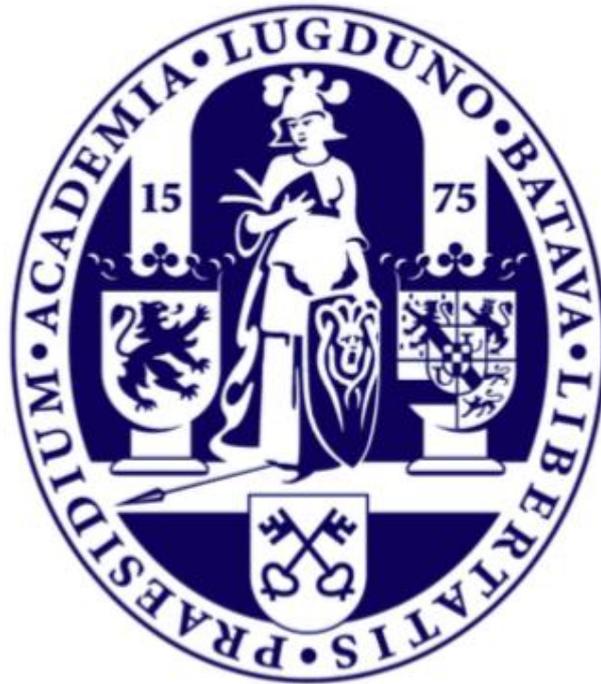


**Master of Laws:  
Advanced Studies in International Children's Rights**



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**The Phenomenon of  
Self-Generated Sexual Content  
among Adolescents**

Supervisor:

Thesis submitted by:

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for the final examination of the Advanced LL.M.  
in International Children's Rights



Date: 9 July 2021  
Location:

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## Executive Summary

With the rapid development of information and communication technologies, the bedroom culture and the natural interest of teenagers towards sexuality, the exploration of the latter has been expanded online. As a result, young people engage in the practice of self-generated sexual material. Using smartphones, webcams, or any other modes of socially interactive digital technology, they produce sexual pictures or videos of themselves, which they transmit online to a recipient, or many recipients. Accordingly, in this study, this phenomenon of produced and shared self-generated sexual material among adolescents is approached from a children's rights perspective. Chapter 1 introduces the context in greater detail and sets the definitions required for a proper understanding of the topic.

Chapter 2 focuses on setting the theoretical basis concerning children's rights to enable a comprehension of the tensions that arise regarding the debate surrounding self-generated sexual material among youngsters. Two particularly relevant theories are explained: the 3P concept (provisions rights, protection rights and participations rights) and the schools of thoughts (paternalism, liberation, emancipation, and welfare). It is also highlighted that the Convention on the Rights of the Child underscores children as subjects of rights that enjoy the whole set of rights.

Chapter 3 introduces the Convention of the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Precisely, the relevant provisions when it comes to teenage sexting are extensively presented. First, it concerns the principle of evolving capacities, which is described as the process of acquiring autonomy. Second, it concerns the right to freedom of expression, which is one of the most important participation rights. Third, it concerns the right to privacy, which covers the private personal life of someone, including relations and sexuality. Fourth, it concerns the right to be protected against all forms of sexual exploitation and sexual abuse. Fifth, it concerns the prohibition of child pornography, contemporary named children sexual abuse material. A wink is made to a regional instrument, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse due to its similar provision and since the treaty is open for signature by all states. This chapter underscores that young people's sexuality is not explicitly recognized in international law.

Chapter 4 provides an overview of the conceptual framework of different age limits across various domains. It shows that different age limits are set within the span of childhood, which modify the definition of child (understood by CRC Article 1 as every human being below the age of eighteen years). The age of sexual consent, the age of medical treatment and the age of criminal responsibility are given attention due to their resemblances with the practice of self-generated sexual content online. They all imply making autonomous decisions, a control over their own body and the capability to understand the consequences, risks, and impact of their actions. Because they relate to similar domains, fixing an age limit in relation to sexting might seem recommendable. However, it would be difficult to alignment it with other relevant age limits like the minimum age of criminal responsibility and the age of sexual consent. In addition, a recent development on the international scene does not support the creation of such age limit.

Chapter 5 addresses certain risks related to the phenomenon of sexting. It covers risks directly present for the depicted person, such as sextortion and secondary sexting. It also presents risks for all children in general, which includes seduction and grooming. In order to identify and manoeuvre those risks, holistic education to teenagers is suggested as a valuable solution.

Chapter 6 reviews two of the contemporary responses of sexting. First, literacy campaigns in France, the Netherlands and Canada. All of them are described as problematic as they explicitly encourage

abstinence as a solution to mitigate the risks associated with sexting. By doing so, teenagers' sexuality is denied. Rather than using the campaigns for education and to direct the attention towards potential perpetrators and their responsibility, they endorse victims blaming attitudes. Second, prosecution as a tool to discourage consensual self-generated sexual content by youngsters is also discussed. The recent development according to which sexting should not be criminalized is acknowledged. However, it highlights the fact that this advancement is not yet located in the context of children's rights. Thus, the chapter suggests that criminalisation is not a suitable solution, particularly in the light of their right of freedom of expression and their right to privacy, both in light of the evolving capacities principle.

Chapter 7 brings insights on how to respond to the risk of secondary sexting. This chapter starts by explaining some of the common motives behind the practice, including revenge, as an attempt to regulate the victims' behaviour, to gain social notoriety, for fun, etc. In all cases, the involvement of criminal law for non-consensual sharing of this kind of material is suggested as a suitable solution. However, being prosecuted for child sexual abuse material also means possibly being labelled as a sex offender. This outcome is not always appropriate. The reasons leading to sharing a sexual picture further than originally intended are so numerous and diverse and do not automatically abuse or exploit the teenager depicted. In consequence, those various intentions must be correctly discovered to appropriately sanction the behaviour. It concludes by recommending enacting a new offense specially for secondary sexting that take into consideration the complexity and the heterogeneous intentions and consequences of the misconduct.

Finally, it is concluded in this thesis that the rights of teenagers must be respected when it comes to the responses to young people's online sexuality, specifically sexting among adolescents. Whether it be regarding primary sexting or secondary sexting, the responses are not completely in conformity with the international children's rights principles. To remediate the situation, recommendations are reiterated. Concerning the literacy campaigns, instead of promoting an abstinence discourse that denies teenager's agency in regard to sexuality, they should provide information to empower juveniles to adequately deal with the risks of the practice. Concerning the recommendation to not prosecute consensual sexting, it should be explicitly mentioned that the debate involves a tension between rights. For instance, it should be established that, on one hand, protection concerns arise (e.g., right to be protected against all form of sexual exploitation and sexual abuse as well as child pornography) and, on the other hand, teenagers are rights holders, which include the right to freedom of expression and privacy in line with their evolving capacities. Concerning secondary sexting, the legal response involving criminal law should be more considerate of the complexity of the practice. Thus, a different offense should be created to adequately respond to the variety of reasons leading to this practice.

## **Keywords**

Teenagers; children's rights; sexual rights; self-generated sexual material; primary sexting; secondary sexting; prosecution; literacy campaign; freedom of expression; right to privacy; evolving capacities.

## Overview of Main Findings

This thesis presents five main findings and contributions.

First, this thesis provides an understanding of teenagers' human rights in a sexual context. Although they are rights-holders, there is only an implicit recognition of their sexual rights in international law. Repression and denial of youngsters' sexuality is still predominant, and it is transposed in the national literacy campaigns analysed, which is one of the responses to young people's online sexuality. Indeed, this thesis finds that the campaigns examined are principally denying youngster's sexual rights by exclusively putting upfront the risks of the practice. An abstinence discourse is simply repeated as a solution and no tool or support were given to overcome them. In opposition, this thesis advocates for the dissemination of information to empower young people to adequately deal with the risks of the practice.

Second, this thesis underlines various age limits across different domains that are similar to sexting. Correspondingly, the desire to create an age limit could emerge when it comes to consensually produced and shared self-generated sexual material among adolescents. However, this thesis supports that this is not recommendable. It would be difficult to set an age limit that is logically aligned with other relevant age limits such as the minimal age of criminal responsibility or the age of sexual consent. Moreover, fixing an age limit would not make sense with the recent development on the topic, according to which criminalisation should be avoided.

Third, this thesis indeed acknowledges the recent development which strongly recommends avoiding the employment of criminal law when it comes to primary sexting. This thesis adds to this advancement by situating the discussion within a rights-based approach, specifically in the narrative of children's rights. Certainly, the right to be free from sexual abuse and exploitation, including child pornography, is at stake. On the other side, after presenting a holistic understanding of the practice, the rights to freedom of expression and to privacy are chosen to host the right-based legal analysis, with the constant interaction with the principle of the evolving capacities. This is necessary from a legal point of view in order to balance the need of protection and empowerment of youngsters in the context of their online sexuality. It is also original because it has not been done yet.

Fourth, this thesis uses a new angle, broadening the interpretation of the right to privacy understood in the field of children's rights. The current academic literature primarily presents the right to privacy of children guaranteed by CRC Article 16 from a data protection point of view. In order to move away from this narrow perspective, this thesis borrows the interpretation generally made in human rights laws. Accordingly, as a 'catch-all' human right, the right to privacy covers the free expression of one-self and sexual activity.

Fifth, the current debate in the academic literature concerning young people's self-generated sexual material is mainly concerning primary sexting. Thus, this thesis also focuses on an overlooked aspect, namely secondary sexting. By understanding the intentions of youngsters who participate in secondary sexting, this thesis contributes to the existing knowledge by giving insights on how to legally respond to the phenomenon in accordance with the international children's rights principles. This thesis supports that the use of criminal law is justifiable when it comes to secondary sexting. Nonetheless, charging young people with children sexual abuse material is questionable. This sexual offense encompasses extremely negative consequences (e.g., sex offender label) that are undoubtedly damageable for the young perpetrators. They, *inter alia*, considerably hinder their reintegration and constructive participation in the society. In addition, due to the numerous motives behind the practice, a unique offense of child sexual abuse material does not necessarily suit the actions, as the

exploitation of a child is not by nature the intent. Sometimes, for instance, it is situated in the (cyber)bullying and harassment narrative, as the intention is to harass, shame or blame. In those situations, charging the teenage perpetrator with a sexual offense is inappropriate. Therefore, an offense specifically for secondary sexting should be created to adequately respond to the variety of reasons leading to this misconduct.

## 1. Introduction

"[...] I speak from experience. For five years, beginning when I was 13 years old, I operated a pornographic web site featuring images of myself fluttered on the Internet by webcams." - Justin Berry, 19-year-old.<sup>1</sup>

### 1.1. Self-generated sexual content and young people

Sexuality is a topic of interest for adolescents. Being in a rapid curve of development, the construction and expression of their sexuality is explorative and influenced by their engagement in the digital world, where they are particularly active. Indeed, as a result of the proliferation of digital technology, children are increasingly using information and communication technologies, including social media and mobile messaging applications.<sup>2</sup> It is estimated that, globally, one in three Internet users is below the age of 18<sup>3</sup> and youth from 15 to 24 represents the most connected age group.<sup>4</sup> Additionally, children do usually not recognise a strict division between the online and offline part of their lives.<sup>5</sup> Thus, without surprise, their sexual exploration has then expanded to the Internet. One of the manifestations of the digitalisation of teenager's sexuality is by generating and sharing self-generated sexual content of themselves online. This might be accentuated by the 'bedroom culture', according to which their online access has become more personal, more private, and less supervised.<sup>6</sup> Images and videos self-generated by children in their bedrooms or another room in a home setting represent almost half of the 153,369 webpages actioned during 2020 by the Internet Watch Foundation.<sup>7</sup>

It must be noted that this thesis does not employ the nomenclature 'children' while referring to people under 18<sup>8</sup> who self-generate sexual compromising pictures or videos of themselves in the digital world.<sup>9</sup> This is because "[t]he term 'child' collapses infants and adolescents in their mid-teens – clearly categories of person with very different life experiences and capacities – and 'child' also denotes an air of vulnerability and innocence".<sup>10</sup> Accordingly, 'teenagers', 'adolescents', 'juvenile', 'young people' and 'youngsters' are the appellations that are used interchangeably.

The practice of self-generated sexual content is broad and encompasses, *inter alia*, sexting. The latter has been defined in multiple ways. Indeed, "it remarkably varie[s] in terms of context, meaning, and

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<sup>1</sup> M. G. Leary, Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation, 15(1) *Virginia Journal of Social Policy & the Law* 4 (2007).

<sup>2</sup> Committee of the Parties to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Opinion on child sexually suggestive or explicit images and/or videos generated, shared and received by children, para a (2019).

<sup>3</sup> UNICEF, The State of the World's Children: Children, Food and Nutrition, Growing Well in a Changing World 144 (2019).

<sup>4</sup> 71% are online, compared to 48% of the total population. See UNICEF, The State of the World's Children: Children in a Digital World 1 (2017).

<sup>5</sup> D. Kardefelt-Winther & C. Maternowska, Addressing Violence against Children Online and Offline, 4(3) *Nature Human Behaviour* 229 (2020); Committee on the Rights of the Child, Report of the 2014 Day of General Discussion "Digital media and children's rights" paras 11 and 29 (2014).

<sup>6</sup> *Supra* note 4, at 1.

<sup>7</sup> Internet Watch Foundation, Face the Facts: The Internet Watch Foundation Annual Report 2020 (2020), available at: <<https://annualreport2020.iwf.org.uk/trends/international/selfgenerated>>.

<sup>8</sup> According to the definition of the CRC, children are human beings below the age of 18 (CRC Article 1).

<sup>9</sup> ECPAT, Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse 43 (2016).

<sup>10</sup> M. McLelland, 'Not in Front of the Parents!' Young People, Sexual Literacies and Intimate Citizenship in the Internet Age, 20(1-2) *Sexualities* 237 (2017).

intention.”<sup>11</sup> From an etymological perspective, it collapses the terms ‘sex’ and ‘texting’.<sup>12</sup> Although there is no universally agreed definition, it is usually used to refer to the digital production - cell phones, smartphones, webcams, or any other modes of socially interactive digital technology - to create and share sexually suggestive or explicit imagery via mobile phones or over the Internet.<sup>13</sup>

The practice of sexting may also be primary or secondary. Primary sexting includes “unity of person among the taker, the depicted, and the transmitter of the image.”<sup>14</sup> In other words, the person taking the intimate self-portrait is also the one who is disseminating it to one, or many recipients. For the purpose of this thesis, primary sexting is seen as a consensual activity, meaning that young people involving in it (senders and receivers) are doing it freely and willingly. In opposition, secondary sexting is one of the non-consensual forms of sexting. It refers to the practice “in which the sender is not the same person who took and initially transmitted the image in question but, instead, is a person who received it from someone else and then forwarded it onto others, without the permission or knowledge of the person who originally took it”.<sup>15</sup> The absence of authorisation for further dissemination of the material depicting the teenager who initially self-produced and shared it makes the practice non-consensual.

## 1.2. Aim of the research

The practice of self-generated sexual material involving young people is delicate. This research aims to ensure that a balance between children’s protection rights and empowerment rights is found regarding the controversial practice. This thesis also attempts to locate the debate surrounding the utilisation of criminal law regarding consensual self-generated sexual content in a children’s rights narrative. Furthermore, it aims to explore and challenge the labelling of sexual-generated sexual material as child sexual abuse material (hereinafter cited as CSAM). In addition, this thesis intends to give attention to the further dissemination of the material than originally intended by the depicted youngsters. Finally, this thesis strives to raise awareness about the sexual rights of juveniles.

