegedly threatened her later to share the videos with her family or put them on a public website.[88] As the girl initially agreed to the production of the video, the question arose whether in this case the 'private use' exception applied.

Apart from the factual concerns as to whether the accused indeed made threats to make the material public, which would consequently exclude the applicability of the 'private use' exemption, the Court had to determine whether the fact that the accused transferred the tape to a third party rendered the 'private use' exemption inapplicable. The Court interpreted the term 'private use' as not equal to exclusive possession. Transferring the material to another person such as a lawyer or trusted party for safekeeping would not deactivate the applicability of the 'private use' exemption.[89] To ensure that the exemption is handled with caution, the Court spelled out factors to be considered in order to determine whether giving up exclusive possession resulted in a loss of privacy:

> Questions such as to whom was the material given, what was the purpose or reason for the transfer, what terms or conditions were agreed upon when the material was given up, what control did the accused maintain over the material, was the material in fact viewed by anyone other than the consensual participants, would be relevant, all in the context of the credibility of the accused and others.[90]

In conclusion, the 'private use' exemption is not interpreted in the sense strictly of exclusive possession manner, but rather taken to mean effective control over the material, which is to be determined according to the factors laid out above. As a consequence, the presiding officer in *R v Dabrowski* ordered a new trial.[91]

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[85] *Ibid.*
[86] *Ibid.*, para. 238.
[87] *R v Dabrowski*, 2007 ONCA 619, para. 2-5.
[88] *Ibid.*, para. 11.
[89] *Ibid.*, para. 28–29.
[90] *Ibid.*, para. 30.
[91] *Ibid.*, para. 31.

3. *R v Keough,* 2011 ABQB 48

After *Dabrowski*, the 'private use' exception created in *Sharpe* was elaborated upon in the Court of Queen's Bench of Alberta case *R v Keough,* 2011 ABQB 48. In this case, 15-year-old S.C. and 18-year-old M.A. produced a video of themselves engaged in sexual activity.[92] With the agreement of S.C., the video, then on a mini-cassette, was to be turned into a VHS recording. To this end, M.A. handed the material to a third person, the accused, who returned the material after the transformation to VHS recording. S.C. and M.A. decided that the VHS should be destroyed afterwards, and M.A. told S.C. he had done so. However, he had in fact handed the recording to the accused (again) for him to destroy it. The accused retained the material and copied the recording.[93]

In this case, the Court had to decide the scope of the private use exception, and conclusively, the scope of the 'right to document' as developed under *Sharpe*.[94] As a starting-point, it spelled out the elements of the private use exemption clause developed in *Sharpe* as follows:

> This passage provides some characteristics of private use materials:
>
> 1. all participants must consent,
> 2. no exploitation or abuse may be involved,
> 3. the sexual activity must be lawful,
> 4. the person in possession must have either:
>
> a) been a participant in the recorded sexual activity, or
>
> b) recorded the sexual activity.[95]

First, the Court considered whether the format change and the copying had the effect of removing the 'private use' exemption.[96] If the owners of the material continue to exert control over the material, the Court concluded that the private use exemption would still apply.[97] Even if the accused had viewed the material during the copying process, the situation would be comparable to the accused *in persona* observing the sexual activity between S.C. and M.A.[98] As such observation is not illegal as long as all parties consent to it, the viewing of the material is also not illegal.[99] Keeping in mind that both S.C. and M.A. had consented to the format change, the Court concluded that they also consented to any collateral viewing during the format-change.[100]

However, the fact that the accused continued to have access to the material without the consent of S.C., namely after it was returned to him by M.A. with the instruction to destroy the material, rendered the private use exemption inapplicable in this case. S.C. was clearly under the impression that M.A. had destroyed the material, and hence did not consent to the continuous access by the accused.[101] Therefore, the Court found the accused guilty of possession of 'child pornography'.[102]

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[92] *R v Keough*, 2011 ABQB 48, para. 24–30.
[93] *Ibid.*, para. 168–180.
[94] *Ibid.*, para. 196.
[95] *Ibid.*, para. 188; note that the additional element that 'no exploitation or abuse may be involved' in the private use exception has been struck down by the Supreme Court in *R v Barabash*, 2015 SCC 29 (see III. B. 4.).
[96] *Ibid.*, para. 199.
[97] *Ibid.*, para. 203.
[98] *Ibid.*, para. 207–208.
[99] *Ibid.*, para. 207.
[100] *Ibid.*, para. 208.
[101] *Ibid.*, para. 210.
[102] *Ibid.*, para. 216.

4. *R v Barabash*, 2015 SCC 29

In *R v Barabash*, 2015 SCC 29, the Canadian Supreme Court again developed the interpretation of the *Sharpe* private use exception, focusing on the element of 'unlawful sexual activity'. In *Barabash*, two 14-year-old girls who were from troubled family backgrounds and had a history of drug addiction, criminal offences and - in the case of one girl – exploitation in prostitution, had run away from an adolescent treatment centre and stayed at the 60-year-old accused's residence, which one of the girls at trial described as a stereotypic 'crack house'. Another accused, Barabash's 41-year-old friend, visited frequently and was also involved in drug abuse. During the time the girls stayed at the residence, they were involved in the creation of video recordings of sexual activity and still images with each other and with Barabash's friend, with Barabash operating the camera. Both accused were charged with making 'child pornography', with Barabash charged additionally with possession of 'child pornography'.[103]

While the trial judge confirmed that the material constitutes 'child pornography', he held that all elements of the private use exception in *Sharpe* were met and entered acquittals.[104] The trial judge's decision was appealed on the grounds that there was an error in the interpretation of the private use exception. The Court of Appeal, relying on *R v Cockell*, 2013 ABCA 112, 553 A.R. 91, held that the private use exception contained additional elements, namely that 'there was no exploitation or abuse involved in the creation of the recording, and a requirement that parties intended the pornographic material to be for the private use of all those involved in its creation'.[105] Therefore, the Court of Appeal held that

> the issue of lawfulness in this context was not limited to whether any specific crime was committed against the children on the video, or in the physical process of making the video. The lawfulness of the activity in the video for the purpose of an exception that protected expressive freedom was activity that did not involve child exploitation or abuse as cognisable in law generally, not just crimes under the *Code*.[106]

The Supreme Court in *Barabash* rendered this interpretation of *Sharpe* incorrect, as exploitative or abusive circumstances are sufficiently covered by the element of lawfulness. As even consensual sexual activity with a child in a relationship of dependency or in a relationship that is exploitative to that child is a criminal offence, regardless of the consent of the child, the Court saw no need for an additional element.[107] Relevant indicia of an exploitative relationship include the age of the young person and the age difference with the sexual partner, the evolution of the relationship and the degree of control or influence over the young person.[108] As the elements of an exploitative relationship are, however, assessed with regard to the sexual activity, the Crown argued that there is a need to examine how exploitation may have influenced a young person's consent to being recorded. The Crown submitted that this needs to be assessed separately from the consent to the underlying sexual activity. In the opinion of the Court, this

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[103] *R v Barabash*, 2015 SCC 29, para. 4–8.
[104] *Ibid.*, para. 10.
[105] *Ibid.*, para. 11.
[106] *Ibid.*, para. 36.
[107] *Ibid.*, para. 34–35 quoting section 153. (1) of the Criminal Code [emphases added]:
153. (1) Every person commits an offence who is *in a position of trust or authority* towards a young person, who is a person with whom the young person is in a *relationship of dependency or who is in a relationship with a young person that is exploitative* of the young person, and who

> (a) for a sexual purpose, *touches*, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or
>
> (b) for a sexual purpose, *invites, counsels or incites* a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.

[108] *Ibid.*, para. 36.

problem can arise only when the underlying sexual activity is not considered unlawful. In the context of Canadian law, this would require a situation where no sexual touching occurs or where the touching is not invited, counselled or incited, for example a nude posing image. The Court noted that in such cases, consent to the sexual activity and to the recording are oftentimes intertwined. Acknowledging that 'an exploitative relationship would be relevant to the common law rules of consent in the context of consent to recording', the Court observed that such circumstances did not arise in the case at hand and therefore would be left to 'a case with a proper record and argument. The implications might be far-reaching'.[109]

Furthermore, the Court held that an additional element of 'mutuality of benefit' cannot be derived from the wording of the private use exception in *Sharpe* and complicates the private use test while not adding any distinct benefit.[110] Apart from the above issues around the lawfulness, consent and exploitation, the Court in an *obiter dictum* stated that the range of the 'solely for private use' requirement as set out in *Sharpe* has to be interpreted in terms of consent to the ongoing possession.[111] This means that depicted persons 'retain the ability to ensure its return and destruction'.[112]

Although the Court struck down the additional element of abuse or exploitation, it held that the trial judge had insufficiently analysed whether the relationship between the girls and the accused was exploitative, which in consequence rendered the underlying sexual activity unlawful. In particular, circumstances such as drug addiction, the need for shelter, and a history of homelessness and exploitation in prostitution, had to be considered in the present case.[113] The Court also stressed that the trial judge wrongfully focused on the exploitative character of the activity, rather than the broader relationship.[114]

5. Assessment

It is commendable that, as early as 2001 in *Sharpe*, the Canadian Supreme Court took a child-rights approach to the issue of teenage sexting, stressing the value of the expressed speech and carefully balancing this right against the risk involved. What might be criticised, however, is the inconsistency of the elements applied in the private use exception.[115] Taking into account the most comprehensive list of elements as stated above in *Sharpe*,[116] the Court has developed an exemption clause that acknowledges a 'right to document'[117] and balances this right with child protection concerns. Even though it is not specified whether this 'right to document' is rooted in freedom of expression, the right to privacy or any other charter right, the child-rights perspective on teenage sexting is visionary.

However, the wide interpretation of the exception clause in particular in *Dabrowski* is of concern. In contrast to *Keough*, the material in *Dabrowski* was from the beginning shared without the consent of the depicted child. Even in that case, the Court accepted that exclusive possession is not required, as long as it can be established that the accused is still in control of the material. While this can be accepted in case of transferring the material to a safety box or a lawyer, it seems disproportionate to draw an equal conclusion if the material is transferred to a third party who is not by contract or by position obliged to act with discretion and integrity. In such a case, the potential harm to the depicted child outweighs the freedom-of-expression aspect raised in *Sharpe*. The dissemination of the material to a third party without the consent

[109] *Ibid.*, para. 47 and 48.
[110] *Ibid.*, para. 52 and 53.
[111] *Ibid.*, para. 29.
[112] *Ibid.*, para. 30.
[113] *Ibid.*, para. 54 and 55.
[114] *Ibid.*, para. 56.
[115] The element of consent to the production of material is missing in *R v Sharpe* [2001] SCC 2, para. 109.
[116] Most comprehensive list contained in *R v Sharpe* [2001] SCC 2, para. 116.
[117] *R v Keough*, 2011 ABQB 48, para. 196.

of the depicted child should therefore only fall under the private use exception if the third party has a legitimate interest in the possession and if confidentiality of the material can be maintained.

Apart from the issue of whether the private use exception is applicable in cases where the material is shared with third parties, the Court in *Keough* made a further remarkable interpretation of the *Sharpe* exception. In the previous Court of Queen's Bench of Alberta case *R v Bono*, [2008] O.J. No. 3928 (QL), a 14-year-old girl recorded herself masturbating and sent the material to the accused. The Court had held that the *Sharpe* exception clause only applies if the person in possession of the material had either recorded or participated in the sexual activity in question, and hence rendered the private use exception inapplicable in this case.[118] While this is in line with the wording in *Sharpe*, the Court in *Keough* held that such an interpretation would be overtly restrictive, as such conduct 'reinforces healthy sexual relationships and self-actualization'.[119] Therefore, the Court expanded the scope of the private use exception to include such 'selfie' scenarios.

The Supreme Court's *Barabash* decision states that with regard to the underlying sexual activity, elements of abuse and exploitation are sufficiently covered by the element of 'lawful sexual activity'. However, the Crown rightfully questions whether – apart from the element of 'consent to recording' – there is a need for assessing exploitative circumstances with regard to the recording. Although the Court leaves this question open intentionally, it can be inferred from the deliberations that the Court operates on the basis that sexual activity and recording are so closely intertwined that only in the case where the sexual activity does not fall under the term 'exploitative relationship', as spelled out in the Criminal Code, can a loophole with regard to exploitative recording occur. The question is thus: if the recording is consensual but exploitative, does this automatically mean that the sexual activity is also exploitative and hence unlawful, rendering the private use exception inapplicable? Or do cases occur where the exploitative element refers solely to the recording? If this is so, there is indeed a need for an additional element of exploitative relationship with regard to the recording. In the Canadian context, such an additional element either requires that the Supreme Court, in amending *Sharpe*, explicitly recognise such an element, as it cannot be derived from the wording, or that the Criminal Code's catalogue of offences with regard to sexual activity in an exploitative relationship be expanded.[120]

C. Germany: modelling European standards in national legislation

Sections 184b and 184c of the German Criminal Code[121] broadly criminalise the creation, possession, and dissemination of child sexual abuse material. Germany's Criminal Code differentiates between 'child pornography' (the depicted person is below the age of 14 years), as stipulated in section 184b, and juvenile pornography (the depicted person is 14 years or older, but

[118] *R v Bono*, [2008] O.J. No. 3928 (QL), para. 24; it has to be noted that the Court in *Bono* rendered the private use exception inapplicable not only because the accused did not record or participate in the material, but also because he pretended to be a 16-year-old boy while actually being a 52-year-old man. As he misrepresented his identity to the victim, the consent of the victim was considered invalid, which also led to the inapplicability of the private use exception (*R v Bono*, [2008] O.J. No. 3928 (QL), para. 6, 24).
[119] *R v Keough*, 2011 ABQB 48, para. 276–277.
[120] Joshua Sealy-Harrington/Ashton Menuz, *Keep It To Yourself: The Private Use Exception for Child Pornography Offences*, The University of Calgary Faculty of Law Blog, available at: https://ablawg.ca/2015/06/23/keep-it-to-yourself-the-private-use-exception-for-child-pornography-offences/ (accessed 21 October 2018).
[121] English version of the Penal Code available at: https://www.gesetze-im-Internet.de/englisch_stgb/ (accessed 20 January 2020).

below the age of 18), as stipulated in section 184c. The differentiation between child and juvenile pornography impacts mainly on the range of the sentence – the definition and the catalogue of offences have been largely aligned.[122]

The regulation of child and juvenile pornography was strongly influenced by the Lanzarote Convention[123] as well as the Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and 'child pornography' (hereafter 'Directive').[124] Major changes in the legislative framework with regard to child and juvenile pornography were first enacted in 2008, followed by an amendment in 2015. As an in-depth discussion of both criminal code amendments exceeds the scope of this Chapter, the section below will focus on the 2015 amendment in the light of the Lanzarote Convention and the Directive.

1. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ('Lanzarote Convention')

Although Germany ratified the Lanzarote Convention only on 18 November 2015, the Convention prompted legislative reform in the area of child sexual abuse and exploitation after its signature on 25 October 2007.[125] The Convention aims to set a standard for various forms of child sexual abuse and exploitation offences and enhance international collaboration in the prevention of and response to such offences.[126] In article 20(1) and (2), the Convention provides for a broad criminalisation of 'child pornography' offences that responds to developments such as child webcam sexual abuse by criminalising the mere accessing of 'child pornography' without downloading the material.[127] Further, article 20(3) provides member states with an opt-out mechanism for teenage sexting material. The exemption clause reads as follows:

> Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material […] involving children who have reached the age set in application of Article 18, paragraph 2, where these images are produced and possessed by them with their consent and solely for their own private use.

Member states hence can make reservations in respect of the criminalisation of the production or possession of images which involve children who have reached the legal age for sexual activities as prescribed in national law, and where the images are produced and possessed by them with their consent and solely for their own private use.[128] From the wording of the exemption clause, it is apparent that the lawfulness of the underlying sexual activity is not explicitly mentioned. However, as the consent to recording of a sexual activity logically implies the consent to such underlying activity, this is not problematic.

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[122] Tatjana Hörnle, *Die Umsetzung des Rahmenbeschlusses zur Bekämpfung der sexuellen Ausbeutung von Kindern und der Kinderpornographie*, Neue Juristische Wochenschrift (2003), p. 3523.
[123] Germany signed the Lanzarote Convention on 25 October 2007, and ratified it on 18 November 2015, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures?desktop=true (accessed 23 October 2018).
[124] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0093 (accessed 23 October 2018).
[125] Gesetzentwurf der Fraktionen CDU/CSU and SPD, BT-Dr. 18/2601 (23 September 2014), p. 1.
[126] Susan H. Bitensky, *Introductory Note to Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, International Legal Materials, Vol. 49 (2010), p. 1663; for an assessment of the international collaboration mechanism in the Lanzarote Convention, see Chapter VI.
[127] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, pp. 22–23; Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para. 140.
[128] Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para. 144.

2. Directive 2011/93/EU of 13 December 2011

The Directive was precedented by the EU framework decision 2004/68/JHA of 22 December 2003 (hereafter framework decision).[129] The framework decision aimed to ensure that serious criminal offences such as the sexual exploitation of children and 'child pornography' are addressed in a comprehensive manner, with standardised constituent elements of criminal law.[130] Acknowledging that the framework decision only criminalised a limited number of offences, did not sufficiently address new forms of abuse and exploitation using information technology, and did not sufficiently provide for instruments facilitating transnational law enforcement collaboration, the EU Commission in 2009 submitted a proposal for a new framework decision[131] that aimed to repeal and incorporate the 2003 framework decision.[132] Apart from broadly criminalising 'child pornography' offences in article 5, the Directive 2011/93/EU of 13 December 2011 (hereafter the Directive) in its article 8(3) provides for an optional exemption clause for various consensual activities. With regard to 'child pornography', it states:

> It shall be within the discretion of Member States to decide whether Art. 5(2) [acquisition or possession] and (6) apply to the production, acquisition or possession of material involving children who have reached the age of sexual consent where that material is produced and possessed with the consent of those children and only for the private use of the persons involved, in so far as the acts did not involve any abuse.

First, it has to be noted that the Directive exempts not only the production and possession of such material, but also its acquisition. This term creates a contradiction in the exemption clause, as the terms 'acquisition' and 'private use' naturally exclude each other: material which has been used, produced and possessed by children solely for their private use cannot be up for acquisition at the same time. Interesting is that in contrast to the Lanzarote Convention, the Directive adds an element pertaining to the recorded act, stating that the acts shall not involve any abuse. Further, the use of the term 'persons' instead of 'children' with regard to the private use indicates that the material can be produced and possessed by adults, as long as the other elements of the exemption clause are fulfilled.

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[129] Framework Decisions can best be compared to the legal instrument of a Directive. Both instruments are binding upon member states as to the result to be achieved, but leave to the national authorities the choice of the form and method of implementation.

[130] EU framework decision 2004/68/JHA of 22 December 2003, para. 7; apart from criminalising, inter alia, the production, dissemination and possession of child pornography material, the framework allows member states to exclude certain conduct related to child pornography, in particular providing the option to exempt teenage sexting from the applicability of the child pornography provision. In art. 3(2)(b), the framework states:

> A Member State may exclude from criminal liability conduct relating to child pornography:
>
> […] (b) referred to in Article 1(b)(i) and (ii) where, in the case of production and possession, images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use. Even where the existence of consent has been established, it shall not be considered valid, if for example superior age, maturity, position, status, experience or the victim's dependency on the perpetrator has been abused in achieving the consent […]

While the framework decision judging from its wording seems to be modelled after *Sharpe*, it is not clear whether the additional indicators for an exploitative situation apply to the consent to the sexual activity, the recording, or both.

[131] Under the 1997 Treaty of Amsterdam, framework decisions were binding upon the member states as to the result to be achieved but shall leave to the national authorities the choice of form and methods. This instrument was repealed by the 2009 Lisbon Treaty, which established the instrument of directives. Directives are binding, as to the result to be achieved, upon any or all the member states to whom they are addressed, but leave the choice of form and methods to the national authorities.

[132] Commission of the European Communities, *Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA*, 2009/0049 (CNS), pp. 3, 6.

3. Criminal Code Amendment

The 2015 Criminal Code Amendment aimed at aligning German legislation with the Lanzarote Convention and the Directive.[133] As with the 2008 version of the juvenile pornography provision,[134] the 2015 Criminal Code amendment included an exemption clause:

> Subsection (1) no. 3, also in conjunction with subsection (5), and subsection (3) do not apply to acts by persons relating to such youth pornography which they have produced exclusively for their personal use with the consent of the persons depicted.[135]

This exemption clause aims to address some of the flaws of the 2008 amendment. While it exempts not only the possession but also the production of juvenile pornography, it is not required that the material was produced by persons under the age of 18 years, as was required under the 2008 exemption clause.[136] The latter aimed to address situations where the consensual production of a 17- and 18-year-old was criminalised.[137] It has to be noted that this aspect is not in line with the Lanzarote Convention which solely speaks of 'children'. Further, it remains problematic that only persons who produce the material fall under the exemption clause. It is, however, commonly agreed that the person who is depicted in the material could also possess the material even if he or she were not involved in its production.[138] The same teleological reduction should apply if a person possesses material which was solely produced by another person and solely depicts the producer,[139] for example where one partner possesses a 'selfie' of the other.

4. Assessment

As mentioned above, the exemption solely of the producer of the material, despite the proposed teleological interpretation, remains a concern. Furthermore, assuming that the purpose of the child and juvenile pornography provision is to protect children from sexual abuse, it is only consequent to ensure that these provisions are aligned with the other provisions addressing sexual activity with children.[140] German law provides for a complex system of age limits on sexual interaction. While any sexual interaction with a child below the age of 14 years is prohibited,[141] sexual activity with 14-17-year-old adolescents is generally legal. However, there are various exceptions to that rule. With regard to the age group of 14- and 15-year-old ado-

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[133] BT-Dr. 18/2601, p. 1.
[134] With the 2008 criminal code amendment, the government detached the child pornography provisions from the depiction of sexual abuse and included a new section 184c that criminalised adolescent pornography depicting children between 14 and 17 years inclusively (Gesetzentwurf der Bundesregierung, BT-Dr. 625/06 (1 September 2006), p. 11). Acknowledging that material consensually developed by teenagers cannot be treated equally with other forms of child and adolescent pornography (BT-Dr. 625/06 p. 11.), the draft amendment in its final version included an exemption clause in section 184c, modelled after art. 3(2)(b) of the 2003 framework decision: 'The 1st sentence [obtaining possession of juvenile pornography] shall not apply to acts of persons related to juvenile pornography produced by them while under eighteen years of age and with the consent of the persons therein depicted.'
[135] Official translation of the German Criminal Code ('Strafgesetzbuch') available here: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1756 (accessed 11 May 2020.
[136] Tatjana Hörnle in: *Münchener Kommentar zum Strafgesetzbuch*, §184c, para. 18–20.
[137] Beschlussempfehlung und Bericht des Ausschusses für Recht und Verbraucherschutz, BT-Dr. 18/3202 (12 November 2014), p. 24.
[138] Tatjana Hörnle in: *Münchener Kommentar zum Strafgesetzbuch*, para. 18–20.
[139] *Ibid.*
[140] Helmut Baier, *Die Bekämpfung der Kinderpornographie auf der Ebene von Europäischer Union und Europarat*, Zeitschrift für Urheber- und Medienrecht, Vol. 39 (2004), p. 45.
[141] See §176 (1) Criminal Code.

lescents, the sexual activity is illegal if the adolescent is entrusted to the perpetrator for educational or caretaking purposes,[142] or if a perpetrator who is above the age of 21 years takes advantage of the adolescent's lack of sexual self-determination.[143] With regard to adolescents between the age of 16 and 17 years, sexual activity is illegal if, for example, the perpetrator takes advantage of the adolescent's dire straits,[144] or if the adolescent obtains some form of reward for the sexual activity.[145]

While this complex system aims to protect children from any form of sexual abuse and exploitation, it is surprising that the exemption clause with regard to juvenile pornography merely requires the consent of the adolescent, regardless of how or under which circumstances such consent was obtained. For example, while the sexual activity of a 15-year-old learner with his or her 35-year-old teacher – regardless of the adolescent's consent - amounts to a criminal offence,[146] the production of juvenile pornography material between these two actors falls under the exemption clause as long as the adolescent gives consent.

Even though it can be assumed that a teleological interpretation of the exemption clause in such a case would result in its inapplicability to avoid inconsistencies within the legal framework, the wording alone does not consider exploitative relationships as invalidating an adolescent's consent. As a result, adolescents who engage in production and possession of juvenile pornography might be less protected than adolescents who engage in contact sexual activity with the same partner. On the other hand, this inconsistency might be intentional, and could be explained with a lower encroachment threshold: since the impact of actual sexual interaction is potentially more harmful to the adolescent, it might justify that in the area of juvenile pornography, the adolescent enjoys more sexual autonomy. In the abovementioned case, this means that the 15-year-old learner and the 35-year-old teacher can legally produce and possess juvenile pornography, while sexual acts in this constellation remain illegal.

Further, the exemption clause does not speak about the consensual or lawful underlying sexual activity. It is submitted that when consenting to the recording of the sexual activity, a person also consents to the recorded sexual activity. However, this constellation undermines the complex system of age of consent under German law, because only consent to both the recording and the recorded activity is required. This leaves out potentially exploitative facts that influenced the teenager's consent in the first place.

In conclusion, the German exemption clause, despite going into the right direction, is erroneous in some respects. Apart from the inconsistency with the legal framework on contact sexual activity, the continuous criminalisation of 'selfies' through sole protection of the producer, even if the possessed image is a depiction of the possessor him- or herself, raises serious constitutional concerns with regard to the principle of legal certainty as well as the right to sexual self-determination.[147]

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[142] See §174 (1) Criminal Code.
[143] See §182 (3) Criminal Code.
[144] See §182 (1) Criminal Code.
[145] See §182 (2) Criminal Code.
[146] See §174 (1) 1. Criminal Code (sexual abuse of wards).
[147] Henning Ernst Müller, *Gesetzgeberischer Murks - der geplante § 184c StGB (Jugendpornografie)*, beck-blog, 18 September 2014, available at: https://community.beck.de/2014/09/18/gesetzgeberischer-murks-der-geplante-184c-stgb-jugendpornografie (accessed 24 October 2018); the principle of legal certainty can be derived from art. 20 III German Constitution ('Grundgesetz'); the right to sexual self-determination has been developed as part of the right to informational self-determination, art. 1 in conjunction with art. 2(1) German Constitution; for an in-depth discussion of the term 'sexual self-determination' under German criminal law, see Tatjana Hörnle, *Sexuelle Selbstbestimmung: Bedeutung, Voraussetzungen und kriminalpolitische Forderungen,* Zeitschrift für die gesamte Strafrechtswissenschaft (2015), pp. 851–887.

IV. REGULATING BODIES: BALANCING AUTONOMY AND PROTECTION

The experiences of the US, Canada and Germany are proof of the complexity of the issues at hand. This section first discusses whether consensual teenage sexting should be exempted from 'child pornography' offences, and if so, which elements should constitute such an exemption clause.

A. A model for a rights-based approach to teenage sexuality: the South African *Teddy Bear Clinic* case

Regardless of the result of the specific teenage sexting discussions, it is striking that most debates are fought in a legal vacuum detached from a rights-based approach. Apart from *Sharpe* and *Barabash*, which mention freedom of expression and a 'right to document' in their deliberations, it is surprising that the teenage sexting debate is mainly conducted from a child-protection, rather than a child-rights, angle.[148]

It is crucial to stress that the regulation of teenage sexting infringes upon such teenager's most private sphere (sexuality) and hence that the criminalisation of such behaviour necessarily needs to be discussed within the realm of child rights such as freedom of expression, the right to privacy or other rights dealing with a person's sexuality or sexual expression. The key question is thus whether this extends to a right for minors to record and document their own lawful sexual activities, in particular sexual conduct and nudity, and consensually share and possess this content. Which right is most suitable to serve as a defence mechanism in such cases, and how exactly various level of infringement can be justified and on which grounds, are matters that go beyond the scope of this publication.[149] Instead, it is submitted, any form of regulation, whether criminal or other, that infringes upon a child's private sphere has to be discussed in the context of a rights-based approach.[150]

Taking a rights-based approach in the context of children, however, also means taking into account the rights-holder's limitations and children's evolving capacities. In turn, it means recognising that sexual autonomy does not always equate to consent.[151] This is particularly relevant where power relationships, relationships of trust or dynamics of authority come into play, as children tend to be specifically vulnerable to such influences due to their developing capacity. It is also the reason why laws in many countries not only criminalise sexual activity with children under a certain age but often limit the validity of consent given in situations where there is a risk that the consent is not given entirely voluntarily (e.g. in relationships of dependence between the child and the other person, or where there are differences in age). Therefore, the child protection lens with regard to potential vulnerability needs to be applied within the context of child's rights, not vice versa.

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[148] A potential reason for this from an international children's rights perspective might be that the CRC does not provide for a mechanism to solve a conflict of various children's rights, see Livingstone/O'Neill, *Minding Minors Wandering the Web: Regulating Online Child Safety*, p. 28.

[149] Arguing that consensual sexting between minors under certain circumstances is protected under Art 8 (Right to Privacy) and Art 10 (Freedom of Expression) of the European Convention on Human Rights, Gillespie, *Adolescents, Sexting and Human Rights*, pp. 632 *et seq.*

[150] Lars Lööf, *Sexual behavior, adolescents and problematic content* in: Ethel Quayle/Kurt M. Ribisl (eds.), *Understanding and Preventing Online Child Sexual Exploitation and Abuse*, Oxon 2012, p. 134; stating that in order to properly weigh these conflicting rights, further research into gender, consent and minority/vulnerable/at-risk youth is required, Sonia Livingstone/Jessica Mason, *Sexual rights and sexual risks among youth online,* London 2015; arguing that discounting children's autonomy in the 'sexting' discourse amounts to paternalism, Sara Fovargue/Suzanne Ost, *Does the theoretical framework change the legal end result for mature minors refusing medical treatment or creating self-generated pornography?*, Medical Law International, Vol. 13 (2013).

[151] For an in-depth discussion of the concepts of sexual autonomy and consent, see Joseph J. Fischel/Hillary O'Connell, *Disabling consent, or reconstructing sexual autonomy*, Columbia Journal of Gender and Law, Vol. 30 (2015).

