

# **Child Rights and Privacy**

The Glushko & Samuelson Information Law and Policy Lab  
Sarah Stapel and Sarah Chen  
9 October 2020



## **Executive Summary**

End-to-end encryption is applied in various communication services. It provides secure communications and affords its users privacy. However, encryption also makes it difficult for law enforcement to detect and investigate the distribution of images of child sexual abuse via these services. Recently, various policymakers, including the Dutch government, have proposed to restrict encryption in chat messaging services in order to allow for lawful access to combat the distribution of images of child sexual abuse. In this report, we investigate whether states have a positive obligation to restrict encryption for this purpose, taking into account its obligations to protect children's rights.

Combating online child sexual abuse is important, but it is difficult to argue that it follows from international human rights instruments that states have an obligation to restrict encryption in the fight against online sexual child abuse. While the international legal framework for children's rights requires states to protect children and defend children's rights, there is no clear requirement to restrict encryption. At the same time, end-to-end encryption affords users the right to data protection and private life and it is important for governments and organisations as well.

A balance must be struck between the state's positive obligation to protect privacy and communications freedom and the positive obligation to protect the physical integrity of the child. The existence of a positive obligation depends on various factors, but ultimately comes down to finding a fair balance between competing interests. Given the impact of restricting encryption on other societal interests, it cannot be argued that the governments can oblige companies to enable access to the content of end-to-end encrypted messages to combat online child sexual abuse. Fortunately, this is not a zero-sum-choice and there appear to remain opportunities to fight the online sexual abuse of children, while still protecting the right to data protection and the right to private life. This is a valuable topic for a follow-up study.

## Table of Contents

- I. Introduction
- II. The role of encryption in combating online child sexual abuse
- III. The general framework for identifying a positive obligation for States
- IV. Child's rights
  - 4.1 Legal framework
    - 4.1.1 Fundamental Rights of the Child
    - 4.1.2 UN Child Rights
    - 4.1.3 Other Relevant International Child Rights
- V. The right to privacy
  - 5.1 The rights to respect for private life and data protection
  - 5.2 The requirements for justified interference
  - 5.3 The right to privacy in relation to encryption restrictions
  - 5.4 A positive obligation to restrict encryption?
- VI. Legal analysis
  - 6.1 Necessity
  - 6.2 Effectiveness
  - 6.3 Impact of a restriction to encryption on other interests
- VII. Conclusion



## **I. Introduction**

The low cost and low risk of using the internet to distribute illegal material has led to a significant increase of the exchange of images of sexual child abuse.<sup>1</sup> It is to be expected that child sexual abusers will also take advantage of the security provided by end-to-end encrypted communication services, such as WhatsApp messaging. In response, governments around the world are discussing curtailing strong encryption. The United States proposed the EARN IT Act, guidelines regulating online abuse by weakening end-to-end encryption.<sup>2</sup> The United Kingdom and Australia have called on WhatsApp to consider a backdoor to encryption.<sup>3</sup> The European Commission, in its communication on the EU strategy for a more effective fight against child abuse, called for the use of encryption for criminal purposes to be “immediately addressed.”<sup>4</sup> Likewise, the Netherlands has called for measures to restrict the use of encryption in chat services.<sup>5</sup>

While states have an obligation to protect children, there are also evident privacy concerns in allowing lawful access to encrypted messages.<sup>6</sup> This raises the question how the tension between children’s rights and privacy concerns are resolved.

In this report, we answer the following question :

*To what extent does the international legal framework for children’s rights require governments to oblige companies to enable lawful access to the content of end-to-end encrypted messages, in order to investigate and prosecute distributors of child sexual abuse images, also taking into account the right to privacy?*

In order to answer this question, we approached experts in the field of child rights, privacy law and encryption. This research focuses on one particular kind of

<sup>1</sup> Michael H. Keller and Gabriel J.X. Dance, ‘The Internet is Overrun With Images of Child Sexual Abuse. What Went Wrong?’ *The New York Times*, 29 September 2019.