## 1.3. Research question

The main question to be answered is the following: To what extent are the responses to young people’s online sexuality, specifically sexting among adolescents, in conformity with the international children’s rights principles?

In the process, this paper analyses various subsidiary questions. Four of them are raised: (1) To what extent are children’s sexual rights recognized within international laws? (2) To what extent would it be recommendable to fix an age limit for consensually produced and shared self-generated sexual material? (3) To what extent is criminalizing consensual sexting a suitable solution? and (4) To what extent is the involvement of criminal law for non-consensual sharing of this kind of material appropriate?

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<sup>11</sup> K. Cooper and al., *Adolescents and Self-Taken Sexual Images: A Review of the Literature* 24 (2015).

<sup>12</sup> L. Murray & T. Crofts, *Gender, Pressure, Coercion and Pleasure: Untangling Motivations for Sexting Between Young People*, 55(3), *British Journal of Criminology* 454 (2015); C. Calvert, *Youth-Produced Sexual Images, “Sexting”, and the Cellphone*, in F. Saleh and al. (Ed.), *Adolescent Sexual Behavior in the Digital Age* 91 (2014).

<sup>13</sup> *Id* Murray and Crofts (2015), at 454; *Id* Calvert (2014), at 91; J. Ringrose and al., *A Qualitative Study of Children, Young People and ‘Sexting’* 6 (2012).

<sup>14</sup> *Supra* note 12 Calvert (2014), at 94.

<sup>15</sup> *Id*, at 95.

## 1.4. Methodology

In order to answer the research question and the sub questions, a desk review had been conducted. Relevant international standards and norms, reports, United Nations documents and academic literature were consulted. While most of the latter read was legal, some were also from other disciplines such as criminology, psychology, and feminist and gender studies. Bringing a multidisciplinary approach to this thesis was necessary to holistically embrace the topic of self-generated content among adolescents. Also, regional, and national legislations were examined to provide some concrete examples of the implementation of the international principles. For the same purpose, domestic news and practices were additionally turned to.

## 1.5. Outline

This thesis is divided into 8 chapters. Following the present introduction, chapter 2 familiarizes the typologies concerning children's rights. Chapter 3 introduces the relevant provisions from the international legal framework when it comes to young people who self-generate sexual material in the digital world. Chapter 4 presents selected age limits that change the definition of the child in specific context. Chapter 5 discloses diverse risks associated with the practice. Chapter 6 moves into contemporary examples of responses to the phenomenon of consensual sexting. Chapter 7 advances some thoughts concerning a contemporary challenge, namely youth who disseminate without permission self-generated sexual material. Finally, chapter 8 concludes this thesis by summarizing the main findings and reiterating the recommendations.

## 2. Typologies Concerning Children's Rights

This chapter familiarises with the different approaches among the conceptions of children's rights. Those conceptual frameworks are important because they are used as lenses when it comes to the analysis of issues involving children's rights. Tensions emerge within the different perspectives, including regarding online self-generated sexual content by youngsters. Consequently, in order to well encircle the topic of this thesis, two important typologies are explained in this chapter: the 3Ps concept and the schools of thoughts in children's rights.

### 2.1. The 3Ps concept

The 3 P's are used to categorise children's rights between three main types of rights: provision rights, protection rights, and participation rights.

Provision is about fulfilling children's basic needs.<sup>16</sup> It includes, for example, social security,<sup>17</sup> education,<sup>18</sup> family life,<sup>19</sup> minimum standards of health,<sup>20</sup> play, recreation, culture, and leisure.<sup>21</sup>

Protection concerns the right to be sheltered from harm.<sup>22</sup> For instance, children have the right to be free from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment,

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<sup>16</sup> T. Hammarberg, The UN Convention on the Rights of the Child – and How to Make It Work, 12(1) *Human Rights Quarterly* 100 (1990).

<sup>17</sup> CRC Article 26.

<sup>18</sup> CRC Articles 28 and 29.

<sup>19</sup> CRC Article 9.

<sup>20</sup> CRC Article 24.

<sup>21</sup> CRC Article 31.

<sup>22</sup> *Supra* note 16, at 100.

maltreatment, or exploitation, including sexual abuse,<sup>23</sup> as well as economic exploitation,<sup>24</sup> substance abuse,<sup>25</sup> and discrimination.<sup>26</sup>

Participation certainly covers the children's right to be heard on decisions affecting one's own life.<sup>27</sup> More extensively, it includes civil and political rights,<sup>28</sup> such as the right to a name,<sup>29</sup> to access to information,<sup>30</sup> of freedom of expression,<sup>31</sup> freedom of association,<sup>32</sup> freedom of thought, conscience and religion,<sup>33</sup> and the right to challenge decisions made on their behalf.<sup>34</sup> Participation rights "underline children's status as individuals with fundamental human rights, and views and feelings of their own."<sup>35</sup>

## 2.2. Schools of thoughts

The schools of thought as developed by Karl Hanson structure the diverse ideological perspectives on children's rights. The differences among conceptions of children's rights are classified in four approaches, namely paternalism, liberation, emancipation, and welfare.

### 2.2.1. Paternalism

From a paternalist position, children are considered as human 'becomings' who are still yet incompetent to make rational decisions.<sup>36</sup> They are viewed, by nature, as lacking "an adequate conception of their own present and future interests".<sup>37</sup> With that perspective, adult control over children is justified to secure their welfare and to preserve their future well-being.<sup>38</sup> They are considered incapable and vulnerable, and their lack of experience and maturity denote their inability to look after themselves.<sup>39</sup> They are in need of protection from themselves and others. Consequently, their rights are limited to protection rights.

### 2.2.2. Liberation

On the opposite spectre, liberationists consider children as competent and autonomous human beings. Consequently, no distinction between the rights of children and those of adults is required: "children are entitled to all the rights and privileges possessed by adults"<sup>40</sup> and it includes participatory rights. In addition, their right to self-determination is extremely important: "The issue of self-

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<sup>23</sup> CRC Article 19.

<sup>24</sup> CRC Article 32(1).

<sup>25</sup> CRC Article 33.

<sup>26</sup> CRC Article 2.

<sup>27</sup> *Supra* note 16, at 100.

<sup>28</sup> G. Lansdown, *Children's Rights*, in B. Mayall (Ed.), *Children's Childhoods: Observed and Experienced* 36 (1994).

<sup>29</sup> CRC Article 7.

<sup>30</sup> CRC Article 13.

<sup>31</sup> CRC Article 13.

<sup>32</sup> CRC Article 15.

<sup>33</sup> CRC Article 14.

<sup>34</sup> *Supra* note 28, at 36.

<sup>35</sup> R. Hodgkin & P. Newell, *Implementation Handbook for the Convention on The Rights of the Child* 149 (2007).

<sup>36</sup> K. Hanson, *Schools of Thought in Children's Rights*, *Children's Rights Unit, University Institute Kurt Bosch* 12 (2008).

<sup>37</sup> V. L. Worsfold, *A Philosophical Justification for Children's Rights*, 44(1) *Harvard Educational Review* 146 (1974).

<sup>38</sup> D. Archard, *Children: Rights and Childhood* 66 (2015).

<sup>39</sup> *Id.*, at 66.

<sup>40</sup> *Id.*, at 65.

determination is at the heart of children's liberation. It is, in fact, the only issue, a definition of the entire concept."<sup>41</sup>

### 2.2.3. Emancipation

The emancipation approach is more nuanced. It considers children as both being and becoming. They have the "right, in accordance with their evolving capacities, to actively take part in shaping their own lives and environment."<sup>42</sup> Children are seen as competent, but it can be proven otherwise. The rights of children are viewed in this particular order: participation rights, provision rights second and protection rights.

### 2.2.4. Welfare

From a welfare perspective, children are also seen as both being and becoming. However, their rights are perceived in a different order: protection rights first, provision rights second, and participation rights last. Primarily perceived as incompetent, children can nevertheless prove the contrary. The approach aims "balance between children's rights to present autonomy with their capacity for future autonomy, which in some instances can be invoked to limit their present autonomy."<sup>43</sup> Indeed, "protecting children and limiting their rights to freedom encourages their future possibilities to make choices".<sup>44</sup>

## 2.3. Position of the Convention on the Rights of the Child

It has been noted that provision and protection rights are stronger in the Convention on the Rights of the Child (hereinafter cited as CRC or Convention) than the rights related to participation.<sup>45</sup> Indeed, the child in the CRC "is produced as a legal subject that needs 'protection more than freedoms' – even protection *at the cost of freedom*".<sup>46</sup>

However, despite this observation, the Committee on the Rights of the Child (hereinafter cited as CRC Committee) recalled that "there is no hierarchy of rights in the Convention".<sup>47</sup> It has been underscored that 'the rights' in CRC Article 4, which requires to take all appropriate measures for the implementation of the rights, must be read as 'all the rights equally'.<sup>48</sup>

Nonetheless, it is commonly agreed that the adoption of the CRC has marked a paradigm shift in regard to children and their rights. The CRC Committee "has consistently emphasized that the child must be regarded as an active subject of rights and that a key purpose of the Convention is to emphasize that human rights extend to children [...] The Committee has rejected what it termed "the charity mentality and paternalistic approaches" to children's issues."<sup>49</sup> Thus, children are recognized as bearers of rights and are no longer treated as the objects of adult protection.

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<sup>41</sup> R. E. Farson, *Birtherights* 27 (1974).

<sup>42</sup> *Supra* note 36, at 17.

<sup>43</sup> M. D.A Freeman, *The Moral Status of Children* 37 (1997).

<sup>44</sup> *Supra* note 36, at 15.

<sup>45</sup> *Supra* note 16, at 100.

<sup>46</sup> R. Linde, *The Rights of Queer Children*, 27(4) *The International Journal of Children's Rights* 734 (2019).

<sup>47</sup> Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)\*, UN Doc. CRC/C/GC/14 para 4 (2013).

<sup>48</sup> *Supra* note 38, at 120.

<sup>49</sup> *Supra* note 35, at 149.

### 3. International Children's Rights Framework

Following the introduction of the important theoretical foundations about children's rights, this chapter presents the international children's rights framework in relation to self-produced sexual content by youngsters. The relevant provisions come from the CRC, which is the world's most widely ratified human rights treaty,<sup>50</sup> and its second optional protocol named Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (hereinafter cited as OPSC). The Convention is also the most elaborated international legal instrument that guarantees children human rights. All of them are universal, indivisible, interdependent and interrelated.<sup>51</sup> Nevertheless, palpable tension emerges from the framework and the principle of evolving capacities, the right to freedom of expression, the right to privacy and the right to be protection against all forms of sexual exploitation and sexual abuse have been chosen to illustrate the friction. Shortly, the CRC pictures children as having agency. Nonetheless, they are not explicitly acknowledged as sexual agencies, which is defined as "the ability to consent, to express a sexual and gender identity, and to engage in sex."<sup>52</sup>

#### 3.1. Evolving capacities (CRC Article 5)

CRC Article 5 indicates that parental direction and guidance must be provided in a manner consistent with the evolving capacities of the child. Explained by the CRC Committee, the concept of evolving capacities is described as an "enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights."<sup>53</sup> In other words, children gain autonomy and more freedom to exercise their rights as they grow up. Because of the strengthened position of children in society, there is a "transfer of responsibility for decision-making from responsible adults to children".<sup>54</sup> When it comes to adolescents, the CRC Committee mentions that "they transition from a situation of dependency to one of greater autonomy."<sup>55</sup>

Accordingly, the level of protection also varies: "With respect to young children, who first need protection and care, rights to protection should be emphasised. As children grow older, their rights to self-determination become more important, and their rights to protection may less immediately lead to a restriction of their rights to freedom."<sup>56</sup> By way of explanation, this level of protection and limitation also applies in regard to sexuality and varies as well: "Seventeen-year-olds are not children, and it is ludicrous to try to impose upon them the same limitations that apply to seven-year-olds... we cannot carry on pretending that sexuality is a mysterious force that descends on a person suddenly on his or her eighteenth birthday, prior to which the individual remains in pristine innocence."<sup>57</sup>

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<sup>50</sup> All States are party to the CRC, with the unique exception of the United States of America. ([https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en)), last visited (26-04-2021).

<sup>51</sup> *Supra* note 47, at para 16(a).

<sup>52</sup> *Supra* note 46, at 724.

<sup>53</sup> Committee on the Rights of the Child, General Comment No. 20 (2016) on the Implementation of the Rights of the Child During Adolescence, UN Doc CRC/C/GC/20, para 20 (2016).

<sup>54</sup> G. Lansdown, *The Evolving Capacities of The Child* at 4 (2005).

<sup>55</sup> *Supra* note 53, para 9.

<sup>56</sup> S. van der Hof, *I Agree... Or Do I? A Rights-Based Analysis of the Law on Children's Consent in the Digital World*, 34(2) *Wisconsin International Law Journal* 124 (2017).

<sup>57</sup> P. Jenkins, *Beyond Tolerance: Child Pornography on the Internet* 220 (2001).

On one hand, the concept of evolving capacities recognizes children as rights holders and children's agency in decision making.<sup>58</sup> On the other hand, it recognises the children's need for protection.<sup>59</sup> The CRC Committee emphasizes that it "does not obviate States' obligations to guarantee protection."<sup>60</sup> Thus, the right to freedom and self-determination as well as the right to protection and care are recognised within the concept of evolving capacities and both must be assiduously balanced.<sup>61</sup>

### 3.2. Freedom of expression (CRC Article 13)

The right to freedom of expression is a civil right exercised by children themselves.<sup>62</sup> It has been described as "the primary channel for participation."<sup>63</sup> The CRC Committee explained that "creating an environment of respect for children to express their views [...] also contributes towards building children's capacities to exercise their right to freedom of expression".<sup>64</sup> CRC Article 13(1) guarantees the right through any media of the child's choice. Without any doubt, it applies offline as well as online.<sup>65</sup> It has been recognized that supporting children's self-expression is indeed one of the effects of social networks.<sup>66</sup>

One of the States' obligations is to "ensure that children are not forced to refrain from sharing an opinion due to a lack of privacy safeguards or online surveillance, or because of the sensibility of the topic."<sup>67</sup> Nonetheless, the right to freedom of speech is not absolute. CRC Article 13(2) denotes that, if necessary, the law may restrict the exercise of the right to freedom of expression. It is, *inter alia*, the case when it comes to the protection of public order and public morals.<sup>68</sup> Although restrictions and limitations on freedom to expression are permissible, it "must constitute an exception to the rule and must be kept to the minimum necessary".<sup>69</sup> It is considered legitimate when it comes to child pornography.<sup>70</sup>

### 3.3. Right to privacy (CRC Article 16)

CRC Article 16 lays down the fundamental right to privacy, which simultaneously includes a protection element, as well as a participatory one.

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<sup>58</sup> S. Varadan, *The Principle of Evolving Capacities Under the UN Convention on the Rights of the Child*, 27 *International Journal of Children's Rights* 317 (2019).

<sup>59</sup> A. McEwan-Strand & M. Skivenes, *Children's Capacities and Role in Matters of Great Significance for Them*, 28 *International Journal of Children's Rights* 466 (2020).

<sup>60</sup> *Supra* note 53, para 19.

<sup>61</sup> *Supra* note 56, at 130.