As an illustration of a rights-based approach to teenage sexuality, the South African Constitutional Court case *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another,* [2013] ZACC 35 (hereafter *Teddy Bear Clinic)* comes to mind. Remarkable in this case are the introductory remarks, which clearly seek to separate issues of morality around teenage sexuality from the problem at hand:

> At the outset it is important to emphasise what this is not about. It is not about whether children should or should not engage in sexual conduct. […] Rather we are concerned with far narrower issue: whether it is constitutionally permissible for children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated herewith.[152]

In this case, the Court had to decide whether provisions in the Sexual Offences Act, which criminalised consensual sexual acts with children between 12 and 16 years, were unconstitutional.[153] If two children in that age group engaged in consensual sexual activity, they were both prosecuted and held guilty for statutorily raping the other.[154] The situation was aggravated by the establishment of the national sex offender registry as well as the mandatory reporting requirements for caregivers.[155]

The applicants in *Teddy Bear Clinic* argued that such criminalisation has various harmful effect on the child, such as exposure to the criminal justice system, and would have a negative effect on the child's understanding of, and healthy attitudes towards, sexuality.[156] In summary, the provisions infringe upon a range of children's constitutional rights, such as human dignity, privacy, bodily and psychological dignity, as well as upon the principle of the best interests of the child.[157] This infringement can not be justified as there is no correlation between the limitations and the purpose they aim to achieve.[158] In contrast, the respondents argued that the provisions did not infringe upon the child's rights but instead advanced and protected them by delaying the choice to engage in consensual sexual activities.[159] They submitted alternatively that, in case the Court found that rights are infringed, there is no less restrictive means and that the provisions have to be read in conjunction with the juvenile justice legislation. In this context, the measures would be implemented only after giving due consideration to the child's interests.[160]

Before delving into the constitutional analysis, it is worthwhile to briefly elaborate on the expert evidence submitted by the applicants. The expert submission stated that the adolescent phase is a critical and transformative period with long-lasting effects in shaping adult lives.[161] Children engage in a range of sexual activities from kissing to sexual intercourse. This exploration is healthy, as long as the person is emotionally ready and willing. Further, the experts stressed that support by adults in children's lives is crucial to help them make healthy choices. If children do not have a safe environment within which they can discuss their sexual experiences and ask questions, they lack this guidance.[162] With regard to the criminal provisions, the experts pointed out a range of negative social and psychological effects. Children would experience a mixture of shame, embarrassment, anger and regret, which may lead to a generally

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[152] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another,* [2013] ZACC 35, para. 3.
[153] *Ibid.,* para. 11.
[154] *Ibid.,* para. 21.
[155] *Ibid.,* para. 17–18.
[156] *Ibid.,* para. 28.
[157] *Ibid.,* para. 29.
[158] *Ibid.,* para. 30.
[159] *Ibid.,* para. 31.
[160] *Ibid.,* para. 32.
[161] *Ibid.,* para. 44.
[162] *Ibid.,* para. 45.

negative attitude towards sexual relations, feelings that could have a chilling effect on their help-seeking behaviour. The criminal provisions therefore contribute to the silencing of children, in particular as caregivers and institutions are faced with the mandatory reporting obligation with regards to sexual offences and hence might not be approached anymore. This makes them more vulnerable to negative and risky behaviour and outcomes.[163]

In its analysis, the Court had to determine whether any rights are limited by the impugned provisions, and if so, whether the limitations are reasonable and justifiable in an open and democratic society. First, the Court stressed that children enjoy each of the fundamental rights in the Constitution granted to everyone as individual bearers of rights.[164] The Court went on to establish that the right to human dignity was limited by the criminal provisions. It held that dignity relates to the inherent worth of all individuals, that children's dignity rights are not dependent on the rights of their parents, and that rights are not held in abeyance until their bearers reach a certain age.[165] The criminalisation of consensual sexual conduct is a form of stigmatisation which is degrading and invasive: if one's consensual sexual choices are disrespected by society, one's innate sense of self-worth is inevitably diminished.[166]

With regard to right to privacy, the Court stated that the Constitution protects the inner sanctum of personhood, including family life and sexual preference. The way in which we give expression to our sexuality is at the core of this area of private intimacy: if, in expressing our sexuality, we act consensually and without harming one another, the invasion of that space constitutes breach of privacy.[167] This applies in equal force to the consensual sexual conduct of adolescents and is exacerbated by the mandatory reporting requirements.[168] Further, the South African Constitution recognises the best interests of the child both as a right as well as a guiding principle.[169] Provisions or conduct that affect children in general need to be tested against this standard.[170] The provisions in the Sexual Offences Act increase the risk of harm to children by driving sexual activity underground, cutting off support structures, and creating an atmosphere in which adolescents do not freely discuss sexuality anymore.[171] The effects of diversion or imprisonment are not in line with the requirement of growing up free from avoidable trauma.[172] Even if a child is diverted from the criminal justice system, he or she still has to face arrest and investigation before being diverted. Lastly, the Court made a significant remark:

> Indeed, it strikes me as fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity, yet in the same breath to contend that they have the capacity to be held criminally liable for such choices.[173]

In the ensuing limitation analysis, the Court accepted that the purpose of legislation is to discourage adolescents from prematurely engaging in consensual sexual conduct.[174] With regard to the nature and the extent of the limitation, it regarded the provisions as a deep encroachment.[175] With regard to the relation between the limitation and statutory purpose, the respondents submitted that children will be deterred from engaging in sexual activity, and this will

[163] *Ibid.*, para. 47.
[164] *Ibid.*, para. 38.
[165] *Ibid.*, para. 52.
[166] *Ibid.*, para. 55.
[167] *Ibid.*, para. 59.
[168] *Ibid.*, para. 60.
[169] *Ibid.*, para. 65.
[170] *Ibid.*, para. 69.
[171] *Ibid.*, para. 72.
[172] *Ibid.*, para. 74.
[173] *Ibid.*, para. 79.
[174] *Ibid.*, para. 81.
[175] *Ibid.*, para. 82.

assist in controlling the effects of sexual intercourse, such as pregnancy and STDs.[176] The Court did not buy into that narrative, and stated that there is lack of proof that the existence and enforcement of these provisions actually leads to the reduction of harm, as maintained by the respondents. It instead followed the expert submission that, as a consequence of the criminalisation, sexual activity is driven underground, away from guidance of parents.[177] Further, the Court stated that the provisions could also deter children from reporting crimes such as rape if they initially agreed to a sexual activity but withdrew their consent in the process and were subsequently raped. In such a case, the child might not report the crime, as he or she was at risk of being prosecuted for the initial consensual sexual activity.[178] Therefore, the Court held that there is no rational link between the provisions and the stated purpose.[179] Elaborating on less restrictive means, the Court stressed that a variety of less restrictive means are available to encourage adolescents to engage in healthy and responsible sexual relationships, such as improving parent-child sexual communication as well as comprehensive sex education, as opposed to abstinence or no sex education.[180] In conclusion, the Court held that the provisions in the Sexual Offences Act criminalising the adolescents for engaging in consensual sexual conduct are unconstitutional.[181]

Recognising both that the criminalisation of teenagers' sexuality touches upon the core of their rights and that they face specific vulnerabilities, the Court set an example of the balancing of autonomy and protection. This decision should be formative in any legal approach to teenage sexting, given that teenage sexting is a form of sexual exploration and teenage sexual activity and hence similar considerations come into play. Taking a rights-based approach as set out in *Teddy Bear Clinic* as a starting-point, the next section will discuss the value of the criminalisation of teenage sexting in the name of protection.

B. Criminalisation in the name of protection – a twisted concept

As the introductory remarks in *Teddy Bear Clinic* made clear, the Court intentionally tried to discuss the issue at hand detached from any moral assessment of whether children should have sex or not. However, when it comes to teenage sexting, the debate seems to be overshadowed by broader concerns about child sexuality, child sexual abuse and exploitation as well as new forms of technology.

As with the dissenting opinion in *Sharpe*, scholars have argued in favour of a criminalisation of teenage sexting either as 'child pornography' offence or as separate, more lenient criminal offence. The arguments for such criminalisation range from the limited value of the expression and the risks related to teenage sexting to the deterrent effect of such legislation.[182] When setting out these arguments, the language that is used usually portrays the child as an innocent being who must be protected at all costs against premature 'sexualisation', a tendency which reveals an 'angel/devil dichotomy' underlying these arguments.[183] If a child dares to break out

[176] *Ibid.*, para. 85–86.
[177] *Ibid.*, para. 87.
[178] *Ibid.*, para. 93.
[179] *Ibid.*, para. 94.
[180] *Ibid.*, para. 98–99.
[181] *Ibid.*, para. 101.
[182] For a comprehensive overview of the debate around sexting and its potential harm for children, see Alisdair A. Gillespie, *Adolescents, Sexting and Human Rights*, Human Rights Law Review, Vol. 13 (2013), pp. 626 *et seq.*; see further the arguments put forward in Megan Sherman, *Sixteen, Sexting, and a Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders*, Boston University Journal for Science and Technology Law, Vol. 17 (2011), pp. 157–158; Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation, Virginia Journal of Social Policy and Law*, Vol. 15 (2008), p. 39.
[183] Dana Northcraft, *A Nation Scared: Children, Sex and the Denial of Humanity*, American University Journal of Gender, Social Policy & the Law, Vol. 12 (2004), p. 511; applying Freud's theory of sexuality to argue that the motives behind

of this label, he or she faces severe consequences.[184] Additionally, girls face the consequences of a 'virgin/whore dichotomy', as they are not supposed to have any sexual desire in the first place.[185] Children, and in particular girls, are hence deprived of any sexuality, let alone a right to express such sexuality, and seem to be granted only a right to protection from sexual exploitation.[186] This approach is – again - especially oppressive for girls, as it perpetuates the old narrative that the only way to keep them safe is to exclude them from the platforms of participation.[187]

These underlying dynamics seem to be the true cause for the urge to criminalise consensual teenage sexting. This is not surprising, as the unresolvable contradictions in the legal framework caused by such a criminalisation cannot seriously be untangled on a technical basis. First, it seems rather obvious that it is a twisted concept that the law turns the same person it intends to protect into the offender, in order to – again - protect that same person. This would mean that the depicted person is simultaneously the victim and the perpetrator.[188]

Further, as pointed out in *Teddy Bear Clinic*, it is contradictory that a child is considered to be mature enough to have criminal capacity, while at the same time considered not mature enough to decide whether to engage in sexual activity. In fact, it is more in line with child development concerns to set a higher age of criminal responsibility and lower age of consent. Comparing criminal liability and consent to sexual activity, there are different questions the child needs to answer: Do I know what is right and wrong and am I capable of seeing the consequences of my actions? Or: Am I capable of giving informed consent to an action which will have no legal consequences? It has to be kept in mind that sexual activity in contrast to criminal activity is not inherently deviant, as sexual activity forms part of the normal developmental processes adolescents go through. Therefore, it is submitted that a higher threshold should be expected in terms of age limits for criminal activity in contrast to sexual activity, given that criminal activity is not an expression of a normal developmental stage. The best interests of the child principle requires us to take an approach which ensures the safety and well-being of children, and weigh our judgment against this objective. Although both decisions – engaging in criminal conduct or in sexual activity – might be largely emotional and impulsive ones, more maturity should be required from a child with regard to criminal liability, as the child needs to assess the legal consequences of his or her behaviour. Therefore, it is contradictory and not in the best interests of the child to assume that a child lacks the capacity to consent to sexual activity but has criminal capacity.

When debating consensual sexting between minors, it is remarkable that this phenomenon is primarily discussed in the realm of child sexual abuse material. While child sexual abuse material and teenage sexting have merely the material depicting sexual activity of children in

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the criminalisation of sexting might actually be the expansion of the latency phase, Matthew H. Birkhold, *Freud on the Court: Re-interpreting Sexting & Child Pornography Laws*, Fordham Intellectual Property, Media & Entertainment Law Journal, Vol. 23 (2013).

[184] *Ibid.*

[185] Northcraft, *A Nation Scared: Children, Sex and the Denial of Humanity*, p. 512; arguing that 'slut-shaming' on social networking sites is a reflection of the sexual double standards which reward men for sexual activity, while women engaging in sexual activity is sanctioned for not performing femininity in an appropriate way, Kathleen van Royen et al., *Slut-shaming 2.0* in: Michel Walrave et al. (eds.), *Sexting. Motives and risk in online sexual self-representation,* Cham 2018; Jessica Ringrose et al., *Teen girls, sexual double standards and 'sexting': Gendered value in digital image exchange*, Feminist Theory, Vol. 14 (2013), p. 307.

[186] Carpenter et al., *Harm, Responsibility, Age, and Consent*, p. 31; arguing that adults have been preventing children from understanding and experiencing their own sexuality by tabooing child sexuality, Kate Millet, *Beyond Politics? Children and Sexuality* in: Carole S. Vance (ed.), *Pleasure and Danger. Exploring female sexuality*, Boston 1984, pp. 218 – 219.

[187] Laurie Penny, *Unspeakable Things*, Bloomsbury 2014, p. 165.

[188] Jamie L. Williams, *Teens, Sexts, & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws*, William and Mary Bill of Rights Journal, Vol. 20 (2012), p. 1032; stating that there is a risk that adolescents who engage in sexting will be labelled as 'dangerous sex offenders', WeProtect Global Alliance, *Global Threat Assessment 2019*, London 2019, p. 32; Fovargue/Ost, *Does the theoretical framework change the legal end result for mature minors refusing medical treatment or creating self-generated pornography?*, p. 26.

common, their underlying dynamics are fundamentally different. Child sexual abuse material depicts child sexual abuse and exploitation, while teenage sexting depicts the consensual sexual activity of teenagers.[189] It is therefore submitted that, as the starting point, we need to rethink the reference point for assessing teenage sexting.[190] Teenage sexting should be discussed in the broader context of sexual activity of teenagers, as it is just another form of teenage sexual activity. As much as sexualised violence is a potential risk for teenagers engaging in sexual activity, child sexual abuse material is a risk for teenagers engaging in sexting. Despite this risk, the CRC Committee in its Guidelines makes it clear that 'States parties' should not criminalize adolescents of similar ages for consensual sexual activity'.[191]

Taking the sexual activity of teenagers as a starting-point and building on the rights-based approach in *Teddy Bear Clinic*, the question arises whether any arguments could justify a different assessment of teenage sexting in contrast to contact sexual activity. When comparing the risk of sexualised violence, pregnancy and STDs inherent to contact sexual activity with the risk of dissemination of material against the will of the depicted person, it is clear that the latter risks cannot be considered more intrusive to a teenager's life (rather the opposite).[192] Moreover, the criminalisation of teenage sexting could lead to the same negative effects as the criminalisation of sexual activity between teenagers discussed in *Teddy Bear Clinic*: teenage sexuality is driven underground, parental guidance on safe sexting is hampered, and teenagers refrain from seeking support if material is disseminated against their will. Given the CRC Committee's stance on consensual sexual activity between adolescents of similar ages mentioned above, it is not surprising and rather consequent that the Committee applies the same standard for online sexual activity by stating that 'children should not be held criminally liable for producing images of themselves'.[193]

The criminalisation of consensual sexting between minors is counterproductive at any level. It is hence submitted that consensual teenage sexting needs to be excluded from 'child pornography' provisions. The necessary elements of such an exemption clause are discussed below.

C. Elements of an exemption clause

The exemption clauses provided for in *Sharpe*, the Lanzarote Convention, EU Directive and German legislation differ, and hence provide for contrasting levels of protection for minors engaged in sexting. This section aims to provide guidance on the optimal elements of an exception clause.

First, with the exception of the EU directive, the exemption clauses decriminalise only the production and possession of teenage sexting material. The inclusion of any other actions should be avoided, as it might negatively expand the scope of the provision. Strictly speaking, if the distribution of teenage sexting material is not covered by the exemption clause, the material could never be shared with the partner, as this always amounts to distribution. However, it is submitted that 'distribution' means the dissemination of material to an unknown number of

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[189] Arguing that it is difficult to detect any form of exploitation if an adolescent who has reached the age of consent takes a sexualised picture of him- or herself and shares it with an intimate partner, Gillespie, *Adolescents, Sexting and Human Rights*, p. 641.

[190] Acknowledging that the autonomy vs protection debates in child law are often overlooked in the context of sexting, Ann Skelton/Benyam Mezmur, *Technology changing @ a Dizzying Pace: Reflections on Selected Jurisprudence of the UN Committee on the Rights of the Child and Technology*, Peace Human Rights Governance, Vol. 3 (2019), p. 279.

[191] See also CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 73; acknowledging that the setting of an age of sexual consent recognises children's evolving capacities, ECPAT, *Explanatory Report to the Guidelines Regarding 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*, Bangkok 2019, p. 74.

[192] Gillespie, *Adolescents, Sexting and Human Rights*, p. 641.

[193] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 67.

recipients, and alternatively, that the 'distribution' between partners would be covered by applying a teleological interpretation of the terms 'possession' and 'production', as such a clause otherwise prevents any form of sharing and hence defeats its purpose.

Moreover, regarding the subjects of the exemption clause, it is clear that people who are either depicted in the recording or who have participated in its creation should be included in an exemption clause. Assuming that a wide range of teenage sexting material includes 'selfies', which are often produced without any other person being present or participating, a person who consensually possesses such material and has received it from the depicted person should enjoy the same level of protection, as anything else would simply not reflect the reality of teenage sexting. Further, the exemption clause should include 'persons' not only 'children', to ensure that close-in-age sexual activity between an adolescent and a young adult is equally excluded as long as it is legal under the laws of the respective country,

With regard to the interpretation of the term 'private use', reference is made to the deliberations on the broad interpretation of the term 'private use' in *Dabrowski*. Even if not interpreted in the strict sense of exclusive possession of the participant, the third party to which such protection is extended must be able to ensure the highest level of confidentiality and have a legitimate reason for the possession of such material.

In view of the interconnectedness of contact and digital sexual activity, the legislative framework should respond to these phenomena in unison: this requires an alignment of age-of-consent laws with any regulations regarding teenage sexting. Acknowledging that the risk related to teenage sexting is equally likely to turn into harm compared to the risk related to contact sexual activity, there is no justification for treating these two forms of teenage sexual activity differently. Generally, the term 'lawful sexual activity' is preferred in contrast to 'consensual sexual activity', as the national framework might criminalise even consensual sexual activity with a minor if there is an exploitative relationship of any kind.

If the national framework with regard to contact sexual activity only focuses on the consent of the child, regardless of any elements of abuse and exploitation, it might be useful to add an element of 'abuse and exploitation', to ensure children are sufficiently protected. However, this is rather a gap in the age-of-consent laws and should primarily be addressed at that level. As has been debated in *Sharpe*, the question arises whether with regard to the recording of the lawful sexual activity, mere consent is sufficient, or whether an additional element of 'lack of abuse and exploitation' should be added. One might argue that if a child consented to the sexual activity without any elements of abuse or exploitation present, there is no need for a distinct element with regard to the recording, as long as the child gives consent to the recording. However, it has to be noted that these elements are not always congruent: a teenager might be pressured into agreeing to a recording, while not being pressured into the recorded sexual activity. In the absence of an additional element on the recording level, the described scenario might be protected by the exemption clause, even though the consent given to the recording was obtained in the context of an abusive or exploitative situation. Therefore, the recording itself should be consensual and that consent should have been obtained without any factors of abuse or exploitation being present. As suggested by the Canadian Supreme Court in *Barabash,* this exploitative element could be considered to be factored into the consent element in common law countries. However, considering that this suggestion was given from a common law perspective, and to make it clear and transparent that exploitative elements might also render the consent given to the recording invalid, the mentioning of an additional element is recommended.

Finally, it seems plausible that – as pointed out in the *obiter dictum* in *Barabash* – the exemption clause should only be applicable as long as all participants consent to the ongoing possession of all parties. However, this topic requires more in-depth research and consideration and hence exceeds the scope of this Chapter.

V. PREVENTING RISK FROM TURNING INTO HARM IN THE DIGITAL SPACE

In conclusion, the criminalisation of consensual sexting between minors is not the right instrument to prevent risk turning into harm. Although criminal law seems often to be the least complex (or most comfortable) solution, and assuming that in the majority of cases the aim of such intervention is truly to protect children from any form of abuse and exploitation, the generational digital divide might significantly contribute to the moral panic around children's digital sexual exploration. As digital sexual exploration is a relatively alien concept for the older generation, they might not understand why teenagers engage in such behaviour in the first place. This lack of understanding of the underlying dynamics can lead to overreaction and result in a blurred perception of risk and harm.

One of the key interventions to ensure that risk does not turn into harm is the capacitation of children to detect risks and respond to them. According to the CRC Committee, this includes as a minimum mandatory school education on online behaviour and safety, to ensure children are capacitated to adequately react to risks.[194] With a particular focus on online sexual exploration, this online behaviour and safety training should go hand in hand with comprehensive sexuality education, focusing on gender stereotypes, sexual autonomy, and building healthy sexual relationships with oneself and others, both online and offline.[195] At the same time, creating a safe and confidential environment in schools, homes and the community for questions about sexuality and sexual exploration could assist in promoting safer sex(ting). As these interventions are not a quick-fix but require long-term investments in the education and social welfare sector, they might be less popular than simply criminalising such behaviour. Or, in the words of Laurie Penny: 'The scourge of the underage slags must be stamped out by any means necessary, as long as those means don't involve actually providing useful sex education.'[196]

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[194] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 40(b), 42.

[195] For the online component of comprehensive sexuality education, this should include informing adolescents that non-consensual sharing of images can have legal consequences, as well as building resilience for adolescents not to engage in 'sexting' if this does not feel right, see Thomas Crofts/Eva Lievens, *Sexting and the Law* in: Michel Walrave et al. (eds.), *Sexting. Motives and risk in online sexual self-representation,* Cham 2018, p. 130; other topics should include the concept of consent, critical media analysis tools and critical pornography analysis, see Livingstone/Mason, *Sexual rights and sexual risks among youth online,* p. 47.

[196] Laurie Penny, *Teenage girls and the pill*, New Statesman America, 2 November 2010, available at: https://www.newstatesman.com/blogs/laurie-penny/2010/11/young-girls-sex-access-pill (accessed 3 October 2018).

CHAPTER IV: LEVERAGING INTERNATIONAL LAW TO STRENGTHEN THE NATIONAL LEGAL FRAMEWORK ON CHILD SEXUAL ABUSE MATERIAL IN NAMIBIA

Abstract

With the gazetting of the regulations of the Child Care and Protection Act 3 of 2015 on 30 January 2019, a crucial regulatory piece of children's rights in Namibia has finally been operationalised. However, the Act insufficiently addresses newly emerging online offences against children, such as the possession and distribution of child sexual abuse material, and leaves a considerable gap in the protection of children's rights. As the Namibian Constitution follows a monist approach to international law, this article argues that the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography could be applied directly to complement the national legal framework in prosecuting cases of possession and dissemination of child sexual abuse material while at the same upholding fair-trial principles.

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I. INTRODUCTION

Child sexual abuse and exploitation is a major concern worldwide. With access to and usage of the Internet increasing, child sexual abuse and exploitation is no longer restricted to homes, schools and communities. The use of Information and Communication Technology (ICT) by perpetrators expands their access to a wide pool of potential victims, as children and adolescents below the age of 18 years constitute one-third of Internet users worldwide.[1] The production, dissemination, and possession of child sexual abuse material is a common means by which children are victimised in the online space. The Internet has facilitated new forms of online child sexual abuse material. Made-to-order services allow the perpetrator to request the production of content in which the age, gender and race of the child are specified according to the perpetrator's sexual preferences.[2] Live-streaming of online child sexual abuse is another emerging form, one in which perpetrators can buy access to the live stream to observe the abuse in real time.[3]

At the international level, article 34 of the Convention on the Rights of the Child (CRC)[4] protects children from all forms of sexual exploitation and abuse. This provision in the CRC is augmented by the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography,[5] (OPSC), which is the first international instrument to explicitly criminalise 'child pornography' offences. At the regional level, the African Union (AU) has acknowledged the need to provide African states with guidance on the criminalisation of online child sexual abuse offences. The African Charter on the Rights and Welfare of the Child (ACRWC)[6] prohibits the use of children in pornographic activities, performances and materials.[7] More specifically, the AU Convention on Cyber Security and Personal Data Protection (ACCS)[8] criminalises the production, possession and distribution of 'child pornography' through a computer system.[9]

Recognising that online child sexual abuse is an emerging threat for all AU member states, the AU has also put it on the political agenda. The AU held a Continental Consultation on Combatting Online Child Sexual Exploitation[10] under the theme 'Protecting Children from Abuse in the Digital World' in March 2019 in Addis Ababa. In her welcoming remarks, the AU Commission Director of Social Affairs, Cisse Mariama Mohamed, noted that 'the rise of information and communication technologies had made it easier and more efficient for sex offenders to produce, access, and distribute child sexual abuse material', and called upon all delegates to take immediate action.[11] The AU will, moreover, assess the threat of online child sexual abuse in 19 African countries, which due to their easy access to Internet services are deemed to be at high risk.[12] Turning to southern Africa, the Southern African Development Community (SADC) drafted Model Legislation on Computer Crime and Cybercrime, which criminalises

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[1] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children,* New York 2015, p. x; UNICEF, *The State of the World's Children 2017,* New York 2017, p. 1.
[2] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children,* p. 21.
[3] *Ibid.,* pp. 22–23.
[4] Adopted on 20 November 1989.
[5] Adopted on 25 May 2000.
[6] Adopted on 1 July 1990.
[7] Art. 27(1)(c) African Charter on the Rights and Welfare of the Child.
[8] Adopted on 27 June 2014.
[9] Art. 29(3) African Union Convention on Cybersecurity and Personal Data Protection.
[10] Held on 6 March 2019 at the African Union Conference Centre in Addis Ababa, see https://au.int/en/pressreleases/20190306/african-union-continental-consultation-combatting-online-child-sexual (accessed 23 March 2019).
[11] See official press release here: https://au.int/en/pressreleases/20190306/african-union-continental-consultation-combatting-online-child-sexual (accessed 24 March 2019).
[12] Muluhne Gebre, *African Union Set to Assess Threat of Online Child Sexual Exploitation in 19 Countries,* 7D News, 6 March 2019, available at: https://7dnews.com/news/african-union-set-to-assess-threat-of-online-child-sexual-exploitation-in-19-countries (accessed 24 March 2019).

the production, offering, distribution, procurement, possession and accessing of 'child pornography' through a computer system.[13] This shows the broad commitment at regional and international level to ensure children all over the world are protected from any form of sexual abuse and exploitation.

Namibia recently joined the African and international community in its fight against online child sexual abuse. With the gazetting of the regulations of the Child Care and Protection Act 3 of 2015 (hereafter CCPA) on 30 January 2019, a crucial piece of law on children's rights in Namibia has finally been operationalised.[14] Among other things, the Act creates new offences relating to children, such as child trafficking, certain forms of child labour and 'child pornography'. Unfortunately, the CCPA criminalises only the creation of such material and various supporting acts; it neither defines the term 'child pornography', nor criminalises the possession or distribution of child sexual abuse material, and hence leaves a considerable legal gap in the protection of children in Namibia.

This article argues that the gap can be closed by leveraging international law such as the OPSC, which Namibia ratified on 16 April 2002. The OPSC clearly defines the term 'child pornography' and criminalises 'producing, distributing, disseminating, importing, exporting, offering, selling or possessing child pornography [for the above purposes]'.[15] As article 144 of the Namibian Constitution[16] stipulates that international treaties shall form part of the law of Namibia, it is argued that the OPSC can be used to complement the provision in the CCPA, while upholding fair-trial principles as set out in article 12 of the Constitution. Little or no research has been done on leveraging article 144 to strengthen the national legal framework in the area of criminal law. This Chapter aims to start a conversation on this important topic and strengthen Namibia's approach to compliance with its international obligations.

After providing an overview of the emerging forms of online child sexual abuse globally as well as in Namibia, the article will point out the significant gaps in the existing Namibian legal framework on combating the dissemination and possession of online child sexual abuse material. Thereafter, it is argued that on the grounds of the position of international law in the Namibian Constitution, the OPSC can be leveraged to strengthen the national legal framework on online child sexual abuse material. The Chapter in particular proves that such an approach does not violate fair-trial principles as set out in article 12 of the Namibian Constitution, and to this end compares similar legal cases successfully prosecuted in the Democratic Republic of Congo (DRC) and Rwanda.

II. ONLINE CHILD SEXUAL ABUSE IN NAMIBIA

A. Emerging forms of online child sexual abuse

The Internet has offered a new and comparably safe realm for offenders to sexually abuse and exploit children. With many countries, including Namibia, not comprehensively criminalising online child sexual abuse,[17] the lack of capacity in digital forensics, the insufficiency of transnational law enforcement mechanisms, the use of cryptocurrencies for money transfers, and

[13] Article 13 SADC Model Law on Computer Crime and Cybercrime, available at: https://www.itu.int/en/ITU-D/Cybersecurity/Documents/SADC%20Model%20Law%20Cybercrime.pdf (accessed 24 March 2019).
[14] Child Care and Protection Act 3 of 2015, available at: https://laws.parliament.na/annotated-laws-regulations/law-regulation.php?id=473 (accessed 24 March 2019).
[15] Article 3(1)(c) OPSC.
[16] 'Namibian Constitution' is the official short title of the Constitution of the Republic of Namibia, see art. 148 Namibian Constitution.
[17] See Chapter II. B.

the ease of hiding one's traces on the Internet[18], many offenders with a sexual interest in children face little risk of investigation and prosecution.[19] While the Internet has created new forms of child sexual abuse, such as live-streaming, it also facilitates a continuum between offline – that is, contact – child sexual abuse and online child sexual abuse.[20]

A prominent form of such an online-offline continuum is the production, dissemination, possession and accessing of child sexual abuse material. Perpetrators produce visual, written or audio documentation of the contact sexual abuse of a child, and disseminate such material over the Internet. New trends in online child sexual abuse include made-to-order content as well as live-streaming of online child sexual abuse.[21] Both forms allow the perpetrator to direct the sexual abuse according his or her own sexual preferences, including the selection of the child as well as the form of sexual abuse perpetrated against the child.[22] Victims of online child sexual abuse suffer additional and enduring victimisation from the awareness that offenders unknown to them will use images of their abuse.[23] Therefore, victims oftentimes face great difficulties in 'closing the chapter', as they are continually exposed to abuse and exploitation through the circulation of their material and live in constant anxiety that someone will recognise or expose them.[24]

It is unknown how many websites, fora and peer-to-peer networks containing online child sexual abuse material exist worldwide.[25] A good indication of the magnitude of the problem is the annual report published by the Internet Watch Foundation (IWF), a UK-based organisation working with law enforcement and industry worldwide to remove child sexual abuse material from the Internet.[26] In 2018, the IWF received about 223,000 reports and confirmed that approximately 105,000 URLs contained child sexual abuse material. Seventy-eight per cent of the depicted children are girls, and 23 per cent of the material showed sexual activity between adults and children, including rape or sexual torture. Forty per cent of the material depicted children 10 years or younger, with 1 per cent depicting children below the age of 2 years.[27] These numbers are shocking, and keeping in mind that these are merely the figures relating to material reported to the IWF, one can only imagine the actual magnitude of the online abuse and exploitation that children suffer worldwide.

With Namibia's Internet connectivity standing at approximately 36.8 per cent in 2017,[28] it is not surprising that anecdotal evidence points to an increased number of incidents of online child sexual abuse in the country. To assess the extent of the problem and create the evidence base

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[18] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, p. 21; on the use of virtual currencies for child sex offending online see Yvonne Nouwen, *Virtual Currency Uses for Child Sex Offending Online in Online Child Sexual Exploitation: An Analysis of Emerging and Selected Issues*, ECPAT International Journal, Issue 12 (2017), pp. 4–11.

[19] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, pp. 18-19.

[20] ECPAT, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, Bangkok 2016, pp. 19–22; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, p. 8.

[21] UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, pp. 21-23; for an in-depth analysis of life-streaming of online child sexual abuse, see Andrea Varrella, *Live Streaming of Child Sexual Abuse: Background, Legislative Frameworks and the Experience of the Philippines*, ECPAT International Journal, Issue 12 (2017), pp. 47–58; WeProtect Global Alliance, *Global Threat Assessment 2019*, London 2019, p. 33.

[22] ECPAT, *Trends in online child sexual abuse material*, Bangkok 2018, p. 7.

[23] Najat M'jid Maalla, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, A/HCR/12/23 (13 July 2009), pp. 10 *et seq.*

[24] *Ibid.*; ITU, *Guidelines for Policy-makers on Child Online Protection*, 2009, p. 19; Ateret Gewirtz-Meydana et al., *The complex experience of child pornography survivors*, Child Abuse and Neglect, Vol. 80 (2018), p. 244; Alisdair A. Gillespie, *Child Pornography. Law and Policy*, London 2011, pp. 31–33; UNICEF, *The State of the World's Children 2017*, p. 76.

[25] ECPAT, *Trends in online child sexual abuse material*, p. 8.

[26] See https://www.iwf.org.uk.

[27] Internet Watch Foundation, *Once upon year: Annual Report*, Cambridge 2018, available at: https://www.iwf.org.uk/sites/default/files/reports/2019-04/Once%20upon%20a%20year%20-%20IWF%20Annual%20Report%202018.pdf, pp. 18-19 (accessed 20 January 2020).

[28] ITU estimate 2017, available at: https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx (accessed 7 July 2019).

for prevention and response interventions, the Government of the Republic of Namibia, with the support from UNICEF, commissioned an 'Explanatory research study on knowledge, attitudes and practices of Information and Communications Technology' in 2016.[29] Only 7 per cent of participants said they had never accessed the Internet before.[30] In terms of negative experiences, 31 per cent of the surveyed children reported that they had received sexually explicit images of people they did not know, and 29 per cent had seen online child sexual abuse material.[31]

These figures changed the previously common narrative that online child sexual abuse is not a real threat for children in Namibia and prompted the government and civil society to joint action to ensure that children in Namibia are safe online.[32] As an important first step, it was recognised that the current legal framework in Namibia does not sufficiently criminalise all forms of online child sexual abuse material and hence requires reform.[33] The gaps in the current national legal framework are discussed in the following Chapter.

B. Gaps in the national legal framework

As indicated above, the national legal framework only sporadically addresses online child sexual abuse and exploitation. The sole legislation referring directly to 'child pornography' is the CCPA. Its section 234(1)(d) provides that it is a criminal offence to 'induce, procure, offer, allow or cause a child to be used for purposes of creating child pornography whether for reward or not'.

