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

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

### *Abstract*

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

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

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

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

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

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

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

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

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

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

<sup>2</sup> *Ibid.*

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

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

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

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

## II. THE CURRENT LEGAL SITUATION IN GERMANY

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

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

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<sup>5</sup> See 89. Konferenz der Justizministerinnen und Justizminister 2018, *TOP II.9 Beschluss: Effektive Verfolgung und Verhinderung von Kinderpornographie und Kindesmissbrauch im Darknet durch die ausnahmsweise Zulassung von sog. Keuschheitsproben für Verdeckte Ermittler*, available at: [http://www.jm.nrw.de/JM/jumiko/beschluesse/2018/Fruehjahrskonferenz\\_2018/II-9-BY--Effektive-Verfolgungund-Verhinderung-von-Kinderpornografie-und-Kindesmissbrauchim-Darknet.pdf](http://www.jm.nrw.de/JM/jumiko/beschluesse/2018/Fruehjahrskonferenz_2018/II-9-BY--Effektive-Verfolgungund-Verhinderung-von-Kinderpornografie-und-Kindesmissbrauchim-Darknet.pdf) (accessed 27 June 2018).

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

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

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

<sup>9</sup> For a divergent legal position, see Marco Gercke, *Brauchen Ermittlungsbehörden zur Bekämpfung von Kinderpornographie im sog. ‘Darknet’ weitergehende Befugnisse?*, Computer und Recht 2018, para. 12 *et seq.*

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

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

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

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

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

#### A. Dissemination of 'real' child sexual abuse material

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

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

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

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

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

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

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

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

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

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

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

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

## B. Dissemination of computer-generated child sexual abuse material

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

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

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

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

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<sup>16</sup> For an in-depth discussion of these categories, see Gillespie, *Child Pornography. Law and Policy*, pp. 98–100.

<sup>17</sup> Gillespie, *Child Pornography. Law and Policy*, p. 100.

<sup>18</sup> For an analysis of international law and national law from the US, Canada, Japan and South Africa on this issue, see Chapter II or Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 1*, Computer and Telecommunications Law Review, Issue 3 (2018), pp. 61 *et seq.*; and Sabine K. Witting, *The 'Greyscale' of 'Child Pornography': Of Mangas, Avatars and Schoolgirls: Part 2*, Computer and Telecommunications Law Review, Issue 4 (2018), pp. 73 *et seq.*

<sup>19</sup> See, for example, the Terre des Hommes Netherlands' project 'Sweetie' here: <https://www.terredeshommes.nl/en/sweetie-20-stop-webcam-childsex> (accessed 23 June 2018); for a legal assessment of the Sweetie operation, see Bart W. Schermer et al., *Legal Aspects of Sweetie 2.0*, Leiden / Tilburg: Center for Law and Digital Technologies (eLaw) / Tilburg Institute for Law Technology and Society (TILT), Leiden 2016.

<sup>20</sup> See, for example, art. 20(3) of the German Constitution (Basic Law), available at: [https://www.gesetze-im-Internet.de/englisch\\_gg/](https://www.gesetze-im-Internet.de/englisch_gg/) (accessed 1 July 2018).



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

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

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

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

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

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

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

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

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

<sup>25</sup> European Court of Human Rights, *Furcht v Germany*, No. 54648/09, para. 53.

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

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

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

## V. CONCLUSION

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

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

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<sup>26</sup> European Court of Human Rights, *Furcht v Germany*, No. 54648/09, para. 50–53; Robert Esser, *Implementation of Judgments of the ECtHR in the Area of Criminal Law and Criminal Procedure Law from a German Perspective*, Journal of Siberian Federal University, Humanities and Social Sciences, Vol. 6 (2017), pp. 877 *et seq.*

<sup>27</sup> European Court of Human Rights, *Furcht v Germany*, para. 50.

<sup>28</sup> *Ibid.*, para. 64.

<sup>29</sup> Schermer et al., *Legal Aspects of Sweetie 2.0*, p. 52.

<sup>30</sup> Christopher Knaus, *Australian police sting brings down paedophile forum on dark web*, The Guardian, 7 October 2017, available at: <https://www.theguardian.com/society/2017/oct/07/australian-police-sting-brings-down-paedophile-forum-on-dark-web> (accessed 6 July 2018); Høydal/Stangvik/Hansen, *Breaking the Dark Net: Why the police share abuse pics to save children*, VG News, 7<sup>th</sup> October 2017, available at: <https://www.vg.no/spesial/2017/undercover-dark-web/?lang=en> (accessed 25 June 2018).

<sup>31</sup> Alisdair, A Gillespie, *Cybercrime. Key Issues and Debates*, Oxon 2019, p. 362.

<sup>32</sup> Gesetzentwurf der Bundesregierung, BT-Dr. 19/13836 (9 October 2019), p. 15.

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

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

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, p. 16.

<sup>35</sup> For further discussion on this topic, see Chapter II.

<sup>36</sup> Sabine Menkens, *Um in die Foren zu kommen, müssen Kinderpornos geliefert werden*, WELT, 21 November 2019, available at: <https://www.welt.de/politik/deutschland/article203673432/Darknet-Um-in-die-Foren-zu-kommen-muessen-Paedophile-Kinderpornos-liefern.html> (accessed 14 January 2020).

<sup>37</sup> Original text of amendment of the Criminal Code (in German) available at: <https://www.gesetze-im-internet.de/stgb/BJNR001270871.html> (accessed 13 May 2020):

„Absatz 1 Nummer 1 und 4 gilt nicht für dienstliche Handlungen im Rahmen von strafrechtlichen Ermittlungsverfahren, wenn

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

Further, the Criminal Procedure Act has been amended as follows (in German), available at: <https://www.gesetze-im-internet.de/stpo/BJNR006290950.html> (accessed 26 May 2020):

„Einsätze, bei denen entsprechend § 184b Absatz 5 Satz 2 des Strafgesetzbuches Handlungen im Sinne des § 184b Absatz 1 Nummer 1 und 4 des Strafgesetzbuches vorgenommen werden, bedürfen der Zustimmung des Gerichts. In dem Antrag ist darzulegen, dass die handelnden Polizeibeamten auf den Einsatz umfassend vorbereitet wurden. Bei Gefahr im Verzug genügt die Zustimmung der Staatsanwaltschaft. Die Maßnahme ist zu beenden, wenn nicht das Gericht binnen drei Werktagen zustimmt. Die Zustimmung ist schriftlich zu erteilen und zu befristen. Eine Verlängerung ist zulässig, solange die Voraussetzungen für den Einsatz fortbestehen.“

<sup>38</sup> Beschlussempfehlung und Bericht des Ausschusses für Recht und Verbraucherschutz, BT-Dr. 19/16543 (15 January 2020), p. 5.

<sup>39</sup> Tagesschau, *Mit Fake-Bildern gegen Kinderpornos*, 7 June 2018, available at: <https://www.tagesschau.de/inland/justizminister-kinderpornografie-101.html> (accessed 2 July 201).

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