<sup>62</sup> L. Smith, *Convention on the Rights of the Child: Freedom of Expression for Children*, in T. McGonagle and Y. Donders (Ed.) *The United Nations and Freedom of Expression and Information* 146 (2015).

<sup>63</sup> Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Mr. Frank La Rue, UN Doc. A/HRC/14/23, para 50 (2010).

<sup>64</sup> Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, UN Doc CRC/C/GC/12, para 81 (2009).

<sup>65</sup> For instance, the participants of the 2014 Day of General Discussion regarding digital media and children's rights "acknowledged that even though the Convention on the Rights of the Child was adopted by the General Assembly at a time where the Internet was still in its infancy, it is fully relevant and applicable in the digital environment." See *Supra* note 5 CRC Committee Report (2014), para 46.

<sup>66</sup> F. Liat, *Minorgraphy - Minors Creating Pornography - A New Digital Practice Demands a Reframing of Children's Rights*, 57(3) *Washburn Law Journal* 491 (2018).

<sup>67</sup> W. Vandenhoe and al., *Children's Rights* 162-163 (2019).

<sup>68</sup> CRC Article 13(2)(b) CRC.

<sup>69</sup> *Supra* note 63, para 77.

<sup>70</sup> *Id.*, para 79(h); Human Rights Council, *Report of the Special Rapporteur on the right to freedom of opinion and expression*, Frank La Rue, UN Doc. A/HRC/17/27, para 27 (2011).

Generally speaking, in international law, the term privacy refers to “an “inner circle” in which the individual may live his own personal life as he chooses.”<sup>71</sup> Indeed, decisional autonomy is one of the many dimensions of the right to privacy.<sup>72</sup> Decisions may concern relations and this relational autonomy covers, among other things, sexual relationships. It is closely related to the notion of ‘private life’, which captures *inter alia*, one’s personal development, including gender identification, sexual orientation, and sexual life.<sup>73</sup> It also covers the right to one’s image and photographs, the protection of individual reputation<sup>74</sup> as well as “the right to establish and develop relationships with other human beings”.<sup>75</sup>

This is in line with Koops et al.’s typology of privacy. In this categorisation, decisional privacy, which is one of the primary types of privacy, is described as “typified by intimate decisions, primarily of a sexual or procreative nature, but also including other decision-making on sensitive topics within the context of intimate relationships”.<sup>76</sup> In other words, it covers the right to make certain intimate choices. However, with regard to children, this right is challenged and subject to an evolving entitlement because it must be adapted in function of the evolving capacities of the child: “Unlike adults who enjoy full autonomy when entering personal relationships, whether of a sexual nature or otherwise, children remain subject to the protective influence of their parents and the state”.<sup>77</sup> Indeed, during the drafting of the Convention, the delegations to the Working Group stressed that freedom rights, including the right to privacy, “should not undermine the principle of parental guidance in accordance with the child’s age and maturity.”<sup>78</sup> Nonetheless, when a certain degree of maturity and understanding is reached by a child, this protective role inherent to the right to privacy is not justified anymore.

### 3.4. Protection against all forms of sexual exploitation and sexual abuse (CRC Article 34)

Children have the right to be protected against all forms of abuse and neglect.<sup>79</sup> Specifically, CRC Article 34 recognizes their right to freedom from sexual exploitation and sexual abuse. It reads as follow:

“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”<sup>80</sup>

On one hand, this provision has been criticized for constructing children as “exploitable, vulnerable to inducement or coercion, and susceptible to gross manipulation.”<sup>81</sup> On the other hand, this provision opens the door to the recognition of children as sexual agencies. Indeed, the expression “unlawful sexual activity” is used in CRC Article 34 (a) and (b). During the negotiation surrounding the drafting of

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<sup>71</sup> Niemietz v. Germany, European Court of Human Rights, Application no. 13710/88 (1992), para 29.

<sup>72</sup> J. Tobin & S. M. Field, *Art. 16 The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation*, in T. Jobin (Ed.) *The UN Convention on the Rights of the Child: A Commentary* 561-562 (2019).

<sup>73</sup> *Supra* note 67, at 187.

<sup>74</sup> *Id.*, at 187.

<sup>75</sup> *Supra* note 71, para. 29.

<sup>76</sup> B-J. Joops and al., *A Typology of Privacy*, 38(2) *University of Pennsylvania Journal of International Law* 567-568 (2017).

<sup>77</sup> *Supra* note 72, at 565-567.

<sup>78</sup> *Supra* note 67, at 185.

<sup>79</sup> CRC Article 19.

<sup>80</sup> CRC Article 34.

<sup>81</sup> *Supra* note 46, at 728.

the CRC, the delegation of China and the USSR found it difficult to accept the inclusion of the word 'unlawful' since "that one could hardly imagine that children's sexual practices could be lawful."<sup>82</sup> Consequently, they both proposed its deletion. In opposition, the Netherlands underlined the word was necessary because it was already adopted that the CRC includes persons up to the age of 18 and, thus, "not all sexual practices were unlawful".<sup>83</sup> For instance, the United Kingdom mentioned that, in their countries, the age of sexual majority was fixed at 16 year-old.<sup>84</sup> The representatives of France and the Netherlands "were of the view that the purpose was not to regulate the sexual life of children but rather to combat the sexual exploitation of children".<sup>85</sup> Nonetheless, a narrow vision of teenagers' sexuality was considered at that time. Indeed, the Report of the Working Group mentions, for instance, that "the draft Convention could not declare unlawful sexual practices between husband and wife under the age of 18."<sup>86</sup> Still, in the end, the term 'unlawful' stayed. Even though the limited context contemplated by the drafters, it suggests that lawful sex is possible.<sup>87</sup>

### 3.5. Child pornography (OPSC Article 3(1)(c))

The rights enshrined in the CRC must be read in conjunction with other international laws, including the OPSC. Adopted on 25 May 2000 and entered into force on 18 January 2002, the OPSC aims to complement the provisions on right to protection from violence, abuse and exploitation contained in the CRC. Building on the right to protection from sexual abuse acknowledged in CRC Article 34, OPSC Article 1 states that States Parties shall prohibit child pornography.<sup>88</sup> It is understood the initial intention of any regulation surrounding child pornography, including the OPSC, was the protection of children.<sup>89</sup> In other words, the objects of the law were children, who the law aimed to protect against sexual predation and exploitation. In accordance with OPSC Article 2(c), child pornography refers to "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". In addition, Article 3(1)(c) requires the criminalisation or penalisation of child pornography. It stipulates what follows:

"Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

[...]

(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2."

Similar legislation exists within the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (hereinafter cited as Lanzarote Convention).<sup>90</sup> Article 20(1)

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<sup>82</sup> Economic and Social Council, Question of a Convention on the Rights of the Child - Report of the Working Group on a draft Convention on the Rights of the Child, UN Doc. E/CN.4/1987/25 para 87 (1987).

<sup>83</sup> *Id.*, para 86.

<sup>84</sup> *Id.*, para 86.

<sup>85</sup> *Id.*, para 88.

<sup>86</sup> *Id.*, para 86.

<sup>87</sup> *Supra* note 46, at 728.

<sup>88</sup> OPSC Article 2 defines child pornography as "any means 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.

<sup>89</sup> A. M. Haynes, *The Age of Consent: When is Sexting No Longer Speech Integral to Criminal Conduct*, 97(2) *Cornell Law Review* 370 (2012).

<sup>90</sup> Although this piece of legislation is regional (lies at the European level), is it relevant at the international level because it is "open for signature by the member States, the non-member States which have participated in its elaboration and by the European Union, and for accession by other non-member States." For instance, in 2019, Tunisia is the first non-member State of the Council of Europe that ratified the Lanzarote Convention. (<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures>), last visited (27-04-2021).

requires the production, possession, acquisition, and dissemination of child pornography to be criminalized. For the purpose of this legislation, child pornography is defined 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.”<sup>91</sup> However, Lanzarote Convention Article 20(3) provides the option to implement an exception regarding the criminalisation of child pornography. Indeed, the production and possession of pornographic material involving children having reached the legal age of sexual consent as set by the national legislator, when these images are produced and possessed by them with their consent and solely for their own private use, can be considered as not a criminal conduct.

### 3.5.1. Child pornography to CSAM

Complementary, it must be noted that the term ‘child pornography’ is being replaced by CSAM. The CRC Committee explained: “Among the reasons behind this change is the fact that these terms can be misleading and insinuate that a child could consent to such practices, undermining the gravity of the crimes or switching the blame onto the child.”<sup>92</sup> Indeed, child pornography is not used anymore in the international community because it is closely related to adult pornography. In the latter, adults consensually engage in sexual activity, and the action is recorded and distributed.<sup>93</sup> This is absolutely not comparable to the situation in which a child is abused, and it is recorded. Consequently, the term CSAM is more appropriate because it represents the situation better than child pornography.

The CRC Committee also indicates the following:

An increasing number of children produce sexual images, such as representations of their own sexual parts, either exclusively for themselves or to share with their boyfriends or girlfriends or a wider group of peers (often through “sexting”). A distinction must be made between what the Optional Protocol refers to as “child pornography”, which constitutes a criminal offence, and the production by children of self-generated sexual content or material representing themselves [...]<sup>94</sup>

As also accurately observed by the Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (hereinafter cited as Lanzarote Committee), the aim of voluntary and consensual sharing by children of their own sexually suggestive or explicit imageries through information and communications technologies is not to distribute CSAM.<sup>95</sup> It is observed that “their underlying dynamics are fundamentally different.”<sup>96</sup> CSAM depicts sexual abuse and exploitation of children, whereas self-generated sexual content by teenagers is a one of the possible forms of consensual sexual activity happening the digital world.<sup>97</sup> Thus, a differentiation of under which circumstances the material was produced is necessary because their essences are completely distinct.

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<sup>91</sup> Lanzarote Convention Article 20(2).

<sup>92</sup> Committee on the Rights of the Child, 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, UN Doc. CRC/C/156, para 5 (2019).

<sup>93</sup> *Supra* note 9, at 42.

<sup>94</sup> *Supra* note 92, para 67.

<sup>95</sup> *Supra* note 2, para c.

<sup>96</sup> S.K. Witting, *Child Sexual Abuse in the Digital Era: Rethinking Legal Frameworks and Transnational Law Enforcement Collaboration*, Leiden University 64 (2020).

<sup>97</sup> *Id.*, at 44.

### 3.6. The position of youth sexuality in international law

The CRC recognizes children as rights-holders<sup>98</sup> and agents with autonomy. The CRC Committee pinpoints that adolescence is a stage characterized by “the onset of puberty and sexual awareness”.<sup>99</sup> In the same vein, it also acknowledges the sexuality of teenagers by stressing the importance of “changing cultural or other taboo about adolescents’ sexuality”.<sup>100</sup>

Nonetheless, there is no explicit recognition of young people’ sexuality within the CRC. This has been criticized: The “construct of the child agent is incongruent [...] with the construct of the child denied sexual agency.”<sup>101</sup> Indeed, as previously covered, the CRC only “understands sex in the context of violence or exploitation” or for the principle of non-discrimination.<sup>102</sup> As a result, children are primarily presented as sexual victims.

Some even argue that young sexters are victims of self-exploitation.<sup>103</sup> Just like drugs, it is described as self-destructive behaviour.<sup>104</sup> Police monitoring and prosecution are thus needed to protect children from themselves.<sup>105</sup> Indeed, although the initial intention of any regulation surrounding child pornography was the protection of children,<sup>106</sup> the same laws are now being used to suppress and punish teen sexual expression.<sup>107</sup> Moreover, it means that child pornography law is sometimes used as a tool to prosecute juvenile engaging in self-generated sexual material, turning simultaneously the person engaging in the practice as the victim and the perpetrator<sup>108</sup> (see chapter 6.2.). This illustrates the conception of children as vulnerable human beings in need of protection. In other words, the predominance of paternalism over empowerment.

It has been noted that “[c]hildren’s right to sexual agency, identity and expression diverges markedly from adult rights and capacities.”<sup>109</sup> Young people’s sexuality is denied, discouraged, not tolerated, and even shamed, while it is commonly recognized for adults. “While adults can and do claim legitimacy through discourses of free expression and privacy, for teenagers online sexual expression is widely framed through ‘gendered pedagogies of shame and regret’, as evident in the burgeoning e-safety curricula on ‘sexting’.”<sup>110</sup>

Indeed, one can wonder “why is it so much easier to assert sexual freedom in a negative than in an affirmative, emancipatory sense; to gain consensus for the right not to be abused, exploited, raped, trafficked, or mutilated in one’s body, but not the right to fully enjoy one’s body?”<sup>111</sup> Sexuality should

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<sup>98</sup> In addition to CRC Articles 5 and 12, see for instance Articles 14 (freedom of thought, conscience and religion) and 15 (freedom of association).

<sup>99</sup> *Supra* note 53, para 9.

<sup>100</sup> Committee on the Rights of the Child, General Comment No. 14: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/4, para 26 (2003).

<sup>101</sup> *Supra* note 46, at 727.

<sup>102</sup> *Id.*, at 727; CRC Articles 19 (Protection from all forms of violence); CRC Articles 34 (Protection against all forms of sexual exploitation and sexual abuse); CRC Article 35 (Prevention against the sale of children or the traffic in children for any purpose or in any form); CRC Article 36 (Protection against all other forms of exploitation).

<sup>103</sup> *Supra* note 1, at 4.

<sup>104</sup> *Id.*, at 22.

<sup>105</sup> *Id.*, at 28.

<sup>106</sup> *Supra* note 89, at 370.

<sup>107</sup> *Id.*, at 377.

<sup>108</sup> *Supra* note 96, at 63.

<sup>109</sup> *Supra* note 46, at 725.

<sup>110</sup> S. Livingstone & A. Third, Children and Young People’s Rights in the Digital Age: An Emerging Agenda, 19(5) *New Media & Society* 657 (2017).

<sup>111</sup> R. Petchesky, *Sexual Rights: Inventing a Concept, Mapping an International Practice*, in R. Parker, R.M. Barbosa & P. Aggleton (Ed.), *Framing the Sexual Subject: The Politics of Gender, Sexuality and Power* 88 (2000); *Supra* note 28, at 36.

be viewed as an affirmative concept: “[A] state of well-being imbued with positive qualities, not merely the absence of those that are undesired” and “must be concerned with the attainment and expression of sexual pleasure, not with the repression of sexual energies and desires or their denial”.<sup>112</sup>

#### 4. Overview of Various Age Limits

Contemporary, childhood remains an “essentially protectionist experience”,<sup>113</sup> as they are perceived as “different, less developed, and in need of explanation”.<sup>114</sup> It is important to note that:

The majority viewpoint is that children enjoy protection rights, but that they may or may not be able to exercise liberty rights for themselves depending on the exact context and their capacity in that context. Competence thus takes a central role in the predominant rights discourse; an individual generally must have relevant competence to assert a given liberty right for himself or herself. Even though protection and liberty are both framed in terms of rights, there is an inverse relationship between the two, with competency as the pivot point. With less competency, protection rights come to the fore and liberty rights drift to the rear; yet with greater competency, liberty rights take greater prominence. Thus, among other contested questions in rights discourses, the role of competence is highly controversial.<sup>115</sup>

In many countries, a definitive pivot point is reached with the age of majority, when a person is recognized by the law as an adult. This means that the person is therefore “capable of managing his or her own affairs and responsible for any legal obligations created by his or her actions.”<sup>116</sup> A similar approach is taken by the CRC. Its Article 1 stipulates that “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” Thus, the age of legal majority is set at 18 years old and everybody below that age is a child. However, different age limits are set by countries for specific purposes within the span of childhood.