The first significant error of this piece of legislation is its lack of a definition of the term 'child pornography'.[34] It is not clear what the term 'child pornography' covers, for example whether it encompasses virtual child sexual abuse material, persons made to appear as minors, or erotic posing.[35] Besides the lack of a definition, the Act criminalises only the creation of child sexual abuse material and various supporting acts.[36] This leaves a considerable gap in the legal framework, as the possession, dissemination and accessing ('streaming') of child sexual abuse material is the centrepiece of the entire market: platforms such as Childs Play[37] and Elysium[38] have made millions by offering a marketplace to disseminate, download and stream child sexual

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[29] UNICEF, *Voices of children: An exploratory research study on knowledge, attitudes and practices of information and communication technology (ICT) use and online safety risks by children in Namibia*, Windhoek 2016; the study sampled 739 children between the ages of 13 and 17 years from urban and rural areas in five regions in Namibia.
[30] *Ibid.*, p. 27.
[31] *Ibid.*
[32] See, for example, Ngaevarue Katjangua, *Namibian children risk online exploitation*, New Era, 29 June 2017, available at: https://neweralive.na/posts/namibian-children-risk-online-exploitation (accessed 2 July 2019); Lahja Nashuuta, *Namibia Save Haven for Cybercriminals*, All Africa, 7 February 2018, available at: https://allafrica.com/stories/201802070287.html (accessed 2 July 2019); Jemima Beukes, *Child porn ex-cop faces 40 charges*, Namibian Sun, 6 May 2020, available at: https://www.namibiansun.com/news/child-porn-ex-cop-faces-40-charges2020-05-05 (accessed 13 May 2020).
[33] See, for example, The Namibian, *Nam joins world to combat child online sexual abuse*, 3 March 2016, available at: https://www.namibian.com.na/148055/archive-read/Nam-joins-world-to-combat-child-online-sexual-abuse (accessed 2 July 2019); New Era, *Legal framework strengthened to deter child sexual abuse online*, 2 March 2016, available at: https://neweralive.na/posts/legal-framework-strengthened-deter-child-sexual-abuse-online (accessed 2 July 2019).
[34] ECPAT, Global Data Base – National Legal Framework protecting children from sexual exploitation online (Namibia), available at: https://globaldatabase.ecpat.org/country/namibia/#2.1 (accessed 23 June 2019).
[35] UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, Windhoek 2016, p. 31; UNICEF, *Increasing legal protection for children from sexual exploitation and abuse in Namibia*, Windhoek 2016, p. 8.
[36] *Ibid.*
[37] Håkon F. Høydal/Einar Otto Stangvik/Natalie Remøe Hansen, *Breaking the Dark Net: Why the police share abuse pics to save children*, VG News, 7th October 2017, available at: https://www.vg.no/spesial/2017/undercover-dark-web/?lang=en (accessed 23 June 2019).
[38] Michael Nienaber, *German police make arrests over massive child pornography website*, Reuters News, 6 July 2017, available at: https://www.reuters.com/article/us-germany-sexcrimes/german-police-make-arrests-over-massive-child-pornography-website-idUSKBN19R0VD?il=0 (accessed 23 June 2019).

abuse material.[39] By not criminalising the dissemination, possession and accessing of child sexual abuse material, Namibia is at risk of becoming a safe haven for platforms such as these and tolerating the re-victimisation of hundreds of thousands of children worldwide through the further distribution and viewing of their ordeals.[40]

Apart from the CCPA, the Publications Act 42 of 1972 (hereafter Publications Act) prohibits the production, possession and distribution of 'undesirable' publications. According to its section 47, a publication is 'undesirable' if it is considered offensive or harmful to public morals. Even though it might be assumed that online child sexual abuse material would be considered 'undesirable' *per definitionem,* the lack of a specific definition of online child sexual material makes it impossible to predict its range.[41] Furthermore, the prescribed range of the sentence for contravention of section 8(1)(b) of the Publications Act is either a fine of not more than 1,000 rands (approximately 70 USD) or imprisonment for a period not exceeding six months.[42] This range of sentence is clearly not appropriate for a sexual offence such as the possession and distribution of online child sexual abuse material. Keeping in mind that some offenders possess millions of child sexual abuse images,[43] it is evidently unsatisfactory that such an offender only faces a maximum of 6 months' imprisonment.

Further, the Communications Act 8 of 2009 (hereafter Communications Act) makes it a criminal offence to 'make[s], create[s], solicit[s] or initiate[s] the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person'. Similar to the interpretation of the term 'undesirable' in the Publications Act, terms such as 'obscene', 'filthy' or 'indecent' are open to interpretation and hence do not set a clear standard for the criminalisation of child sexual abuse material. Further, the term 'solicit' does not include the downloading, possession or streaming of such material, and hence leaves a considerable gap. Even though the range of sentence is higher than in the Publications Act, with imprisonment for a period not exceeding five years or to a fine not exceeding N$20 000 (approximately 1350 USD) or to both such fine and such imprisonment, it can be doubted whether this range is appropriate for a sexual offence involving children.

Lastly, the classification of possession and dissemination of online child sexual abuse material as a sexual offence – in contrast to a general criminal provision such as stipulated in the Publications and in the Communications Act – is necessary in the light of section 238 of the CCPA. The latter sets out the requirements in respect of persons who work with children. This section provides that a person convicted of certain offences should not be employed in management or operation of an institution providing welfare services to children, have direct access to children at such institution, or become a caregiver or adoptive parent. It is crucial to note that one of the offences listed under the section is the manufacture, distribution or possession of pornography. The distribution and possession of an 'undesirable' publication is, however, not listed. Therefore, there is an inherent risk that if only the Publication or the Communications

[39] Regarding victim protection and rule of law concerns of undercover investigations on such child pornography fora, see Chapter V of this study or Sabine K. Witting, *Do ut des: Disseminating online child sexual abuse material for investigative purposes?,* Journal of Universal Computer Science, Proceedings of the Central European Cybersecurity Conference 2018, Article No. 14 (November 2018).

[40] Arguing that gaps in the legal framework and ill-equipped institutions in the developing work make them specifically attractive for perpetrators, Ann Skelton/Benyam Mezmur, *Technology changing @ a Dizzying Pace: Reflections on Selected Jurisprudence of the UN Committee on the Rights of the Child and Technology*, Peace Human Rights Governance, Vol. 3 (2019), p. 281.

[41] UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, p. 31; UNICEF, *Increasing legal protection for children from sexual exploitation and abuse in Namibia*, p. 8.

[42] See Section 43 Publications Act, No. 42 of 1972.

[43] Richard Wortley/Stephen Smallbone, *Internet Child Pornography: Causes, Investigation, and Prevention*, Santa Barbara 2012, p. 31.

Act is applied to sanction the dissemination and possession of online child sexual abuse material, perpetrators could fall through the cracks in terms of section 238 of the CCPA and still be deemed fit to work with children.

In summary, the national legal framework in Namibia touches upon only certain matters such as the production of child sexual abuse material; does not provide for a definition of 'child pornography'; and if it should be considered a criminal offence under the Publications or the Communications Act, does not provide for a sufficient range of sentence. Therefore, the current legal framework in Namibia is insufficient to effectively combat the dissemination, possession and accessing of child sexual abuse material.[44]

III. INTERNATIONAL LAW ON ONLINE CHILD SEXUAL ABUSE IN NAMIBIA

Given the gaps above in the legal framework, the question arises whether international law, such as the OPSC, could be leveraged to criminalise the possession and dissemination of child sexual abuse material. This Chapter will first discuss the protection standards in both Namibia and the OPSC,[45] and thereafter argue that international law, in particular the OPSC, can be directly applied in Namibian courts to prosecute online child sexual abuse offenders, while upholding fair-trial principles.

A. Online child sexual abuse in the ACCS

With the adoption of the ACCS, the AU has taken an important step towards tackling the threat of cybercrime in Africa. After its approval by the AU Executive Council in 2013, the ACCS was adopted on 27 June 2014. So far, only five states, namely Namibia, Guinea, Mauritius, Ghana and Senegal, have ratified the Convention.[46] According to article 26, the Convention shall enter into force 30 days after the date of the receipt of the fifteenth instrument of ratification. Therefore, although Namibia ratified the Convention on 25 January 2019, and is hence its second-latest member, the Convention has no legal effect yet, as the minimum number of 15 member states has not been reached yet.

[44] In line with the recommendations from the ECPAT Global Database, available at: https://globaldatabase.ecpat.org/country/namibia/#2.6 (accessed 6 July 2019).

[45] As an analysis of non-binding international standards exceeds the scope of this Chapter, this Chapter will focus only on legally binding international standards, such as the ACCS and the OPSC. Namibia has not ratified the Council of Europe Convention on Cybercrime ('Budapest Convention') and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ('Lanzarote Convention'); as such, these will be omitted. For an overview of relevant international and regional standards on online child sexual abuse, see UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*.

[46] See status of ratification here (latest version of 28 June 2019): https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection (accessed 20 January 2020).

It is against this background that this article will not focus on the ACCS[47] but rather on international law currently having legal effect in Namibia, such as the OPSC.[48]

B. Online child sexual abuse in the OPSC

Article 2 of the OPSC defines 'child pornography' as 'any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes'. Although the term 'child' is not defined in the OPSC, the definition of the main convention, the CRC, applies, and hence defines the term as 'every person under the age of 18 years'.[49] The OPSC only criminalises content depicting actual children and hence excludes virtual 'child pornography' or persons who are made to appear as minors.

With regard to the criminalised conduct, article 3(1)(c) of the OPSC states:

> Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organized basis: […] Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Art. 2.

This shows that the OPSC criminalises not only the production of 'child pornography', but also the dissemination and possession of such material.[50] Together with the definition of the term 'child pornography', the OPSC avails a basic set of criminal provisions to combat child sexual abuse material.

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[47] In case the ACCS reaches the 15 ratifications necessary for it to enter into force, the analysis below provides a brief overview of the strengths and weaknesses of the ACCS in relation to online child sexual abuse material. Art. 1 ACCS defines the term 'child pornography' as:

> […] any visual depiction, including any photograph, film, video, image, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:
> a) The production of such visual depiction involves a minor;
> b) Such visual depiction is a digital image, computer image, or computer-generated image where a minor is engaging in sexually explicit conduct or when images of their sexual organs are produced or used for primarily sexual purposes and exploited with or without the child's knowledge;
> c) Such visual depiction has been created, adapted or modified to appear that a minor is engaging in sexually explicit conduct.

According to art. 1, the term 'child' or 'minor' means every human being below the age of 18 years in terms of the ACRWC and CRC. The definition of 'child pornography' only covers visual depictions and hence excludes audio or written content. Further, it covers not only the visual depiction of actual children, but also computer-generated images (also called virtual 'child pornography') as well as persons who are made to appear as minors.
The catalogue of offences in art. 29(3)(1) ACCS is as follows:

> State Parties shall take the necessary legislative and/or regulatory measures to make it a criminal offence to:
> a) Produce, register, offer, manufacture, make available, disseminate and transmit an image or a representation of child pornography through a computer system;
> b) Procure for oneself or for another person, import or have imported, and export or have exported an image or representation of child pornography through a computer system;
> c) Possess an image or representation of child pornography in a computer system or on a computer data storage medium.

Therefore, the ACCS criminalises various actions such as production, dissemination and possession of child sexual abuse material, but does not extend to the accessing ('streaming') of such material.

[48] Upon entering into force, the same line of arguments set forth for the direct application of the OPSC can be applied in the context of the ACCS.

[49] See art. 1 CRC; UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, p. 12.

[50] Even though not the mere possession of 'child pornography', as deliberated in Chapter II.

C. Closing the gaps in the national legal framework through direct application of the OPSC?

Given the abovementioned limitations of the national legal framework in Namibia, the OPSC, particularly with regard to the definition of 'child pornography' and the criminalisation of dissemination and possession of such material, provides for a greater protection standard than the Namibian legal framework. Therefore, the question arises whether the OPSC could be leveraged to strengthen the legal framework. This section explores the role of international law in the Namibian Constitution and how the OPSC can be directly applied in Namibian courts. Such direct application will be balanced against fair-trial principles as guaranteed under article 12 of the Namibian Constitution.

1. Direct applicability of human rights law in Namibian courts

International law does not predetermine its position in the national legislation of each member state and leaves this decision to the national constitutions.[51] Generally speaking, states take either a dualist or a monist approach to international law.[52] In a dualist system, the national and the international legal order are regarded as two separate legal systems.[53] In order to make international law applicable in the national legal system, the international treaty in question has to be translated by way of domestic legislation through an Act of Parliament.[54] Without domestication, international law has no force or effect in such a country. In monist systems, international law and national legislation are considered as one legal system, which means that international law automatically forms part and parcel of the national legal system upon ratification or accession.[55] Hence, there is generally no need to domesticate the international treaty through an Act of Parliament to make it applicable in the member state.

Regarding the relationship between international law and national legislation, article 144 of Namibian Constitution states: 'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.' As the wording of article 144 does not require an Act of Parliament to make international law part of the law of Namibia, the country is following a 'monist approach' to international law and hence regards international law as an integral part of its legal system.[56] Monists claim that there is no

[51] Arguing that the question of monism and dualism should be settled by each country through a legal instrument and that the constitution of a country is the best legal instrument for solving that question, D.J. Devine, *The Relationship between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia*, Case Western Reserve Journal of International Law, Vol. 26 (1994), p. 299.
[52] Joseph G. Starke, *Monism and dualism in the theory of international law*, London/Melbourne 1936, p. 66; Francois-Xavier Bangamwabo, *The implementation of international and regional human rights instruments in the Namibian legal framework* in: Nico Horn/Anton Bösl (eds.), *Human Rights and the Rule of Law in Namibia*, Windhoek 2009, p. 166; John Dugard, *International Law: A South African Perspective*, Cape Town 2011, p. 42.
[53] Dugard, *International Law: A South African Perspective*, p. 42; Starke, *Monism and dualism in the theory of international law*, p. 66, arguing that in case of conflict between international law and municipal law, the court must apply municipal law.
[54] Onkemetse Tshosa, *The status of international law in Namibian national law: A critical appraisal of the constitutional strategy*, Namibian Law Journal, Vol. 2 (2010), p. 5.
[55] Michelle Barnard, *Legal reception in the AU against the backdrop of the monist/dualist dichotomy*, Comparative and International Law Journal of Southern Africa, Vol. 48 (2015), p. 154, stating that in the monist system, international law is superior to national law and that national law should thus always conform to the requirements of international law.
[56] Yvonne Dausab, *International law vis-à-vis municipal law: An appraisal of Article 144 of the Namibian Constitution from a human rights perspective* in: Anton Bösl/Nico Horn/André du Pisani (eds.), *Constitutional democracy in Namibia: A critical analysis after two decades*, Windhoek 2010, p. 266; Tshosa, *The status of international law in Namibian national law: A critical appraisal of the constitutional strategy*, p. 11; Devine, *The Relationship between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia*, p. 301.

need for further enabling legislation when applying international law to the domestic legal scenario.[57]

However, it has to be acknowledged that the first half-sentence of article 144 of the Namibian Constitution raises possible exceptions to that rule: the general rule of direct applicability of international law does not apply if 'otherwise provided by this Constitution or Act of Parliament'. Therefore, the Constitution or an Act of Parliament can limit the direct applicability of international law. This exception reflects the position of the Namibian Constitution as the supreme law of the country and in terms of an Act of Parliament, the supremacy of the will of the people, as expressed by the Namibian legislature. The OPSC is an international agreement and as such automatically forms part of Namibian law. As neither the Constitution nor an Act of Parliament state anything to the contrary, there is no limitation to the principle of direct applicability regarding the OPSC.

One might argue that such direct application of international law circumvents the role of the National Assembly as primary legislative organ, as set out in article 63(1) of the Namibian Constitution. However, it has to be noted that the National Assembly has the power and function in terms of article 63(2)(e) of the Constitution to decide whether or not to accede to international agreements and to agree to the ratification of or accession to international agreements that have been negotiated and signed by the President. Hence, the will of the people is duly reflected in the treaties ratified by the state.

The position that, according to article 144, international law automatically forms part of Namibian law, has been confirmed in Supreme Court decisions. In *S v Mushwena and Others,*[58] the Court ruled:

> As a matter of fact, as I have shown […] the International Covenant on Civil and Political Rights and the U.N. Covenant and Protocol Relating to Refugees, have become part of Public international law and by virtue of art. 144, [have] become part of the law of Namibia. The whole process of taking the accused prisoner and handing them over to Namibian officials, was also in conflict with the aforesaid principles and rules of public international law.

In *Government of the Republic of Namibia & Others v Mwilima & Others*,[59] the Court ruled:

> The Namibian Parliament acceded to this Covenant on 28 November 1994. It also, on the same date, acceded to the First and Second Optional Protocols. […] According to article 63(2)(e) read with article 144, international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'. From this it does not follow that the said article is now part of the Constitution of Namibia but being part of the law of Namibia it must be given effect. […] As was pointed out by Mr Smuts, the state not only has an obligation to foster respect for international law and treaties as laid down by article 96(d) of the Constitution, but it is also clear that the International Covenant on Civil and Political Rights is binding upon the state and forms part of the law of Namibia by virtue of article 144 of the Constitution.

[57] Devine, *The Relationship between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia*, p. 301.
[58] *SA4/04, SA4*/04 [2004] NASC 2 (21 July 2004).
[59] *AHRLR 127* (NaSC 2002).

The *Mwilima* case shows that in case the domestic legal framework does not provide sufficient protection for a citizen, due consideration should be given to international law to close this gap.[60]

2. Direct applicability of international criminal law in Namibian courts and the fair-trial principles of article 12 of the Namibian Constitution

Although the above-cited case law confirms the direct applicability of international treaties in the domestic legal framework, it has to be acknowledged that these court decisions are dealing with human rights treaties that aim to strengthen unconditionally the legal position of rights-holders. However, it has to be taken into account that the criminal law elements of the OPSC may lead to a different assessment. While criminal law provisions, whether derived from international or national law, aim to protect the rights of the victim, they limit the rights of the accused: the accused stands the risk of being convicted, followed by deprivation of liberty or the obligation to pay a fine. Because of this subsequent effect of limiting the rights of the accused during criminal procedure, the OPSC can be directly applied in Namibian courts only if such an application does not lead to a violation of the rights of the accused, in particular the fair-trial principles laid out in article 12 of the Namibian Constitution. The latter guarantees all persons the right to a fair trial. Particularly important for the question at hand is article 12(3), which states:

> No person shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time the offence was committed.

The principle set out in article 12(3) of the Namibian Constitution states that, first, there needs to be a law criminalising the specific conduct at the time it took place, and, secondly, that the penalty prescribed needs to remain within the range of sentence. The latter inherently includes the notion that a penalty must be prescribed in the first place. Only if both conditions are fulfilled does a specific law meet the standards of the principle of legality (*nullum crimen sine lege*), which is a core value, a human right and a fundamental defence in criminal prosecution.

With regard to the criminalisation of the distribution and possession of online child sexual abuse material, there are two potential legal grounds constituted under the CCPA and the OPSC. However, both provisions have potential shortfalls. While the CCPA as an Act of Parliament contains both a catalogue of offences as well as a prescribed penalty, it criminalises only the production of 'child pornography'. On the other hand, the OPSC provides a definition and a complete catalogue of offences but lacks a penalty provision. In order to have a complete 'set' that meets the fair-trial requirements set out in article 12 of the Namibian Constitution, both provisions need to be combined. Therefore, the crucial question is: will articles 2 and 3 of the OPSC be read in conjunction with section 234 of the CCPA, or vice versa?

3. Excursus: Lessons from DRC and Rwanda

To answer this complex question, it is useful to explore how other countries in the region have dealt with similar legal constellations. As no other country in the African region has discussed the issue specifically with regard to online child sexual abuse material, we propose to draw a comparison with the prosecution of genocide and crimes against humanity in the aftermath of the atrocities committed in the DRC and Rwanda. As it is not primarily relevant what the criminal offence is but rather that a criminal offence based on international law has been leveraged

[60] Dausab, *Constitutional democracy in Namibia: A critical analysis after two decades* (2010), p. 283.

to strengthen the national legal framework, we believe such a comparison is appropriate and relevant in guiding the Namibian approach to direct applicability of international criminal law. This is particularly important in balancing such direct application with fair-trial principles.

The DRC and Rwanda struggled to end the era of impunity for perpetrators of genocide and crimes against humanity committed during civil war. As the legal framework in the two countries was fragmented and did not provide a sufficient legal basis to prosecute these offences, domestic courts in both countries directly applied provisions from international criminal law in order to deliver justice to the victims, finding such direct application not to be in violation of fair-trial principles.

Case law from the DRC

From 1998 to 2003, the DRC was consumed by a regional conflict described as 'Africa's World War'.[61] Beginning with the genocide of the Tutsi population in Rwanda,[62] a total of eight African countries became involved on opposite sides of the conflict.[63] During this period, widespread and systematic human rights violations took place, including sexual violence committed against women, men and children. Millions of Congolese civilians lost their lives in atrocities committed both by rebels and members of the DRC army.[64]

The DRC ratified the Rome Statute on 11 April 2002.[65] Since 1994, it has followed a monist system, i.e. international treaties form part of the national legal framework upon ratification.[66] Against this background, it is clear that the Rome Statute, upon ratification in 2002, became immediately part and parcel of the national legal system. At the time that atrocities such as war crimes and crimes against humanity were committed, the domestic legal framework, in the form of the Military Code and the Criminal Code, regulated these offences only in a fragmentary way.[67] One of the first cases that leveraged the Rome Statute was the *Songo Mboyo*

[61] Dunia P. Zongwe, *Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo*, Israel Law Review, Vol. 26 (2013), p. 249.
[62] Milli Lake, *Ending Impunity for Sexual and Gender-Based Crimes: The International Criminal Court and Complementarity in the Democratic Republic of Congo*, African Conflict and Peacebuilding Review, Vol. 4 (2014), p. 8.
[63] Zongwe, *Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo*, p. 249.
[64] *Ibid*.; Lake, *Ending Impunity for Sexual and Gender-Based Crimes: The International Criminal Court and Complementarity in the Democratic Republic of Congo*, pp. 8–9; for a detailed description on the history of the conflict, see Rebecca Bowman, *Lubanga, the DRC and the African Court: Lessons learned from the first International Criminal Court case*, African Human Rights Law Journal, Vol. 7 (2007), pp. 414 *et seq*.
[65] See a full listing of the status of signature, ratification, and accession of the Rome Statute at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en (accessed 19 February 2019).
[66] Ovo Catherine Imoedemhe, *The Complementarity Regime of the International Criminal Court: National Implementation in Africa*, Cham 2017, p. 96; see art. 112 of the Constitutional Act of Transition (1994), art. 193 of the Transitional Constitution of the Democratic Republic of Congo of 4 April 2003, arts. 215 and 216 of the Constitution of the Democratic Republic of Congo of 18 February 2006: 'Duly concluded international treaties shall, upon publication, prevail over Acts of Parliament', as translated in Zongwe, *Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo*, Israel Law Review (2013), p. 254; similar translation in Avocats sans Frontières, *Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo*, Brussels 2009, para. 115, available at: https://asf.be/wp-content/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf (accessed 24 February 2019); original text in French: 'Les traités et accords internationaux régulièrement conclus ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve pour chaque traité ou accord, de son application par l'autre partie', available at: https://www.wipo.int/edocs/lexdocs/laws/fr/cd/cd001fr.pdf (accessed 24 February 2019).
[67] Imoedemhe, *The Complementarity Regime of the International Criminal Court: National Implementation in Africa*, pp. 96–97.

case,[68] also referred to as the *Eliwo* case,[69] in which the courts applied the Rome Statute for the first time to convict soldiers of mass rape and sexual violence as crimes against humanity.[70] The court made use of the Rome Statute's definition of crimes against humanity with regard to rape, as it is clearer and more comprehensive than the offence under national law.[71] Further, the application of the Rome Statute also allowed the court to impose sentences as set out under article 77 of the Rome Statute, thereby avoiding the death penalty as stipulated under domestic law.[72]

Other cases, such as the *Massabo* case,[73] used the Rome Statute to complement domestic law provisions that lacked sanctions. Under the Military Penal Code, the war crime offence did not contain a sentence.[74] To fill this 'omission', the courts in *Massabo* simply applied the sentence as set out in article 77 of the Rome Statute.[75] Mindful of the principle of legality and the potential implications of applying the Rome Statute as a sentencing guideline, the *Massabo* court clearly stated that 'the ratification by the DRC of the [Rome] Statute included it as part of the arsenal of laws of the DRC subject to the primacy of international law and in accordance with the monist legal tradition'.[76]

Case law from Rwanda

After the genocide in 1994, Rwanda faced tremendous challenges in prosecuting perpetrators in domestic courts, particularly due to a highly fragmented legal framework.[77] Genocide, crimes against humanity and war crimes did not form part of the Penal Code at the time these offences were committed on a large scale in Rwanda.[78] Criminalising them after they had been committed would have violated the principle of legality, as the law would have been considered *ex post facto* legislation.[79] To avoid the violation of such a key element of the *nulla poena sine lege* doctrine, which is enshrined in the 1991 Constitution,[80] the government leveraged the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (hereafter

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[68] Mbandaka Military Garrison Court, RPA 615/2006 (April 12, 2006), French version available at: https://www.droitcongolais.info/files/4.30.-TMG_BDK,-Jgt-du-12-avril-2006,-complot-militaire.pdf (accessed 24 February 2019).

[69] Songo Mboyo is the name of the location where the crimes were committed, whereas Eliwo Ngoy is the name of the first accused See Mbandaka Military Garrison Court, RPA 615/2006 (April 12, 2006), French version available at: https://www.droitcongolais.info/files/4.30.-TMG_BDK,-Jgt-du-12-avril-2006,-complot-militaire.pdf (accessed 24 February 2019).

[70] International Center for Transitional Justice, *Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court*, May 2014, available at: https://www.ictj.org/publication/democratic-republic-congo-impact-rome-statute-and-international-criminal-court (accessed 24 February 2019).

[71] Imoedemhe, *The Complementarity Regime of the International Criminal Court: National Implementation in Africa*, p. 98.

[72] Zongwe, *Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo*, p. 261.

[73] This case is also referred to as *Bongi* case. The differing case names originate from the full name of the accused 'Blaise Bongi Massabo', as retrieved from full case citation in Zongwe, *Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo*, p. 262, n. 85.

[74] *Ibid.*, pp. 264-265: the *Massabo* court applied art. 77 Rome Statute out of concern for a potential violation of the principle of legality, arguing that the Military Penal Code has only a generic sentencing provision.

[75] *Ibid.*, p. 264; Avocats sans Frontières, *Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo*, para. 18.

[76] Patryl I. Labuda, *Applying and 'misapplying' the Rome Statute in the Democratic Republic of the Congo* in: Christian de Vos, Sara Kendall, Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge 2015, p. 424; Avocats sans Frontières, *Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo*, para. 18.

[77] Jean Bosco Mutangana, *Domestic Justice Mechanisms: perspectives on referred cases to Rwanda*, 2014, p. 3, available at: http://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/v-domestic-justice-mechanisms-mutangana.pdf (accessed 3 March 2019).

[78] *Ibid.*

[79] *Ibid.*

[80] See art. 12 (3) 1991 Constitution.

Genocide Convention).[81] With Rwanda following a monist system, the Genocide Convention formed part of its domestic legal framework since its ratification on 12 February 1975.[82]

In order to bridge the gap between the Rwandan Penal Code, which only criminalises constitutive acts, and the Genocide Convention, which clearly defines genocide and crimes against humanity but lacks penalties for these offences, Rwanda enacted the Organic Law No. 08/1996 of 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990[83] (hereafter Organic Law). Article 1 Organic Law came up with the so-called dual incrimination approach.[84] This acknowledges that any prosecutions must be based on the offences and their penalties set out in the Rwandan Penal Code,[85] but should allow for an 'upgrade' in both the categorisation of offences as well as the sentence. In a first step, the judges assess whether the conduct constitutes an offence under the Penal Code. In a second step, the judge determines whether the conduct simultaneously constitutes the crime of genocide or a crime against humanity under the Genocide Convention.[86] In such a case, the penalties set in the Penal Code apply, except that they are aggravated depending on the level of involvement of the accused in the act of genocide or crimes against humanity.[87] This shows that the prosecution of perpetrators of genocide or crimes against humanity is primarily based on the Rwandan Penal Code, which is then modified based on international law.[88]

4. Lessons for Namibia

In summary, both the DRC and Rwanda provide for workable solutions to directly apply international criminal law in domestic courts, while respecting the fair-trial principles.

In the Congolese case, *Songo Mboyo,* the definition of the crimes in the national legal framework were complemented by the Rome Statute, whereas in *Massabo*, the range of sentences contained in the Rome Statute was used to complement the definition of war crimes in national legislation. Rwanda based the prosecution of the *génocidaires* on the Rwandan Penal Code, while leveraging international law to expand its scope of application with regard to the criminalised conduct through the Organic Law. This approach ensures that the Rwandan interest in the prosecution of the *génocidaires* is balanced against rule-of-law considerations.

This shows that the prosecution in neither the DRC nor Rwanda based its case solely on international criminal law – national legislation was always used as a basis for either the elements of crime, the range of sentence, or – in the case of Rwanda - even both. Therefore, international

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[81] Sam Rugege/ Aimé M. Karimundam, *Domestic Prosecution of International Crimes: The Case of Rwanda* in: Gerhard Werle/Lovell Fernandez/Moritz Vormbaum (eds.), *Africa and the International Criminal Court*, The Hague 2014, pp. 86–87.

[82] According to art. 5 Genocide Convention, 'Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III'. Because of this explicit wording in the Genocide Convention, the Convention cannot – even in monist countries – be considered self-executing (William A. Schabas, *Genocide in International Law. The Crime of Crimes*, Cambridge 2009, p. 405; Jan Wouters/Sten Verhoeven, *The domestic prosecution of genocide*, Working Paper No. 55 (2010), p. 4.).

[83] Available at: https://www.refworld.org/docid/3ae6b4f64.html (accessed 4 March 2019).

[84] Mutangana, *Africa and the International Criminal Court*, pp. 86 *et seq*.

[85] See clear references to the Penal Code in art. 1 and art. 14 Organic Law.

[86] See art. 1 Organic Law; Rugege/Karimunda, *Africa and the International Criminal Court*, p. 87.

[87] See art. 14 Organic Law; Pietro Sullo, *Beyond genocide: Transitional justice and Gacaca courts in Rwanda*, The Hague 2018, p. 105.

[88] This approach has yielded mixed results in practice (Rugege/Karimunda, *Africa and the International Criminal Court*, p. 87). In some cases, such as *Prosecutor v Ukezimpfura Jean and Others* or *Prosecutor v Mvumbahe Denys and Others*, the courts correctly applied both international law and domestic legislation to argue their case. However, in other cases such as *Prosecutor v Hanyurwimfura Epaphrodite* and *Prosecutor v Karorero Charles and Others*, the courts based their charges mainly on domestic law without properly acknowledging the construct of the dual-incrimination approach set out in the Organic Law, thus potentially leading to a violation of the principle of legality.

criminal law played a complementary, rather than constitutive, role, thereby filling in the gaps of the national legal framework.

Coming back to the direct application of the OPSC for prosecuting the dissemination and possession of online child sexual abuse material, it is clear from the Rwandan and DRC experience that the OPSC alone cannot serve as the basis for the prosecution of online child sexual abuse perpetrators but that a 'hook' in the national legislation is required. The CCPA clearly serves as such a 'hook'; however, the question remains whether the CCPA should be interpreted in the light of the OPSC, leveraging its definition of the term' child pornography' and the more comprehensive catalogue of offences, or vice versa, meaning that the CCPA's range of sentence is merged with the definition and catalogue of offences from the OPSC.

D. Interpreting the CCPA in the light of the OPSC

To expand its catalogue of offences, section 234 of the CCPA could be interpreted in the light of the OPSC. This would have the advantage that the criminalisation is rooted in national legislation, with international law only expanding the range of applicability. Both in the DRC and the Rwandan contexts, courts have emphasised the importance of basing their judgment on domestic law, which is then interpreted and expanded in view of and in line with international law. However, the disadvantage is that the wording of section 234 of the CCPA is excessively stretched to accommodate the possession and dissemination of online child sexual abuse material. The other option is to base the criminalisation on the OPSC and 'merge' the definition and catalogue of offences of the OPSC with the penalty provisions of section 234 of the CCPA. This has the advantage that both the definition and catalogue of offences of the OPSC broadly criminalise the production, possession and dissemination of online child sexual abuse material, but poses challenges with regard to the rule of law, as such a merger had not been foreseen initially by the legislator.

As a first step towards answering this question, it has to be acknowledged that the regulation of 'child pornography' offences in the OPSC and the CCPA do not present a conflict of norms. This is an important statement, as in case of a conflict of norms, the CCPA (enacted in 2015) would simply render the OPSC (ratified in 2002) inapplicable (*lex posterior derogat legi priori*). The provisions are not contradicting each other, but rather complement each other: both the OPSC and the CCPA criminalise the production of 'child pornography', but only the OPSC provides for a clear definition of the term and expands the catalogue of offences to the distribution and possession of it.