<sup>2</sup> S.2298 EARN IT Act of 2020, 116th Congress (2019-2020).

<sup>3</sup> Nandita Bose and Joseph Menn, ‘U.S. legislation targets online child sexual; threatens encryption on Facebook, Google’ *Reuters*, 5 March 2020.

<sup>4</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU strategy for a more effective fight against child sexual abuse, Brussels, 24 July 2020 COM(2020) 607 final.

<sup>5</sup> Laurens Cerulus, ‘Dutch minister urges EU action to fight child pornography online’ *POLITICO*, 4 December 2019; Minister Grapperhaus, Kamerbrief over internetcriminaliteit, 20 May 2020.

<sup>6</sup> Laurens Verhagen, ‘Hoe graag minister Grapperhaus het ook wil, je kunt niet ‘een beetje’ minder chatberichten versleutelen’ *Volkscrant*, 13 December 2019.



encrypted messages: the mutual communication between two online child predators (third parties). That is to say, this research does not discuss the communication between minors or the communication between an online child predator and a minor.

## II. The role of encryption in combating online child sexual abuse

The use of encryption is widespread and increasing.<sup>7</sup> Encryption affords users secure communications and privacy. However, law enforcement authorities have also noted the challenges that encryption poses to investigating and preventing cases of child sexual exploitation.<sup>8</sup> Some traditional means by which law enforcement operates, such as through wiretapping and surveillance, have become less effective or at least more difficult as a result of encryption.<sup>9</sup>

It is therefore tempting to restrict the use of encryption in messaging services in the fight against child sexual exploitation. But this approach has its drawbacks. Firstly, the effectiveness and workability of a restriction to encryption are debatable.<sup>10</sup> The technical measures needed to guarantee effective detection of the content and the perpetrators at scale are very complex. Moreover, in order for this to work, one will have to weaken the encryption used of all users, not only perpetrators, since there is no technology yet which would protect privacy while allowing the detection of illegal content. This would thus also affect the privacy of innocent users.

Simultaneously, the necessity of such a measure can be questioned. While encryption contributes to the online distribution of images, the role of website hosts should not

<sup>7</sup> J.A. Lewis, D.E. Zheng, W.A. Carter, 'The Effect of Encryption on Lawful Access to Communications and Data', February 2017.

<sup>8</sup> United Nations Children's Fund (UNICEF), *Discussion Paper Series: Children's Rights and Business in a Digital World*, March 2017.

<sup>9</sup> As explained in the joint statement by the Five Eyes nations, "the inability of intelligence and law enforcement agencies to lawfully access encrypted data and communications poses challenges to law enforcement agencies' efforts to protect our communities, Five Country Ministerial 2018, Security Coordination <<https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/security-coordination/five-country-ministerial-2018>>; James B. Comey, 'Going Dark: Are Technology, Privacy and Public Safety on a Collision Course?' Federal Bureau of Investigation.

<sup>10</sup> Laurens Verhagen, 'Hoe graag minister Grapperhaus het ook wil, je kunt niet 'een beetje' minder chatberichten versleutelen' *Volkskrant*, 13 December 2019.



be disregarded, as they perhaps play a bigger role in online abuse. Europe has a significant problem with taking down content from servers that are publicly available.

In 2018, 75.4 percent of child abuse material reported to hotline was hosted in the country that harbors the association of child abuse hotlines, the Netherlands.<sup>11</sup> On 8 October 2020, Minister Grapperhaus presented a blacklist of webhosts that do not do enough to combat child sexual abuse.<sup>12</sup> While this puts pressure on hosts to improve their monitoring efforts, the effectiveness of this measure is still unclear.<sup>13</sup>

These considerations also play a role in the legal assessment below.

### III. The general framework for identifying a positive obligation for States

This report focuses on the question whether governments under children's rights law have an obligation to weaken end-to-end encryption. Such an obligation is called a positive obligation. While there is no fixed definition of a positive obligation, it can be understood as an obligation on states to take the necessary measures to safeguard a right. These may be legal and practical measures, and states have a margin of appreciation in determining them.