The term ‘childhood’ is a construction. It “bundles together ideas and expectations about young people and their roles in societies.”<sup>117</sup> The vision of the child is socially constructed and, thus, varies over time and cultures.<sup>118</sup> A critical reconstruction is needed, and, in my point of view, it starts with the establishment of minimum age laws, which are guided by the concept of evolving capacities as a policy principle. In that vein, the CRC Committee recommends that setting minimum ages should “closely reflect recognition of the status of human beings under the ages of 18 as rights holders in accordance with their evolving capacity, age and maturity”.<sup>119</sup> In other words, minimum ages denote the beginning of children’s legal competence in a specific area. In respect of competence, “dominant ideas about children’s competence are translated into precise legal age limits that mark the boundaries of childhood and adolescence”<sup>120</sup>

<sup>112</sup> P. Aggleton & C. Campbell, Working with Young People: Towards an Agenda for Sexual Health, 15(3) *Sexual and Relationship Therapy* 285 (2010).

<sup>113</sup> C. Jenks, *Childhood* 123 (2005).

<sup>114</sup> *Id.*, at 4.

<sup>115</sup> D. Cipriani, Children’s Rights and the Minimum Age of Criminal Responsibility a Global Perspective 2 (2009).

<sup>116</sup> (<https://legal-dictionary.thefreedictionary.com/Legal+majority#:~:text=The%20age%20at%20which%20a,by%20his%20or%20her%20actions.&text=Another%20name%20for%20the%20age%20of%20majority%20is%20legal%20age.>), last visited (29-04-2021).

<sup>117</sup> *Supra* note 115, at 2.

<sup>118</sup> *Id.*, at 2.

<sup>119</sup> *Supra* note 100, para 5.

<sup>120</sup> *Supra* note 115, at 3.

To give examples, this chapter covers the age to consent to sexual activities, the age to consent to medical treatments, and the minimum age of criminal responsibility. This aims to understand how age limits fixed across different domains relate to each other, and to evaluate if fixing one in the context of online dissemination of self-generated sexual content be recommendable.

#### 4.1. Age of sexual consent

The CRC Committee mentioned that a minimum age for sexual consent should be set by the States Parties.<sup>121</sup> Solely above the determined age of sexual majority, a youth's consent is considered valid. Protecting children from sexual abuse and exploitation is the justification behind such regulation. Nonetheless, an "appropriate balance is required between the need for legal protection from exploitation and abuse on the one hand, and the need to respect the rights of young people to privacy and to make autonomous decisions (including about their sexual lives) on the other."<sup>122</sup>

In South Africa, the Supreme Court in the *Teddy Bear clinic* case indirectly recognized adolescents as sexual beings who may engage in consensual sexual conduct among themselves.<sup>123</sup> This is indeed the case in societies throughout the world: Research indicates that 37.5% of 16-year-olds had started sexual activity in Mongolia. In Zimbabwe, girls who had sex at least once between 15 and 19 years represent 30%. In Iceland and Denmark, over 70 % of girls had sex before the age of 18 years. In the United Kingdom, 33% of boys and 25% of girls have had intercourse before 16 of age.<sup>124</sup>

The behaviour is nevertheless legislated. Although "the age of consent to sexual activity differs greatly around the world, the most common age of consent is set at 16 to 18 years."<sup>125</sup> Thus, it can be said that many countries recognize that teenagers are sexual agencies.<sup>126</sup>

The age of consent represents "the solemn legislative judgment that minors are mature enough to appreciate the potential consequences of their sexual activity".<sup>127</sup> Analogically, self-generated sexual material, which is sometimes described as a risky form of behaviour,<sup>128</sup> also carries its own risks, including sexual violence and non-consensual sharing. It also encompasses a degree of permanency. It is often underscored that "the Internet does not know boundaries and does not forget, including any

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<sup>121</sup> *Supra* note 100, para 5.

<sup>122</sup> UNESCO, *Young People and the Law in Asia and the Pacific: A Review of Laws and Policies Affecting Young People's Access to Sexual and Reproductive Health and HIV Services* 36 (2013).

<sup>123</sup> *The Teddy Bear Clinic for Abused Children and Others v Minister of Justice and Constitutional Development and Others* [2013] ZACC 35. The case concerns a 17-year-old teenager who was in a romantic relationship with his 15-year-old girlfriend. Following consensual sexual intercourse, the girl became pregnant. However, the Sexual Offences Act criminalised consensual sexual acts with children between 12 and 16 years. Thus, the Supreme Court of South Africa had to determine "whether the impugned sections are inconsistent with the Constitution insofar as they impose criminal liability on children for engaging in consensual sexual conduct" (para 37). Although the Court has emphasised at paragraph 3 what the case is not about: "It is not about whether children should or should not engage in sexual conduct. It is also not about whether Parliament may set a minimum age for consensual sexual conduct", the case nevertheless exposed adolescents as sexual beings who can engage in consensual sexual conduct.

<sup>124</sup> G. Lansdown, *The Evolving Capacities of The Child* 39 (2005).

<sup>125</sup> *Supra* note 96, at 40.

<sup>126</sup> E.g., The age of consent is 13 in Burkina Faso, Japan, and Niger. The age of consent is 14 in Austria, Bangladesh, Brazil, Chad, Colombia, Ecuador, Germany, Hungary, Italy, Malawi, Myanmar, Peru, and Portugal. The age of consent is 15 in Aruba, Cambodia, Denmark, Laos, Poland, and Uruguay. The age of consent is 16 in most of the Australian territories, Belgium, Botswana, Finland, Jamaica, Jordan, Namibia, the Netherlands, South Africa, Tonga, and Thailand Venezuela. The age of consent is 17 in Cyprus, Ireland, Mexico, and Nauru. See (<https://www.ageofconsent.net/world>), last visited (15-04-2021).

<sup>127</sup> *Supra* note 89, at 374.

<sup>128</sup> A. A. Gillespie, *Adolescents, Sexting and Human Rights*, 13(4) *Human Rights Law Review* 642 (2013).

experimental behaviours of children”<sup>129</sup> such as self-generated sexual content. As correctly underscored: “Yes, photographs have a degree of permanence, but so do pregnancy and sexually transmitted diseases.”<sup>130</sup> Indeed, the consequences of sexual activity are multiples, including unwanted pregnancy, which include childbirth or abortion, sexually transmitted diseases, and sexualized violence. However, those risks do not appear greater or more intrusive in a teenager’s life than those associated with offline sexuality.<sup>131</sup> Once again, it seems like young people are trusted to make very important decisions, for instance, relating to contraception, abortion and sexually transmitted diseases “but not over the portrayal of their bodies.”<sup>132</sup> For that reason, some have expressed being “tremendous skepticism that sexting warrants independent legislative action beyond setting the age of consent.”<sup>133</sup> Briefly, the dichotomy between the age of consent and the age to share self-generated sexual content is illogic. Online and offline sexual activities should be aligned.

#### 4.2. Age for medical treatment

CRC Article 24 encompasses the right of the child to the enjoyment of the highest attainable standard of health. In relation to the concept of evolving capacities, the CRC Committee recognizes that the latter has “a bearing on their independent decision-making on their health issues.”<sup>134</sup>

Around the world, the age to consent to treatment varies.<sup>135</sup> It illustrates the tension between children’s protection and autonomy in the context of medical treatment. Indeed, the right to consent, or refuse consent, to medical treatment or surgery without parental consent illustrates the “tensions between children’s right to make decisions about their own bodies and what others perceive to be in their best interests.”<sup>136</sup> Nonetheless, it is important to bear in mind that the right to health contains, *inter alia*, a set of freedoms, “which are of increasing importance in accordance with growing capacity and maturity, includes the right to control one’s health and body.”<sup>137</sup>

Moreover, a relevant example of children as rights-holders in the context of health-care decision-making is the English decision referred to as the *Gillick* case.<sup>138</sup> In the latter, the mother of five daughters under the age of 16-year-old sought a declaration that it would be unlawful for a doctor to prescribe contraceptives to girls under 16 without the knowledge or consent of the parent. Although the ruling does not specify an age, Lord Scarman decided that a child under 16 is able to consent to their own medical treatment, without the need for parental permission or knowledge. This decision depicts that the authority of parents to make decisions for their minor children is not absolute: It diminishes while the child’s evolving maturity is growing. The *Gillick* case underscores the participatory rights of children in medical situations since it “respects rights to be the main decision maker”.<sup>139</sup>

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<sup>129</sup> *Supra* note 5 CRC Committee Report (2014), para 74.

<sup>130</sup> A. A. Gillespie, *Child Pornography*, 27(1) *Information & Communications Technology Law* 33 (2018).

<sup>131</sup> *Supra* note 96, at 64.

<sup>132</sup> *Supra* note 130, at 53.

<sup>133</sup> *Supra* note 89, at 374.

<sup>134</sup> Committee on the Rights of the Child, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art.24), UN Doc. CRC/C/GC/15, para 21 (2013).

<sup>135</sup> In Europe, for example, the age is set at 14 in Latvia, 15 in Slovenia, 16 in several countries including Ireland, Lithuania, Poland, Portugal and Spain. In other countries, no fixed minimum age is set. The maturity of the child is assessed on an individual basis. It is the reality in Austria, Estonia, Luxembourg, and Sweden, for instance. See (<https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/consent-medical-treatments>), last visited (19-04-2021).

<sup>136</sup> Child Rights International Network, *Age is Arbitrary: Setting Minimum Ages 21* (2016).

<sup>137</sup> *Supra* note 134, para 24

<sup>138</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985], 2 WLR 480.

<sup>139</sup> *Supra* note 136, at 5.

Nowadays, it is said that the Gillick Competence, namely the “maturity of faculties”,<sup>140</sup> would perhaps be recognized as young as 12-13-14 year-old.<sup>141</sup>

Another interesting case concerns a 12-year-old Dutch boy who decided to stop chemotherapy, which would have helped him to treat the cancer.<sup>142</sup> His father disagreed with his son’s decision. Under the Dutch law, a person of 16 years old is fully autonomous to make medical decisions. However, between 12 to 15 years old, such decisions are commonly made by the child and his or her parents.<sup>143</sup> In this case, the Court ruled that even though his decision reduces his chances of survival, the boy has the right to decide on his care, including the right to deny medical treatment. This decision was confirmed in appeal.<sup>144</sup> In my opinion, one element to remember from this case is that the self-determination of a young person and his or her participatory rights should not be challenged based on the outcome of his or her decision. In other words, adults who disagree with the child’s decision should not challenge the right of the child to make that decision.

In sum, in line with the concept of evolving capacities, from a certain age, children are listened to when it comes to medical choices and due weight to their opinion. This illustrates their right to control their body. Indeed, they actually have the power over their own bodies, even regarding decisions of life or death.

### 4.3. Age of criminal responsibility

CRC Article 40 concerns juvenile justice. It calls for a child specific and separated juvenile justice system and the “establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”.<sup>145</sup> Children aged below that minimum age at the time of the commission of an offense “cannot be held responsible in a criminal law process”<sup>146</sup> and children at or above the minimum age but younger than 18 years “can be formally charged and subject to juvenile justice procedures.”<sup>147</sup>

Although the CRC does not set the minimum age of criminal responsibility (hereinafter cited as MACR), nor does the CRC Committee, some guidance is provided. Relying on documented evidence in the fields of child development and neuroscience, the CRC Committee indicates that the frontal cortex of children aged 12 to 13 years is still developing. Consequently, their maturity and capacity for abstract reasoning is still evolving, which means that “they are unlikely to understand the impact of their actions or to comprehend criminal proceedings.”<sup>148</sup> Thus, the minimum age of criminal responsibility should not be fixed under the age of 14, according to the CRC Committee. Ideally, it recommends a higher age, such as 15 or 16 years old.<sup>149</sup> Nonetheless, many countries still have a MACR below 12, but, internationally, the most common MACR is 14.<sup>150</sup> Accordingly, below that age, the child is considered competent to participate throughout the process.<sup>151</sup>

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<sup>140</sup> *Supra* note 38, at 148.

<sup>141</sup> J. Sloth-Nielson, Lecture on the Right to Health, Leiden Law School, 19 November 2020.

<sup>142</sup> *v* Stichting de Jeugd- & Gezinsbeschermers, case number: C/15/257410 / KG ZA 17-264 (12 May 2017).

<sup>143</sup> Article 450 Civil Code Book 7 (Burgerlijk Wetboek Boek 7).

<sup>144</sup> *v*. Stichting de Jeugd & Gezinsbeschermers, case number: 200.216.218/01 SKG (11 July 2017).

<sup>145</sup> CRC Article 40(3)(a).

<sup>146</sup> Committee on the Rights of the Child, General Comment No. 24 (2019), replacing General Comment No. 10 (2007) Children’s rights in juvenile justice, UN Doc. CRC/C/GC/24, para 5 (2019).

<sup>147</sup> *Id*, para 5.

<sup>148</sup> *Id*, para 22.

<sup>149</sup> *Id*, para 21.

<sup>150</sup> *Id*, para 21.

<sup>151</sup> *Id*, para 46.

Some resemblances are visible between the minimum age of criminal responsibility and self-generated sexual content online. The former is set, *inter alia*, in function of the capability of children to understand the consequences of their actions. Similarly, when it comes to the latter, one of the reasons behind a paternalistic approach is because young people are judged as being incapable of understanding the risks associated with the activity. Indeed, it is said that “an adolescent under the age of 18 may not yet have the capacity to understand the dangers involved in posing for sexualised images.”<sup>152</sup> Or, in the same vein, that they don’t understand the “implications of the Internet and the consequences of their behaviour.”<sup>153</sup> However, it is important to mention that this argument is not supported by any research.<sup>154</sup> In addition, one could question if an 18-year-old really understands the consequences any more than a 17-year old does.<sup>155</sup> It is also questionable whether children of 14 years of age<sup>156</sup> understand the consequences of their criminal behaviour better than one would understand the consequence of creating sexual content digitally. In that vein, it was pointed out in *Teddy Bear Clinic*, that it is “fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity, yet in the same breath to contend that they have the capacity to be held criminally liable for such choices.”<sup>157</sup> In other words, it is inconsistent to affirm that youngsters have criminal capacity but are incapable of consenting to sexual activities.

#### 4.5. Reflections

In conclusion, the competency of children is not black or white. One’s childhood is strewn with law bestowing varying degrees of responsibility depending on the context. Without exploring other arenas where children are given responsibility,<sup>158</sup> this chapter covered the age of sexual consent, the age at which the right to consent (or refuse to consent) to medical treatment or surgery is granted, as well as the minimum age of criminal responsibility. In all those settings, a balance was made between protection and empowerment of children.