The complementarity of the OPSC and CCPA (and more importantly, the intent of the legislator to create such a complementarity) can be derived from section 2(1)(c) of the CCPA, which lays out the objectives of the CCPA:

> The objects of this Act are to […] give effect to Namibia's obligations concerning the well-being, development and protection of children in terms of the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and other international agreements binding on Namibia […].

Furthermore, section 2(2) of the CCPA states: 'The objects referred to in subsection (1) must be given due consideration in the interpretation and application of any provision of this Act.'

Therefore, section 2(1)(c) of the CCPA evidently endorses the status of international law such as the OPSC and stresses that the CCPA aims to give effect to such international treaties. In

section 2(2) of the CCPA, it becomes clear that international treaties must be given due consideration in the interpretation and application of any provision of the CCPA. The will of the legislator hence clearly endorses the interpretation of the CCPA in the light of international law, and therefore legitimises the interpretation of section 234 of the CCPA in view of the OPSC. This means that the term 'child pornography' in the CCPA can be defined in line with article 2 of the OPSC, and that the catalogue of offences as set out in section 234 of the CCPA could be expanded to the distribution and possession of 'child pornography' material as stipulated in article 3(1)(c) of the OPSC. As the CCPA itself calls for an interpretation in the light of international law, and the OPSC forms part of the domestic legal system, such an approach is compatible with the *nullum crime sine lege* requirement in article 12 of the Constitution.

However, some would submit that the fact that the legislator did not use the opportunity to draft section 234 of the CCPA in line with the OPSC was a deliberate decision, and that the legislator intended to criminalise only the creation of child sexual abuse material, not its possession and dissemination. Following this line of argument, interpreting section 234 of the CCPA in view of and in line with the OPSC would clearly go against the will of the legislator. The authors would strongly disagree with this interpretation and submit that the lack of a comprehensive 'child pornography' provision is a mere oversight of the legislator. It has to be noted that the Government of the Republic of Namibia only put online child safety concerns on the political agenda from 2016 onwards,[89] and that the text of the CCPA was largely developed well before that. Given that an object of the Act, as mentioned above, is to give effect to international conventions concerning the well-being of children, it is submitted that the interpretation of section 234 of CCPA does not contradict the will of the legislator.

Lastly, one could argue that the range of sentence prescribed in section 234(7) of the CCPA has been set for the production of 'child pornography' offences, and that the production of 'child pornography' justifies a higher range of sentence than the mere distribution or possession of already existing material. However, it has to be noted that the range of sentence set out in section 234(7) of the CCPA also applies for mere auxiliary conduct, such as inducing a child to be used for the creation of 'child pornography'. Furthermore, the CCPA does not prescribe a minimum sentence, and hence the presiding officer can take the specific circumstances of each case into account. It can therefore be argued that the range of sentence prescribed for production of 'child pornography' is also applicable for the dissemination and possession of 'child pornography' under article 3 of the OPSC.

In summary, the direct applicability of the OPSC according to article 144 of the Namibian Constitution, paired with the special position of international treaties in the CCPA, allows for an interpretation of the CCPA in view of the OPSC without violating fair-trial principles, in particular the *nullum crimen sine lege* doctrine as set out in article 12 of the Namibian Constitution.

IV. CONCLUSION

This article is an attempt to show how, using Namibia as a case study, international law can be leveraged to strengthen the national legal framework on online child sexual abuse material in monist systems. With the strong position of international law in the Namibian Constitution, this article advocates for putting international law into action to ensure that the rights of all people, in particular the most vulnerable ones such as children, are duly protected. With the legislative reform process being long and complex at the national level, particularly in the field of cybercrime, countries struggle to enact child-rights-based, comprehensive legislation in the

[89] See, for example, the development of the UNICEF study 'Voices of children: An exploratory research study on knowledge, attitudes and practices of information and communication technology (ICT) use and online safety risks by children in Namibia'.

emerging field of online child sexual abuse. As such, international law plays an evermore important role in this area, as its direct application can increase the protection of children from all forms of online and offline sexual abuse.

However, the authors submit that, in the case of Namibia, this solution is only temporary and that strong national legislation on online child sexual abuse is still required on top of the CCPA and OPSC. Although the application of section 234 of the CCPA in conjunction with the OPSC closes a legal loophole, it has to be acknowledged that the definition of 'child pornography' in article 2 of the OPSC[90] as well as the catalogue of offences set out in its article 3 have limitations. First, article 3 only criminalises possession if it is for the purpose of disseminating, selling or offering the material ('possessing for the above purposes'), but not if the material is possessed solely for private use.[91] Secondly, the OPSC does not criminalise accessing online child sexual abuse material if the material is not downloaded and hence not in the 'possession' of the recipient.[92] As mentioned earlier, accessing child sexual abuse material through live-streaming services is an emerging trend that requires urgent legislative response. This shows that law reform in Namibia is still required in the long run in order to close current loopholes in the OPSC and to keep up with trends in this field.[93]

[90] For an in-depth discussion of the deficits in the definition of art. 2 OPSC with regard to virtual 'child pornography', see Chapter II or Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 1*, p. 64, and UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, pp. 12–13.
[91] For further deliberation on this issue see Chapter II.
[92] UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, pp. 12–13.
[93] For concrete proposals on legislative reform in the Namibian context, see UNICEF, *Regulation of Child Online Sexual Abuse Content – Legal Analysis of International Law and Comparative Legal Analysis*, pp. 32 *et seq*.

CHAPTER V: DO UT DES: DISSEMINATING ONLINE CHILD SEXUAL ABUSE MATERIAL FOR INVESTIGATIVE PURPOSES?

Abstract

The infiltration of child sexual abuse fora on the dark web is a key investigation strategy in combating online child sexual abuse worldwide, the aim thereof being to identify perpetrators and rescue children from ongoing abuse and exploitation. The dissemination of child sexual abuse material is the currency required to gain access to these fora. As the dissemination of such material constitutes a criminal offence, police in most countries are prohibited from engaging in these interventions. Since 2018, Germany debated whether police should be legally authorised to disseminate child sexual abuse material in such cases. Although this contributes to the continuing traumatisation of the depicted child, police might be able to save more children from abuse and exploitation. The article examines whether and under which circumstances such interventions 'for the greater good' justify the damage caused to the depicted child, and whether such interventions can be brought in line with the rule of law.

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I. TASK FORCE ARGOS - FOR THE 'GREATER GOOD'?

On 3rd January 2017, WarHead, the administrator of the child sexual abuse forum, Childs Play, posted this status update, together with two child sexual abuse pictures:

> I hope that some of you were able to give a special present to the little ones in your lives, and spend some time with them. It's a great time of year to snuggle up near a fire, and make some memories.

Childs Play was at that point the largest online forum for child sexual abuse material, with more than 1 million user registrations. It was closed down by law enforcement in September 2017 - a full 11 months after the arrest of the administrator, WarHead. In the 11 months after WarHead's arrest, the website was run by Task Force Argos, a specialised unit under the Australian Police. The status update, including the child sexual abuse pictures, was in fact posted by investigator Paul Griffith.[1]

During the time the forum was run by police, thousands of users shared child sexual abuse material, and even set up meetings to sexually abuse children, film the abuse and upload it on Childs Play. As seen above, police themselves actively engaged in disseminating material to uphold their cover and ensure users would not get suspicious and delete their profiles, as this would have hampered the objective of the operation: to arrest perpetrators, identify victims, and rescue children from ongoing abuse.[2]

But to what extent can law enforcement justify these methods? Is committing criminal offences such as the dissemination of child sexual abuse material for the 'greater good' acceptable? Every instance of dissemination of child sexual abuse material contributes to the perpetuation of such abuse and hence Task Force Argos actively contributed to the re-traumatisation of the child survivors.

By the same token, there are strong arguments in favour of the legalisation of such police operations, or, rather, an exemption of prosecution for such offences. In particular when attempting to infiltrate child sexual abuse fora which are based on user registration, the prospective user is expected to share child sexual abuse material as an 'entry ticket'.[3] This *do ut des* principle ('I give, so that you may give') serves a twofold purpose. First, the administrators of the forum ensure confidentiality amongst the users, as every user has committed a criminal offence and disclosure would lead to self-incrimination. Secondly, they ensure that the prospective user is not a law enforcement officer: as most countries do not allow police to commit offences even during undercover operations, the *do ut des* principle provides an automatic filtering system against police infiltration.

Under fairly restricted conditions, the Australian legislation exempts participants in 'controlled operations' from prosecution for a variety of offences, including the dissemination of child sexual abuse material.[4] This legislative authority created the enabling environment for

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[1] Håkon F. Høydal/Einar Otto Stangvik/Natalie Remøe Hansen, *Breaking the Dark Net: Why the police share abuse pics to save children*, VG News, 7 October 2017, available at: https://www.vg.no/spesial/2017/undercover-dark-web/?lang=en (accessed 25 June 2018).

[2] *Ibid.*

[3] A famous example for this approach was the interaction in the 'Dreamboard' online community. See Warren Binford et al., *Beyond Paroline: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad*, Children's Legal Rights Journal, Vol. 35 (2015), p. 120; Bernd-Dieter Meier, *Kinderpornographie im Internet: Ergebnisse eines Forschungsprojekts* in: Dieter Dölling/Jörg Jehle, *Täter – Taten – Opfer: Grundlagenfragen und aktuelle Probleme der Kriminalität und ihrer Kontrolle*, Neue Kriminologische Schriftenreihe, Mönchengladbach 2013, p. 386

[4] See Crimes Act 1914 (Cth) pt IAB, available at: https://www.legislation.gov.au/Details/C2018C00200 (accessed 25 June 2018); Commonwealth Ombudsman, *A report on the Commonwealth Ombudsman's activities in monitoring controlled operations*, Canberra 2016, available at: https://www.ombudsman.gov.au/__data/assets/pdf_file/0024/37446/Controlled-Operations-Annual-Report-2014-15-Pdf-version-from-printers.pdf (accessed 25 June 2018)

the police activities under Task Force Argos. In contrast, many other countries do not allow police officers to engage in criminal activities, even if it serves the purpose of an undercover investigation. Germany was one of those countries – but that recently changed. During the Ministers of Justice Conference held on 6 and 7 June 2018, the Ministers decided to explore the opportunity of using computer-generated material (so-called virtual child sexual abuse material) for such purposes and exempt police officers from prosecution accordingly.[5] The Minister of Justice from Hesse, a German state, went even a step further by considering the use of actual child sexual abuse material if the victim consented to the usage of his or her material for such police operations.[6]

It is against this background that this Chapter, after giving a brief overview of the legal situation in Germany (II.), provides an in-depth analysis of whether the dissemination of real and computer-generated child abuse material could achieve its stated objective (III.). This question is then discussed within the broader context of rule-of-law considerations (IV.), before a final conclusion is drawn (V.).

II. THE CURRENT LEGAL SITUATION IN GERMANY

Sections 184b and 184c of the German Penal Code broadly criminalise the creation, possession, and dissemination of 'child pornography' (the depicted child is below the age of 14 years) and 'adolescent pornography' (the depicted child is above the age of 14 years but below the age of 18). Further, the provisions refer to 'real or realistic conduct', which shows that computer-generated depictions are also covered, as long as they seem 'realistic' to the objective viewer.[7]

Sections 184(b)(5) and 184(c)(6) of the German Penal Code do not make punishable the dissemination and possession of child sexual abuse material if such conduct exclusively serves the fulfilment of lawful official or professional duties. A typical example is the sharing of such material with the digital forensics laboratory or other third parties, which assists police with the investigation or lawfully participates in the criminal justice process.[8] The intent and purpose of the norm therefore suggest that both distributor and recipient need to participate in such transfer based on lawful official or professional duties. Although one might argue that police disseminate the material to a child sexual abuse forum on the dark web as part of their lawful official duty to investigate crime, the recipient of the material, the 'target' of the investigation, aims to possess the material for his or her sexual gratification, and not for the fulfilment of a lawful official duty. Hence, the exemption clause in the German Penal Code does not apply in such circumstances.[9]

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[5] See 89. Konferenz der Justizministerinnen und Justizminister 2018, *TOP II.9 Beschluss: Effektive Verfolgung und Verhinderung von Kinderpornographie und Kindesmissbrauch im Darknet durch die ausnahmsweise Zulassung von sog. Keuschheitsproben für Verdeckte Ermittler*, available at: http://www.jm.nrw.de/JM/jumiko/beschluesse/ 2018/Fruehjahrskonferenz_2018/II-9-BY--Effektive-Verfolgungund-Verhinderung-von-Kinderpornografie-und-Ki ndesmissbrauchim-Darknet.pdf (accessed 27 June 2018).

[6] Marcus Sehl, *Rechtsstaat reloaded in Eisenach*, Legal Tribune Online, 6 June 2018, available at: https://www.lto.de/recht/justiz/j/jumiko-eisenach-cannabis-kinderpornografie-vollverschleierung-verfassungsschutzpruefung/ (accessed 27 June 2018); Philipp Hedemann, *Wie Hessen die verdeckten Ermittler stärken will*, Rhein-Neckar-Zeitung, 5 June 2018, available at: https://www.rnz.de/politik/suedwest_artikel,-kampf-gegen-kinderpornographie-wie-hessen-die-verdeckten-ermittler-staerken-will-_arid,363440.html (accessed 27 June 2018).

[7] Karl Lackner/Kristian Kühl, *Strafgesetzbuch Kommentar*, München 2018, § 184b, para. 6; Wolfgang Mitch, *Fehlvorstellungen über das Alter der Darsteller bei Kinder- und Jugendpornographie*, §§ 184b, c StGB, Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 124 (2012), p. 325.

[8] Lackner/Kühl, *Strafgesetzbuch Kommentar*, para. 8; *Münchener Kommentar zum Strafgesetzbuch*, §184b, München 2017, para. 45 *et seq.*

[9] For a divergent legal position, see Marco Gercke, *Brauchen Ermittlungsbehörden zur Bekämpfung von Kinderpornographie im sog. 'Darknet' weitergehende Befugnisse?*, Computer und Recht 2018, para. 12 *et seq.*

In contrast, it is common practice in other areas of criminal activity, namely the field of illicit drug trafficking, that police in undercover operations attempt to sell or buy drugs. Therefore, it has to be considered under which circumstances these actions are regarded as lawful and whether such an approach is transferrable to the dissemination of child sexual abuse material. An important aspect of these operations in the area of illicit drug trafficking is that police arrest the suspect before he or she can secure final possession of the drugs. In such cases, police have not committed a criminal offence, as the *mens rea* element regarding the completion of the drug deal is missing: the police officer never intended to facilitate final possession.[10]

This legal approach will not hold in the situation discussed in this article, as police definitely intend to disseminate 'child pornography' and do not intervene before the dissemination is finalised. The offence does not remain in the attempt stage but is completed: once the material is shared, police have naturally lost control over it. The dynamics of the online sphere change the situation significantly. In summary, while in the cases of illicit drug trafficking the protective purpose of the norm is not violated, the opposite is the case in disseminating child sexual abuse material. Such police interventions infringe the depicted child's right to dignity, corporal integrity, and informational self-determination. Therefore, the German approach to illicit drug trafficking – besides not being covered by a formal exception clause – is fundamentally different from the subject matter discussed in this Chapter.

The current legal situation in Germany hence does not allow police to disseminate online child sexual abuse material for investigative purposes.

III. OF CONSENT, RIGHT TO PRIVACY AND ENDS-MEANS RELATIONS

Authorising police to disseminate either 'real' child sexual abuse material with the consent of the victim or virtual child sexual abuse material would not achieve the declared objective. The following sections explain why this is so.

A. Dissemination of 'real' child sexual abuse material

As proposed by the Hessian Minister of Justice, police should be authorised to disseminate child sexual abuse material with the consent of the victim to enable police to infiltrate child sexual abuse fora. This proposal is problematic for several reasons, and interestingly so: on the one hand, it is too far-reaching, while on the other, it is too limited.

Regarding the first component, the dissemination of any child sexual abuse material means, as mentioned before, continuous traumatisation of the victim. Knowing that the reality of the abuse is kept alive through dissemination is one of the most traumatic aspects of online child sexual abuse.[11] Given this context, it seems like a fair proposal to disseminate content only with the consent of the depicted victim, but this sounds much easier than it is in reality.

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[10] Klaus Weber, *Betäubungsmittelgesetz Kommentar*, §4 para. 234, München 2017; Mark Deiters, *Straflosigkeit des agent provocateur*?, Juristische Schulung (2006), p. 303.

[11] Najat M'jid Maalla, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, A/HCR/12/23 (13 July 2009), pp. 10 *et seq.*; ITU, *Guidelines for Policy-makers on Child Online Protection*, Geneva 2009, p. 19; Alisdair A. Gillespie, *Child Pornography. Law and Policy*, London 2011, pp. 31–33; UNICEF, *The State of the World's Children 2017*, New York 2017, p. 76; for the powerful victim impact statement on this subject matter in Paroline v United States, 134 S. Ct. 1710 (2014), see Binford et al., *Beyond Paroline: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad*, p. 121; further, it has to be kept in mind that some children depicted in child sexual abuse material might not even be aware that such material has been produced and disseminated, raising the question of whether such persons should even be informed, see Suzanne Ost/Alisdair A. Gillespie, *To know or not to know: should*

First, this proposal seems to operate on the basis that the victim has in the meantime reached the age of majority (18 years in Germany). Only then is a person legally capable of consenting to the proposed usage of the abuse material. Furthermore, the traumatic impact of the dissemination is not predictable: many victims live in a constant state of anxiety about whether and when the material will surface again and if someone will recognise or expose them.[12] Once they give consent and the police start with the dissemination, victims might only at this point realise that it is absolutely certain that people have access to their material.[13] The reaction of the victim to that realisation is not predictable. If the victim then changes his or her mind about the previously given consent, the decision to upload the material cannot be revisited, as the material can never be removed again: the damage is irreversible.[14]

Secondly, if a victim has only recently been identified, it means that the victim must be a child and hence is probably still below the age of 18 years. Whether a child can give consent to the dissemination of his or her own sexual abuse material would depend on the developmental capacity of the concerned child. Children can give consent, as long as they have the mental and developmental capacity to assess the significance and scope of the decision: there is no age determination for this criterion and the matter is decided instead on a case-by-case basis. However, if a child is too young to be capable of consenting, the question arises whether the parents or legal guardians can give consent on his or her behalf. Both scenarios are alarming: even if a child is considered capable of consenting, comprehensive support mechanisms need to be put in place to assist the child with the decision. Even in such a context, the abovementioned concern about the irreversibility of the decision remains. If the parents or legal guardians were indeed to make the decision, the child's right to privacy might be infringed at its core, which raises questions about the constitutionality of a provision that transfers the decision-making power in such a case to the parents or legal guardians. It is therefore submitted that children cannot consent to the dissemination of their own abusive material for investigative purposes.

The proposal is at the same time not far-reaching enough from a 'demand-supply' perspective. If the material is so old that the depicted victim is not a child anymore and can therefore consent to its dissemination, it is very unlikely that the objectives of the dissemination could still be achieved. The child sexual abuse material 'market' evolves quickly, with 'fresh' material constantly being uploaded. The number of files available online is as unknown as the number of victims; there is no international data on the scope of the offence. The reason for the lack of international data is that the standard of what content is considered 'child pornography' differs from country to country. Further, many countries, especially in Africa and Asia, do not collect data on it.[15] Material which is potentially a couple of years old, depending on the time of the child's abuse, might have lost its 'value' significantly, as it is likely that most users know the material already. As such, the only safe 'entry ticket' to the forum is first-generation material. Keeping in mind the abovementioned concerns about getting the consent of a minor victim, the only way to successfully infiltrate child sexual abuse fora is to allow the police to share the material without the consent of the victim. In this regard, the proposal is too limited. However, whether the dissemination of material without the consent of the victim is justifiable overall is a different question, which will be discussed at a later stage.

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crimes regarding photographs of their child sexual abuse be disclosed to now-adult, unknowing victims?, International Review of Victimology, Vol. 25 (2018), pp. 223-247.

[12] Ateret Gewirtz-Meydana et al., *The complex experience of child pornography survivors, Child Abuse and Neglect,* Vol. 80 (2018), p. 244.

[13] For a summary of studies assessing the effect of online child sexual abuse on the victims, see Binford et al., *Beyond Paroline: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad*, p. 127.

[14] Additionally, it has to be kept in mind that young adults who have experienced online child sexual abuse tend to show higher levels of psychopathology (see Ateret Gewirtz-Meydan et al., *Psychopathology amongst adult survivors of child pornography,* Child Abuse and Neglect, Vol. 98 (2019), p. 9) and hence are potentially even more vulnerable to secondary trauma.

[15] ECPAT, *Child pornography: An international perspective*, presented at the World Congress against Commercial Sexual Exploitation of Children, 2004, http://www.crime-research.org/articles/536 (accessed 1 July 2018).

B. Dissemination of computer-generated child sexual abuse material

After debating the original proposal at the Ministers of Justice Conference, the federal Ministry of Justice was tasked to investigate whether authorisation at least of the dissemination of computer-generated material is legally possible. Although there are various categories of computer-generated material,[16] it is assumed that the proposed authorisation would entail only computer-created images, as these types of images do not involve the depiction of real children whatsoever.[17] If no child is harmed in the production of such material, one might wonder why many countries, including Germany, even criminalise the production, dissemination and possession of computer-generated child sexual abuse material (also called virtual child sexual abuse material). Depending on the country, the justification for the criminalisation ranges from an increased risk of accessing 'real' child sexual abuse material and committing contact child sexual abuse offences to the effect of normalising child sexual abuse through the legalisation of such material.[18] In this regard, it seems hypocritical to declare the dissemination of virtual child sexual abuse material by police as harmless, whereas the law criminalises the exact same behaviour if conducted by any other person. The rationale for criminalising virtual child sexual abuse material should not be trivialised solely because the dissemination is initiated by police.

Besides the potentially harmful effects of disseminating virtual child sexual abuse material, it is questionable whether its dissemination would suffice for the intended purpose of infiltrating child sexual abuse fora. Although very realistic material can be produced,[19] insiders would probably find it easy to differentiate real from computer-generated material, and hence it might not have the same effect as sharing 'real' child sexual abuse material. Even if police were authorised to download ('take possession') of computer-generated material for further dissemination in undercover operations, similar problems around first-generation material might occur. This could lead to the peculiar situation in which police are forced to produce their own computer-generated material. This is not only cost-intensive but raises questions about the proportionality of ends and means.

IV. RULE OF LAW OR THE CONCEPT OF THE LESSER EVIL?

The rule of law is the cardinal principle for ensuring that, inter alia, the various branches of government are bound by the constitutional order, law and justice.[20] While the state through criminal law and its enforcement can hold members of the public accountable for breaching laws, the state itself is through the rule of law bound by the norms it establishes. The state is

[16] For an in-depth discussion of these categories, see Gillespie, *Child Pornography. Law and Policy,* pp. 98–100.
[17] Gillespie, *Child Pornography. Law and Policy,* p. 100.
[18] For an analysis of international law and national law from the US, Canada, Japan and South Africa on this issue, see Chapter II or Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 1*, Computer and Telecommunications Law Review, Issue 3 (2018), pp. 61 *et seq.*; and Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 2*, Computer and Telecommunications Law Review, Issue 4 (2018), pp. 73 *et seq.*
[19] See, for example, the Terre des Hommes Netherlands' project 'Sweetie' here: https://www.terredeshommes.nl/en/sweetie-20-stop-webcam-childsex (accessed 23 June 2018); for a legal assessment of the Sweetie operation, see Bart W. Schermer et al., *Legal Aspects of Sweetie 2.0*, Leiden / Tilburg: Center for Law and Digital Technologies (eLaw) / Tilburg Institute for Law Technology and Society (TILT), Leiden 2016.
[20] See, for example, art. 20(3) of the German Constitution (Basic Law), available at: https://www.gesetze-im-Internet.de/englisch_gg/ (accessed 1 July 2018).

hence the guardian and role model of the rule of law: it is not above the law. This principle ensures that people's liberty is protected by means of limitation of the state's power.[21]

In the criminal justice field, this means that police are generally not allowed to commit criminal offences or violate human rights even if it serves the 'greater good'. A fairly extreme incident that sparked public debate on the permissibility of police committing a crime for the 'greater good' was the Daschner case. In this case, the police – upon instruction of the deputy head of police in Frankfurt am Main, Germany, one Wolfgang Daschner – threatened a child-murder suspect with torture if he did not disclose the location of the child victim. The police thereby intended to save the life of the child whom they deemed still to be alive. Several courts ruled that the instruction amounted to inhumane treatment, and Daschner was thereafter convicted. His intention to save the child was not considered a lawful justification for his actions: the Frankfurt am Main Regional Court held that even in such a case, the right to human dignity is not violable, and thus ruled that the threat of torture could not be justified under German law (LG Frankfurt/Main, 20.12.2004 - 5/27 KLs 7570 Js 203814/03 (4/04)). This has been confirmed by the European Court of Human Rights (Gäfgen v Germany, No. 22978/05), which held that 'this method of interrogation constituted inhuman treatment as prohibited by Article 3'.[22]

The current debate on the dissemination of child sexual abuse material for investigative purposes touches upon the same principles, but in an even more aggravated manner: whereas in the abovementioned case, the human dignity of a murder suspect was at stake, it is the human dignity and right to privacy of an abuse victim in the present case. Although an in-depth discussion of the rich legal theory and philosophical aspects of these scenarios exceed the scope of this Chapter,[23] the importance of the rule of law, and the indispensability of norms such as human rights, cannot be overemphasised.[24] Opening the door to a relativisation of the rule of law is a dangerous development, particularly at a time when the sacrifice of human rights in the name of safety and security seems to have become an increasingly popular (and acceptable) approach.

Despite the overwhelming rule-of-law concerns, such an exemption provision also faces severe challenges in the implementation stage. First, the dissemination of child sexual abuse material needs to be an *ultima ratio* intervention; hence, it should be acceptable only as a measure of last resort. This means an exemption provision would have to rely on generic terms such as 'exceptional circumstances' and 'proportionality'. Until case law defines these terms more narrowly and sets clear boundaries for such police interventions, police operate in a legal vacuum, which is particularly problematic bearing in mind the serious effects of the dissemination of child sexual abuse material for the victim. Furthermore, stringent authorisation levels are required to ensure that the proportionality of the planned operation is comprehensively assessed in advance and to guarantee sufficient judicial supervision. The European Court of Human Rights has also stressed the importance of clear and foreseeable procedures for any such authorisation and the need for judicial supervision.[25]

Depending on the nature of the operation and the circumstances of the case, there are related concerns about the violation of fair-trial principles, as the police operation could amount to

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[21] Alfredo Narváez Medécigo, *Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico*, Berlin 2016, p. 158; Christoph Degenhart, *Staatsrecht I. Staatsorganisationsrecht*, Heidelberg 2016, pp. 59–60.

[22] For a case summary, see Richard Bernstein, *Kidnapping Has Germans Debating Police Torture*, New York Times, 10 April 2003, available at: https://www.nytimes.com/2003/04/10/world/kidnapping-has-germans-debating-police-torture.html, (accessed 1 July 2018).

[23] For the so-called 'ticking time-bomb scenario', see Niklas Luhmann, *Are there still indispensable norms in our society?*, Soziale Systeme, Vol. 14 (2008), pp. 18–37; Jeremy Bentham, *Means of extraction for extraordinary occasions*, 1804.

[24] For an in-depth discussion of the constitutional and international law issues, see Matthias Jahn, *Gute Folter — schlechte Folter? Straf-, verfassungs- und völkerrechtliche Anmerkungen zum Begriff »Folter« im Spannungsfeld von Prävention und Repression*, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, 2004, pp. 24-49.

[25] European Court of Human Rights, *Furcht v Germany*, No. 54648/09, para. 53.

entrapment or incitement to criminal offences. In *Furcht v Germany*, the European Court of Human Rights set out strict criteria 'to distinguish police incitement, or entrapment [...] from the use of legitimate undercover techniques in criminal investigations'.[26] The criteria developed by the Court include the reasons underlying the covert operation, the conduct of the authorities carrying it out, as well as whether there were any objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence.[27] Disregard of these criteria leads to the inadmissibility of the evidence.[28] Similar concerns have been raised in the context of the Sweetie 2.0 operation by Terre des Hommes, which used a child avatar styled as a 10-year-old Filipino girl to catch perpetrators on child sexual abuse websites.[29]

In setting the criteria for distinguishing between enticement and legitimate undercover techniques, the Court seems to be arguing on the premise that the action undertaken by police targets one identified suspect. However, when gaining access to a dark web forum by sharing online child sexual abuse material, police might not target a specific suspect at that point in time, but rather use the exchange of the material to gain access to a large pool of suspects. This might turn the police operation into a fishing expedition. Although it is fairly obvious that members of a child sexual abuse forum have committed or are predisposed to commit a criminal offence, the prosecution would have to establish the above criteria for each and every person on the forum.

This shows that the proposed authorisation faces serious challenges not only with regard to the rule of law, but so too in its implementation.

V. CONCLUSION

Running a child sexual abuse portal such as Childs Play is perhaps an extreme example of an undercover investigation. However, it shows to what extent police could use such legal authority. Following the completion of this particular operation, it remains unknown how many children were rescued and how many perpetrators successfully brought to justice. The Argos commander, Insp. Jon Rouse, said it had led to 'significant rescues of children globally' and the arrest of 'serious criminal child sex offenders'.[30] However, based on the above analysis, it is clear that dissemination of child sexual abuse material for investigative purposes is not a number game. Ultimately, police are 'trading the degradation of a child to stop the abuse of another child'.[31]

Despite the serious concerns raised with regards to this proposal, the Bundesrat (Federal Council) has proposed the introduction of such extended police authority as part of a revision of the Criminal Code in October 2019.[32] Even though the revision of the Criminal Code proposed by Cabinet originally aimed at solely strengthening the regulation of cyber-grooming, the Bundesrat recommended that in the context of improving the safety of children online, the sharing

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[26] European Court of Human Rights, *Furcht v Germany*, No. 54648/09, para. 50–53; Robert Esser, *Implementation of Judgments of the ECtHR in the Area of Criminal Law and Criminal Procedure Law from a German Perspective*, Journal of Siberian Federal University, Humanities and Social Sciences, Vol. 6 (2017), pp. 877 *et seq.*
[27] European Court of Human Rights, *Furcht v Germany*, para. 50.
[28] *Ibid.*, para. 64.
[29] Schermer et al., *Legal Aspects of Sweetie 2.0*, p. 52.
[30] Christopher Knaus, *Australian police sting brings down paedophile forum on dark web,* The Guardian, 7 October 2017, available at: https://www.theguardian.com/society/2017/oct/07/australian-police-sting-brings-down-paedophile-forum-on-dark-web (accessed 6 July 2018); Høydal/Stangvik/Hansen, *Breaking the Dark Net: Why the police share abuse pics to save children*, VG News, 7th October 2017, available at: https://www.vg.no/spesial/2017/undercover-dark-web/?lang=en (accessed 25 June 2018).
[31] Alisdair. A Gillespie, *Cybercrime. Key Issues and Debates*, Oxon 2019, p. 362.
[32] Gesetzentwurf der Bundesregierung, BT-Dr. 19/13836 (9 October 2019), p. 15.

of virtual child sexual abuse material should be legalised as part of undercover operations.[33] Therefore, the initially proposed sharing of child sexual abuse material with the consent of the depicted child has not been carried through into the proposed amendment – for very good reasons, as discussed above. Interestingly, the legalisation of sharing of virtual child sexual abuse material by law enforcement is justified by the Bundesrat by stating that no legally protected interest of third parties are concerned.[34] As mentioned earlier, this argument is inconsistent with the will of the legislator to declare even virtual child sexual abuse material harmful and hence illegal under German law. This connotation of harmfulness attached to virtual child sexual abuse material does not change depending on the sender – the harmful impact on children *in abstracto* is the same, even if the material is shared by law enforcement as part of an undercover operation.[35] The introduction of such extended police authority has been heavily criticised by the opposition party B90/Grüne. Apart from opposing the narrative that crime could be fought by committing more crime, they caution that such fora on the dark web will as a response to the changed legislation simply raise their entry level requirements, either towards videos instead of photos, as the former are more difficult to produce, or potentially towards more brutal, explicit material.[36] On 17 January 2020, the Bundestag (Parliament) adopted the proposed amendment to the Criminal Code. However, Members of Parliament felt that such an authority should be further limited, and hence added to the amendment that the virtual child sexual abuse material used for the operation cannot be based on material depicting actual children, that the dissemination of such material requires judicial approval and that it can only be applied as an *ultima ratio* measure.[37] In this regard, the Bundestag followed the proposals previously made by the Committee on Legal Affairs and Consumer Protection.[38]

Online child sexual abuse is a highly complex and emotive topic. The political will to improve the police's capacity to respond to it is certainly welcome, and given that online and offline child sexual abuse does not receive the public attention it warrants, the discussion at the Ministers of Justice Conference and the legislative efforts to strengthen the protection of children online is genuinely a step in the right direction. However, the proposals seem to be more about political feel-good than solid, evidence-based interventions, and are regarded with scepticism even by the German police union.[39] This approach is particularly dubious considering the

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[33] *Ibid.*
[34] *Ibid.*, p. 16.
[35] For further discussion on this topic, see Chapter II.
[36] Sabine Menkens, *Um in die Foren zu kommen, müssen Kinderpornos geliefert werden*, WELT, 21 November 2019, available at: https://www.welt.de/politik/deutschland/article203673432/Darknet-Um-in-die-Foren-zu-kommen-muessen-Paedophile-Kinderpornos-liefern.html (accessed 14 January 2020).
[37] Original text of amendment of the Criminal Code (in German) available at: https://www.gesetze-im-internet.de/stgb/BJNR001270871.html (accessed 13 May 2020):
‚Absatz 1 Nummer 1 und 4 gilt nicht für dienstliche Handlungen im Rahmen von strafrechtlichen Ermittlungsverfahren, wenn

1. die Handlung sich auf eine kinderpornographische Schrift bezieht, die kein tatsächliches Geschehen wiedergibt und auch nicht unter Verwendung einer Bildaufnahme eines Kindes oder Jugendlichen hergestellt worden ist, und
2. die Aufklärung des Sachverhalts auf andere Weise aussichtslos oder wesentlich erschwert wäre.'

