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

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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.

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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.