Analogically, a minimum age giving the possibility for young people to self-generate sexual content online could be made so as to achieve more appropriately balance their rights. Indeed, all the different situations covered in this chapter are similar domains and “[d]espite the variations in the minimum competencies held necessary for various liberty rights, it is generally incoherent to argue that children at a given age are mature and responsible in one domain, yet unready to exercise rights on their own behalf in a comparable domain.”<sup>159</sup> Thus, fixing an age limit in relation to sexting might seem recommendable. Nevertheless, inconsistencies between the different age limits are problematic as it would be difficult to install an age limit for sexting. On one hand, it would be logical to align the age of online and offline sexual activity. However, as previously covered, the age of consent is quite high in some countries. On the other hand, the age of sexting should also be the same as the MACR, although it is set at quite a low age in some countries. Setting the age of sexting and the MACR at different ages would leave some teenagers unprotected. By way of explanation, if the MACR of a country is supposedly set at 14 and the legal sexting age at 16 – which coincides with the age of sexual consent of that country - it would mean that 14 and 15-year-old youngsters could face criminal charges for their online sexual activities. The likelihood that the protection would be incomplete is

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<sup>152</sup> *Supra* note 128, at 642.

<sup>153</sup> *Supra* note 130, at 53.

<sup>154</sup> *Id.*, at 53.

<sup>155</sup> *Id.*, at 53.

<sup>156</sup> Considering that 14 of age is the most common minimum age of criminal responsibility on the international scene.

<sup>157</sup> *Supra* note 123, para 79.

<sup>158</sup> Other age limits could be considered, such as in the context of admission to employment, voluntary enlistment and conscription into armed forces, end of compulsory education, marriage (with parental consent), the age for a driving licence, etc.

<sup>159</sup> *Supra* note 115, at 4.

worrying and would not properly reach the main purpose of creating a sexting age limit. In addition, what would be the response for those under the MACR who engage in sexting? Placing them in the child protection system? Briefly, after all, installing an age limit for sexting is not an appropriate solution. Moreover, as it is explained in greater detail in chapter 6, criminalizing the behaviour of sexting is simply not recommended according to recent development on the international scene. Thus, what would be the purpose of installing an age limit for consensual sexting if it is not recommendable to make the behaviour an offense?

## 5. Risks Associated to Sexual Material Picturing Young People

A teenager confessed: “Before, because I hadn’t done it, I thought [sending self-produced images] was just the most terrible thing ever. But now that I’ve done it, it’s not as bad as people think. Like, if it’s to... your partner, like someone you trust, it’s not that bad”.<sup>160</sup> Following this comment, the question whether sexting is truly riskless or harmless arises.

Thus, this chapter puts light on the risks associated with the practice of self-generated sexual content on the Internet. The risks directly affecting the adolescents who have taken compromising pictures or videos of themselves are discussed first, followed by the risks towards other children.

### 5.1. Towards the teenage creators themselves

#### 5.1.1. Coercion

This thesis positions self-generated sexual content in the digital world within the context of consent and with young people as sexual agencies who have the capacity to make sexual choices. However, due to the notable tension emerging within available studies regarding the reasons explaining why juveniles engage in sexting, it is recognized that the practice can either be voluntary or coercive. Indeed, “on the one hand, some scholars place emphasis on a range of gendered and socio-cultural pressures, while others prioritise choice, capacity and youth agency.”<sup>161</sup> Consequently, a few words need to be said about the possibility of coercion.

In that vein, the CRC Committee identified that self-generated sexual material “often appears to be a product of youth peer pressure”.<sup>162</sup> In addition, it generally encompasses an important gendered dimension.<sup>163</sup> Guys are trying to convince girls with sentences such as “Come on, just do it”<sup>164</sup> or “Come one baby, just one picture”,<sup>165</sup> as reported by girls in a group discussion. The not-so-subtle pressure has also been experienced by another juvenile who explained having been pushed into sexting: “I just let him talk me into it. It wasn’t very nice. The moment I took photos for him, I got this really disgusting, dirty feeling”.<sup>166</sup> Thus, the possible use of coercive methods in association with sexting behaviours is not disputed.

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<sup>160</sup> J. V. Weiler, Living in the Era of Digital Exhibitionism, 36(4) *Child & Youth Services* 399 (2015).

<sup>161</sup> E. Agnew, Sexting among Young People: Towards a Gender Sensitive Approach, 29 *The International Journal of Children’s Rights* 6 (2021).

<sup>162</sup> *Supra* note 92, para 42.

<sup>163</sup> *Supra* note 161, at 14-16.

<sup>164</sup> Testimony of a 15-year-old girl named Naomi. See E. Setty, Risk and Harm in Youth Sexting Culture: Young People’s Perspective 96 (2020).

<sup>165</sup> Testimony of Riley, a 16-year-old girl. See *Id.*, at 96.

<sup>166</sup> *Supra* note 160, at 340.

Nonetheless, the gendered culture surrounding (pressured) sexting among young people incorrectly visualizes a passive young woman. The latter is conceptualised as a “sexting girl, inappropriately engaging in sexualised self-expression in response to the demands of boys and men.”<sup>167</sup> A recent study has critically reviewed the currently available research on the topic and found that “researchers appear to be over-stating the extent that pressure and coercion are a motivation”.<sup>168</sup> As a conclusion, it is said that “the current empirical evidence does not support the notion that pressure or coercion is *the* key factor, or even *one of* the key factors, motivating girls to produce and send nude or semi-nude pictures of themselves. To be more specific, it is not a factor commonly expressed by girls (or boys) who themselves send sexts, as motivating instances or acts of sexting.”<sup>169</sup> Instead, it is found that “the most common reason for sending sexy content was to be “fun or flirtatious””.<sup>170</sup> In other words, pleasure or desire are the usual motivation to engage in sexting.<sup>171</sup>

Nevertheless, a veritable problem concerning pressure arises in cases involving sextortion. The latter is the colloquial for sexual extortion and it is defined as follow: “[B]lackmailing of a person with the help of self-generated images of that person in order to extort sexual favours, money, or other benefits from her/him under the threat of sharing the material beyond the consent of the depicted person”.<sup>172</sup> The testimony of Charlie, a 17-year-old girl, explains the issue. When she started a new relationship, she informed a previous guy that she was not interested in sexting with him anymore. In a one-on-one interview, she testified having been blackmailed by the guy: “He was like, either send me more, or I’m sending them around”.<sup>173</sup> As a consequence of the event, she explained having been very affected: “I was really paranoid for a really long time about it.”<sup>174</sup>

#### 5.1.2. Unwanted dissemination

Another principal danger of consensual sexting commonly recognized is the loss of control of the image.<sup>175</sup> Indeed, one inherent characteristic of the Internet is its spreadability. As stated by the CRC Committee, “[s]exualized images of children can easily spread online or offline beyond or against the will of the child”.<sup>176</sup> In other words, the practice encompasses the risk to become more extensively available than originally intended. This situation describes secondary sexting. Indeed, the latter is defined as “initially produced and shared among consenting parties, but then shared further without consent”.<sup>177</sup> Various circumstances may lead to secondary sexting, including for example revenge porn.<sup>178</sup>

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<sup>167</sup> E. Setty, Meanings of Bodily and Sexual Expression in Youth Sexting Culture: Young Women’s Negotiation of Gendered Risks and Harms, 80(9) *Sex Roles* 586 (2019).

<sup>168</sup> *Supra* note 12 Murray & Crofts (2015), at 469.

<sup>169</sup> *Id.*, at 456.

<sup>170</sup> *Id.*, at 462.

<sup>171</sup> *Id.*, at 454.

<sup>172</sup> *Supra* note 9, at 52.

<sup>173</sup> *Supra* note 164, at 99.

<sup>174</sup> *Id.*, at 99.

<sup>175</sup> *Supra* note 128, at 639

<sup>176</sup> *Supra* note 92, para 42; Committee on the Rights of the Child, General comment No. 25 (2021) on children’s rights in relation to the digital environment, UN Doc. CRC/C/GC/25, para 81 (2021).

<sup>177</sup> In the same vein, primary sexting is understood as “produced and shared amongst consenting parties”. See *Supra* note 96, at 41; *Supra* note 12 Calvert (2014), at 95.

<sup>178</sup> Revenge porn is the action of leaking an image or video of sexually explicit content that was initially shared privately. “This sometimes occurs when a young couple breaks up and a spurned and angered boyfriend blasts out sexted images of his ex-girlfriend for all of his friends and her enemies to ogle. Those recipients, in turn, may pass them on to still other minors, with the prospect of shame, embarrassment, and public ridicule growing exponentially larger for the ex-girlfriend with each further retransmission to an originally unintended and undesired audience.” The material sometimes ends up on revenge porn websites. See *Supra* note 12 Calvert (2014), at 91.

The consequences of secondary texting may be very serious. At the end of the spectre is to be found suicide. Indeed, the literature underscore “incidences where young women have committed suicide as a result of the humiliation of having a digital image of themselves circulated.”<sup>179</sup> It is the case, for instance, of Hope Witsell, a 13-year-old girl who hung herself due to the bullying - online and offline - that she was the victim after her boyfriend had shared a topless photo of her.<sup>180</sup>

## 5.2. Towards other children

Interests of other children are also at stake when it comes to self-generated sexual material. Indeed, it may be risky to children who are not depicted in the images.

### 5.2.1. Seduction and grooming process

Grooming refers to the process of soliciting a child for sexual purposes,<sup>181</sup> where the establishment of a trust relationship is built. One of the grooming tools susceptible to be used is self-generated sexual content. For example, a predator could expose a child to a self-generated sexual video in which some other children are engaging in different sexual activities. By doing so, the objective is to give the impression to the child exposed that the activities are normal or common.<sup>182</sup> The technique also has the effect of desensitizing the potential victim and reducing his or her inhibitions.<sup>183</sup>

In Canada, the Supreme Court of the country acknowledged that the possession of child pornography “may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences.”<sup>184</sup> Indeed, a detective inspector testified that child pornography is “often used as a tool by paedophiles to seduce children. They use it as a tool to lower their inhibitions. They do that by exposing the children to photographs. They’ll usually start out with photographs of partial nudity and then they’ll work their way up to total nudity and children being involved in actual sex acts.”<sup>185</sup> In that sense, self-generated sexual content depicting someone under 18-year-old may be used to facilitate further exploitation of children.

## 5.3. Reflections

Youth sexting is not inherently harmful, nor pleasurable.<sup>186</sup> Youngsters themselves consider being motivated to exchange self-generated sexual material for fun and flirtatious.

However, as recognized by the CRC Committee, sexting is a risk (not a harm in and of itself) that needs to be managed carefully.<sup>187</sup> The Lanzarote Committee has a similar approach, expressing that “the increasing number of child self-generated sexually suggestive and explicit images and/or videos

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<sup>179</sup> *Supra* note 12 Murray and Crofts (2015), at 458.

<sup>180</sup> D. Moritz & L.S. Christensen, When Sexting Conflicts with Child Sexual Abuse Material: The Legal and Social Consequences for Children, 25(7) *Psychiatry, Psychology and Law* 5 (2020); (<http://edition.cnn.com/2010/LIVING/10/07/hope.witsells.story/index.html>), last visited (05-05-2021).

<sup>181</sup> *Supra* note 9, at 51.

<sup>182</sup> M. Eneman, *The New Face of Child Pornography*, in M. Klang & A. Murray (Ed.) *Human Rights in the Digital Age* (2005).

<sup>183</sup> *Supra* note 1, at 13; T. Altobelli, Cyber-Abuse - A New Worldwide Threat to Children’s Rights, 48(3) *Family Court Review* 465 (2010).

<sup>184</sup> R. c. Sharpe [2001] 1 R.C.S. 45 at para 28. One of the issues that the Canadian Supreme Court had to decide was whether Section 163.1(4) of the Criminal Code, which criminalises the possession of ‘child pornography’, is unconstitutional because it infringes the constitutional right to freedom of expression and whether this violation is justifiable in a free and democratic society.

<sup>185</sup> *Id.*, para 205.

<sup>186</sup> *Supra* note 167, at 588.

<sup>187</sup> *Supra* note 92, para 67.

[...] is putting more and more children at risk of harm”.<sup>188</sup> In other words, the behaviour is risky, not harmful *per se*, and measures must be put in place to ensure that the risks associated with sexting should not turn into harms. In that sense, criminal law is not an appropriate instrument to respond to consensual self-produced sexual material. Indeed, that legal response is designed to react to harm, not risk. To put it another way, a criminal response should be used when harm has already occurred. In that sense, as it is substantiated in chapter 6.2., criminal law is not an appropriate response to primary sexting among adolescents. In order to reduce the risks associated with the phenomenon, it is better to move towards prevention, awareness-raising, education, etc. so that the harm will not take place. Alternative strategies are then more suitable, and it starts by giving teenagers the capacity to detect and navigate the risks. To do so, a holistic education (digital literacy and comprehensive sexuality education including online sexual exploration) is a key solution. Likewise, the Lanzarote Convention supports “that children, during primary and secondary education, receive information on the risks of sexual exploitation and sexual abuse, as well as on the means to protect themselves, adapted to their evolving capacity”.<sup>189</sup>

On the contrary, harm occurs when it comes to secondary sexting. In such context, the employment of criminal law towards the perpetrators is opportune as it is further elaborated in chapter 7. Indeed, “the non-consensual sharing of sexual materials is a form of sexual violence or abuse”.<sup>190</sup> Same for (cyber)bullying and sextortion. In such cases, it is essential “to distinguish between the initial image and the use being made of it.”<sup>191</sup> In this vein, the CRC Committee expressed its concern:

[T]he self-generated aspect of such material could increase the risk that the child is considered responsible instead of being treated as a victim [...] If such images are produced as a result of coercion, blackmailing or other forms of undue pressure against the will of the child, those who made the child produce such content should be brought to justice. If such images are subsequently distributed, disseminated, imported, exported, offered or sold as child sexual abuse material, those responsible for such acts should also be held criminally liable.<sup>192</sup>

This point of view is also shared by some judges. For instance, it has been highlighted that “[t]he fact that the victim may have consensually participated in recording sexual activity in no way impacts or diminishes the moral responsibility of the offender. To conclude otherwise engages retrograde thinking surrounding the interplay of sex, privacy, consent and control.”<sup>193</sup>

It is a great opportunity to highlight that “[a]lthough children (in particular adolescents) may willingly produce sexual content, this does not mean they consent to or are responsible for the exploitive or abusive use and/or distribution of these images.”<sup>194</sup> Consequently, the importance of not blaming the child who has produced the image must be reiterated. Victim blaming (e.g., “she or he should not have taken the picture in the first place”) is the wrong speech to hold.

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<sup>188</sup> *Supra* note 2, para f.

<sup>189</sup> Lanzarote Convention Article 6.

<sup>190</sup> M. Naezer & L. Van Oosterhout, Only Sluts Love Sexting: Youth, Sexual Norms and Non-Consensual Sharing of Digital Sexual Images, 30(1) *Journal of Gender Studies* 79 (2021).

<sup>191</sup> *Supra* note 9, at 43.

<sup>192</sup> *Supra* note 92, para 67.

<sup>193</sup> *R v JS*, 2018 ONCJ 82, para 35.

<sup>194</sup> *Supra* note 9, at 43.

## 6. Responses to Primary Sexting

Some have noticed that the phenomenon of sexting has led to a public moral panic.<sup>195</sup> Accordingly, several responses have been put in place to tackle the practice. In that vein, this chapter introduces and scrutinizes two of them: literacy campaigns and prosecution.

### 6.1. Literacy campaigns

Public literacy campaigns are one of the mechanisms used as a reaction to sexting. “As a form of a social marketing campaign, sexting literacy campaigns make use of supporting campaign posters and leaflets portraying pictures and texts to underline their message, with the ultimate goal of influencing adolescents’ attitudes and behaviour towards sexting.”<sup>196</sup> This section exposes a French campaign, followed by a Dutch and Canadian one.