Further, the Criminal Procedure Act has been amended as follows (in German), available at: https://www.gesetze-im-internet.de/stpo/BJNR006290950.html (accessed 26 May 2020):
‚Einsätze, bei denen entsprechend § 184b Absatz 5 Satz 2 des Strafgesetzbuches Handlungen im Sinne des § 184b Absatz 1 Nummer 1 und 4 des Strafgesetzbuches vorgenommen werden, bedürfen der Zustimmung des Gerichts. In dem Antrag ist darzulegen, dass die handelnden Polizeibeamten auf den Einsatz umfassend vorbereitet wurden. Bei Gefahr im Verzug genügt die Zustimmung der Staatsanwaltschaft. Die Maßnahme ist zu beenden, wenn nicht das Gericht binnen drei Werktagen zustimmt. Die Zustimmung ist schriftlich zu erteilen und zu befristen. Eine Verlängerung ist zulässig, solange die Voraussetzungen für den Einsatz fortbestehen.'
[38] Beschlussempfehlung und Bericht des Ausschusses für Recht und Verbraucherschutz, BT-Dr. 19/16543 (15 January 2020), p. 5.
[39] Tagesschau, *Mit Fake-Bildern gegen Kinderpornos*, 7 June 2018, available at: https://www.tagesschau.de/inland/justizminister-kinderpornografie-101.html (accessed 2 July 201).

child-rights violations at issue and the fact that it involves subverting the rule of law as a fundamental principle of the German legal order.

CHAPTER VI: TRANSNATIONAL BY DEFAULT: CONTEXTUALISING CROSS-BORDER LAW ENFORCEMENT COLLABORATION IN ONLINE CHILD SEXUAL ABUSE CASES

Abstract

Combatting child sexual abuse on the Internet requires a high level of harmonisation of both substantive and procedural laws, as online child sexual abuse is transnational by default. In order to prosecute and investigate online child sexual abuse across country borders, states heavily rely on extraterritorial jurisdiction clauses as well as informal and formal law enforcement collaboration channels. This paper analyses existing channels in the OPSC, Budapest Convention and Lanzarote Convention, particularly against the background of the recently published CRC Committee Guidelines regarding 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 (CRC/C/156), and provides for concrete guidance on how to ensure that the best interests of the child in the investigation and prosecution of transnational crimes such as online child sexual abuse is the primary consideration.

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I. TRANSNATIONAL BY DEFAULT: ONLINE CHILD SEXUAL ABUSE RESPECTS NO BORDERS

> Anna is a seven-year-old girl who was born and lives in the Netherlands as a Dutch national together with her father, a German national. On a family holiday to Canada, her father, together with a Canadian family friend, takes a video of them jointly sexually abusing Anna and uploads it to an open-source website. The website is hosted on an American server. Ever since, the video has been downloaded thousands of times. Law enforcement officials in South Africa find the material on a computer they seize from a suspected child sex offender, who possessed the material for private use only, and manage to identify Anna. Anna's father, the Canadian family friend and the South African client are arrested.

This case study is fictitious, but children worldwide share Anna's destiny. While sexual abuse used to be restricted to the homes and communities where children live, with the advent of the Internet and increased globalisation they are at risk of sexual exploitation not only by people in their surroundings but, increasingly, by offenders far afield who use the realm of the Internet.[1]

Combating child sexual abuse on the Internet requires a high level of harmonisation of both substantive and procedural laws, as such abuse is transnational by default: while the transnational nature of child sexual abuse material used to be the exception before the advent of the Internet, it is now the rule. In order to follow this shift in offending behaviour and avoid the creation of 'safe havens', countries require harmonised legal mechanisms to facilitate the investigation and prosecution of offences beyond their territorial borders.[2] Inasmuch as the harmonisation of substantive laws is hampered by varying constitutional, moral and ethical concerns at a national level,[3] so procedural law in many cases also fails to provide for harmonised standards in adjudicating and investigating cybercrime.[4] Traditionally, the power to investigate and prosecute offences, including the claiming of jurisdiction, was tied to the territory of each state. This territoriality principle is founded in the protection of state sovereignty, a core value protected under international customary law.[5] If a state intends to claim jurisdiction outside its territory or investigate an offence in the territory of another state, special bilateral mechanisms are required to ensure that sovereignty of the other state is not violated.[6]

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[1] UNICEF, *State of the World's Children*, New York 2017, p. 71.
[2] UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, New York 2013, p. 60.
[3] While the role of international law traditionally is to set a minimum standard for national legislators, international treaties dealing with the regulation of child sexual abuse material provide varying standards (Alisdair A. Gillespie, *Cybercrime. Key Issues and Debates*, Oxon 2019, p. 238), which makes it difficult for countries who ratified various instruments to decide which standard to adhere to (Alisdair A. Gillespie, *Child pornography in international law* in: Ethel Quayle/Kurt M. Ribisl (eds.), *Understanding and Preventing Online Child Sexual Exploitation and Abuse*, Oxon 2012, p. 74); for a comprehensive discussion of emerging forms of online child sexual abuse such as virtual child sexual abuse material and self-generated imagery and the relevant international legal instruments, see Chapter II and III or Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 1*, Computer and Telecommunications Law Review, Issue 3 (2018); Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 2*, Computer and Telecommunications Law Review, Issue 4 (2018); Sabine K. Witting, *Regulating bodies: the moral panic of child sexuality in the digital era*, Critical Quarterly for Legislation and Law, Vol. 1 (2019).
[4] Miriam F. Miquelon-Weismann, *The Convention on Cybercrime: A Harmonized Implementation of International Penal Law: What Prospects for Procedural Due Process?*, Journal for Computer & Information Law, Vol. 32 (2005), p. 335.
[5] Cedric Ryngaert, *The Concept of Jurisdiction in International Law* in: Alexander Orakhelashvili, *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham 2015, p. 51; Anna-Maria Osula, *Transborder access and territorial sovereignty*, Computer Law and Security Review, Vol. 31 (2015), p. 722; UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, p. 184.
[6] *Ibid.*, pp. 184–185.

In the realm of the Internet, these principles are complicated by the architecture itself of the cyberspace. As the Internet knows no borders, crimes are naturally committed across numerous jurisdictions. Perpetrators can easily hide their identities, and the evidence they leave (if any) is highly ephemeral and easily removed, altered or hidden.[7] As will be discussed below, determining whether an offence was committed in or outside a state's territory is increasingly difficult. In Anna's case, was the online child sexual abuse offence committed on the territory of Canada, seeing as the material was uploaded there? Or in the US, which was the location of the server onto which the material was uploaded? As for the investigation of the offences, are Dutch law enforcement authorities allowed to conduct open-source investigation of the American server, or is this considered an extra-territorial activity that could violate US sovereignty and that hence requires US consent? Given the volatile nature of digital evidence, which channels could the Netherlands leverage to obtain such evidence expeditiously yet while obeying Dutch law of evidence rules so as to ensure the admissibility of the evidence in Dutch courts? In summary, the key questions that need to be answered are:

- Does the country have jurisdiction? What happens if more than one country claims jurisdiction?
- If the country requires investigative support from another country, how can such collaboration be facilitated in a timely and efficient manner? If the country needs to extradite, how can this be accomplished?
- How can transnational law enforcement mechanisms take the specific considerations of child victims into account?

To facilitate such transnational law enforcement collaboration, states depend largely on both formal and informal collaboration channels. While informal collaboration mechanisms are based on transnational police networks or peer-to-peer police support,[8] formal collaboration channels are rooted in bi- and multilateral mutual legal assistance and extradition agreements, which play a key role in ensuring that evidence can be obtained outside a state's territory.[9] The most important international instruments to facilitate such collaboration in the area of online child sexual abuse are the UN Convention on the Rights of the Child's Optional Protocol on the sale of children, child prostitution and child pornography (OPSC), the Council of Europe Convention on Cybercrime (hereafter Budapest Convention) and the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (hereafter Lanzarote Convention). All three Conventions not only provide guidance to states on the regulation of online child sexual abuse,[10] but also include provisions on jurisdiction, mutual legal assistance, extradition and other transnational law enforcement mechanisms. This highlights the importance that transnational collaboration mechanisms have in combating online child sexual abuse effectively.

Therefore, this Chapter aims to analyse the comprehensiveness and effectiveness of the transnational law enforcement mechanisms contained in the abovementioned international instruments. Anna's case will assist in understanding the complexities of jurisdiction, mutual legal assistance and extradition in instances of online child sexual abuse. The OPSC, Budapest Convention and Lanzarote Convention have been chosen for this analysis, as the OPSC is the most ratified Convention dealing specifically with child sexual abuse material, the Lanzarote Con-

[7] Roderic Broadhurst, *Developments in the global law enforcement of cyber-crime*, Policing: an international Journal of Police Strategies and Management, Vol. 29 (2006), p. 431; Jan-Jaap Oerlemans, *Investigating cybercrime*, Amsterdam 2017, p. 1.
[8] UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, pp. 208–209.
[9] UNODC, *Manual on Mutual Legal Assistance and Extradition*, New York 2012, p. 19.
[10] For a comparative analysis of the child sexual abuse material offences in the OPSC, Budapest Convention and Lanzarote Convention, see UNICEF, *Regulation of Child Online Sexual Abuse. Legal Analysis of International Law & Comparative Legal Analysis*, Windhoek 2016.

vention, the most recent child protection convention with a focus on child sexual abuse material, and the Budapest Convention, the most ratified international cybercrime treaty.[11] Furthermore, this Chapter aims to identify specific considerations in transnational law enforcement with regard to cases of online child sexual abuse and provide recommendations on how a child-centred approach to transnational law enforcement can contribute to ensuring that the best interests of the child are the paramount consideration throughout the formal justice process.

II. (EXTRA)TERRITORIAL JURISDICTION

Before exploring the jurisdiction clauses in the OPSC, Budapest Convention and Lanzarote Convention, this Chapter briefly introduces the concept of jurisdiction. Analyses of the treaty-specific jurisdiction clauses will be followed by a discussion of the determination of intra- and extra-territoriality and the dissolution of jurisdictional conflicts by applying the 'rule of reason'.

A. The concept of jurisdiction

To understand the concept of jurisdiction, it is crucial to grasp its interlinkages with the principle of state sovereignty, which is protected under customary international law.[12] The principle of sovereignty entails that states shall not 'interfere in any form or for any reason whatsoever in the internal and external affairs of other States'.[13] The principle is expressed in various forms of jurisdiction, i.e. jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce.[14] Jurisdiction to prescribe covers a state's power to regulate the actions and activities of certain people by law, policy or administrative act, while the jurisdiction to adjudicate means a state's power to submit certain persons or entities to its courts. Lastly, the jurisdiction to enforce entails a state's power to enforce its laws through means of executive or administrative acts, i.e. compel compliance or punish non-compliance.[15] In summary, the power to regulate, adjudicate and enforce is at the core of a state's 'internal affair'.

As sovereignty in the context of the Westphalian bent of the international legal order is derived from the notion of territorially separate nation states, the predominant factor in determining the reach of a state's sovereignty is its territory.[16] Therefore, jurisdiction is generally based on two principles: territoriality and extra-territoriality.[17] As extra-territorial jurisdiction potentially violates the sovereignty of another state, the default rule is that extra-territorial jurisdiction can only be exercised if there is a specific permissive rule.[18] There are various approaches on how to establish extra-territorial jurisdiction. The most important component is the link to the asserting state, which can be established in different ways. For example, an asserting state

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[11] The 2000 United Nations Convention against Transnational Organized Crime covers only transnational offences committed by an organised criminal group (arts. 2, 3). As online child sexual abuse offences can, but do not always, form part of organised crime, this Convention will be excluded.
[12] UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, p. 184.
[13] See art. 1 of the UN General Assembly, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States*, A/RES/36/103 (9 December 1981).
[14] Ryngaert, *Research Handbook on Jurisdiction and Immunities in International Law*, pp. 15–17; Osula, *Transborder access and territorial sovereignty*, p. 721.
[15] Dan Svantesson/Felicity Gerry, *Access to extraterritorial evidence: The Microsoft cloud case and beyond*, Computer Law and Security Review, Vol. 31 (2015), p. 480; Susan W. Brenner/Bert-Jaap Koops, *Approaches to Cybercrime Jurisdiction*, Journal of High Technology Law, Vol. 4 (2004), pp. 5–6; Osula, *Transborder access and territorial sovereignty*, p. 721.
[16] Stephan Kolossa, *The charm of jurisdictions: a modern version of Solomon's judgment?*, Voelkerrechtsblog, 5 June 2019, available at: https://voelkerrechtsblog.org/the-charm-of-jurisdictions-a-modern-version-of-solomons-judgment/ (accessed 1 August 2019); Ryngaert, *Research Handbook on Jurisdiction and Immunities in International Law*, p. 51; Osula, *Transborder access and territorial sovereignty*, p. 722.
[17] Gillespie, *Cybercrime. Key Issues and Debates*, p. 290.
[18] Kolossa, *The charm of jurisdictions: a modern version of Solomon's judgment?*.

justifies a link to its home country based on the nationality of either the offender ('active personality principle') or the victim ('passive personality principle'), the state's interest in protecting its country from a national threat ('protective principle'), or its interest in relying on universal jurisdiction for a small number of 'international crimes'.[19] As online child sexual abuse is not generally recognised as international crime and does not pose a national threat to states,[20] this Chapter will focus only on the active and passive personality principle.

Although the range of a state's extra-territorial jurisdiction is ultimately determined at a national level, international conventions such as the OPSC, Budapest Convention and Lanzarote Convention provide guidance on the range of jurisdiction clauses by which to establish a harmonised approach that respects state sovereignty and balances it against the states' interests to investigate and prosecute offences which affect them.

B. Jurisdiction clauses in relevant international conventions

This section will provide an overview of the nature and range of jurisdiction clauses in the OPSC, Budapest Convention and Lanzarote Convention.

1. Article 4 of the OPSC

Article 4 of the OPSC provides for a territorial and extra-territorial jurisdiction provision in cases of article 3(1) OPSC offences, i.e. sale of children, child prostitution and child pornography.

a) Wording and interpretation

Article 4(1) prescribes that 'each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, when the offences are committed in its territory or on board a ship or aircraft registered in that State'. Article 4(1) of the OPSC therefore establishes territorial jurisdiction, including ships or aircrafts registered in the concerned state. The term 'shall' shows that this is an obligatory clause for all state parties.

Article 4(2) of the OPSC extends the range of jurisdiction to offences committed outside the state's territory. The clause states:

> Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, in the following cases:
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> (a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory;
>
> (b) When the victim is a national of that State.

The term 'may' indicates that this extension to extra-territorial jurisdiction cases is merely optional for state parties. The extra-territorial jurisdiction clause encompasses both the active and passive personality principle. Additionally, it extends the active personality principle to persons who merely have their habitual residence in the state party, without being citizens. This

[19] Alisdair A. Gillespie, *Child Pornography. Law and Policy*, London, 2011, p. 304; Ryngaert, *Research Handbook on Jurisdiction and Immunities in International Law*, p. 51; for an in-depth analysis of the various forms of jurisdictions, see Danielle Ireland-Piper, *Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law*, Melbourne Journal of International Law, Vol. 13 (2012), pp. 131 *et seq.*
[20] Gillespie, *Child Pornography. Law and Policy*, p. 305.

extension is somewhat questionable, as a resident does not profit from the benefits and protections extended to citizens by their home state. While it is justifiable that a resident needs to obey the laws and rules of his or her host state while being on its territory, it seems less justifiable that the same applies if he or she is in a third country.[21]

Applying this to the case study, this would mean that the Netherlands could claim jurisdiction over Anna's father even though he is a German national and committed the offence while in Canada, merely because he resides permanently in the Netherlands. Although this construction evidently aims to avoid any jurisdictional loopholes particularly in the case of travelling sex offenders, it holds the risk that countries artificially extend their jurisdiction and impose their laws on citizens of other countries.

Following the *aut dedere aut iudicare* principle,[22] article 4(3) of the OPSC states that

> each State Party shall also take such measures as may be necessary to establish its jurisdiction over the abovementioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.

This means that a state that does not want to extradite one of its citizens for an offence he or she committed abroad has to establish jurisdiction over this offence.[23] Applying this to the case study, Germany could not refuse extradition of Anna's father while he is on German territory to either the Netherlands or Canada, while at the same time not establishing jurisdiction over the offence under German law. The clause effectively limits the optional character of article 4(2) of the OPSC, as it forces a member state to apply the active personality principle if it refuses to extradite one of its nationals.[24] However, the clause again aims to close any loopholes in jurisdictional matters arising in transnational child sexual abuse cases. Lastly, article 4(4) of the OPSC states that 'this Protocol does not exclude any criminal jurisdiction exercised in accordance with internal law'. This co-existence of jurisdiction based on international and national law reinforces the strong link between state sovereignty and jurisdiction, stressing the right of every state to regulate jurisdiction in its own way.

Although the jurisdiction clause in the OPSC is comprehensive, it excludes cases of attempt and complicity (regulated in art. 3(2) OPSC) by referring only to article 3(1) of the OPSC. Further, the optional character of the extra-territorial jurisdiction clause in article 4(2) carries the inherent risk of creating jurisdictional gaps and loopholes. Therefore, gaps and loopholes remain for matters of jurisdiction in the prosecution of sale of children, child prostitution and 'child pornography' offences.

b) The CRC Committee's Guidelines on the implementation of the OPSC

Given that the OPSC was adopted in 2000, it is clear that the provisions aiming to protect children from all forms of exploitation and abuse are at risk of failing to live up to the realities that children face in a highly digitalised and globalised world. Acknowledging the need to provide an interpretation of the OPSC which is in line with today's realities of child sexual abuse and exploitation, the CRC Committee recently published its Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of

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[21] Arguing that the assertion of jurisdiction over residents is in violation of international law, Ireland-Piper, *Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law,* p. 131; Gillespie, *Child Pornography. Law and Policy*, pp. 305 *et seq.*
[22] UNODC, *Manual on Mutual Legal Assistance and Extradition*, p. 50.
[23] UNICEF Innocenti, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, Florence 2009, p. 13.
[24] *Ibid.*

children, child prostitution and child pornography (hereafter the Guidelines), aiming thereby to enable better implementation of the OPSC.[25]

With regard to jurisdiction, the CRC Committee in the Guidelines encourages state parties to extend jurisdiction to victims with habitual residence in member states.[26] This recommendation is modelled on the jurisdiction clause in article 25 of the Lanzarote Convention, which will be discussed below. Furthermore, state parties are encouraged to abolish the principle of double criminality and establish universal jurisdiction over offences under the OPSC.[27]

During the drafting stage of the guidelines, the CRC Committee invited interested parties to provide written submissions on the Draft Guidelines.[28] Austria, among others, criticised the recommendation to extend the range of jurisdiction clauses to cover universal jurisdiction, as this could lead to an extensive violation of the principle of state sovereignty.[29] Although the expansion of universal jurisdiction beyond crimes such as genocide, crimes against humanity and war crimes to 'ordinary crimes' is not as uncommon as it may seem,[30] such broad jurisdiction does not solve the issue of cumbersome transnational law enforcement collaboration during the investigation stage. Austria therefore argued that state parties are sufficiently equipped with the existing jurisdiction regimes.[31] In regard to the differentiation between the jurisdiction to adjudicate and to enforce, the CRC Committee indeed seems to conflate the two terms, as the section on jurisdiction refers to 'investigate and prosecute'.[32] It has to be recognised that the jurisdiction to investigate extra-territorially is not governed by article 4 of the OPSC, but can only be facilitated by formal and informal law enforcement collaboration mechanisms: universal jurisdiction does not mean universal investigation. Despite these concerns of member states, the Committee in its final Guidelines maintained the section, 'encourag[ing] States parties to establish universal jurisdiction for all offences covered by the Optional Protocol'.[33]

Further, during the drafting stage the Czech Republic criticised the recommendation to abolish the double criminality standard,[34] as this seems to be inadequate particularly in cases of the passive personality principle (i.e. jurisdiction based on the nationality of the victim), as the offender might not have been familiar with the legal framework in the country of the victim's origin. This argument clearly needs to be rejected, as it gives a free pass to travelling sex offenders. While it is evident that the sexual offences laws vary in different countries, it seems fair to assume that people are generally aware that child sexual abuse and exploitation, in whatever form, might be considered illegal. As will be discussed below, article 25(4) of the

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[25] CRC Committee, *Guidelines regarding 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*, CRC/C/156 (10 September 2019), para. 1 and 9.
[26] *Ibid*., para. 83.
[27] *Ibid*., para. 84 and 87.
[28] For the draft Guidelines, see CRC Committee, *Guidelines 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 – Draft '0' – February 2019*, Geneva 2019, para. 1 and 11, available at: https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGuidelinesOPs.aspx (accessed 4 August 2019).
[29] Government of Austria, *Austrian comments on the DRAFT Guidelines 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*, 2019, available at: https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGuidelinesOPs.aspx (accessed 6 August 2019); Government of Japan, *Japan's Comments on the Draft Guidelines 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*, 2019, para. 28, available at: https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGuidelinesOPs.aspx (accessed 6 August 2019).
[30] According to Amnesty International, *Universal Jurisdiction – A preliminary survey of legislation around the world. 2012 Update*, London 2012, p. 13, 47.1% of UN member states have provided their courts with universal jurisdiction over ordinary crime.
[31] Government of Austria, *Austrian comments on the DRAFT Guidelines 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*, 2019.
[32] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 80 and 82.
[33] *Ibid*., para. 87.
[34] The double criminality standard means that the conduct has to be considered a criminal offence in both the requesting and the requested state. See UNODC, *Manual on Mutual Legal Assistance and Extradition*, p. 69.

Lanzarote Convention abolishes the double criminality requirement for offences typically committed by travelling sex offenders, as it risks considerable loopholes in the prosecution of such offences. Although the Guidelines appreciate the necessity of such abolition in the context of travelling sex offenders, they demand the abolishment of the double criminality standard for all offences criminalised under the OPSC.[35]

As mentioned above, it has to be noted that the abolishment of double criminality in the Lanzarote Convention is clearly limited to offences typically committed by travelling sex offender. For example, article 25(4) exempts the production of 'child pornography' from the double criminality standard but not the dissemination, possession or procuring of such material, as these are not typical offences committed by travelling sex offenders. As the double criminality standard in the context of jurisdiction aims to respect the law of the state in whose territory the crime was committed and ultimately avoid potential violation of this state's sovereignty by taking its laws into account, it might have been more balanced to adopt a limited abolition of double criminality in the Guidelines.

In summary, the Guidelines aim to interpret the OPSC in the light of the great technological development of the past two decades and strengthen the jurisdiction regime in transnational child sexual abuse cases. Concerns raised about universal jurisdiction and double criminality were not addressed in the final version of the Guidelines. Whether the latter have seized the opportunity to guide member states on child-centred jurisdiction, especially in regard to resolving jurisdictional conflicts will be discussed below.

2. Article 22 of the Budapest Convention

The 2001 Budapest Convention is the most ratified cybercrime treaty, with 64 state parties from in- and outside Europe.[36] The Convention contains a comprehensive set of provisions on substantive and procedural criminal law, while additionally addressing international cooperation as key element of the Convention. This strong commitment to international collaboration is highlighted in the preamble, which declares that 'an effective fight against cybercrime requires increased, rapid and well-functioning international cooperation in criminal matters'.[37] As article 9 of the Budapest Convention includes a detailed provision on 'child pornography', the jurisdiction clause in article 22 is also applicable in online child sexual abuse cases.

Article 22(1)(a)–(c) establishes jurisdiction over offences committed in the territory of a member state, on board a ship flying the flag of that party, or on board an aircraft registered under the laws of that party. Article 22(1)(d) extends jurisdiction to offences committed outside its territory, if the offence was committed 'by one of its nationals, and if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State'.

In contrast to the OPSC, the extra-territorial jurisdiction clause in the Budapest Convention is fairly limited. It does not acknowledge the passive personality principle and makes the active personality principle dependent on double criminality. While linking extra-territorial jurisdiction to the fulfilment of the double criminality standard is common in some countries,[38] it leaves a potential loophole in particular for travelling sex offenders. Given the wide variation

[35] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 84–85.
[36] See charts of signatures, ratifications and accessions available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures (accessed 20 January 2019).
[37] Preamble, Budapest Convention.
[38] Geoff Gilbert, *Responding to International Crime*, Leiden 2006, p. 109.

in standards of criminalising online child sexual abuse offences,[39] this extra-territorial jurisdiction clause creates the risk that offenders could go unpunished, in particular when committing an offence in a country with no or limited cyber-specific legislation. Additionally, according to article 22(2), state parties may reserve the right not to apply article 22(1)(b)–(d). Although article 22(4) states that 'this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with its domestic law', this leaves a considerable gap for asserting extra-territorial jurisdiction for state parties.

Lastly, article 22(5) addresses the issue of jurisdictional conflict. With the possibility of more than one country claiming jurisdiction over a cybercrime case, the Budapest Convention provides guidance on how to solve jurisdictional conflict. It states that 'when more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution'. The range of this provision and the solution of jurisdictional conflicts more broadly will be discussed below.

3. Article 25 of the Lanzarote Convention

The 2007 Lanzarote Convention is the most recent international convention with a focus on protecting children against sexual exploitation and abuse. With a total of 46 ratifications or accessions,[40] its support from the international community lags far behind that of the OPSC. However, as the Convention was adopted in 2007, it takes into account recent developments in the production and dissemination of child sexual abuse material and so is in some regards more comprehensive than the OPSC.[41] It adopts a holistic approach by providing for a comprehensive set of preventive and responsive measures. As for the latter, the Convention addresses both substantive and procedural law, as well as international cooperation. As online child sexual abuse is included in the substantive law chapter (art. 20), the jurisdiction clause in article 25 is applicable to these cases.

Article 25(1) establishes jurisdiction for offences committed on a party's territory, on board a ship flying the flag of that Party, on board an aircraft registered under the laws of that party, by one of its nationals or by a person who has his or her habitual residence in its territory. Regarding the last component, article 25(3) allows state parties to make reservations. Further, the state parties 'shall endeavour' to extend jurisdiction to offences which are committed against one of its nationals or a person who has his or her habitual residence in its territory. This is in line with the proposal of the CRC Committee in the Guidelines discussed above. However, it has to be noted that this extension to the passive personality principle and residents of a party's territory is a recommendation rather than a mandatory standard such as that in article 25(2) ('shall endeavour').[42]

To combat offences typically committed in the context of sex tourism, article 25(4) states that in cases of production of 'child pornography', among others, parties shall ensure that the double criminality standard is not applicable. As discussed above, this is in line with the recommendation made by the CRC Committee in its Guidelines. Complementing the abolition of double criminality in offences typically committed in the context of sex tourism, article 25(6) makes it obligatory for parties to ensure that its jurisdiction is not dependent on a report from

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[39] For an overview of differing legal standards, see UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, pp. 100–103.
[40] See charts of signatures, ratifications and accessions available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures (accessed 20 January 2020).
[41] See, for example, the exemption of consensual sexting between minors from the scope of the 'child pornography' provision in art. 20(3) Lanzarote Convention; for further analysis of the exemption clause, see Chapter III and Witting, *Regulating bodies – the moral panic of child sexuality in the digital era*, p. 5–34.
[42] Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, Strasbourg 2007, para. 170.

the victim or a denunciation from the state in which the offence was committed. This should ensure that in a situation where the state in which the offence was committed is not willing or able to investigate the matter, the state whose national committed the offence can still claim jurisdiction. Apart from the *aut dedere aut iudicare* clause in article 25(7), the Convention in its article 25(8) states that in case of more than one state claiming jurisdiction over a case, the states shall, where appropriate, consult to determine the most appropriate location of jurisdiction. This will be discussed in more detail below.

In summary, article 25 avails a comprehensive set of provisions to expand extra-territorial jurisdiction in regard to both the active and passive personality principle, including to offenders and victims who are merely habitual residents. The additional provisions applicable to offences typically committed in cases of travelling sex offenders show that the Lanzarote Convention responds adequately to the transnational nature of child sexual abuse and exploitation with regard to jurisdiction.

C. Determining (extra)territoriality in cyberspace

As discussed above, jurisdiction was traditionally based on the notion of territorial sovereignty. If an offence took place within a country's borders, territorial jurisdiction was established. While it is relatively easy to determine whether cattle had been stolen on the one or the other side of a border, the nature of cyberspace significantly complicates the determination of intra- and extra-territoriality.[43] As will be shown, the *sui generis* character of cyberspace leads to the effect that basically every country can claim jurisdiction over a cybercrime offence even though the link may seem fairly remote.

One way in which many countries establish a link between the offence and their territory is to ascertain the location of the act(s).[44] In attempting to locate where the act of disseminating child sexual abuse material took place in the case study,[45] one could argue that the material was uploaded in Canada and therefore that the act took place on Canadian territory. On the other hand, the act was initiated in Canada but only completed once the material actually reached the end user. As such, this would enable the South African authorities, among all the other countries in which the material was accessed, to claim jurisdiction. Furthermore, as the content was uploaded to an American server, and given that processing of the data is key to both initiating and completing the dissemination of the material, it could be argued that the substantial part of the act took place in the US. Given that the location of the act is ultimately determined by national courts when interpreting the jurisdiction clause in national legislation, it is fair to say that Canada, the US, South Africa and all other countries in which the material was accessed could claim territorial jurisdiction over Anna's case. This demonstrates that a single location is in most cases not determinable.

Apart from using the location of the act to determine territoriality, countries in their national legislation use the location of the computer, the location of the persons involved, or simply the harmful effect on their territories to determine territorial jurisdiction.[46] Adding extra-territorial jurisdiction claims based on the active and passive personality principle to the above territorial

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[43] Some have attempted to draw parallels between cyberspace, the high seas and outer space to determine national territory and 'international water'. However, these attempts have failed, as cyberspace is – unlike the high seas and outer space – not a global common, as it is 'man-made, fully intangible, [and] highly changeable'. See Kolossa, *The charm of jurisdictions: A modern version of Solomon's judgment?*; Alisdair A. Gillespie, *Jurisdiction issues concern online child pornography*, International Journal of Law and Information Technology, Vol. 20 (2012), pp. 155-156.

[44] Brenner/Koops, *Approaches to Cybercrime Jurisdiction*, pp. 10 *et seq*; UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, pp. 192–194.

[45] The contact offence and the production of child sexual abuse material clearly took place on Canadian territory. These offences need to be separated from the dissemination of child sexual abuse material online through uploading.