#### 6.1.1. France

In March 2021, the French National Police launched a public campaign to prevent sexting. By doing so, it seems like their initial intention was to raise awareness among teenagers about secondary sexting, which is one of the possible negative consequences of engaging in sexting.

The message is the following: “He well received your nude. Your friends, your parents, your classmates, your cousins, your teachers, your neighbours, your baker, your ex-boyfriend, your postman, your grandparents, and your niece as well [#Sexting] Sending a nude is accepting the risk that it could be shared” [author’s translation].



Picture from Ouest France<sup>197</sup>

<sup>195</sup> *Supra* note 164, at 33; *Supra* note 96, at 39; A. A. Hasinoff, *Sexting Panic: Rethinking Criminalization, Privacy, and Consent* 451-453 (2015).

<sup>196</sup> (<http://arno.uvt.nl/show.cgi?fid=146518>), last visited (12-05-2021).

<sup>197</sup> (<https://www.ouest-france.fr/societe/police/la-police-supprime-un-de-ses-tweets-de-prevention-contre-le-revenge-porn-7177498>), last visited (15-04-2021).

The campaign has been highly criticized because victims were blamed rather than people who share without consent the private content. Recognizing the mistake, the campaign was removed.<sup>198</sup> Nonetheless, this exemplifies that young people “must choose between digitally expressing desire and the right to be free from violence.”<sup>199</sup>

### 6.1.2. The Netherlands

Another questionable campaign is the safe sexting campaign launched in 2020 by the Dutch Public Health Service. The goal was the protection of young people against sextortion.<sup>200</sup> In that vein, the campaign prevented juveniles from sending nude photos and videos. Instead, emoticons such as the peach and the aubergine were proposed as alternatives. The slogan is the following: “Sex is fun and sexting too but do it safety” [author’s translation].



Picture from Adformatie<sup>201</sup>

With the aim of reaching young people, it was advertised, *inter alia*, through posters on local buses, in schools and online.<sup>202</sup>

<sup>198</sup> ([https://www.lepoint.fr/societe/une-campagne-de-pub-de-la-police-contre-le-sexting-fait-polemique-06-03-2021-2416650\\_23.php](https://www.lepoint.fr/societe/une-campagne-de-pub-de-la-police-contre-le-sexting-fait-polemique-06-03-2021-2416650_23.php)), last visited (15-04-2021); ([https://www.bfmtv.com/police-justice/la-police-nationale-vivement-critiquee-pour-une-campagne-de-prevention-sur-le-sexting\\_AN-202103060144.html](https://www.bfmtv.com/police-justice/la-police-nationale-vivement-critiquee-pour-une-campagne-de-prevention-sur-le-sexting_AN-202103060144.html)), last visited (15-04-2021).

<sup>199</sup> L. Karaiian, Lolita Speaks: ‘Sexting,’ Teenage Girls and the Law, 8(1) *Crime, Media, Culture* 68 (2012).

<sup>200</sup> (<https://www.adformatie.nl/campagnes/ggd-adviseert-jongeren-bescherm-jezelf-tegen-sextortion#:~:text=Om%20sextortion%20onder%20jongeren%20te%20voorkomen%20is%20de%20GGD%20Hollands.thema%3A%20'Safe%20Sexting'.&text=De%20campagne%20wil%20jongeren%20meer.jongeren%20herkenbare%20manier%20te%20presenteren.>), last visited (11-05-2021).

<sup>201</sup> (<https://www.adformatie.nl/campagnes/ggd-adviseert-jongeren-bescherm-jezelf-tegen-sextortion>), last visited (11-05-2021).

<sup>202</sup> (<https://www.gezondeschoolhollandsmidden.nl/nieuws/item/seks-is-leuk-en-sexting-ook-maar-doe-het-wel-veilig>), last visited (11-05-2021).



Picture from Adformatie<sup>203</sup>

Prima facie, the campaign might be seen as a progressive one because it does not directly discourage young people from participating in sexting. However, is it really the case? No. By suggesting to teenagers to use emojis instead of taking compromising pictures of themselves distorts the very definition of sexting. It is thus a way of persuading juveniles to not participate in the practice, otherwise they might face the risk of sextortion.

### 6.1.3. Canada

In June 2021, the police department of Quebec City launched a campaign against sexting, which was disseminated in several high schools. The idea was to raise awareness concerning the consequences of sharing online pictures and videos of sexual nature. The director of the communications division of the Police Department of Quebec City phrases it this way: “The goal is to reach the target and then light a candle in these young people so that in the end, they see that this behaviour, in fact, to send a sext, it is not ideal because afterwards, the consequences are great and can be very serious.”<sup>204</sup>

One of the prevention advisors warns about the technological affordances of the Internet by saying: “Often young people think [...] that it is ephemeral, but with Snapchat, everyone knows you can take screenshots, you can take a picture of the screen. So, once it’s uploaded to the web, well it’s really ... it doesn’t erase. Here we go, it’s a wildfire”.<sup>205</sup>

<sup>203</sup> *Supra* note 201.

<sup>204</sup> (<https://news.in-24.com/news/46281.html>), last visited (06-06-2021).

<sup>205</sup> *Id.*



Picture from Radio-Canada<sup>206</sup>

Foul language is used on the campaign itself. It can be read: “Don’t snap your ding, don’t snap your crack [booty/titties], and don’t snap your pussy” [author’s translation]. On the website accompanying the campaign, it is written: “It’s normal to want to seduce, but you have to be aware that what you share on your cell phone or on social media, it leaves traces, and it is shared. Think about it before sending a sexy photo or message, which might be seen by other people at your school”.<sup>207</sup>

#### 6.1.4. Reflections

After being exposed those campaigns, a thought that might arise is:

What if a young woman’s [and a young man’s] rights to digital participation did not imply an obligation to either (a) maintain absolute secrecy regarding her sexual desires or (b) abstain entirely from all forms of mediated sexual expression? What if being known as ‘someone who gossips, and shares sexual images without consent’ was the *more* shameful identity and was presented to young people as such? What if they were cautioned that inappropriate gossip and non-consensual picture sharing was a violation of others’ rights [...]?<sup>208</sup>

In all public campaigns, youth sexting is framed as an almost inevitably negative experience and sexting abstinence is given as a solution to mitigate the risks associated with the practice. Indeed, the “abstinence discourse enacts an implicit form of censorship through its linking of the ‘respect yourself’ and ‘protect yourself’ message, only now in order to adequately protect against the harms of sex one must refrain from expressing themselves in the form of sexting.”<sup>209</sup>

<sup>206</sup> (<https://ici.radio-canada.ca/nouvelle/1798330/sexta-texto-campagne-sensibilisation-adloescent-internet-police>), last visited (06-06-2021).

<sup>207</sup> *Supra* note 204.

<sup>208</sup> K. Albury, Just Because It’s Public, Doesn’t Mean It’s Any of Your Business: Adults and Children’s Sexual Rights in Digitally Mediated Spaces, 19(5) *New Media & Society* 722 (2017).

<sup>209</sup> *Supra* note 199, at 68.

This leads to the fact that the messages divulged by public campaigns seem to endorse victim blaming attitudes.<sup>210</sup> In France, it was highlighted that taking part in sexting is accepting the risk of secondary sexting. In the Netherlands, it is recommended to use sexualised emoticons to prevent sextortion. In Canada, it is implicitly underscored that the solution to the fact that the Internet does not forget is to not share intimate pictures in the first place. In all cases, abstinence is firmly encouraged. In other words, in case of incidents, the responsibility is, to some extent, placed on the author of the self-generated sexual content because that person failed to prevent the situation by not being abstinent. Expectations of prudence and responsibility are put on adolescents' shoulders. In a certain way, potential victims are "responsibilized for managing not only their own risks".<sup>211</sup> Very little sympathy is shown by some young people for those who have experienced non-consensual sexting. Some judge that the situation is "their own fault".<sup>212</sup> Likewise, one expressed: "[B]ut you sent an image, okay, and now that [unauthorised distribution] might happen [...] at some point you have to take ownership of that and say that I have control of this situation."<sup>213</sup>

Moreover, those campaigns redirect the attention and the responsibility on the potential victims rather than on potential perpetrators. Indeed, it has been noted that "the advice to stop sexting in order to prevent image-based abuse makes those who are actually responsible invisible, namely the perpetrators: people who share other people's sexual images without their consent."<sup>214</sup> The energy of this kind of campaign should be oriented to responsabilize, inform and raise awareness to the negative impacts of non-consensual sexting, such as secondary sexting and sextortion.

In addition to encouraging victim-blaming and to divert the responsibility towards the potential victim rather than the potential perpetrators, those advice are problematic in respect to young people's rights. Indeed, they limit their sexual freedom.<sup>215</sup> Literacy campaigns are important because they instill education in vigilance, which is incontestably important for prevention. However, those contemporary literacy campaigns exposed violate adolescents' right to act as sexual beings by suggesting acting as "vigilant risk managers".<sup>216</sup> The abstinence solution denies teenagers agency and sexual development and exploration. Rather, "it perpetuates the old narrative that the only way to keep them safe is to exclude them from the platforms of participation."<sup>217</sup> This perspective is even impregnated by some youngsters. For instance, Ling, a 16-year-old boy, mentions: "If you don't send the image, then it can't be distributed".<sup>218</sup> Thus, instead of primarily focusing on the protection aspect, literacy campaigns could be more respectful of the full range of teenagers' rights. Instead of denying their rights to sexuality, the expression of it and undermining their digital participation, the focus could be on potential predators, who are responsible for the exploitative or abusive use and/or distribution of the material, which infringe potential victims' rights. Indeed, "any implication that consensual youth sexual expression is immoral, shameful, or illegal [should be avoided] and, rather, explicitly delineates the line between consensual and non-consensual intimate image sharing".<sup>219</sup> The literacy campaign could also

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<sup>210</sup> Victim blame refers to the fact that "victims are likely to, at least partially, bear responsibility for their images being shared." See (<http://cybercrimejournal.com/Starr&Lewisvol12issue2IJCC2018.pdf>), last visited (11-05-2021).

<sup>211</sup> L. Karaian, Policing 'Sexting': Responsibilization, Respectability and Sexual Subjectivity in Child Protection/Crime Prevention Responses to Teenagers' Digital Sexual Expression, 18(3) *Theoretical Criminology* 289 (2014).

<sup>212</sup> E. Setty, A Rights-Based Approach to Youth Sexting: Challenging Risk, Shame, and the Denial of Rights to Bodily and Sexual Expression Within Youth Digital Sexual Culture, 1(4) *International Journal of Bullying Prevention* 306 (2019).

<sup>213</sup> *Id.*, at 306.

<sup>214</sup> *Supra* note 190, at 80.

<sup>215</sup> *Id.*, at 79.

<sup>216</sup> A. Dodge, Try Not to Be Embarrassed': A Sex Positive Analysis of Nonconsensual Pornography Case Law, 29 *Feminist Legal Studies* 26 (2021).

<sup>217</sup> *Supra* note 96, at 63.

<sup>218</sup> *Supra* note 212, at 305.

<sup>219</sup> *Supra* note 216, at 32.

empower adolescents who want to engage - or are already engaging - in sexting by giving tips. For instance, it might be relevant to remind them to minimize (ideally eliminate) any identifying features, such as the face or distinctive birthmark, piercings, or tattoos.<sup>220</sup>

In brief, rather than insisting on the danger of sexting, the topic should be addressed in a human manner, without tending to humiliate the young person who sends that kind of content.

## 6.2. Prosecution

“Sex itself is presented as a crime to children”.<sup>221</sup> This is very true, especially when it comes to teenagers digitally expressing their sexuality. Indeed, the discussion relating to sexting is situated in the field of criminal law. Young people who engage in the consensual activity of online self-generated sexually explicit material are potentially guilty of an offence. For instance, in England and Wales, between 2017 and 2019, more than 6,000 children under 14-year-old have been investigated by the police in relation to sexting offences.<sup>222</sup>

### 6.2.1. But is sexting a criminal offense?

Sexting is not an offence *per se*.<sup>223</sup> Nonetheless, the practice may fall under the criminal offence of child pornography as it shows sexual activity involving a child. As previously covered in chapter 3, OPSC Article 3(1)(c) stipulates that producing, distributing, disseminating, importing, exporting, offering, selling, or possessing child pornography shall be fully covered under criminal or penal law. Similar provision is to be found within the Lanzarote Convention as Article 20(1) requires the production, possession, acquisition, and dissemination of child pornography to be criminalized. Nevertheless, states members may enact the exception in which the material of a child who has reached the age of consent and ‘where the images are produced and possessed by them with their consent and solely for their own private use’ is not considered a criminal offense.

In 2019, the Lanzarote Committee held that the “self-generation of sexually suggestive or explicit images and/or videos by children does not amount to ‘the production of child pornography’ when it is intended solely for their own private use”.<sup>224</sup> The same year, the CRC Committee held similar discourse: “children should not be held criminally liable for producing images of themselves”.<sup>225</sup> It reiterated the same position in 2021: “Self-generated sexual material by children that they possess and/or share with their consent and solely for their own private use should not be criminalized.”<sup>226</sup> In other words, consensual sexting between minors should not be subjected to criminal prosecution when the content is intended solely for children’s own private use.

### 6.2.2. A rights-based approach

The CRC Committee has taken a stand on the matter of consensual sexting in its General Comment No.25. Nevertheless, the CRC Committee lacked to acknowledge that the phenomenon is a right based issue. In other words, without locating the discussion from a children’s rights narrative, the CRC

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<sup>220</sup> (<https://www.sfu.ca/sexual-violence/education-prevention/new-blog-/consent/sexting--tips-on-staying-safe-r-.html>), last visited (12-05-2021).

<sup>221</sup> *Supra* note 46, at 733.

<sup>222</sup> (<https://www.theguardian.com/society/2019/dec/30/thousands-of-children-under-14-have-been-investigated-by-police-for-sexting>), last visited (26-05-2021).

<sup>223</sup> *Supra* note 161, at 4.

<sup>224</sup> *Supra* note 2, para 3.

<sup>225</sup> *Supra* note 92, para 67.

<sup>226</sup> *Supra* note 176 CRC Committee General Comment No. 25 (2021), para 19.

Committee simply recommended not criminalising the behaviour. Thus, it is now needed to approach consensual sexting from a rights perspective.

It must be acknowledged that from the debate surrounding consensual sexting emerges a tension between some rights. On one hand, teenagers have the right to right to be protected from all forms of sexual exploitation and sexual abuse.<sup>227</sup> In that vein, child sexual abuse material is criminalized.<sup>228</sup> On the other hand, young people should be allowed to communicate their sexuality in the digital area. But what are the rights enabling this? I suggest locating the discussion within the rights to freedom of expression<sup>229</sup> and the right to privacy.<sup>230</sup> In addition, both of those rights need to be looked at in accordance with the principle of evolving capacities. In that vein, the discussion around the negative effects of the criminalisation of consensual sexual activity in the South African case *Teddy Bear Clinic* is relevant to highlight because it could be transported in the debate around consensual teenage sexting.<sup>231</sup> Experts warned that criminalisation may drive sexual activity underground, away from guidance of parents.<sup>232</sup> As a result, instead of nourishing the communication between parents and young people, parental guidance on sexting could be hampered.<sup>233</sup> If driven underground, meaning that teenage sexuality is not freely discussed, support structures of adolescents are cut off and they may refrain from seeking support if their material circulates further without their consent.<sup>234</sup> Accordingly, it is important to bear in mind that appropriate guidance for young people is necessitated in conformity with the principle of evolving capacities, which should guide the rights at stake.

#### 6.2.2.1. Right to freedom of expression

Being digital natives, the exploration of sexuality and intimate relationships of teenagers may logically take place online under the form of consensual self-generated sexual material. Indeed, sexting has been summarized as a “combination of sexual expression and modern communication technologies.”<sup>235</sup> According to research on adolescent development, “teens have always found ways to explore their sexual identity and express themselves sexually” and sexting is “merely the newest form of doing this.”<sup>236</sup> Correlatively, many young people refer to sexting as a way of expressing themselves sexually.<sup>237</sup> For instance, on a blog, a teenage girl wrote that “[t]exting a boy sexual things is just another way of expressing yourself.”<sup>238</sup> In that vein, sexting should be labelled as a digital sexual act.

An example of the recognition of sexting as being protected by the right to freedom of expression can be found at the national level. In *R v Sharpe*, the Supreme Court of Canada acknowledged that

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<sup>227</sup> CRC Article 34.

<sup>228</sup> OPSC Article 3(1)(c); Lanzarote Convention Article 20(1).

<sup>229</sup> CRC Article 13.

<sup>230</sup> CRC Article 16.

<sup>231</sup> *Supra* note 96, at 64.

<sup>232</sup> *Supra* note 123, para 87. This submission is made because prosecution may imaginably lead to psychological effects. Shortly, the diminution of self-worth of the adolescent prosecuted is possible because his or her consensual sexual choices are disrespected by society (para 55). The young person could experience a mixture of shame, embarrassment, anger and regret, which may lead to a generally negative attitude towards sexual relations, feelings that could have a chilling effect on their help-seeking behaviour (para 47).

<sup>233</sup> *Supra* note 96, at 64.

<sup>234</sup> *Id.*, at 64.

<sup>235</sup> *Supra* note 128, at 626.

<sup>236</sup> M. Levick and K. Moon, Prosecuting Sexting as Child Pornography: A Critique, 44(4) *Valparaiso University Law Review* 1035 (2010).

<sup>237</sup> *Supra* note 128, at 627; *Supra* note 130, at 5.

<sup>238</sup> *Supra* note 199, at 67.

sexually explicit photographs or videotapes taken by a teenager of him- or herself alone<sup>239</sup> or engaged with a partner in lawful sexual activity “may implicate the values of self-fulfilment and self-actualization”.<sup>240</sup> Therefore, it is contained within the constitutional protection of free expression under the Canadian constitution.<sup>241</sup> Ultimately, prohibition of self-produced material of lawful activity “trenches heavily on freedom of expression while adding little to the protection the law provides children.”<sup>242</sup> However, they cannot be shared. In other words, as long as such material is “kept in strict privacy and intended for personal use only”, charges of child pornography cannot be pressed.<sup>243</sup> This is an exception to laws that aim to protect children from exploitation.<sup>244</sup>

#### 6.2.2.2. Right to privacy

Decisions about relationships are personal and covered by the right to privacy. When it comes to sexting, adolescents’ ability to decide essential factors regarding the practice, including the content itself and the person who will have access to it, is also part of the right to privacy. This control is necessary for them to self-determine their sexual identity and its online representation.<sup>245</sup> Criminalizing consensual sexting in the name of protection - protecting children against all forms of abuse and neglect - is a trespassing interference to their right to sexual privacy. This right “emcomposse[s] a minor’s right to sexual intercourse and that it further extended to situations where the minor memorializes the act through pictures or video”.<sup>246</sup>

Privacy is also of utmost importance when it comes to access and information. In terms of sexual privacy, it enables individuals to build boundaries around their intimate lives.<sup>247</sup> It also involves, among other things, “the presumed confidentiality of communications” and it “concerns expectations about the decision to share one’s nude body with others.”<sup>248</sup> This whole experience around sexual identity through self-generated sexual material implies a certain degree of control. This exercise of control “relates to the ability of self-determining one’s sexual identity and (online) sexual representation.”<sup>249</sup> The online component does not automatically turn everything digital public.<sup>250</sup> In other words, using the Internet does not deprive anyone from maintaining their right to privacy, even in case they decide to self-produce sexual material. Sexual privacy is recognized as being a foundation for the exercise of human agency and sexual autonomy.<sup>251</sup>

#### 6.2.3. Reflections

Before it was wondered: “If the laws relating to child pornography are designed to protect children from abuse or exploitation, how can that be achieved by punishing the very people that they seek to protect?”<sup>252</sup> As a response, it was underscored that “the law appears to have forgotten its purpose.”<sup>253</sup>

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<sup>239</sup> In *R v Bono* [2008] O.J. No. 3928 (QL), a 14-year-old girl recorded herself masturbating and sent the material to the accused. It is an example in which a selfie scenario, namely a sexually explicit material taken by a teenager of herself alone, is part of the *Sharpe* exception clause.

<sup>240</sup> *Supra* note 184, para 76.

<sup>241</sup> *Id*, para 76.

<sup>242</sup> *Id*, para 110.

<sup>243</sup> *Supra* note 184, para 116.

<sup>244</sup> *Id*, para 28.

<sup>245</sup> A. Chatzinikolaou & E. Lievens, A Legal Perspective on Trust, Control and Privacy in the Context of Sexting among Children in Europe, 14(1) *Journal of Children and Media* 41 (2020).

<sup>246</sup> *Supra* note 89, at 377.

<sup>247</sup> D. K. Citron, Sexual Privacy, 128(7) *The Yale Law Journal* 1870 and 1882 (2019).

<sup>248</sup> *Id*, at 1880-1881.

<sup>249</sup> *Supra* note 245, at 41.

<sup>250</sup> *Id*, at 42; *Supra* note 207.

<sup>251</sup> *Supra* note 247, at 1882.

<sup>252</sup> *Supra* note 130, at 53.

<sup>253</sup> *Id*, at 50.

Now, as recently expressed by the Lanzarote Convention and the CRC Committee, it is understood that criminal law is not suitable to respond to concerns of consensual self-produced sexual material by teenagers.

The practice encloses a conflict of rights that need to be approached from a children's rights centered understanding. This chapter suggests that the right to freedom of expression and the right to privacy are at the core of the legal debate, with the right to be free from sexual abuse and exploitation. Laws related to child pornography cannot be used to prosecute adolescents who sext, otherwise it "no longer serves to protect children or individuals, and instead adopts a paternalistic stance that could be viewed as infringing the rights of an individual to free expression or sexual autonomy."<sup>254</sup> The initial image shared during consensual sexting is the expression of sexual agency, exploration and expression, which is part of a normal sexual behaviour.<sup>255</sup> Indeed, consensual youth sexting is "a normal part of the exploration of sexuality during puberty among youths".<sup>256</sup> In a nutshell, identifying and balancing the rights at stake in the debate of consensual sexting allows to legally justify why criminalization is not a suitable response.

## 7. Response to Secondary Sexting

From a legal point of view, the non-criminalisation of consensual sharing of self-generated sexual material is settled within the international community. However, as covered in chapter 5, multiple risks are associated with the practice, and secondary sexting is one of them. It cannot be denied or ignored. Thus, what happens if the material is shared without consent? Should the youngster responsible for this unwanted dissemination be prosecuted? Should he or she be labelled as a sex offender? This chapter covers those questions and, accordingly, expands the debate of criminalisation to secondary sexting because this aspect of sexting has not yet been well researched and addressed. Thus, this chapter aims to provide a few insights to suggest a way forward to deal with such behaviour.

### 7.1. National level

As previously covered in chapter 5, the outcomes associated with non-consensual distribution of a sexualized text or images are deeply alarming. Therefore, responses to such behaviour have been undertaken by some countries. It mainly revolves around the identification and prosecution of individuals who distribute the content more widely. For example, the Canadian government introduced a legislation according to which the non-consensual sharing, distribution or selling of intimate images and videos is illegal, without regard to the motive(s) of the accused.<sup>257</sup> Comparable legislation as the Canadian one had been undertaken in other countries. It is the case in the United Kingdom,<sup>258</sup> the Netherlands,<sup>259</sup> Germany<sup>260</sup> and many American states, including Alabama,<sup>261</sup> New Hampshire,<sup>262</sup>

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<sup>254</sup> *Id.*, at 52.

<sup>255</sup> *Supra* note 190, at 79.

<sup>256</sup> *R v Zhou*, 2016 ONCJ 547, para 22.

<sup>257</sup> Section 162.1 Criminal Code of Canada, R.S.C., 1985, c. C-46.

<sup>258</sup> Section 33 of The United Kingdom Criminal Justice and Courts Act 2015.

<sup>259</sup> Article 240b Criminal Code of the Netherlands (*Wetboek van Strafrecht*).

<sup>260</sup> Section 201a Criminal Code of Germany (*Strafgesetzbuch*).

<sup>261</sup> Alabama Code Title 13A. Criminal Code. Acts 1977, No. 607 Article 13A-6-240 outlaws the distribution of a private image.

<sup>262</sup> Section 644:9 New Hampshire Revised Statutes Title LXII (Criminal Code) prohibits the action of non-consensual dissemination of private sexual images with the intent to harass, intimidate, threaten, or coerce the depicted person.

Oklahoma,<sup>263</sup> Virginia,<sup>264</sup> etc. However, in most of them, the motive is an important component of the infraction. For instance, the English legislation requires the intention to cause distress to the depicted person. Equivalently, the legislation in Alabama and New Hampshire necessitates the intention to harass, threaten, coerce, or intimidate the individual depicted.

## 7.2. Intentions

The motives behind non-consensual image sharing are numerous. One of the first that comes to mind is revenge.<sup>265</sup> Sometimes called 'revenge porn', this form of online sexual violence<sup>266</sup> is used when intimate images are shared without the consent of the depicted individual with the intention to cause harm and distress.<sup>267</sup> Although it often takes place in the context of breakdowns between two ex-lovers, it can also happen in other relationships, including friendship. For instance, a 17-year-old girl perpetrator explained: "Before the holidays, her image was exposed, and after the holidays, [...] we got into a fight and that's when I decided to forward her image as well".<sup>268</sup> One of the outcomes of that is victim-blaming and it punishes them for taking sexual photographs of themselves.<sup>269</sup> Indeed, it is noted that the victims may be bullied and harassed: "People called her a slut. [...] Boys started sending her messages on Snapchat, because they thought she was 'easy'", explained a 16-year-old perpetrator.<sup>270</sup> Particularly when girls are the victims, they are frequently bullied, slut-shamed, judged, joked about, and sexually harassed.<sup>271</sup>

In a similar vein, secondary texting can be used as a tool to regulate other people's - mainly girls - sexual behaviour. For instance, when a 16-year-old perpetrator was asked why she forwarded a friend's sexual image, she explained that "[her friend] had to learn a lesson, that she should not send such pictures".<sup>272</sup>

Another motive behind secondary sexting is social notoriety. Indeed, some youngsters hope to gain popularity and they see sharing someone else's sexual content as a way to enhance their social status.<sup>273</sup> To give a real example, a girl forwarded another girl's sexual material to a popular boy, hoping that he would like her back. She thought that she would then feel like she belongs to the popular kids.<sup>274</sup>

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<sup>263</sup> Section 1040.13b Oklahoma Statutes Title 21 (Penal Code of the State of Oklahoma, R.L.1910) forbids the dissemination of private sexual images of a person without that person's consent.

<sup>264</sup> Disseminating sexual photos without the victim's consent and with the malicious intent to coerce, harass, or intimate that person is illegal according to Section 386.2 of the Code of Virginia Title 18.2 (Crimes and Offenses Generally).

<sup>265</sup> *Supra* note 190, at 83; N. Henry and al. Policing Image-Based Sexual Abuse: Stakeholder Perspectives, 19(6) *Police Practice & Research* 568 (2018); T. H. Yeung and al., Prevalence, Correlates and Attitudes Towards Sexting among Young People in Melbourne, Australia, 11(4) *Sexual Health D* (2014).

<sup>266</sup> S.E. Lageson, S. McElrath & K.E Palmer, Gendered Public Support for Criminalizing "Revenge Porn", 14(5) *Feminist Criminology* 560 (2019).

<sup>267</sup> T.S Staar & T. Lavis, Perceptions of Revenge Pornography and Victim Blame, 12(2) *International Journal of Cyber Criminology* 427 (2018).

<sup>268</sup> *Supra* note 190, at 83.

<sup>269</sup> *Supra* note 266, at 565.

<sup>270</sup> *Supra* note 190, at 85.

<sup>271</sup> *Id.*, at 85.

<sup>272</sup> *Id.*, at 84.

<sup>273</sup> *Supra* note 265 Henry (2018), at 568.

<sup>274</sup> *Supra* note 190, at 84.

Non-consensually shared with others material that were originally made and share consensually is also done for fun<sup>275</sup> or as a joke<sup>276</sup>. Other motives include the reinforcement of friendship,<sup>277</sup> a conversation starter to discuss and learn about sexuality,<sup>278</sup> to project sexual accomplishment<sup>279</sup> such as trophy,<sup>280</sup> financial gain<sup>281</sup> and more.

In a nutshell, the intention is sometimes to intimidate, harass, hurt, shame, embarrass or humiliate.<sup>282</sup> Nonetheless, the diversity in teenager's motives indicates that secondary sexting is not automatically done with malicious intentions.

### 7.3. Label: Juvenile sex offender

Consequences of criminalising are undoubtedly damaging. Indeed, the negative effects of the criminal justice system are well known, and its exposure has been demonstrated to cause harm to young people.<sup>283</sup> Accordingly, it is worth recalling that "it is important to avoid drawing children and adolescents into the criminal justice system."<sup>284</sup> In that line, the CRC states that detention of minors shall be only used as a measure of last resort.<sup>285</sup> In a similar vein, the CRC Committee relies on diversion for children and specialized systems.<sup>286</sup> It avoids, *inter alia*, stigmatization and inscription in any registers, including criminal records and sex offender register.<sup>287</sup>

Nonetheless, juvenile justice systems vary between countries. In a lot of them, no diversion mechanisms are allowed for sex crimes. Thus, when teenagers are prosecuted for CSAM, which is a sexual offense, the diversion system is not an option. Substantially, a youngster successfully prosecuted leads to severe sentences, including juvenile sex offender registration. This label "carries some of the most draconian and long-lasting penalties" of the criminal justice system.<sup>288</sup>

As correctly highlighted in the *Teddy Bear* case, the stigma of criminalisation is exacerbated by the requirement of being added on the sex offender registry.<sup>289</sup> Indeed, being formally labelled by the criminal justice system as a juvenile sex offender induces an "intense social stigma".<sup>290</sup> They are seen as, *inter alia*, 'monsters', 'beasts' or 'predators'.<sup>291</sup> Indeed, despite the heterogeneity of crimes that may lead to such labels, all individuals convicted for sexual offenses are treated in a similar way. One confirmed and expressed indignation: "They're treating everyone as predatory, when I didn't go out and attack someone."<sup>292</sup>

<sup>275</sup> *Supra* note 265 Henry (2018), at 566.

<sup>276</sup> C. McGlynn and al., Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse, 25(1) *Feminist Legal Studies* 27 (2017); E.M. Clancy, B. Klettke & D.J. Hallford, The Dark Side of Sexting - Factors Predicting the Dissemination of Sexts, 92 *Computers in Human Behavior* 271 (2019).