[46] Brenner/Koops, *Approaches to Cybercrime Jurisdiction*, pp. 10 *et seq*; UNODC, *Comprehensive Study on Cybercrime Draft—February 2013*, pp. 192–194.

jurisdiction claims, Canada, America, South Africa, Germany, the Netherlands and all other countries in which the material depicting Anna's sexual abuse was accessed or downloaded could claim jurisdiction over the case. The sheer magnitude of the (legitimate) jurisdiction claims is rooted in the fact that, ultimately, states can regulate jurisdiction as extensively as they wish. The notion of respect for other countries' sovereignty is not a limiting factor at a national level, and hence national legislation cannot be measured against any conflicting superior law. Even international law such as the OPSC, Budapest Convention and Lanzarote Convention acknowledge that their proposed jurisdiction clauses do not undermine existing clauses in national legislation. This strong protection of jurisdictional discretion should be welcomed, as a jurisdictional gap seems unlikely, but it could also lead to jurisdictional conflicts. These will be discussed in the next section.

D. Jurisdictional conflicts

Given the various sources of jurisdictional claims in the area of online child sexual abuse offences, jurisdictional conflicts seem inevitable. As mentioned above, both the Budapest and the Lanzarote Convention contain clauses on jurisdictional conflict. According to article 22(5) of the Budapest Convention, parties shall, where appropriate, consult with a view to determine the most appropriate jurisdiction. As the wording indicates, this obligation is not absolute, but depends on the specific case.[47] The jurisdictional conflict clause in the Lanzarote Convention is worded and interpreted similarly.[48] This generic clause unfortunately does not give sufficient guidance on how to concretely resolve jurisdictional conflicts, as guiding factors are missing.

Accordingly, the 'rule of reason' has been introduced to solve jurisdictional conflicts in cybercrime cases.[49] The 'rule of reason' entails that the valid assertion of jurisdiction will only be lawful if exercised reasonably, i.e., after State courts and regulators have balanced the different interests involved in a transnational situation before establishing their jurisdiction, and – quite probably – applying their own law. Ultimately, the 'rule of reason' aims at 'identifying the State with the strongest connection, in terms of contacts or interests, with the situation'.[50] The obvious flaw in this 'rule of reason' is its subjectivity. What is considered the strongest connection in a specific case can and will be interpreted differently by various states.[51] Further, given that the rule will be interpreted by the judiciary and that the subject matter touches on political questions regarding foreign relations and hence on the core business of the executive, it could cause unease within the different branches of government against the background of the separation of power.[52]

This shows that there is a clear need for internationally agreeable factors to guide negotiations between states in determining the closest link to the case.[53] Given that cases dealing with online child sexual abuse material produce highly traumatised (child) victims, it is submitted that the 'rule of reason' in such cases should not necessarily aim to establish which state has the closest link to the offence, but rather which state can best serve the interests of the child victim. Child-centred factors aiming at putting the best interests of the child victim at the centre of the negotiations will therefore be discussed below.

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[47] Council of Europe, *Explanatory Report to the Convention on Cybercrime*, Strasbourg 2001, para. 239.
[48] See art. 25(8) Lanzarote Convention and Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para. 175.
[49] Ryngaert, *Research Handbook on Jurisdiction and Immunities in International Law*, p. 56.
[50] *Ibid.*
[51] *Ibid.*, p. 57.
[52] *Ibid.;* another, more practical proposal to solve jurisdictional conflicts is based on the fact that jurisdiction is only valuable if it is enforceable. As enforceability requires custody over the suspect, this should be determining factor for solving jurisdictional conflicts. See Alisdair A. Gillespie, *Cybercrime. Key Issues and Debates*, Oxon 2019, pp. 299 – 300.
[53] Brenner/Koops, *Approaches to Cybercrime Jurisdiction*, p. 42.

III. MUTUAL LEGAL ASSISTANCE AND EXTRADITION

Once a state has established its jurisdiction to adjudicate, it starts the investigation of the online child sexual abuse case at hand. Due to the transnational nature of such offences, the state might be dependent on gathering evidence located outside its territory. As discussed previously, the jurisdiction to investigate is rooted in the principle of sovereignty of states.[54] Therefore, if state A intends to investigate a crime on the territory of state B, state B needs to generally give consent to such an investigation.[55]

The volatile nature specifically of digital evidence requires a prompt and efficient transnational law enforcement mechanism to obtain such consent.[56] Such a mechanism is key to ensuring that online child sexual abuse offences are investigated beyond, and despite, country borders. Traditionally, such transnational collaboration is facilitated by mutual legal assistance (hereafter MLA) and extradition requests. MLA in criminal matters is defined as 'a process by which States seek and provide assistance in gathering evidence for use in criminal cases'.[57] Extradition in turn is

> the formal process by which one jurisdiction asks another for the enforced return of a person who is in the requested jurisdiction and who is accused or convicted of one or more criminal offences against the law of the requesting jurisdiction.[58]

In view of the volatile nature of such evidence, on the one hand, and the delay in obtaining such evidence caused by formal requests, on the other, the state's interest in protecting its sovereignty often clashes with the need for speedy and efficient transnational procedures. Therefore, law enforcement relies not only on traditional MLA and extradition requests, but a variety of informal or accelerated means to obtain extra-territorial evidence. Given the *sui generis* character of cyberspace, and with it the conflation of intra- and extra-territoriality, this Chapter will explore how formal and informal collaboration mechanisms are regulated in the OPSC, Budapest and Lanzarote Convention.

A. Introduction to mutual legal assistance and extradition mechanisms

MLA and extradition regimes are in most countries governed by a two-pronged system comprising national legislation and bi- or multilateral treaties. While national legislation sets out the domestic procedure for facilitating the requests, many countries require a bi- or multilateral treaty regulating and legitimising such requests at a transnational level with the requesting or receiving state.[59] This dual legal regime of MLA and extradition poses significant challenges to state collaboration, as it puts the threshold for satisfying the legal requirements of both states fairly high. Seeing as it is extremely cumbersome for a state to enter into bilateral agreements

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[54] *Ibid.*, pp. 5–6; Susan W. Brenner, *Cybercrime and the Law: Challenges, Issues, and Outcomes,* Boston 2012, p. 171.
[55] Oerlemans, *Investigating cybercrime*, p. 57; for an in-depth analysis of trans-border access and breach of sovereignty, see Osula, *Transborder access and territorial sovereignty*, pp. 725 *et seq.*
[56] Anna-Maria Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, Masaryk University Journal of Law and Technology, Vol. 9 (2015), p. 46.
[57] UNODC, *Manual on Mutual Legal Assistance and Extradition*, p. 19.
[58] *Ibid.*, p. 41.
[59] *Ibid.*, pp. 21–22; if there is no treaty in place, a requesting country is entirely dependent on the willingness of the requested law enforcement authority, see Oerlemans, *Investigating cybercrime*, p. 63.

with any other state,[60] the value of MLA and extradition clauses in multilateral treaties such as the OPSC and Budapest and Lanzarote Convention cannot be overstated.

Furthermore, the traditional MLA and extradition processes were developed in the 1970s, that is to say before the era of cybercrime.[61] Therefore, they might not be tailored for such an ever-changing field, as they do not take the volatile nature of digital crime scenes into account. Formal processes in particular in the area of MLA take a long time and are cumbersome. It can take months and years to obtain crucial evidence needed for an ongoing investigation.[62] Given that in online child sexual abuse cases the depicted child might be under continuous threat of further abuse and exploitation, the situation places immense pressure on law enforcement.

As mentioned, further bottlenecks are the varying legal standards at national level regarding the requirements and processes of MLA and extradition requests. Although an analysis of national level legislation exceeds the scope of this Chapter, it is important to note that national legislation applicable to MLA and extradition in cybercrime cases exists in two-thirds of countries in Africa, Asia and Oceanica as well as nearly all the countries in Europe.[63] However, most of it is not cyber-specific.[64] Keeping in mind that the majority of countries are not part of cyber-specific multilateral treaties, the execution of specialised cybercrime investigation is considerably hampered.[65] Moreover, the capacity at national level to execute such requests, particularly in conducting cyber-specific investigation and evidence collection, varies greatly between countries and adds a further barrier in the executing stage.[66]

Even though this introduction might paint a grim picture of the status of MLA and extradition regimes in the area of cybercrime in general and online child sexual abuse in particular, there is an urgent need to conceptualise existing regimes and rethink traditional concepts in order to make them suitable for investigating online child sexual abuse cases. Against this background, the next section will analyse the range and challenges of MLA and extradition clauses in the OPSC, Budapest and Lanzarote Convention. We will also explore child-centred standards that in the execution of such requests ensure a child-friendly and victim-oriented criminal justice procedure.

B. MLA and extradition in relevant international conventions

This section will analyse the MLA and extradition regulations in the OPSC, Budapest Convention and Lanzarote Convention. While the OPSC and Lanzarote Convention contain only skeletal extradition and MLA clauses, the Budapest Convention provides for a comprehensive and cyber-specific set of collaboration regimes.

1. Articles 5-7 and 10 of the OPSC

MLA and extradition are regulated in articles 5-7 and 10 of the OPSC. This section will analyse the wording and interpretation of the relevant provisions and discuss their expansion to cases of mere possession and accessing of online child sexual abuse material.

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[60] UNODC, *Manual on Mutual Legal Assistance and Extradition*, pp. 21.
[61] Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, p. 46.
[62] Philip J. Pullen, *Nail in the MLAT Coffin: Examining Alternatives Solutions to the Current Mutual Legal Assistance Treaty Regime in International Cross-Border Data Sharing*, North Carolina Journal of International Law, Vol. 44 (2018), p. 4; Jean-Baptiste Maillart, *The limits of subjective territorial jurisdiction in the context of cybercrime*, ERA Forum 2019, p. 384; Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, p. 51.
[63] UNODC, *Comprehensive Study on Cybercrime Draft - February 2013*, p. 200.
[64] *Ibid*.
[65] *Ibid.*, p. 202.
[66] *Ibid.*, p. 143.

a) Wording and interpretation

Article 5(1) of the OPSC states that offences referred to in article 3(1) shall be considered extraditable offences in existing extradition treaties and be included as extraditable offences in future extradition treaties. The reference to article 3(1) of the OPSC shows that this should not apply to attempts to commit and complicity in committing 'child prostitution', sale of children and 'child pornography' offences, as this is regulated in article 3(2) of the OPSC.[67] However, the CRC Committee encourages state parties to extend the application of extradition provisions to article 3(2) OPSC offences.[68] Article 5(2) of the OPSC provides that in the event that a state party makes extradition dependent on the existence of an international treaty, the OPSC shall serve as legal basis for such an extradition request. Given that 176 states have ratified the OPSC,[69] the provision can facilitate extradition between these states, subject to their respective domestic legislation. Additionally, where a state does not make extradition dependent on the existence of a treaty, the state party should recognise article 3(1) OPSC offences as extraditable offences according to article 5(3) of the OPSC. Article 5(5) concludes with the *aut dedere aut iudicare* principle.[70]

When it comes to MLA requests, the provisions in the OPSC are generic. Article 6(1) prescribes that state parties shall 'afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings, […] including assistance in obtaining evidence'. In terms of article 7 of the OPSC, they shall provide for the seizure or confiscation of goods and proceeds. Nevertheless, it seems unlikely that data could be subsumed under the terms 'goods' or 'proceeds', with the result that a key source of evidence in online child sexual abuse cases is not covered by this provision. Finally, article 10(1) of the OPSC requires states to 'take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the […] investigation, prosecution and punishment' of article 3(1) OPSC offenders. This should extend to law enforcement and judiciary, as well as to partnerships set up with the private sector and civil society organisations to develop technological solutions to improve investigation and prosecution.[71] The OPSC provides for a strong extradition regime but a very generic MLA one. The deficiencies in its MLA provisions can be seen as an indication that, the time of the drafting of the protocol in the 1990s, the phenomenon of online child sexual abuse offences had only recently come to light.[72]

b) Expansion to mere possession and accessing?

Given the importance of these regimes to online child sexual abuse cases, the CRC Committee in its Guidelines envisions a strengthening of some of the generic provisions.[73] However, one major gap in the Guidelines is the non-applicability of the OPSC extradition and MLA provisions to cases of mere possession and accessing of child sexual abuse material. This is not criminalised by article 3(1)(c) of the OPSC ('producing, distributing, disseminating, importing, exporting, offering, selling or possessing [child pornography] for the above purposes').[74] In our

[67] UNICEF Innocenti, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, p. 14.
[68] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 89.
[69] For a full list of ratifications and accessions, see http://indicators.ohchr.org (accessed 19 August 2019).
[70] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 88.
[71] *Ibid.*, para. 111.
[72] UNICEF Innocenti, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, p. viii.
[73] See, for example, concrete proposals for international cooperation in CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 109.
[74] See in-depth deliberations on this issue in Chapter II.

case study, the South African client who downloaded Anna's material possessed it only for his private use, hence not 'for the above purposes', which include distributing, disseminating, importing, exporting, offering, or selling it. On the basis of the wording of the extradition and MLA clauses in articles 5(1) and 6(1) of the OPSC, any extradition or MLA request extended to South African authorities could not be based on the OPSC. The same applies to the live-streaming of child sexual abuse material, as the accessing of material without possession for further purposes is not covered either by article 3(1) of the OPSC.[75] Given in particular that live-streaming of child sexual abuse is an emerging trend,[76] the OPSC leaves a considerable gap for extradition and MLA requests in such cases.

It is recommended that, to prioritise the principle of the best interests of the child in article 3(1) of the CRC, the MLA and extradition provisions in articles 5–7 and 10 of the OPSC be interpreted as covering not only article 3(1) OPSC offences, but also the attempt to commit and complicity in committing such offences, as set out in article 3(2) of the same, as well as the mere possession and accessing of child sexual abuse material.

2. Articles 23–35 of the Budapest Convention

The Budapest Convention is the only international treaty with cyber-specific MLA and extradition provisions.[77] Chapter III (International cooperation) contains extradition provisions and a wide range of MLA ones that apply even where no MLA treaty exists between the parties. Specific provisional MLA regulations are complemented by a 24/7 network for speedy mutual assistance among parties. As in-depth discussion of the MLA provisions exceeds the scope of this Chapter, this section focuses on articles 23–25 of the Budapest Convention, in addition to which it offers a brief overview of the further MLA provisions in articles 26–35.

Article 23 outlines three general principles of international cooperation. First, it should be provided 'to the widest extent possible'. Secondly, the scope of the provisions in Chapter III are not limited to the offences set out in the substantive criminal law provisions (arts. 2–12) but apply to 'criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence' (with the exception of articles 24, 33 and 34). The wording extends the applicability of Chapter III excessively, as it applies to any offence involving a computer system or data, or any form of electronic evidence.[78] This broad range of application, and therewith flexibility of interpretation, allows for an evolving applicability of the provisions, dynamically following the latest developments in the area of cybercrime. Lastly, the parties shall co-operate 'in accordance with the provisions of this chapter and through the application of relevant international instruments on international cooperation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic laws'.

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[75] Art. 3(1)(c) OPSC does not criminalise the accessing of child sexual abuse material and hence leaves a considerable gap for live-streaming of child sexual abuse material; even though the CRC Committee in its Guidelines acknowledges live-streaming as emerging trend (CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 2), it is surprising that it fails to consequently recommend the criminalisation of 'accessing' child sexual abuse material (see CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 65, only recommending the criminalisation of 'mere possession').

[76] ECPAT, *Trends in online child sexual abuse material,* Bangkok 2018, p. 29; UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015, pp. 22–23.

[77] Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, p. 49.

[78] Council of Europe, *Explanatory Report to the Convention on Cybercrime*, para. 243; for an argument that the broad range of the Budapest Convention does not safeguard the proportionality of the intervention, see Hosuk Lee-Makiyama, *A Multilateral Legal Assistance Protocol: Preventing Fragmentation and Re-territorialisation of the Internet*, ECIPE Policy Briefs No. 9/2013, p. 6; for criticism of outsourcing the general proportionality standard to domestic law while providing for intrusive procedural measures at the international level, see Miquelon-Weismann, *The Convention on Cybercrime: A Harmonized Implementation of International Penal Law: What Prospects for Procedural Due Process?*, pp. 355 *et seq.*

This confirms the principle that any existing international or national cooperation mechanism shall not be superseded by the Budapest Convention.[79]

The extradition clause in article 24 is, according to paragraph 1, only applicable to offences established in articles 2–11 of the Budapest Convention, and only if they are punishable with a minimum sentence of one year under the law of both parties concerned. Article 24(2) requires that state parties include these offences as extraditable offences in any existing and future extradition treaty. According to article 24(3), state parties can use the Budapest Convention as a legal basis for extradition if a party makes extradition conditional on the existence of an international treaty. Further, extradition shall be subject to the conditions provided for by the law of the requested party or by applicable extradition treaties (art. 24(5)), while the *aut dedere aut iudicare* principle is embedded in article 24(6).[80] Lastly, article 24(7) requires all state parties to communicate the name and address of the authority in charge of making and receiving extradition requests. This aims to ensure the smooth and timely processing of extradition requests, particularly where there is no extradition treaty between the parties involved.[81]

Over and above these generic extradition and MLA clauses, the Budapest Convention provides a set of additional MLA clauses focusing on MLA in the absence of an MLA treaty (arts. 27-28), MLA regarding provisional measures (arts. 29-30) and MLA regarding investigative powers (arts. 31-34). Articles 27 and 28 apply only if there is no other MLA regime between the parties that could be utilised for the request. The drafters of the Budapest Convention decided against the establishment of a general MLA regime that could be applied in the absence of an existing treaty, arguing this could lead to confusion among parties about competing MLA regimes.[82] However, to provide state parties with an instrument for rapid response in 'emergency' situations, articles 27 and 28 provide for rules and procedures on the request and execution of MLA requests outside an existing MLA regime, with the matters covered including the imposition of conditions, grounds of refusals, confidentiality of requests, limitation of use, and direct communication.[83]

Furthermore, in articles 29 and 30 the Budapest Convention sets out provisional measures for the preservation of data, which take the volatile nature of digital evidence into account.[84] Notably, a requested party can expedite the preservation of computer data stored in its territory while the requesting party is preparing the official MLA request, this to ensure that the data is not altered, removed or deleted.[85] Lastly, articles 31–34 avail a comprehensive set of MLA provisions regarding investigative powers, including the accessing of stored computer data on another party's territory (art. 31), transborder access to stored computer data without consent or where publicly available (art. 32), real-time collection of traffic data (art. 33), and interception of content data (art. 34). The provisions aim to strike a balance between the protection of state sovereignty and the need for prompt and efficient transborder investigation of cybercrime.

In view of its broad set of extradition and MLA provisions, the Budapest Convention is clearly tailored to the specific needs of addressing cybercrime. In order to further strengthen the MLA regime in the Budapest Convention, the Council of Europe in 2017 started the process of drafting a second additional protocol to the Convention, which focuses – inter alia - on developing simplified MLA procedures, facilitate direct cooperation between judicial authorities in MLA

[79] Council of Europe, *Explanatory Report to the Convention on Cybercrime*, para. 244.
[80] *Ibid*., para. 251.
[81] *Ibid.*, para. 252.
[82] *Ibid.*, para. 262.
[83] *Ibid.*, para. 264 and 275.
[84] Osula, *Mutual Legal Assistance & Other Mechanisms for Accessing Extraterritorially Located Data*, p. 50.
[85] Council of Europe, *Explanatory Report to the Convention on Cybercrime*, para. 282; according to Amalie M. Weber, *The Council of Europe's Convention on Cybercrime*, Berkeley Technology Law Journal, Vol. 18 (2003), p. 434, procedural errors in the preservation of the data can still be rectified before the data is officially handed over.

requests and establish joint investigations and investigation teams.[86] In conclusion, the Budapest Convention remains the only international cybercrime treaty with cyber-specific MLA and extradition provisions, even though some of its provisions might be outdated by now.

3. Article 38 of the Lanzarote Convention

The international cooperation chapter in the Lanzarote Convention is fairly short and consists only of general principles and measures for international cooperation. Given that the Council of Europe has put a comprehensive set of MLA and extradition treaties in place,[87] the drafters felt there is no need to duplicate it.[88] While the reasoning is evidently that most of the parties to the Lanzarote Convention are also party to these MLA and extradition treaties, this creates a potential gap for state parties who ratify only the Lanzarote Convention.

Article 38(1) requires state parties to collaborate with each other to the 'widest extent possible' in the areas of prevention, protection and investigation concerning the offences enumerated in this Convention. Article 38(2) establishes a mechanism whereby victims can file a complaint before the competent authorities in their state of residence even if the offence were committed outside the territory of the state of residence; the state of residence may then decide whether it intends to take the case forward or instead refer it to the authorities in the country where the offence took place. This victim-friendly procedure aims to make it easier for victims to report offences under the Lanzarote Convention.[89] Furthermore, article 38(3) provides that if state parties require a bilateral treaty to facilitate MLA or extradition requests, they 'may consider this Convention the legal basis for mutual legal assistance in criminal matters or extradition in respect of the offences established in accordance with this Convention'. The provision bridges the gap between state parties that are not otherwise interconnected through any of the above-mentioned or other MLA and extradition treaties.

IV. CHILD SPECIFIC CONSIDERATIONS IN TRANSNATIONAL LAW ENFORCEMENT

Both the determination of appropriate jurisdiction and the procedure of MLA and extradition in online child sexual abuse cases require that the states concerned apply a child-centred lens to all their proceedings.[90] As has been demonstrated, in view in particular of the best-interests principle, there is a strong need to resolve jurisdictional conflicts; by the same token, MLA and extraditions need to be carried out in a child-friendly and victim-centred manner. Accordingly, this section makes recommendations to facilitate transnational law enforcement collaboration in the area of jurisdiction, MLA and extradition in such a way as to avoid secondary traumatisation of the child victim during criminal justice procedures and uphold the paramountcy of the best interests of the child.

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[86] Council of Europe, *Terms of Reference for the Preparation of a Draft 2nd Additional Protocol to the Budapest Convention on Cybercrime*, Strasbourg 2017.
[87] For example the European Convention on Extradition (ETS 24), the European Convention on Mutual Assistance in Criminal Matters (ETS 30), their Additional Protocols (ETS 86, 98, 99 and 182), and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141).
[88] Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para. 253.
[89] Council of Europe, *Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, para. 258–259.
[90] Stressing that the rights of the child should remain at the centre of every investigative process, UNICEF, *Child Safety Online. Global Challenges and Strategies*, New York 2012, p. 81.

A. The best interests of the child as key factor in jurisdictional conflicts

As discussed above, the 'rule of reason' is currently applied to resolve jurisdictional conflicts between states, the aim being to establish which state can reasonably claim the closest connection to an offence by applying territoriality as decisive factor. The CRC Committee in its Guidelines seems to follow this approach as well in declaring that 'the State in which the offence was committed is primarily responsible for the investigation and prosecution of the offender'.[91] Baring in mind the difficulties of determining *where* the offence was committed in the first place, and given that online child sexual abuse has a major impact on the physical and mental well-being of the child victim,[92] the 'rule of reason' approach in such cases should focus not on what is the closest connection to a state's territory but on which of the states could best serve the interests of the child victim. Avoiding secondary trauma caused by the criminal justice process is therewith the key consideration in advancing the best interests of the child.

Article 3(1) of the CRC states that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. Similarly, article 30(1) of Lanzarote Convention requires 'each Party [to] take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child'. The best interests of the child are a principle, a substantive right and a rule of procedure.[93] In terms of the latter, this means that in any decision-making process the impact of the decision on the child must be evaluated.

Against the background of solving jurisdictional conflicts, this section identifies factors that could guide states in determining which jurisdiction is the most suitable to serve the best interests of the offended child. What is suggested is an ecological approach that assesses the child's situation holistically at an individual, family, community and societal level.[94] It therefore takes the child's identity and needs as the starting-point, while also considering the situation of his or her family and community as well as the child-friendliness of the criminal justice system.[95] This approach also draws on factors the CRC Committee has enumerated to assist in determining the best interests of the child.[96] Which decision serves the best interests of the child must be determined on a case-by-case basis.[97] As such, the list of factors is not exhaustive and not all of them have to be considered in each and every case. The primary aim is to effect a mind-shift from a territory- to a child-focused 'rule of reason' test in jurisdictional conflicts.

1. The child's identity and needs

The child's identity should be at the core of any assessment of his or her best interests when determining the most reasonable place of jurisdiction. This includes taking cognisance of the

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[91] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 82.
[92] Ateret Gewirtz-Meydana et al., *The complex experience of child pornography survivors*, Child Abuse and Neglect, Vol. 80 (2018), p. 244.
[93] CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14 (29 May 2013), para. 6.
[94] For the (socio-)ecological model see Daniel Kardefelt-Winther/Catherine Maternowska, *Addressing violence against children online and offline*, Nature Human Behaviour (2019); UNICEF, *The Child Witness: A Training Manual*, Windhoek 2019, p. 9.
[95] *Ibid.*
[96] See CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, para. 52–79.
[97] *Ibid.*, para. 32.

child's vulnerability and need for safety and protection.[98] Children who have experienced online sexual abuse might face considerable mental and physical consequences.[99] To stabilise them and assist in their recovery, a consistent and supportive environment is key. The need for this is heightened depending on the developmental stage of the child, as stability and consistency in the immediate environment are even more important for younger children than older ones. Furthermore, a child's general vulnerability plays a key role, for example if the child is living with a disability, or needs access to special medicines or medical services.[100]

These factors come into play when determining the most suitable place of jurisdiction in that the assertion of jurisdiction outside the child's country of residency might mean that he or she is removed from his or her usual environment in order to participate in the criminal justice process abroad, either *in persona* or via teleconferencing or other technological means. This could have an adverse effect on the child's well-being. Removing the child from the usual environment might be interpreted by him or her as punishment, which could impair his or her confidence and, consequently, the quality of his or her statement.

Relating these factors to the case study, Anna's developmental stage and her strong need for consistency as a seven-year-old child needs to be taken into account. Further, given that the contact offence (i.e. sexual abuse) as well as the production and (at least partly) the dissemination of the child sexual abuse material took place on Canadian territory, and assuming that Canada would assert jurisdiction, Anna may feel as if she were being punished by being forced to return to (or at least collaborate with) the country where the abuse took place. This could have an overall negative impact on her willingness to participate in the criminal justice process and/or the quality of her testimony.

2. The role of family and community

Children's relationships with their families and communities are crucial factors in assessing which location of jurisdiction serves their best interests. A child's family and community are the environment in which the child understands, relates and associates. As the overall stability of this context influences the resilience of the child and the chances for recovering from the abuse, the consistency of the child's position in the family and the community needs to be considered. Many survivors of child sexual abuse wish to return to a sense of normality: they want to live lives like those of other children who have not been sexually abused.[101] Access to health services, including psychological or therapeutic support, and access to education are considered part of the community environment and hence the structure of a child's daily life.[102] Particularly in a context where the sexual abuse was committed by a family or community member and the child's relationship to these systems is therefore jeopardised, the child's reintegration and re-establishment of relationships and trust in family and community are key.[103] Healing the 'relational injury' is a precondition for re-establishing the child's ability to bond

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[98] In line with factors set out by CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, para. 52–79.
[99] Devika Ghimire/Victoria M. Follette, *Revictimisation – Experiences related to Child, Adolescent and Adult Sexual Trauma* in: Melanie P. Duckworth/Victoria M. Follette, *Retraumatization: Assessment, Treatment, and Prevention*, New York 2012, p. 31; describing online child sexual abuse as a 'layering of harm', UNODC, *Study on the Effects of New Information Technologies on the Abuse of Children*, New York 2015, pp. 19-20; Gewirtz-Meydana et al., *The complex experience of child pornography survivors*, Child Abuse and Neglect, p. 244.
[100] CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, para. 75–76.
[101] ECPAT/University of Bedfordshire, *Connecting the Dots: Supporting the Recovery and Reintegration of Children Affected by Sexual Exploitation*, Bangkok 2017, p. 15.
[102] *Ibid.*, p. 83.
[103] In the general context of stability and child development, stating that 'the higher the levels of instability are within a family, the higher the levels of maladjustment that can be expected', Stephen Baldridge, *Family Stability and Childhood Behavioral Outcomes: A Critical Review of the Literature*, Journal of Family Strengths, Vol. 11 (2011), p. 9.

with others.[104] The process should not be constrained by removing the child from this context, even if it is only for a short period. In this context, the impact of interrupting the child's therapy or schooling needs to be considered as well. Further, it has to be noted that even if the child is accompanied by a trusted parent or caregiver when participating in the criminal justice process outside the country of residency, the exposure to a new environment, one possibly including a foreign language and culture, might have a negative impact on the child.

In Anna's case, the fact that her father was involved in the abuse would, almost needless to say, impact massively on the family situation. These negative effects on the stability and health of the family life require extensive reintegration and redefinition efforts by Anna and her family. This could also extend to the community in a broader sense. It means that removing Anna from this familiar context is even more difficult than otherwise, as the trust she had in her support structure is likely to have been broken by the intrafamily abuse.

3. Child-friendliness of the criminal justice system

Another factor to take into consideration when determining the most appropriate location of jurisdiction in online child sexual abuse cases is the child-friendliness of the criminal justice system at hand. As will be discussed further below, the child's experience in the criminal justice system can be improved significantly by measures such as meaningful and child-friendly court preparation, testifying via CCTV, the presence of an intermediary or support person, access to quality social welfare support, avoidance of direct confrontation with the alleged perpetrator, and the replacement of oral testimony with video or audio recordings.[105] Another factor is the speed of the justice system and the nature of pre- and post-trial care.[106]

As these factors are based on national legislation, an in-depth analysis of the child-friendliness of the criminal justice system in Canada and other countries involved in the case study exceeds the scope of this Chapter. In practice, though, such an analysis would be crucial to determine which justice system creates the better environment for children to avoid secondary trauma.

4. Balancing the elements in the best interests assessment

As indicated earlier, the best interests of the child have to be determined on a case-by-case basis, depending on the individual experiences of the concerned child, the circumstances as well as the weight of each factor in the case. Naturally, some factors may contradict each other, for example in a situation where a country aiming to assert jurisdiction over a specific case has a more child-friendly justice system than the child's home country. In such a case, the child-friendliness of the justice system collides with the child's need for a stable and consistent environment.

Lastly, regardless of the age, the developmental level or any particular vulnerability of the child victim, the child's views need to be taken into consideration.[107] Children's right to participation, as guaranteed in article 12 of the CRC in the context of the criminal justice system,

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[104] Sally Hunter, *Childhood Sexual Experiences: Narratives of Resilience*, Oxford/New York 2010, p. 169.
[105] UN Economic and Social Council, *Guidelines on justice in matters involving child victims and witnesses of crime*, E/CN.15/2005/L.2/Rev.1 (25 May 2005), para. 29–31; UNODC/UNICEF, *Handbook for Professionals and Policymakers on Justice Matters involving Child Victims and Witnesses of Crime*, New York 2005, pp. 49–88; CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 97.
[106] *Ibid;* UNODC/UNICEF, *Training Programme on the Treatment of Child Victims and Child Witnesses of Crime for Prosecutors and Judges*, New York 2015, p. 100.
[107] CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, para. 53–54; UNODC, *Handbook for Professionals and Policymakers on Justice Matters involving Child Victims and Witnesses of Crime*, pp. 42–43.

includes the opportunity for them to express 'their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process'.[108] This is particularly important in child sexual abuse cases, as having their voices heard assists children in regaining the control they were deprived of during the period of the sexual abuse.[109] In the words of the CRC Committee, the balancing of these interests should not only consider the

> physical, emotional, educational and other needs at the specific moment of the decision, but also possible scenarios of the child's development, and analyse them in the short and long term. In this context, decisions should assess continuity and stability of the child's present and future situation.[110]

B. Child-friendly procedures in MLA and extradition procedures

Referring again to the case study, assuming that Canada would assert jurisdiction over Anna's case, the Canadian police would have to collaborate with their Dutch counterparts in obtaining Anna's statement and facilitating her testimony during the trial stage. If Canadian authorities leverage international collaboration clauses in the OPSC, Budapest or Lanzarote Convention for this purpose, the question arises whether the international conventions lay down any minimum standards on how Anna's rights and interests as a child sexual abuse victim should be protected during the execution of the international collaboration request.

As for the OPSC, article 8 provides a detailed catalogue of measures state parties are to adopt to protect the rights and interests of children during the criminal justice process, including adopting procedures that recognise the specific needs of child victims and witnesses, providing appropriate support services during the criminal justice process, and allowing the views, concerns and needs of the child to be presented throughout the process. Based on article 8 of the OPSC, the United Nations Economic and Social Council Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes[111] detail child-friendly criminal procedures, for example the use of CCTV in courtrooms or video and audio recordings of statement. Similarly, article 31 of the Lanzarote Convention sets out general measures of protection in criminal justice proceedings, with articles 35 and 36 of the Lanzarote Convention even providing detailed minimum standards on interviewing child witnesses and appropriate criminal procedures for child sexual abuse and exploitation cases. In contrast, the Budapest Convention does not contain any provisions on safeguarding vulnerable victims during the criminal justice process. Given that the vast majority of articles in the Convention deal with procedural matters, this is somewhat surprising.