<sup>277</sup> *Supra* note 190, at 83.

<sup>278</sup> *Id.*, at 84.

<sup>279</sup> *Supra* note 164, at 68.

<sup>280</sup> *Supra* note 265 Yeung (2014), at D.

<sup>281</sup> *Supra* note 265 Henry (2018), at 566.

<sup>282</sup> *Supra* note 266, at 561.

<sup>283</sup> *Supra* note 146, para 2.

<sup>284</sup> *Supra* note 92, para 71.

<sup>285</sup> CRC Article 37(b).

<sup>286</sup> CRC Article 40(3)(b).

<sup>287</sup> *Supra* note 92, para 71.

<sup>288</sup> *Supra* note 236, at 1036.

<sup>289</sup> *Supra* note 123, para 57.

<sup>290</sup> L. Murray and al., 'Let's Get Sexting': Risk, Power, Sex and Criminalisation in the Moral Domain, 2(1) *International Journal for Crime, Justice and Social Democracy* 38 (2013).

<sup>291</sup> G. Lowe & G. Willis, 'Sex Offender' Versus 'Person': The Influence of Labels on Willingness to Volunteer with People Who Have Sexually Abused, 32(5) *Sexual Abuse* 592 (2020).

<sup>292</sup> (<https://stories.usatodaynetwork.com/juvenile-sex-offenders/home/>), last visited (03-06-2021).

The public opinion and attitudes towards such labels are undeniably unfavourable. For instance, people do not want sex offenders to live in their community, to employ them or to include them in their social life.<sup>293</sup> In the *Teddy Bear* case, the Supreme Court noted that it prevent adolescents from meaningful interaction with children in the future, because such label restrict to be employed to work with a child, to hold any position which places them in authority, supervision or care of a child and it may also limit the possibility to become a foster parent or an adoptive parent.<sup>294</sup> In other words, no positive outcome comes from being added to a sex offender registry. The adverse effects are felt by the children adjudicated for sex crimes and required to register as sex offenders: They “are four times more likely to commit suicide”.<sup>295</sup>

This is problematic in light of CRC Article 40(1), which states that children who had infringed the law should be treated in a way that promotes their reintegration and their ability to assume a constructive role in society. In other words, the justice system should prevent children from having a negative impact on their short- and long-term interests because an integral part of the system is rehabilitation. The CRC Committee has stressed that “promoting reintegration requires that a child who is or has been in conflict with the law should be protected from actions or attitudes that hamper the child’s full participation in his/her community, such as stigmatization, social isolation, or negative publicity.”<sup>296</sup> However, the label has negative long lasting effects that infringe the possibility to be reintegrated into society with minimal impact on their future opportunities. Someone who has had the label since he was 12-year-old confessed: “It’s miserable, it’s impossible”.<sup>297</sup>

#### 7.4. Reflections

Should young people who share self-generated content without the consent of the depicted teenager be prosecuted like other sex offenders? In light of this chapter, the answer is hardly black or white and this debate around the criminalisation of secondary sexting must be approached multidisciplinary.

There are grey areas because it is not just one homogenous offense. As covered, there is not one typical motive for non-consensual image sharing. For instance, when the intentions of secondary sexting are, for example, to engage a discussion, for fun or even within the bullying narrative, it can be argued that sentencing the youth perpetrator is “erroneous and unjustified”,<sup>298</sup> as different offenses would match better the premises of their misconduct. Such situations are completely different than when an adult accesses material self-produced by a teen for sexual arousal. Nonetheless, despite the lack of bad intention, the material might end up in the hands of an adult predator at some point due to the spreadability of the Internet. But, once again, a deeper analysis must be assessed in terms of the scale of distribution: Did the sharing happen physically, e.g., showing the content on a smartphone or desktop? Through social media, e.g., forwarding it through WhatsApp or messenger? Or by uploading it, e.g., on Instagram or a revenge porn site?

In sum, when it comes to secondary sexting, looking at the intention, the context and the perspective of the victim is highly necessary. Doing otherwise would fail to consider the complexity of the practice. In my opinion, employing the juvenile justice system as a remedy for non-consensual image sharing is suitable. Indeed, non-consensual distribution of an intimate image is substantial wrongdoing and

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<sup>293</sup> *Supra* note 291, at 592.

<sup>294</sup> *Supra* note 123, para 57.

<sup>295</sup> *Supra* note 292.

<sup>296</sup> *Supra* note 146, para 29.

<sup>297</sup> *Supra* note 295.

<sup>298</sup> J.R. Lee & K.M. Darcy, Sexting: What's Law Got to Do with It?, 50(2) *Archives of Sexual Behavior* 571 (2021).

criminalisation is designed to prevent the conduct from occurring.<sup>299</sup> Expectation of privacy remains when the juvenile sender shares in the first place his or her intimate image to the recipient. As covered in chapter 3, a teenager who explores his or her sexual identity through sexting entails the exercise of control over his or her image.<sup>300</sup> Thus, this control is dragged away when the material is disseminated without permission: "Victims are denied agency over their intimate lives."<sup>301</sup> Consequently, there is a privacy violation that deserves criminal punishment. It must be noted that the "[p]ersonal threats to the dignity and safety of the victim include the shame and humiliation of the victim, not only because a sexualised or private image may now be seen by an unintended audience but because the dissemination via social media or online takes away any sense of control from the person so affected."<sup>302</sup> Relatedly, criminalisation is also justified due to the profound harm of sexual-privacy invasions. Grave harms may result from secondary sexting. Some victims testified having suffered from, *inter alia*, stalking, loss of professional and educational opportunities as well as psychological damage,<sup>303</sup> sometimes to the point to contemplate suicide. Indeed, "minors are particularly vulnerable to depression and suicide."<sup>304</sup> To respond to actions that cause a degree of harm and which include "a level of culpability, usually with intention or recklessness",<sup>305</sup> the employment of criminal law is justified. However, condemning youngster as sex offenders is most of the time inadequate considering that the intent to distribute beyond the intended recipient does not seem to sexually exploit a child.

That being said, some nuances must be expressed. Non-consensual sharing can be perceived as an "[s]exual-privacy invasions [which] reduce victims to sexual objects that can be exploited and exposed."<sup>306</sup> When the objective of the youth perpetrator is to abuse, exploit or victimize the depicted teenager - as would it be the case for a sex offender<sup>307</sup> - then, the inscription in the registry is appropriate. Indeed, I support that non-consensual sharing in those circumstances takes part of a continuum of sexual violence.<sup>308</sup> Such behaviour joins the common character in sexual abuse, in which the abuse, intimidation, coercion, intrusion, threat and force is used to control the victims, who are predominantly female.<sup>309</sup> In my point of view, the non-consensual image sharing then becomes image-based sexual abuse and the act of sexual violence is simply facilitated by the available technology. In those cases, "child pornography laws serve as useful sanctions that confront sex offenders whose objective is to abuse, exploit and victimize children."<sup>310</sup>

In a nutshell, because prosecution under CSAM is oftentimes not appropriate, there is undoubtedly a need for new criminal law offenses to cover the existing gap generated by secondary sexting. I would suggest incorporating a specific type of non-sexual offense for secondary sexting like it has already been adopted at the national level by some countries or states. An 'non-consensual distribution of intimate images', 'non-consensual sharing of intimate images', or 'non-consensual disclosure of private sexual photographs or films', for instance. Considering the multiple reasons leading to sexting, this offense should not punish all perpetrator uniformly without regard to the intent.<sup>311</sup> "This solution acknowledges that not all [secondary] sexting is the same: low-level [secondary] sexting warrants low-

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<sup>299</sup> T. Crofts & T. Kirchengast, A Ladder Approach to Criminalising Revenge Pornography, 83(1) *The Journal of Criminal Law* 93 (2019).

<sup>300</sup> *Supra* note 247, at 1882.

<sup>301</sup> *Id.*, at 1924.

<sup>302</sup> *Supra* note 299, at 89.

<sup>303</sup> D.K. Citron & M. A. Franks, Criminalizing Revenge Porn, 49(2) *Wake Forest Law Review* 347 (2014).

<sup>304</sup> *Supra* note 247, at 1927.

<sup>305</sup> *Supra* note 290, at 45.

<sup>306</sup> *Supra* note 247, at 1925.

<sup>307</sup> *Supra* note 298, at 571.

<sup>308</sup> *Supra* note 276 McGlynn and al (2017), at 26.

<sup>309</sup> *Id.*, at 27.

<sup>310</sup> *Supra* note 298, at 571.

<sup>311</sup> A. Kushner, The Need for Sexting Law Reform: Appropriate Punishment for Teenage Behaviors, 16(3) *University of Pennsylvania Journal of Law and Social Change* 293 (2013).

level punishment, and more serious acts call for more severe consequences.”<sup>312</sup> Moreover, the harsh consequences of being convicted for a sexual offense leading to stigmatisation are avoided and the possibility of extrajudicial procedures remains. The latter is important because the relational aspect between the victim and offender may be seriously affected when it comes to secondary sexting (e.g., in chapter 7.2 where a perpetrator has forwarded a (ex-)friend’s sexual picture after getting in a conflict with the latter). Thus, having discretionary power, a prosecutor could divert such kind of cases if it is judged that the interpersonal problems could be better dealt with outside of the juvenile justice system. This moves away from punishing young offenders in favour of restoring the relationship between the victim and the offender, which is, in the end, beneficial for both.

## 8. Conclusion

### 8.1. Summary, including recommendations

Rapid advances in the world of information and communications technology have led adolescents to explore their sexuality in new ways. This thesis has explored teenagers sexting and the responses associated from a children’s rights perspective. Considering the findings in all previous chapters, the responses to young people’s online sexuality, specifically sexting among adolescents, are not completely compliant with the international children’s rights principles.

Relevant theoretical basis concerning children’s rights were introduced to set up the backdrop for discussion. The 3P concept (provision, protection, and participation rights) as well as the school of thoughts (paternalism, liberation, emancipation, and welfare) were explained because they are existing lenses when looking at the controversial issue of sexting. The relevant international legal framework (the principle of evolving capacities, the right to freedom of expression, the right to privacy, the right to be protected against all forms of sexual exploitation and sexual abuse and the specific prohibition of child pornography, nowadays called CSAM) was presented to enable a comprehensive legal analysis around teenage sexting. In sum, it was highlighted that the framework does not explicitly recognize young people’s sexuality. In other words, when it comes to teenagers’ sexuality, including self-generated sexual material, adolescents are still pictured as particularly innocent and vulnerable. In this context, paternalism is often privileged over empowerment.

In a similar vein, this thesis recognized that the practice of sexting is risky. Indeed, although self-generated sexual material is, in the very first place, consensual and even pleasurable, the practice encompasses inherent risks such as sextortion, secondary sexting as well as seduction and grooming. A holistic education as an alternative strategy is a key solution as it would give teenagers the capacity to detect and navigate those risks. Nonetheless, while examining the French, Dutch and Canadian literacy campaigns, it was found that the three of them were problematic because they were promoting abstinence as a solution to mitigate the risks of sexting. Also, they were redirecting the attention and responsibility on the potential victims rather than on potential perpetrators, endorsing victims blaming attitudes. Overall, those campaigns were denying teenagers’ agency as sexual entities, which is not compliant with the international children’s rights principles. In opposition, information to empower young people to adequately deal with the risks of the practice should be provided.

Moreover, an overview of various age limits across different domains was also presented to illustrate that children are granted legal competence in specific areas during childhood. The age of sexual consent, the age of medical treatment and the age of criminal responsibility were chosen due to their

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<sup>312</sup> *Supra* note 298, at 570.

resemblances with the practice of self-generated sexual content online. Like sexting, they relate to similar domains as they all concern the right to make autonomous decisions, to control their own body as well as the capability to understand the consequences, risks, and impact of their actions. Nevertheless, fixing an age limit for sexting is not recommendable as it would be extremely difficult to reach consistency between all the different age limits. In addition, the recent development according to which consensual sexting should not be criminalized was highlighted. It supports that the creation of an age limit for sexting is not a solution, as criminal law should simply be not used as a respond to the behaviour. It was also pointed out that the new advancement does not yet acknowledge that sexting is a legal debate. Locating it in the context of children's rights is necessary to reach a position that adequately balance the need of protection of adolescents, as well as their empowerment. Certainly, the right to be free from all forms of sexual exploitation and abuse, including CSAM, are at stake. However, this thesis suggested that the criminalisation of consensual sexting by youngsters is not a suitable solution because it would infringe the right to freedom of expression and the right to privacy, both in light of the evolving capacities principle.

Finally, it was expressed that the involvement of criminal law for secondary sexting, a non-consensual form of sexting, is a suitable solution. Nonetheless, it acknowledged that the common motives behind this practice are extremely diversified (e.g., revenge, for fun, to project sexual accomplishment, financial gain, etc.) and that not all of them justify the sex offender label that comes with a successful prosecution for child sexual abuse material. Indeed, the reasons leading to sharing a sexual picture further than originally intended are so numerous and diverse and do not automatically relate to the abuse or exploitation of the teenager depicted. In consequence, those various intentions must be correctly discovered to adequately prosecute the behaviour of the perpetrator. It was recommended to enact a new legislation specifically related to secondary sexting, as it would more appropriately cover the heterogenous intentions and results of the behaviour.

## 8.2. Direction for future research

During this research, it was also found that young people across the world are making money from selling their own self-generated sexual content on the Internet. This is what a 17-year-old from Scotland, is doing.<sup>313</sup> She started to sell sexually explicit content of herself when she was 16. At that moment, she was making around 15 000 to 20 000\$ a month by selling her material on OnlyFans.<sup>314</sup> She also mentioned knowing a 14-year-old girl who disseminates sexual content of herself on Snapchat Premium.<sup>315</sup> However, it was not within the scope of this thesis to examine the reality of teenagers who voluntarily share online their self-produced sexual material for economic purposes. Nonetheless, it would be needed to further investigate the issue of child pornography. Indeed, due to the economic aspect, it also involves child prostitution. According to CRC Articles 34(c), states parties of the Convention shall take all appropriate measures to prevent the exploitative use of children in prostitution. In other words, the wording under the CRC opens the door for children to prostitute themselves if it does not entail exploitation. On the contrary, the OPSC completely prohibits child prostitution.<sup>316</sup> Although the OPSC is supposed to complement the CRC, there is *prima facie* a conflict between the two international instruments when it comes to the use of a child in sexual activities for remuneration or any other form of consideration.<sup>317</sup> Therefore, it would be interesting to reflect further

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<sup>313</sup> Nudes4Sale by reporter Ellie Flynn (2020), available at: <<https://www.bbc.co.uk/programmes/p087m1nh>>.

<sup>314</sup> OnlyFans is a social platform where creators can monetize their content. The platform is designed for people of 18-year-old and older. A creator who registers has to provide OnlyFans with a selfie headshot with one identification document including a picture in order to prove that the ID provided belongs to the account holder. Hannah explained that she had to sell her nudes under different accounts because, being a minor, they were often suspended. However, she says that it is still easy to sign up to a OnlyFans when you are under 18. See *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> OPSC Article 1.

<sup>317</sup> Definition of child prostitution according to OPSC Article 2(b).

how this discord plays out when it comes to teenagers selling their self-produced sexual content online. Accordingly, it would be a topic to bear in mind for future research.

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