However, taking into account the above analysis of the range of extradition and MLA provisions, on the one hand, and the child safeguarding provisions, on the other, it is clear that both the OPSC and Lanzarote Convention lack cyber-specific or -appropriate international collaboration mechanisms, while providing for sufficient child safeguarding mechanisms during the

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[108] UN Economic and Social Council, *Guidelines on justice in matters involving child victims and witnesses of crime*, E/CN.15/2005/L.2/Rev.1, para. 21.
[109] ECPAT/University of Bedfordshire, *Connecting the Dots: Supporting the Recovery and Reintegration of Children Affected by Sexual Exploitation*, p. 46.
[110] CRC Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, CRC/C/GC/14, para. 84.
[111] UN Economic and Social Council, *Guidelines on justice in matters involving child victims and witnesses of crime*, E/CN.15/2005/L.2/Rev.1.

criminal justice procedure. As for the Budapest Convention, it does indeed provide a seemingly comprehensive set of cyber-specific MLA and extradition provisions, but without so much as mentioning the specific needs and concerns of vulnerable witnesses.

V. CONCLUSION

Anna's case - similar to many other cases of online child sexual abuse and exploitation - shows the complexity of (extra)territorial jurisdiction and law enforcement collaboration across country borders. Although territorial and extra-territorial jurisdiction clauses are included in the OPSC, Lanzarote Convention and Budapest Convention, it is clear that the devil lies in the detail. Unfortunately, the detail on determining jurisdiction and resolving jurisdictional conflicts is discussed mainly in the context of cybercrime offences in general and hence without taking the specific vulnerability of child sexual abuse victims into account.

Similarly, MLA and extradition provisions in the child-specific conventions, the OPSC and the Lanzarote Convention, are not informed by an appropriate level of cybercrime expertise and are too 'old-school' to cater for the circumstances of cybercrime investigations and the volatile nature of digital evidence. In turn, the Budapest Convention treats cybercrime broadly as an area of crime that does not typically produce vulnerable witnesses, a stance apparent from its lack of any victim-centred procedural provision whatsoever. As a result, international cooperation under the OPSC and Lanzarote Convention might be less efficient but more child-friendly, while international collaboration in the Budapest Convention might be more efficient but is less child-friendly.

It is argued that this is symptomatic of the academic and practical divide in the field of online child sexual abuse: the focus lies either on the 'child sexual abuse' or on the 'online' component. In the former, child protection takes centre-stage, while in the latter it is cybercrime issues. In view of this gap in the response to online child sexual abuse offences, there is an urgent need to marry child protection expertise with cybercrime expertise and thereby create standards and instruments that are efficient in the cyber context yet that always put the best interests of the child victim first. This is a task yet to be completed at the international level.

This study revolves around international and national regulation, investigation and prosecution of emerging aspects of online child sexual abuse material. With regard to regulation, the study focused on aspects in which the causal connection between the material and the harm to children is not patently clear - virtual child sexual abuse material, pornographic material depicting persons made to appear as minors, and consensually produced and possessed 'sexting' material between adolescents for their private use only. Further, the study investigated the potential for leveraging international law to strengthen the regulation of online child sexual abuse material in 'developing countries'. It then shifted the focus to investigation and transnational law enforcement collaboration in online child sexual abuse cases, analysing the dissemination of child sexual abuse material for investigative purposes as well as the efficiency and effectiveness of international legal collaboration mechanisms in online child sexual abuse cases.

Against this background, the problem statement was formulated as follows:

> *How can the international and national regulation, investigation and prosecution of emerging aspects of online child sexual abuse material embrace the currently competing discourses of a cyber-specific yet child-sensitive offence?*

To answer this problem statement, three Research Questions were formulated and examined in Chapters II–VI. The following sections will answer the problem statement by providing the key findings of the research; lastly, some concluding remarks will be made.

I. KEY FINDINGS FOR RESEARCH QUESTIONS

The problem statement has been specified by three Research Questions and the latter examined in five substantive Chapters (Chapters II–VI) using a mixed methodology of doctrinal legal research, comparative legal analysis and interdisciplinary legal research. The key findings will be discussed in this Chapter.

A. Research Question 1

> *Can the criminalisation of emerging issues in online child sexual abuse material, such as the depiction of virtual children, pornographic material depicting persons made to appear as minors, and consensual sexting material produced amongst minors for their private use, be justified, given that the relation between the material and immediate harm to actual children is not inherently obvious?*

Research Question 1 targets the regulation of emerging issues pertaining to the definition of child sexual abuse material. It entails investigating whether forms of child sexual abuse material for which a direct causal link between the material and harm to children is not inherently obvious should be included in the definition of criminal provisions pertaining to such material. The focus is on virtual child sexual abuse material and pornographic material depicting persons made to appear as minors, as well as consensually self-produced pornographic material between adolescents.

Chapter II explores the international and national response to the criminalisation of virtual child sexual abuse material and pornographic material depicting persons made to appear as minors. While the US and Japan are supporting the decriminalisation of such material based on the lack of unanimous scientific evidence for harm to children and freedom-of-speech considerations, Canada and South Africa endorse its criminalisation, as they acknowledge a reasonable apprehension of harm to real children.

This study argues that the scientific proof which the US and Japan invoke is an inappropriate valuation standard. Scientific proof focusing on the behaviour of child sexual abuse offenders is difficult to obtain, and claiming that only unanimous scientific evidence could justify the criminalisation of such material renders this valuation standard inappropriate. Applying instead the valuation standard of reasonable harm for children suggested by the Canadian Supreme Court and South African Constitutional Court, this study

argues that the justification for the criminalisation of such material lies in the normalisation of sexual abuse and exploitation of children.

Applying the feminist discourse around adult pornography in the 1970s and 1980s, the study submits that any form of child sexual abuse material produces and reproduces the narrative of children as sexual objects. Depending on whether the child is depicted as consenting or non-consenting partner in the sexual activity, the material produces and reproduces the eroticisation of a constructed equality, or the eroticisation of inequality respectively. It is therefore submitted that the sexual objectification of children, whether real or virtual, is a sufficient argument to acknowledge the harm caused to children *in abstracto.* Although the criminalisation of such material is generally endorsed, it has to be limited to material which is actually shared with others. As the sharing of such material and the normalisation of child sexual abuse is a catalyst of harmful thought only if such thought is *communicated* with others, virtual child sexual abuse material which is produced and thereafter possessed purely for private purposes has to be excluded from the reach of the criminal provision. The different treatment of the same content is justified on the basis of its potential harm through normalisation of the sexualisation of children. As long as the material is a mere expression of thought, whether materialised or not, the criminal law reaches its boundary: thoughts need to be free – no matter what the quality of the thought. Same applies to material depicting virtual 'child-like', non-human subjects, as the harm described as the eroticisation of inequality/constructed equality in the context of children falls away in such cases. Only through such a differentiation can freedom of speech and child protection be proportionally balanced.

Chapter III explores international and national responses to the emerging phenomenon of consensually self-produced pornographic material (commonly referred to as 'sexting' material) between adolescents. In an attempt to protect children from abuse and exploitation, consensual 'sexting' between minors is in some countries categorised as production and dissemination of 'child pornography', leading to the potential prosecution of the children involved as sex offenders. Arguments in favour of the criminalisation of such behaviour are based on the risks associated with teenage sexting and the deterrent effect of such legislation. However, the underlying dynamics in these arguments are that children are perceived as 'innocent beings' who must be protected at all costs against premature 'sexualisation'. The moral panic about child sexuality in the digital era is hence the real driver of the criminalisation.

Leveraging the rights-based approach to teenage sexuality formulated in the South African Constitutional Court case *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another,* [2013] ZACC 35, the study argues that the criminalisation of teenage sexuality in the online space through 'sexting' cannot be justified based merely on the potential risks for minors. Such criminalisation may lead to expressions of teenage sexuality such as 'sexting' being driven underground, thereby hampering parental guidance on safe 'sexting' and leading to a deterioration of help-seeking behaviour by teenagers. This study argues that the general criminalisation of children for consensual sexual exploration in the online space is counterproductive to the child protection objective. Instead, a rights-based approach to consensual 'sexting' between minors, and hence a decriminalisation of such conduct paired with a focus on comprehensive sexuality education, allows for an appropriate balancing of sexual autonomy and child protection concerns.

Based on the above deliberations in Chapter II and III, this Research Question has to be answered separately for virtual child sexual abuse material and pornographic material depicting persons made to appear as minors, on the one hand, and teenage 'sexting' material, on the other. With the former, it is clear that the criminalisation of such material infringes on freedom of speech, which is protected as a constitutional or human right under relevant national legal frameworks and international law. However, when considering whether such infringement can be justified, the argument of normalising sexual abuse and exploitation of children through the legal acceptance of such material generally outweighs and justifies the infringement on freedom of speech. Therefore, the Research Question has to be answered positively with regard to the criminalisation of virtual child sexual abuse material and pornographic material depicting persons made to appear as minors, with the exception of material produced and possessed solely for private use as well as depictions of virtual 'child-like', non-human subjects. In the case of teenage 'sexting' material, the study argues that it is necessary to address the issues with children's rights as a reference and starting-point, taking into account rights such as freedom of expression and rights to privacy and other rights dealing with a person's sexuality or sexual expression. Acknowledging a child's limitations when it comes to its expression of sexuality, the criminalisation of teenage 'sexting' does not prevent risk from turning into harm and is hence not a suitable instrument to protect children. Against this background, in the case of teenage 'sexting', the Research Question has to be answered negatively.

The adverse answers to the Research Question at hand prompt the question whether these findings do not pose a contradiction. How can the criminalisation of child sexual abuse material which lacks an obvious link between the depiction and the harm to children be justified for one type of material, but be considered disproportionate for the other? The study argues that there is no contradiction in these findings as firstly, there is an inherent difference in the material's actual harm to children on the one hand, and in the creation of risk of harm to children on the other hand. Further, it is submitted that one type of material is causing a conflict between rights of different rightsholders and the other type of material a conflict between rights of rightsholders within the same protected group. With regards to the first argument, it is submitted that virtual child sexual abuse material and material depicting persons made to appear as minors indeed pose direct harm to children *in abstracto*, whereas 'sexting' material does only create a risk of harm for children. In this context, it is referred back to the importance of differentiating between risk and harm. As discussed, the risk of harm can be considerably reduced for consensual 'sexting' between minors through educative means as proposed by the CRC Committee's guidelines. Therefore, 'sexting' has to be accepted as a manageable risk for adolescents, which in turn does not justify its criminalisation.

Secondly, there is an inherent difference with regards to the affected rights and rightsholders. With regards to the first category of material, virtual child sexual abuse material and material depicting persons made to appear as minors, it is submitted that this material creates a conflict between the child's right to protection from sexual abuse and exploitation and the person's right to freedom of expression who produces or consumes such material. In contrast, consensual 'sexting' is a conflict between the child's right to protection from sexual abuse and exploitation and – again - the child's right to privacy, freedom of expression and other relevant rights concerned with sexual exploration and expression. While the former conflict hence affects the rights of different stakeholders, the latter creates a conflict between the rights within the same group of rights holders, i.e. children, and hence ultimately between a child's right to protection on the one, and to autonomy on the other hand. In order to solve this conflict between protection and autonomy, the principle of evolving capacities has to be considered. The CRC Committee defines the principle of evolving capacities as described in article 5 CRC as 'an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights'.[1] This principle is hence crucial in ensuring a proportionate balance between recognising children as active agents in their own lives while also being entitled to protection.[2] Consequently, this study submits that applying the principle of evolving capacities in the context of consensual 'sexting' between minors must lead to the decriminalisation of such material, while at the same time acknowledging the need for preventative measures which ensure risk does not turn into harm. In this context, the CRC Committee recommends 'engaging adolescents in the identification of potential risks and the development and implementation of programmes to mitigate them [as this] will lead to more effective protection'.[3]

In conclusion, these differing outcomes for Research Question 1 exemplify the complexity of the regulation of child sexual abuse material. Upon analysing the different approaches taken in international and national legislation, and contextualising the arguments in feminist theory, it is clear that the protection concerns and the affected human rights must be delicately balanced through proportionate legislation acknowledging the child's evolving capacities and pursuing the realisation of the best interests of the child.

B. Research Question 2

> *Noting the important role that international law plays in guiding national legislators in the regulation of online child sexual abuse material, how can 'developing states' strengthen their national legal frameworks by leveraging international law?*

Research Question 2 investigates how 'developing states' can leverage international law to strengthen their national legal framework pertaining to child sexual abuse material, while upholding the rule of law.

In this regard, Chapter IV uses Namibia as a case study to exemplify how international law can be leveraged to strengthen the national legal framework pertaining to child sexual abuse material. Namibia has

[1] CRC Committee, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20 (6 December 2016), para. 18.
[2] UNICEF Innocenti, *The evolving capacities of the child*, Florence 2005, p. 3.
[3] CRC Committee, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20, para 19.

ratified the OPSC and follows a monist approach to international law. The national legal framework provides for insufficient criminalisation of offences pertaining to child sexual abuse material. The Publications Act and the Communications Act criminalise content by using generic terms such as 'undesirable' or 'obscene, lewd ad filthy material' respectively, without providing a clear definition of the term 'child sexual abuse material'. Further, in its Child Care and Protection Act 3 of 2015 (CCPA), Namibia has criminalised the production of child sexual abuse material, albeit that the possession and dissemination of such material remain legal. In considering the direct application of international law such as the OPSC in the national legal framework, specific consideration has to be paid to the fair-trial principles set out in article 12 of Namibian Constitution, which require that 'no person shall be tried or convicted for any criminal offence or on account of an act or omission which did not constitute a criminal offence at the time when it was committed […]'.

Drawing upon the experience of Rwanda and the DRC in leveraging international law to close loopholes in their national criminal law in cases of genocide and crimes against humanity, it is argued that the anchor for the prosecution needs to lie in national legislation, i.e. the CCPA, which can then be expanded by the direct application of international law. With this approach, the gap in the national legal framework can be closed by upholding the rule of law and respecting fair-trial principles. Given that the CCPA already criminalises certain offences pertaining to child sexual abuse material, and states in its preamble that due consideration has to be given to international law in the interpretation and application of this Act, the will of the legislator clearly endorses the expansion of the CCPA in view of the OPSC. Therefore, such an approach is compatible with the fair-trial principles set out in article 12 of the Namibian Constitution, as the possession and dissemination of child sexual abuse material constitutes a criminal offence in the national legal framework through the relevant provisions in the CCPA, interpreted in the light of the OPSC.

The reader might wonder why this study pays such specific and detailed attention to the appropriate reflection of rule of law concerns within the child sexual abuse context, given that Namibia ratified the OPSC and hence seems to be supportive of strengthening its efforts to combat online child sexual abuse anyway. The reason for this specific attention is twofold: firstly, the proportionate balancing between child online safety, and cybercrime more broadly, and rule of law concerns is at considerable risk in many African countries. Secondly, there is a general suspicion by several African states towards international criminal law. With regards to the first point, human rights organisations observed with concern that the cybercrime legislation, which often includes provisions on online child sexual abuse material, tends to sacrifice rule of law and fair trial aspects – which are not strongly institutionalised to start with - in the name of (perceived) cybersecurity. Besides individual reports on relevant national legislations[4], this risk also becomes apparent on the AU level. Article 31(3) of the African Convention on Cybersecurity and Personal Data Protection furnishes judges with broad powers to investigate alleged cybercrime offences, including surveillance, interception, and preservation and seizure of digital evidence, as long as such intervention is 'useful in establishing the truth'. This expansion of judicial power creates the risk of overreach, especially in countries where the judiciary is not independent from the political actors.[5] Cybercrime legislation is therefore prone to being instrumentalised by political actors to crack down on the rights of citizens, political opposition and minority groups by diluting the rule of law. Against this background, the study submits that the protection of the rule of law in the context of cybercrime, including issues around online child sexual abuse, needs to be paramount and hence requires substantive consideration, to ensure that no precedence for a lax interpretation of the rule of law is set in this fragile context. Secondly, the relationship between African states and international criminal law is – to say the least – complicated. After the AU's call for mass withdrawals from the International Criminal Court (hereafter ICC)[6], the dissatisfaction of African states with

[4] For Tanzania, see Article 19, *Tanzania: Cybercrimes Act upheld in further blow to free expression*, 15 March 2017, available at: https://www.article19.org/resources/tanzania-cybercrimes-act-upheld-in-further-blow-to-free-expression/ (accessed 17 May 2020); for Zimbabwe, see Newsday, *Army to monitor social media*, 3 March 2020, available at: https://www.newsday.co.zw/2020/03/army-to-monitor-social-media/ (accessed 17 May 2020); for Kenya, see Mercy Muendo, *Kenya's new cybercrime law opens the door to privacy violations, censorship*, The Conversation, 29 May 2018, available at: https://theconversation.com/kenyas-new-cybercrime-law-opens-the-door-to-privacy-violations-censorship-97271 (accessed 17 May 2020); for Egypt, see ANND/Civicus, *Egypt: "Cyber crime" law another massive blow for freedom of expression*, 10 September 2018, available at: https://www.civicus.org/index.php/media-resources/news/3449-egypt-cyber-crime-law-another-massive-blow-for-freedom-of-expression (accessed 17 May 2020).

[5] Mailyn Filder, *The African Union Cybersecurity Convention: A Missed Human Rights Opportunity*, Council on Foreign Relations, 22 June 2015, available at: https://www.cfr.org/blog/african-union-cybersecurity-convention-missed-human-rights-opportunity (accessed 17 May 2020); Tom Jackson, *Can Africa fight Cybercrime and preserve Human Rights?*, BBC News, 10 April 2015, available at: https://www.bbc.com/news/business-32079748 (accessed 17 May 2020).

[6] AU Assembly, *Decision On The International Criminal Court (ICC)Doc. EX.CL/1006(XXX)*, AU Assembly Doc. Dec.622(XVIII), *available at* https://www.au.int/web/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf (accessed 17 May 2020).

the Rome Statute and its execution became clearly visible.[7] The reason for this dissatisfaction is complex and is at least partly routed in a rejection of a 'Western-imposed' international legal regime. While it is clear that there are considerable differences between the Rome Statute and the OPSC, they have in common that they provide for criminal provisions which can be directly applied to the citizens of the member states. With Namibia being amongst the countries endorsing the AU's call for a mass withdrawal[8], it is clear that any direct application of criminal provisions contained in international law requires a substantiated justification. Stressing the fact that the application of the OPSC is anchored in the CCPA therefore aims to counter any political arguments which could present the OPSC as yet another 'Western-imposed' legal regime. It is against this background that the direct application of international law in this context requires in-depth deliberation from a rule of law angle.

In conclusion, Chapter IV shows how international law can be leveraged to strengthen the national legal framework in the context of child sexual abuse material in 'developing countries'. The prosecution of such offences based on the direct application of international law, albeit through being anchored in an already existing provision in the national legislation, is a helpful first step in strengthening the national legal framework. Given that in the case of Namibia the OPSC is the only international treaty it has ratified in this area, a more substantial provision on child sexual material should still be enacted, considering the shortcomings of the definition and the catalogue of offences in the OPSC.

Although the possibility of direct application is limited to countries with a monist approach to international law, it has to be acknowledged that international law also plays a crucial role in guiding the national legislator by setting minimum standards for criminal provisions, in particular in countries following a dualist approach. However, states should be cautious about relying solely on international law when drafting national legislation, as international law such as the OPSC often will have been developed years ago and might not provide for a legal standard that responds to emerging forms of online child sexual abuse in the second decade of the 21st century. That being said, the guiding character of international law for national law-making processes, in particular in 'developing countries', is recognised.

C. Research Question 3

> *How can international and national legal frameworks governing investigation and prosecution mechanisms be strengthened to ensure that law enforcement responds effectively and efficiently to online child sexual abuse material in a child-sensitive manner?*

Research Question 3 shifts the focus from the regulation of online child sexual abuse material to procedural aspects such as the investigation and prosecution of such offences. It examines how the need for efficient and effective law enforcement mechanisms, including transnational collaboration, can be strengthened while upholding the rule of law and the principle of the best interests of the child.

As seen in Chapter V, the infiltration of child sexual abuse fora on the dark web is a key investigation strategy in combating online child sexual abuse, the aim being to identify perpetrators and rescue children from ongoing abuse and exploitation. With regard to the dissemination of virtual child sexual abuse material, such dissemination is criminalised under German law, and it seems hypocritical to trivialise such an act because it is initiated by police.

As regards the dissemination of 'real' child sexual abuse material, the proposal seems to operate on the basis that the depicted child has meanwhile reached the age of majority and can legally give consent to such an operation. Even if the person gives initial consent, the impact of knowing that the material is being circulated cannot be predicted. As the damage in such a situation is irreversible, it is questionable whether informed consent can ever be given. The problem is compounded if the person depicted in the material is still a child when asked to give consent to its dissemination. Whether a child can legally give such consent is highly questionable, given the immense impact on the overall wellbeing of the child.

Further, the proposal raises serious questions about its compatibility with the rule of law. Giving police the authority to commit criminal offences effectively puts law enforcement above the law. The importance of

[7] Priya Pillai, *The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability*, American Society of International Law, available at: https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court (accessed 17 May 2020).
[8] Kaure, Alexactus, *The ICC – When is Namibia going to exit?*, The Namibian, 28 February 2017, available at: https://www.namibian.com.na/161803/archive-read/The-ICC-When-is-Namibia-Going-to-Exit (accessed 17 May 2020).

the rule of law and the indispensability of norms such as human rights cannot be overemphasised. Such police operations could also lead to a violation of fair-trial principles, as they potentially amount to entrapment or enticement to criminal offences. In conclusion, the study submits that the proposed authority for police to disseminate child sexual abuse material for investigative purposes holds a tremendous risk of re-traumatisation for the affected child, violates the rule of law and, depending on the circumstances of the case, leads to entrapment and enticement.

Chapter VI then explores the efficiency and effectiveness of transnational law enforcement collaboration mechanisms in various international treaties. Focusing on the analysis of extra-territorial jurisdiction, jurisdictional conflicts, MLA and extradition clauses in the OPSC, Lanzarote Convention and Budapest Convention, it becomes apparent that these mechanisms are insufficient in addressing emerging issues around transnational law enforcement collaboration in online child sexual abuse cases.

With regard to extra-territorial jurisdiction clauses, jurisdictional conflicts are inadequately dealt with at the international level. Given that such conflicts will occur in many online child sexual abuse cases, this study proposes that the 'rule of reason' currently applied to solve jurisdictional conflicts in cybercrime should not focus on the closest connection to a state's territory but needs to establish which state can best serve the interests of the child victim. Important aspects to be factored in such a 'rule of reason' test are the child's identity and needs, the community and family in which the child operates, as well as the child-friendliness of the criminal justice system.

Moving on to MLA and extradition mechanisms, the study submits that such mechanisms are either cyber-specific and efficient, or victim-sensitive and insufficient. International cooperation under the OPSC and Lanzarote Convention might be less efficient but more child-friendly, while international collaboration in the Budapest Convention might be more efficient but less child-friendly. Given this gap in responding adequately to online child sexual abuse offences, there is an urgent need to marry child protection with cybercrime expertise in order to create standards and instruments that are efficient in the cyber-context but that always put the best interests of the child victim first.

Research Question 3 analyses the international and national legal frameworks governing investigation and prosecution mechanisms relevant for child sexual abuse offences online. As has been seen in Chapter V, a sense of powerlessness in combating online child sexual abuse material can lead to proposals for legal reform that – upon in-depth analysis – do not contribute to the well-being of the victims and put important principles such as the rule of law and fair-trial principles at risk. The rule of law and fair-trial principles are crucial gatekeepers in avoiding disproportionate expansion of law enforcement capacity in aid of political feel-good. Furthermore, the cyber-specific and child-centred discourses need to be brought together, as otherwise the mechanisms are either not operable for *online* child sexual abuse offences or ignore the fact that this form of cybercrime creates highly traumatised, vulnerable (child) victims, who require dedicated attention throughout the justice process. National and transnational law enforcement mechanisms need to triangulate the best-interests-of-the-child principle with upholding the rule of law and cyber-specific investigation mechanisms in order to effectively and efficiently respond to online child sexual abuse cases. This study acknowledges that the efficiency specifically of transnational law enforcement collaboration mechanisms cannot be solely measured on the basis of the existence of a sufficient legal framework. It is clear that these mechanisms encounter considerable hurdles in their application. In order to move away from a solely national or regional focus of states in developing online child sexual abuse prevention and response strategies, the CRC Committee recommends States parties 'to support national and international alliances to protect children from sale and sexual exploitation and to ensure effective cooperation in the investigation and prosecution of criminal networks and perpetrators'.[9]

To put this proposal to action, the CRC Committee's Guidelines would have been the optimal opportunity to exemplify such a 'married' approach at the international level, but unfortunately this has been missed. The study therefore recommends the initiation of the drafting of transnational guidelines focusing on investigation and transnational law enforcement collaboration in online child sexual abuse cases, guidelines that could be drafted as an appendix to the CRC Committee's Guidelines.

[9] CRC Committee, *Guidelines regarding 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*, CRC/C/156 (10 September 2019), para. 113.

II. KEY FINDINGS FOR PROBLEM STATEMENT

As mentioned in the introduction to this study and showcased in the above key findings of the Research Questions, it is clear that the international and national regulation, investigation and prosecution of emerging aspects of online child sexual abuse material are informed by the various dichotomies identified in the introduction: firstly, international vs. national law; secondly, child protection vs. autonomy; thirdly, development of regulatory frameworks vs. evolving technical capacities; and child online safety vs. rule of law. This study submits that in order to embrace and navigate the currently competing discourses of cyber-specific yet victim-sensitive regulation, investigation and prosecution, it is crucial that the dichotomies polarising the discourse, and with it the relevant reference points, are identified and contextualised. The dichotomies bring the regulatory questions into a conceptual framework which assists in determining the realm in which the discourse is held and the different poles which influence its navigation. Given that online child sexual abuse is an emotive topic that can trigger impulsive reactions from lawmakers and the general public alike, it is crucial to take a step back to identify the dynamics at play and formulate a well-balanced response that champions the best interests of the child.

One constant area of tension in the regulation, investigation and prosecution of online child sexual abuse offences is the interplay between international law and national legislation. As discussed above, the implementation of international standards at national level is often complex, given that online child sexual abuse as part of the overall regulatory area of sexual offences is exposed to culturally, societally or religiously influenced perceptions around sexuality. The influence of perceptions around sexuality is most apparent when the dominant narrative of children as mere subjects in need of protection, rather than as rights-holders, is challenged. To navigate such deep waters, it is helpful to refocus the discourse on children's rights first and foremost. As the South African Constitutional Court eloquently stated in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*, [2013] ZACC 35: 'At the outset it is important to emphasise what this is not about. It is not about whether children should or should not engage in sexual conduct.'[10] Such an approach assists in restructuring the discourse from one in which there is a generic perception of children as subjects of protection to one in which children are regarded as rights-holders with evolving capacities. Further, this dynamic also impacts the strengthening of the national legal framework through the direct application of international law. As has been shown above, international law is crucial in guiding national legislators, but can also be regarded as an alien and external concept. In such cases, careful navigation of this international-national dichotomy is required to strengthen the legal framework in the area of online child sexual abuse. Lastly, the dichotomy also becomes apparent in transnational law enforcement collaboration. Effective and efficient collaboration mechanisms do not only require aligned national legal frameworks, but furthermore a shift away from national- or regional-focused policing towards a true global response mechanism.

Furthermore, the special character of the production, dissemination and possession of online child sexual abuse material as content-related cybercrime impacts on the value of international law as a regulatory mechanism. Given the ever-evolving character of cyberspace, human behaviour in this realm also constantly changes and adapts. Noting both the risk that these developments can outpace international law and the requirement that international law provide the minimum standard for national lawmakers, it is crucial to be aware of the paradoxical role that international law plays in regulating online child sexual abuse. In this study, the challenge of creating legal frameworks which stand the test of time has become apparent in the context of criminalising virtual child sexual abuse material, given that this field is rapidly evolving and hence requires constant adaptation. Further, it impacts transnational law enforcement collaboration, as some states might not be able to follow the rapid developments which will have a negative impact on creating internationally comparable legal standards. As pointed out by the CRC Committee, states are therefore required to constantly monitor and reassess the relevance and appropriateness of their legal frameworks on online child sexual abuse.[11]

Moreover, the deterioration of the rule of law in the name of child online safety is a real threat in current debates. As exemplified in this study, special attention has to be paid to the risk of child protection concerns being instrumentalised in the broader discourse of police authority in investigating cybercrime. Given that

[10] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*, [2013] ZACC 35, para. 3.
[11] CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 19.

debates around investigating online child sexual abuse often solicit an emotional, and not necessarily evidence-based, reaction, the study submits that there is a strong need for awareness of 'hidden agendas' that aim to weaken the rule of law. Although investigation techniques in online child sexual abuse cases differ from those in contact sexual offences, the maxim of putting the child's interests first and upholding the rule of law needs to be top of mind at all times. This study further shows that this dichotomy also impacts the direct application of international law to strengthen national legal frameworks. Even though there is an urgent need for the leveraging of the OPSC and other treaties, potential negative impacts on the rule of law and fair trial principles have to be duly taken into consideration. In this context, it is important to highlight that the concern of sacrificing the rule of law in the name of child protection is not only relevant in the context of one specific case, but more broadly on setting a precedence which serves as a blueprint to justify a deterioration of the rule of law in similar cases in the future.

Lastly, the study showcased how the classic conflict between child protection and autonomy plays out in the digital context, and how the moral panic around child sexuality in the digital era risks the development of solutions which do not take the evolving capacities of adolescents into account. While this conflict is typical for issues around the regulation of sexual exploration of adolescents, it will also become apparent in other areas of children's rights in the digital era, for example in the context of setting a minimum age for registration on social media and gaming websites without parental approval. Further potential areas of conflict include the installation of tracking apps, which aim to protect children by tracking either their whereabouts, their web activities or both. While this study focused on the child protection-autonomy conflict in the context of consensual 'sexting' between minors, it is clear that this conflict will occur in numerous scenarios concerning children's rights in the digital era. As has been shown, it is important in this context not to get carried away by the risks which children might encounter in the online space, and instead focus on ensuring that their rights as enshrined in the CRC are interpreted in a digitally-adequate manner and any solutions take the evolving capacities of children into account.

This study has provided recommendations on how the conceptual framework as described in the dichotomies can be applied so the above conflicts are navigated with the best interests of the child as primary consideration. At the same time, it is clear that each and every country will have to find a solution to the above discourses within its own legal, political, social, cultural and religious realm. While this study can provide a certain framework or minimum standard within which countries should operate, it cannot provide black-and-white answers to emerging questions that apply widely to a variety of country contexts.

In conclusion, the identified competing discourses constitute the realm in which the regulation, investigation and prosecution of online child sexual abuse offences operate. The navigation of these discourses - exemplified by the Research Questions and the respective findings – is therefore transferrable to any other legal discourse involving the regulation, investigation and prosecution of online child sexual abuse offences, and – considering the above-mentioned examples - issues concerning children's rights in the digital era more broadly. identified competing discourses constitute the realm in which the regulation, investigation and prosecution of online child sexual abuse offences operate. The navigation of these discourses - exemplified by the Research Questions and the respective findings – is therefore transferrable to any other legal discourse involving the regulation, investigation and prosecution of online child sexual abuse offences, and – considering the above-mentioned examples - issues concerning children's rights in the digital era more broadly. The international and national regulation, investigation and prosecution of emerging aspects of online child sexual abuse material hence require constant identification, reflection and calibration of competing discourses, with a view to developing a cyber-specific yet victim-sensitive response that upholds the rule of law and takes a child-centred approach.

III. FINAL REMARKS

As mentioned in the introduction, 20 years ago the online images of child sexual abuse were a problem; 10 years ago, an epidemic; and now, a crisis which is at breaking-point.[12] As has been shown in this study, the regulation and transnational law enforcement collaboration with regard to emerging forms of online child

[12] Michael H Keller/Gabriel J.X. Dance, *The Internet is overrun with images of child sexual abuse. What went wrong?*, New York Times, 28th September 2019, available at: https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html (accessed 20 October 2019).

sexual abuse material pose complex legal questions to national legislators, and its regulation requires distinct expertise in both cybercrime as well as child protection and children's rights in general.

However, the reality is that many countries simply do not have this kind of expertise at hand, and additionally lack financial and technical resources to stand up to the emerging challenges in the area of online child sexual abuse and cybercrime more broadly.[13] As mentioned above, the role of international law is, against this background, more important than ever, as it gives countries at least a starting-point for the development of national legislation. Given the rapid development of cybercrime, regions have made ever-greater use of model legislation.[14] Although model legislation is not legally binding, it has the great advantage that it is a flexible instrument, one that can be adapted quickly to developments, as the amendment process is less cumbersome than in the amendment of international law. Although the CRC Committee's Guidelines have been criticised for their lack of guidance in the area of transnational law enforcement collaboration, the development of such guidelines per se is a step in the right direction. At the same time, it is important to acknowledge that due to the fast pace the digital world develops, the recommendations in the Guidelines might be outdated soon. Therefore, the CRC Committee is required to continuously update and develop its jurisprudence on the issue to ensure its recommendations speak to the reality on the ground.[15] Furthermore, it has to be noted that particularly in the complex area of online child sexual abuse material, meaningful international guidance would not only state how certain online offences against children should be regulated; equally important is to elaborate on the underlying contextual considerations, as the identification of the dichotomies – as has been shown above - is crucial to navigate the legal complexities around the regulation of online child sexual abuse material at a national level.

As with any form of child sexual abuse and exploitation, the regulation, investigation and prosecution of such offences is only one side of the coin. In order to avoid crossing the breaking-point and losing the fight against online child sexual abuse material, both prevention and response strategies have to be deployed concurrently. Prevention here means not only creating a safe online environment for children in which they can enjoy the many advantages the Internet has to offer, but more importantly making sure children are equipped with the skills to identify and adequately respond to risks, so these risks do not turn into harm. Digital literacy and comprehensive sexuality education, including sexual exploration in the online space, are hence important aspects of equipping children with the necessary skills to navigate the online space.

With regard to the response, it is crucial to highlight the role the private sector, in particular the ICT industry, plays in this area. Although global guidance has been developed to guide ICT stakeholders in their role in combating online child sexual abuse material,[16] it is important to keep in mind that although they play an important role in assisting law enforcement, they *are not* law enforcement. This means that ICT stakeholders cannot take over the role of law enforcement to identify whether certain material is illegal, but should rather assist law enforcement to gain access to potentially illegal material. This differentiation is crucial because the ICT stakeholders as private actors are, in contrast to law enforcement, not bound by the rule of law. Given the sensitivity around removing and taking down content from the Internet in the context of freedom of speech and access to information, national legislators should be conscious of the purely assistive yet pivotal role the ICT industry plays in investigating online child sexual abuse material.[17]

Lastly, on the 20 November 2019, the world celebrated the 30th anniversary of the CRC. When rethinking regulation and transnational law enforcement collaboration in the context of child sexual abuse in the digital era, it is crucial to conceptualise these issues in the broader discourse of children's rights in the digital

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[13] Ann Skelton/Benyam Mezmur, *Technology changing @ a Dizzying Pace: Reflections on Selected Jurisprudence of the UN Committee on the Rights of the Child and Technology*, Peace Human Rights Governance, Vol. 3 (2019), p. 281.

[14] See, for example, model law on cybercrime for the Caribbean (HIPCAR): https://www.itu.int/en/ITU-D/Cybersecurity/Documents/HIPCAR%20Model%20Law%20Cybercrimes.pdf (accessed 20 January 2020), Sub-Saharan Africa (HIPSSA): https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_data_protection.pdf (accessed 20 January 2020), and the Pacific Islands Countries (ICB4PAC): https://www.itu.int/en/ITU-D/Cybersecurity/Documents/ICB4PAC%20Skeleton%20Electronic%20Crime.pdf (accessed 20 January 2020).

[15] Skelton/Mezmur, *Technology changing @ a Dizzying Pace: Reflections on Selected Jurisprudence of the UN Committee on the Rights of the Child and Technology*, p. 296.

[16] See, for example, ITU, *Guidelines for Industry on Child Online Protection*, Geneva 2009, available at: https://www.itu.int/en/cop/Documents/guidelines-industry-e.pdf (accessed 11 November 2019).

[17] Especially if liability is linked to removal of illegal content, ISPs might tend to remove a disproportionally large amount of content, with a chilling effect on freedom of expression, see Karel Demeyer/Eva Lievens/Jos Dumortier, *Blocking and Removing Illegal Child Sexual Content: Analysis from a Technical and Legal Perspective*, Policy and Internet, Vol. 4 (2012), p. 14; advocating for strong partnerships with the private sector, CRC Committee, *Guidelines regarding 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*, CRC/C/156, para. 41, 111.

era. Acknowledging that the children's rights contained in the CRC were developed in the context of an analogue reality, the reconceptualisation of such rights in the digital era is the starting-point for the development of any child-rights based prevention and response strategy for online child sexual abuse and exploitation.[18] The development of the CRC Committee's Guidelines is as such only the starting-point. At the time of this writing, the CRC Committee is drafting a General Comment on children's rights in relation to the digital environment, which aims

> to shape the interpretation and implementation of the Convention in a digital age, […] to strengthen the case for greater action and elaborate what measures are required by States in order to meet their obligations to promote and protect children's rights in and through the digital environment, and to ensure that other actors, including business enterprises, meet their responsibilities.[19]

This General Comment will hence create the conceptual framework for children's rights in the digital era and provide guidance for states on how to navigate not only prevention and response to online child sexual abuse material, but children's rights in the digital era more broadly.

In conclusion, this study ends with an appeal to all researchers, practitioners and law-makers tasked and entrusted with the protection of children's rights in the digital era to make meaningful child participation a central aspect of all their interventions. Given that many technical experts have not experienced a childhood in which technology is an everyday component of their interactions, learning processes and development, we need to reflect critically on our own limitations in speaking for and on behalf of children when developing strategies to ensure that children can reach their full potential both online and offline. In the spirit of the 30th anniversary of the CRC, listening to and learning from children is hence paramount in creating an online environment conducive and safe for children all over the world.

[18] Skelton/Mezmur, *Technology changing @ a Dizzying Pace: Reflections on Selected Jurisprudence of the UN Committee on the Rights of the Child and Technology*, p. 277.
[19] CRC Committee, *Concept Note for a General Comment on children's rights in relation to the digital environment*, available at: https://www.ohchr.org/EN/HRBodies/CRC/Pages/GCChildrensRightsRelationDigitalEnvironment.aspx (accessed 10 November 2019).

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SUMMARY

Child Sexual Abuse in the Digital Era: Rethinking Legal Frameworks and Transnational Law Enforcement Collaboration

With access to and usage of it increasing dramatically over the past 20 years, the Internet has become an emerging realm for human interaction. With children constituting one-third of Internet users worldwide, this realm offers endless opportunities to learn, connect, and interact. But the Internet is not only a platform for producing, accessing, sharing and retrieving information – it offers a distinct forum for criminals to operate in spaces that are increasingly difficult for law enforcement agencies to penetrate. Criminal offences committed online range from acts against the confidentiality, integrity and availability of computer systems, to computer-related acts for financial or personal gains, and to the production, dissemination and possession of child sexual abuse material or hate speech. While some forms of these offences were 'born' in the age of new technology, other offences such as child sexual abuse have always existed but are now being committed in a different environment.

To focus on the discourse on the regulation, investigation and prosecution of online child sexual abuse material, there is a general consensus about the harmfulness of child sexual abuse whether committed online or offline. However, what is distinctive about the discourse on online child sexual abuse is that it is characterised by a set of dichotomies. The first is the contrast between the global and national level. While online child sexual abuse is a global problem that requires a global response, a comprehensive legal framework needs to be in place at a national level. Another dichotomy is between the discourse around sexual abuse, on the one hand, and sexual autonomy, on the other. While pornographic material clearly depicting child sexual abuse is an obvious case for criminalisation, the line between sexual abuse and sexual autonomy is less straightforward in cases where the causality between the material and the harm to children is less obvious. Furthermore, there is a dichotomy between the need to develop binding legal standards, both nationally and internationally, and constantly evolving technical capacities. While the development of legal standards can be a cumbersome process at a national as well as international level, the technical environment is in constant expansion. This leads to an inherent risk of a wild goose chase in regulating cybercrime, as the legal framework might be outdated once enacted. Lastly, there is a dichotomy between child protection and the protection of the rule of law. There is a tendency, borne of the sheer horrendousness of child sexual abuse material, to justify the infringement of the rule of law and fair-trial principles if it assists – or at least seems to assist – the fight against online child sexual abuse. The ends therefore often justify the means, notwithstanding the impact that deterioration of the rule of law has on criminal justice in the long run, including violence against children.

With the abovementioned dichotomies guiding the investigation, this study aims to critically analyse emerging aspects of the international and national regulation, investigation and prosecution of online child sexual abuse material from a child-rights and rule-of-law-based approach. Firstly, it investigates the regulation of online child sexual abuse material where the relation between the material and the harm to children is not patently clear and where child protection concerns need to be balanced with the protection of human rights such as freedom of expression. This includes the regulation of virtual child sexual abuse material and material depicting persons made to appear as minors. With no unanimous scientific evidence proofing increased risk of harm to real children, the study explores how international law as well as national legislators, including the US, Canada, Japan and South Africa, strike the balance between child protection on the one hand, and freedom of expression concerns on the other. It will be shown that there is indeed a sufficient justification for the criminalisation of such material: the sexual objectification of children, whether real or virtual, through the eroticisation of inequality or a constructed equality is a sufficient argument to acknowledge the harm caused to children *in abstracto.* However, to balance competing interests, the scope of criminalisation should be determined by harm-based rather than strictly idealistic criteria. Therefore, the production and possession of self-generated virtual child sexual abuse material as well as the depiction of virtual 'child-like', non-human subjects should be excluded from the range of criminal provisions.

Further, the study examines the emerging phenomenon of consensually self-produced pornographic material (commonly referred to as 'sexting' material) between adolescents. In an attempt to protect children, consensual 'sexting' between minors is in some countries categorised as the production and dissemination

of child sexual abuse material, leading to the prosecution of the children concerned as sex offenders. Arguments in favour of the criminalisation of such behaviour are based on the risks associated with teenage sexting and the deterrent effect of such legislation. However, the underlying dynamics in these arguments are that children are perceived as 'innocent beings' who must be protected at all costs against premature 'sexualisation'. The moral panic about child sexuality in the digital era is hence the real driver of the criminalisation. By analysing legislation and case law from the US, Canada, Germany and South Africa, this study investigates the need for a balance between child protection, on the one hand, and the child's right to privacy, on the other. This study argues that the criminalisation of teenage sexuality in the online space through 'sexting' cannot be justified based merely on the potential risks for minors. Such criminalisation may lead to expressions of teenage sexuality such as 'sexting' being driven underground, thereby hampering parental guidance on safe 'sexting' and leading to a deterioration of help-seeking behaviour by teenagers. This study argues that the general criminalisation of children for consensual sexual exploration in the online space is counterproductive to the child protection objective. Instead, a rights-based approach to consensual 'sexting' between minors, and hence a decriminalisation of such conduct paired with a focus on comprehensive sexuality education, allows for an appropriate balancing of sexual autonomy and child protection concerns.

Secondly, the study investigates the difficulties of leveraging international law in order to strengthen the national legal framework relating to the criminalisation of online child sexual abuse material, which it does by analysing the influence of international law on national legislation and the balancing of child-protection with rule-of-law concerns in that context. Given that the majority of legal research in the area of regulating online child sexual abuse material focuses on North American, European or Asian countries, this study draws attention to an African country, Namibia, in which children's safety online has emerged on the national child protection agenda over the past few years. Despite having ratified the UN Convention on the Rights of the Child's Optional Protocol on the sale of children, child prostitution and child pornography (OPSC), Namibia has so far failed to comprehensively criminalise the production, dissemination, possession and accessing of child sexual abuse material. Given the urgent need to rectify the situation, the study considers how the OPSC can be leveraged to fill the gap in national legislation through direct application of the OPSC in national courts. Drawing upon the experience of Rwanda and the DRC in leveraging international law to close loopholes in their national criminal law in cases of genocide and crimes against humanity, it is argued that the anchor for the prosecution needs to lie in national legislation, which can then be expanded by the direct application of international law. With this approach, the gap in the national legal framework can be closed by upholding the rule of law and respecting fair-trial principles.

Thirdly, the study shifts the focus to procedural aspects, in particular the authority of law enforcement in investigating and prosecuting online child sexual abuse material, with the focus placed on the investigative powers given to law enforcement agencies both at national as well as transnational level. The study is informed by an acute awareness of the need for technology-savvy legislation that simultaneously serves the best interests of the child as well as a national legal standard aligned with international law. When discussing investigative powers and transnational law enforcement collaboration in the context of cybercrime, the academic discourse largely fails to focus on the child as a highly vulnerable victim and to consider how this specific vulnerability impacts investigations. The lack of putting the child at the centre of the intervention becomes clear when examining the investigative powers of police under German law in the context of infiltration of child sexual abuse fora on the dark web. The infiltration of child sexual abuse fora on the dark web is a key investigation strategy in combating online child sexual abuse worldwide, the aim being to identify perpetrators and rescue children from ongoing abuse and exploitation. Following the *do ut des* principle ('I give, so that you may give'), the dissemination of child sexual abuse material is the currency required to gain access to these fora: new users are accepted only after they share child sexual abuse material with the forum administrators. In the past years, Germany debated whether police should be legally authorised to disseminate child sexual abuse material in such cases. Proposals included the dissemination of virtual child sexual abuse material as well as actual child sexual abuse material, with the consent of the depicted child. The study submits that the proposed authority for police to disseminate child sexual abuse material for investigative purposes holds a tremendous risk of re-traumatisation for the affected child, violates the rule of law and, depending on the circumstances of the case, leads to entrapment and enticement.

Lastly, the study explores the efficiency and effectiveness of transnational law enforcement collaboration mechanisms in various international treaties. Both the determination of jurisdiction and the conduct of transnational law enforcement collaboration in online child sexual abuse cases are complicated affairs due to the architecture of cyberspace. As the Internet knows no borders, crimes are typically committed across

numerous jurisdictions. Perpetrators can conceal their identities, and the evidence they leave behind (if any) is highly ephemeral and easily removed, altered or hidden. Efficient and effective transnational law enforcement collaboration is therefore crucial, which calls for a strong international legal framework that upholds the best interests of the child as primary consideration. Against this background, the study examines extra-territorial jurisdiction, jurisdictional conflicts, mutual legal assistance and extradition clauses in the OPSC, the Council of Europe Convention on Cybercrime (Budapest Convention), and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention). With regard to extra-territorial jurisdiction clauses, jurisdictional conflicts are inadequately dealt with at the international level. Given that such conflicts will occur in many online child sexual abuse cases, this study proposes that the 'rule of reason' currently applied to solve jurisdictional conflicts in cybercrime should not focus on the closest connection to a state's territory but needs to establish which state can best serve the interests of the child victim. Moving on to mutual legal assistance and extradition mechanisms, the study submits that such mechanisms are either cyber-specific and efficient, or victim-sensitive and insufficient. Given this gap in responding adequately to online child sexual abuse offences, there is an urgent need to marry child protection with cybercrime expertise in order to create standards and instruments that are efficient in the cyber-context but that always put the best interests of the child victim first.

In conclusion, this study provides recommendations on how the above-mentioned dichotomies should be navigated in the context of the emerging aspects of the international and national regulation, investigation and prosecution of online child sexual abuse material. It is clear that each and every country will have to find a solution to the above discourses within its own legal, political, social, cultural and religious realm. While this study provides a framework or minimum standard within which countries should operate, it cannot provide black-and-white answers to emerging questions that apply widely to a variety of country contexts. Instead, it is submitted that the identified competing discourses constitute the realm in which the regulation, investigation and prosecution of online child sexual abuse offences operate. Therefore, in order to solve these complex legal issues, the answer to the problem statement is not straightforward and unambiguous, but lies in the identification and subsequent navigation of discourses as elaborated above, founded in the rule of law and in the principle of the best interests of the child. The international and national regulation, investigation and prosecution of emerging aspects of online child sexual abuse material hence require constant identification, reflection and calibration of competing discourses, with a view to developing a cyber-specific yet victim-sensitive response that upholds the rule of law and takes a child-centred approach.

Seksueel kindermisbruik in het digitale tijdperk: een heroverweging van juridische kaders en transnationale wethandhavingssamenwerking

In de laatste twintig jaar is de toegang tot en het gebruik van het internet dramatisch toegenomen, waardoor de online wereld een opkomend domein van menselijke interactie is geworden. Een derde van alle internetgebruikers wereldwijd zijn kinderen, en dit domein biedt eindeloze mogelijkheden voor hen om te leren, aansluiting te vinden en met elkaar te communiceren. Maar het internet is niet slechts een platform voor het produceren, beoordelen, delen en verkrijgen van informatie—het biedt criminelen een ruimte om in te opereren die steeds moeilijker toegankelijk is voor wethandhavingsinstanties. Online gepleegde strafbare feiten variëren van het schade toebrengen aan privacy, integriteit en toegankelijkheid van computersystemen tot computer gerelateerde diefstal en de productie, verspreiding en het bezit van seksueel kindermisbruik materiaal of haatzaaiend materiaal. Sommige van deze misdaden zijn producten van nieuwe technologieën, terwijl andere misdaden, zoals seksueel misbruik van kinderen, altijd hebben bestaan en nu worden gepleegd in een andere omgeving.

In het discours over wetgeving, strafrechtelijk onderzoek en vervolging van online seksueel kindermisbruik bestaat er algemene overeenstemming over de schadelijkheid van seksueel misbruik van kinderen; ongeacht of het online of offline plaatsvindt. Wat echter kenmerkend is voor het discours over online seksueel kindermisbruik is dat het wordt gekenmerkt door een aantal tegenstellingen. De eerste is het contrast tussen het nationale en het mondiale niveau. Ofschoon online seksueel kindermisbruik een wereldwijd probleem is dat een internationale aanpak vergt, moet er ook een volledig juridisch kader zijn op nationaal niveau. Een andere tegenstelling is die tussen het discours over seksueel misbruik enerzijds en seksuele autonomie anderzijds. Alhoewel pornografisch materiaal dat duidelijk seksueel misbruik van kinderen laat zien vanzelfsprekend strafbaar dient te worden gesteld, is de grens tussen seksueel misbruik en seksuele autonomie ingewikkelder in zaken waarin de causaliteit tussen het materiaal en de schade aan het kind minder duidelijk is. Verder is er ook een tegenstelling tussen de noodzaak om bindende juridische standaarden te ontwikkelen, beide nationaal en internationaal, en de constant evoluerende technische mogelijkheden. De ontwikkeling van juridische standaarden is een omslachtig proces op zowel het nationale als internationale niveau en daarnaast breidt het technische werkveld zich continu uit. Dit leidt tot een inherent risico dat het reguleren van cybercrime op een dwaalspoor geraakt aangezien een juridisch kader, zodra het wordt vastgesteld, wellicht alweer achterhaald is. Tot slot is er een tegenstelling tussen de bescherming van kinderen en de bescherming van de rechtstaat. Er bestaat een neiging, geboren uit de weerzinwekkende aard van seksueel kindermisbruik materiaal, om schendingen van de rechtstaat en de principes van een eerlijk proces te rechtvaardigen als deze bijdragen—of lijken bij te dragen—aan het gevecht tegen het seksueel misbruik van kinderen. Het doel heiligt dan vaak de middelen, ongeacht de impact die de aantasting van de rechtstaat op de langere termijn heeft op de strafrechtspraak, inclusief geweld tegen kinderen.

Met deze tegenstellingen als leidraad poogt dit onderzoek opkomende aspecten van nationale en internationale regelgeving, strafrechtelijk onderzoek en strafvervolging van online seksueel kindermisbruik materiaal kritisch te analyseren middels een aanpak gebaseerd op kinderrechten en de rechtstaat. Allereerst onderzoekt het de regelgeving met betrekking tot online seksueel kindermisbruik materiaal waarbij de relatie tussen het materiaal en de schade aan het kind niet vanzelfsprekend is en waarbij het belang van de bescherming van kinderen moet worden afgewogen tegen het belang van mensenrechten als vrijheid van meningsuiting. Dit omvat regelgeving omtrent virtueel seksueel kindermisbruik materiaal en materiaal waarin personen als minderjarigen worden afgebeeld, waarvan in beide gevallen niet wetenschappelijk is aangetoond dat ze schade berokkenen aan echte kinderen. Dit onderzoek bekijkt hoe internationaal recht en nationale wetgevers, waaronder de Verenigde Staten, Canada, Japan en Zuid Afrika, de balans vinden tussen de bescherming van kinderen aan de ene hand en de vrijheid van de meningsuiting aan de andere. Er zal worden aangetoond dat er inderdaad voldoende rechtvaardiging is voor het strafbaar stellen van zulk materiaal: de seksuele objectificatie van kinderen, zij het werkelijk of virtueel, door middel van het erotiseren van ongelijkheid of een geconstrueerde gelijkheid is afdoende argument om de schade aan kinderen *in abstracto* te erkennen. Om echter tegenstrijdige belangen te wegen? Zou het kader van strafbaarstelling moeten worden bepaald door op daadwerkelijke schade gebaseerde criteria; niet slechts op idea-

listische overwegingen. Hierom zou de productie en het bezit van zelfgemaakt virtueel seksueel kindermisbruikmateriaal, eveneens als de voorstelling van virtuele 'kind-achtige', niet-menselijke personen uitgezonderd moeten zijn van strafrechtelijke bepalingen.

Verder bestudeert dit onderzoek het opkomende fenomeen van vrijwillig, zelfgeproduceerd pornografisch materiaal (zogeheten 'sexting') dat wordt uitgewisseld tussen adolescenten. In een poging kinderen te beschermen, categoriseren sommige landen vrijwillig sexting tussen minderjarigen als het verspreiden van seksueel kindermisbruikmateriaal, hetgeen leidt tot de vervolging van kinderen als zijnde zedendelinquenten. Argumenten voor de strafbaarstelling van zulk gedrag zijn gebaseerd op de risico's die gepaard gaan met sexting door tieners en het ontmoedigende effect van dergelijke wetgeving. De onderliggende dynamiek voor dit soort argumenten is echter dat kinderen gezien worden als 'onschuldige wezens' die ten koste van alles moeten worden beschermd tegen voortijdige 'seksualisering'. De morele paniek over de seksualiteit van kinderen is dan ook de echte motor achter deze strafbaarstelling. Door het analyseren van wetgeving en jurisprudentie uit de Verenigde Staten, Canada, Duitsland en Zuid-Afrika onderzoekt deze studie de behoefte aan een balans tussen de bescherming van kinderen enerzijds en het recht van het kind op privacy anderzijds. Dit onderzoek betoogt dat het strafbaar stellen van de seksualiteit van kinderen in de online wereld, geuit door middel van sexting, niet kan worden gerechtvaardigd met alleen een beroep op de potentiele risico's voor minderjarigen. Dergelijke strafbaarstelling kan ertoe leiden dat uitingen van seksualiteit door tieners, bijvoorbeeld in de vorm van sexting, de illegaliteit in worden gejaagd, hetgeen begeleiding door ouders over veilig sexting bemoeilijkt en leidt tot een afname van hulpzoekend gedrag door tieners. Deze studie betoogt dat de algemene strafbaarstelling van vrijwillige seksuele exploratie door kinderen in de online wereld contraproductief is met betrekking tot het doel om kinderen te beschermen. Een op rechten gebaseerde aanpak van vrijwillig sexting tussen minderjarigen, en dus een decriminalisering van dit gedrag in combinatie met een focus op brede seksuele voorlichting, is echter in staat om een gepaste balans te vinden tussen de bescherming van kinderen en hun seksuele autonomie.

Ten tweede onderzoekt deze studie de uitdagingen van het inzetten van internationaal recht om de nationale juridische kaders omtrent de strafbaarstelling van online seksueel kindermisbruik materiaal te versterken. Dit doet de studie door middel van het analyseren van de invloed van internationaal recht op landelijke wetgeving en het balanceren van de bescherming van zowel kinderen als de rechtstaat in die context. Gezien het feit dat het merendeel van juridisch onderzoek op het gebied van het reguleren van online seksueel kindermisbruikmateriaal zich richt op Noord-Amerikaanse, Europese of Aziatische landen zal dit onderzoek zijn aandacht vestigen op een Afrikaans land, Namibië, waar de online veiligheid van kinderen de laatste jaren op de nationale kinderbeschermingsagenda is komen te staan. Ondanks het feit dat Namibië het VN-Verdrag inzake de rechten van het kind Facultatief Protocol betreffende de verkoop van kinderen, kinderprostitutie en kinderpornografie heeft geratificeerd, heeft het land tot nu de productie, verspreiding, het bezit en het bekijken van seksueel kindermisbruik materiaal nog niet volledig strafbaar gesteld. Gezien de dringende noodzaak om deze situatie te verbeteren bekijkt deze studie hoe dit Facultatief Protocol kan worden ingezet om het gat in de wetgeving te dichten door middel van de directe toepassing van het Protocol in nationale rechtbanken. Verwijzende naar de ervaring die Rwanda en de Democratische Republiek Congo hebben met het inzetten van internationaal recht om mazen in hun nationale wetboeken van strafrecht te dichten als het gaat om genocide en misdaden tegen de menselijkheid betoogt dit onderzoek dat het anker voor vervolging dient te liggen in nationale wetgeving, welke vervolgens kan worden uitgebreid door de directe toepassing van internationaal recht. Met deze aanpak kunnen de mazen in de wet worden gedicht middels het hooghouden van de rechtstaat en het respecteren van de beginselen van een eerlijk proces.

Ten derde verplaatst het onderzoek de focus naar procedurele aspecten, vooral naar de autoriteit van wetshandhavingsinstanties om online seksueel kindermisbruik materiaal te onderzoeken en relevante personen te vervolgen, waarbij de focus ligt op de onderzoeksbevoegdheden van wethandhavingsinstanties beide op het nationale en het transnationale niveau. De studie wordt geïnformeerd door een acuut besef van de noodzaak tot technologie-slimme wetgeving die tegelijkertijd de belangen van het kind beschermd evenals een nationale juridische standaard die is afgestemd op het internationaal recht. Wanneer het gaat over onderzoeksbevoegdheden en transnationale samenwerking van wethandhavingsdiensten in de context van cybercriminaliteit slaagt het academische discours er grotendeels niet in zich te richten op het kind als een zeer kwetsbaar slachtoffer en te overwegen hoe deze specifieke kwetsbaarheid onderzoeken beïnvloedt. Dat het kind niet centraal staat in de interventie blijkt uit de onderzoeksbevoegdheden van de Duitse politie in de context van infiltratie van seksueel kindermisbruikfora op het dark web. De infiltratie

van seksueel kindermisbruikfora op het dark web is een belangrijke onderzoeksstrategie in het bestrijden van online seksueel kindermisbruik wereldwijd, het doel zijnde om daders te identificeren en kinderen te redden van misbruik en uitbuiting. In naleving van het *do ut des* principe ('ik geef, zodat jij kunt geven') wordt de toegang tot deze fora alleen verleend op voorwaarde van de verspreiding van seksueel kindermisbruik materiaal: nieuwe gebruikers worden alleen geaccepteerd als zij eerst zelf seksueel kindermisbruik materiaal delen met de forumbeheerders. In de afgelopen paar jaar is er in Duitsland gedebatteerd over de vraag of de politie wettelijke bevoegd zou moeten zijn om in dergelijke gevallen seksueel kindermisbruik materiaal te verspreiden, met toestemming van het afgebeelde kind. Dit onderzoek stelt dat de voorgestelde bevoegdheid, waarmee de politie seksueel kindermisbruik materiaal kan verspreiden voor onderzoeksdoeleinden, een zeer groot risico in zich draagt van hertraumatisering van het kind in kwestie, de rechtstaat schendt en, afhankelijk van de omstandigheden van de zaak, leidt tot uitlokking en verlokking.

Als laatste onderzoekt de studie de efficiëntie en effectiviteit van transnationale wethandhavingssamenwerkingsmechanismen in verschillende internationale verdragen. Zowel de bepaling van bevoegdheden als de uitvoering van transnationale wethandhavingssamenwerking in seksueel kindermisbruikzaken zijn complexe zaken gezien de architectuur van cyberspace. Omdat het internet geen grenzen kent, worden misdaden meestal gepleegd onder meerdere rechtssferen. Daders kunnen hun identiteit verbergen, en het bewijsmateriaal dat ze (soms) achterlaten is erg vergankelijk en kan gemakkelijk worden verwijderd, veranderd of verborgen. Efficiënte en effectieve transnationale wethandhavingssamenwerking is daarom cruciaal en dit vraagt om een stevig internationaal kader dat de belangen van het kind voorop zet. Tegen deze achtergrond onderzoekt deze studie de extraterritoriale bevoegdheden, jurisdictiegeschillen, wederzijdse juridische bijstand en uitleveringsclausules in het Facultatief Protocol betreffende de verkoop van kinderen, kinderprostitutie en kinderpornografie, het Cybercrimeverdrag van de Raad van Europa (Verdrag van Boedapest) en het Verdrag van de Raad van Europa inzake de bescherming van kinderen tegen seksuele uitbuiting en seksueel misbruik (Verdrag van Lanzarote). Als het gaat over extraterritoriale jurisdictieclausules word er met jurisdictiegeschillen niet goed omgegaan op het internationale niveau. Gezien het feit dat zulke geschillen vaak voor zullen komen in online seksueel kindermisbruikzaken stelt deze studie voor dat de 'rule of reason' die nu wordt toegepast wordt om jurisdictiegeschillen over cybercriminaliteit op te lossen niet gericht zou moeten zijn op de dichtstbijzijnde connectie tot het territorium van een staat maar op welke staat het beste de belangen van het kind slachtoffer kan behartigen. Vervolgens betoogt de studie op het punt van wederzijdse juridische bijstands- en uitleveringsmechanismen dat zulke mechanismen ofwel cyber-gericht en efficiënt zijn of gevoelig richting het slachtoffer en ontoereikend. Gezien dit tekort in het adequaat reageren op online seksueel kindermisbruikmisdrijven is er dringend behoefte om de bescherming van kinderen te koppelen aan cybercriminaliteitsexpertise om zo standaarden en instrumenten te ontwikkelen die efficiënt zijn in de cybercontext maar die altijd het belang van het kind slachtoffer vooropstellen.

Ter conclusie doet dit onderzoek aanbevelingen over hoe de hierboven besproken tegenstellingen zouden moeten worden benaderd in de context van de opkomende aspecten van internationale en nationale wetgeving, onderzoek en vervolging van online seksueel kindermisbruik. Het is duidelijk dat alle landen oplossingen zullen moeten vinden voor de beschreven uitdagingen binnen hun eigen juridische, politieke, sociale, culturele en religieuze domeinen. Ofschoon deze studie een kader biedt voor een minimale standaard waarbinnen landen zouden moeten opereren, kan het geen zwart-wit antwoorden geven op opkomende vragen die breed betrekking hebben op een heel palet aan nationale contexten. In plaats daarvan stelt de studie voor dat de besproken concurrerende discoursen het domein vormen waarin de wetgeving, het onderzoek en de vervolging van online seksueel kindermisbruik opereren. Daarom, het doel zijnde om deze complexe juridische kwesties op te lossen, is het antwoord op de probleemstelling niet duidelijk en eenduidig: het ligt in de identificatie en daaropvolgende navigatie van discoursen zoals hierboven beschreven, gebaseerd op de rechtstaat en het belang van het kind. Daarom vereisen de nationale en internationale wetgeving, het onderzoek en de vervolging van opkomende aspecten van online seksueel kindermisbruik constante identificatie, reflectie en kalibratie van concurrerende discoursen, met het oog op het ontwikkelen van een cybergerichte aanpak die ook gevoelig is naar het slachtoffer en die de rechtstaat respecteert en kindgericht is.

CURRICULUM VITAE

Sabine Katharina Witting was born on 24 December 1989 in Berchtesgaden, Germany. She studied Law at Goethe University (Frankfurt am Main, Germany) and China University of Political Science and Law (Beijing, China) between 2010 and 2015, specialising in Europeanisation and Internationalisation of Law. From 2015-2019, Sabine worked for the United Nations Children's Fund (UNICEF) in Namibia, first as International Legal Consultant and later as Legal Child Protection Officer. Since May 2019, she has been the Child Justice and Legal Reform Officer with UNICEF Zimbabwe. In her professional work, Sabine focuses on legal reform in the area of violence against women and children, access to justice for vulnerable witnesses, and prevention and response to online violence against women and children.

Since September 2017, Sabine has been a PhD Candidate and Researcher at Leiden University, Netherlands, and connected to the Department of Child Law and the Centre for Law and Digital Technologies (eLaw). The title of her research is: *Child sexual abuse in the digital era: Rethinking legal frameworks and transnational law enforcement collaboration*.

Disclaimer:

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