Whether there exists a positive obligation under the ECHR is determined on the basis of several factors:

- The importance of the interests at stake. If the interests pertain to “fundamental values” or “essential aspects” of the right, more weight should be attributed to them.<sup>14</sup>
- The impact on the applicant. The Court determines the impact on the applicant by assessing the “discordance between the social reality and the

<sup>11</sup> Annual Report 2018 on Child Sexual Abuse Material, INHOPE Association, 21.

<sup>12</sup> Grapperhaus, F (2020, 8 October) Hostingbedrijven en kinderpornografisch beeld materiaal [Letter of government]. Retrieved from: [https://www.tweedekamer.nl/kamerstukken/brieven\\_regering/detail?id=2020Z18360&did=2020D39646](https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2020Z18360&did=2020D39646).

<sup>13</sup> Minister Grapperhaus, speech during an online event hosted by the European Parliament concerning the online abuse of children, 09 June 2020 < <https://www.rijksoverheid.nl/documenten/toespraken/2020/06/09/speech-by-minister-of-justice-and-security-ferdinand-grapperhaus-on-eu-action-to-combat-child-sexual-abuse-9-june-2020>>.

<sup>14</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, § 66, ECHR 2014; *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91; *Gaskin v. the United Kingdom*, 7 July 1989, § 49, Series A no. 160.



law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor.”<sup>15</sup>

- The nature of the obligation.<sup>16</sup> Here, the Court assesses the nature of the obligation, by determining whether it is “narrow and precise or broad and indeterminate,”<sup>17</sup> and whether the obligation poses a “burden on the State.”<sup>18</sup> An interference that is narrow and precise is more easily justified than one that is broad and indeterminate. In respect of the margin of appreciation, it is wider in case of moral or ethical issues.<sup>19</sup>
- Where there are competing interests, the Court has stated that in determining the proportionality of the interference, a “fair balance (...) has to be struck between the competing interests of the individual and of the community as a whole.”<sup>20</sup> In order to strike a fair balance, the negative obligations that flow from the relevant article from the ECHR should be considered.<sup>21</sup>

According to the Court, a breach of a positive obligation is only accepted in light of significant flaws.<sup>22</sup>

The positive obligation in respect to securing children’s rights, privacy and encryption will be discussed in the following chapters.

<sup>15</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, § 66, ECHR 2014.

<sup>16</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, § 66, ECHR 2014.

<sup>17</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, § 66, ECHR 2014; *Botta v. Italy*, 24 February 1998, § 35, Reports of Judgments and Decisions 1998-I.

<sup>18</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, § 66, ECHR 2014; *Rees v. the United Kingdom*, 17 October 1986, § 43-44, Series A no. 106; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 86-88, ECHR 2002-VI.

<sup>19</sup> *X and Y v. the Netherlands*, 26 March 1985, § 24 and 27, Series A no. 91; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI; *Pretty v. the United Kingdom*, no. 2346/02, § 71, ECHR 2002-III.

<sup>20</sup> *Rees v. the United Kingdom*, 17 October 1986, § 37, Series A no. 106; *Gaskin v. the United Kingdom*, 7 July 1989, § 42, Series A no. 160; *Hämäläinen v. Finland* [GC], no. 37359/09, § 65, ECHR 2014.

<sup>21</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, § 65, ECHR 2014; *Gaskin v. the United Kingdom*, 7 July 1989, § 42, Series A no. 160; *Roche v. the United Kingdom* [GC], no. 32555/96, § 157, ECHR 2005-X.

<sup>22</sup> *B.V. and Others v. Croatia*, no. 38435/13, § 151, 15 December 2015.



## **IV. Children's rights**

### **4.1 Legal framework**

Over the years, several institutions have established provisions on the criminalization of distribution of images of child sexual abuse and the prevention of sexual exploitation of children. While the signatories in these instruments call on states to take measures to protect children, they do not prescribe or even hint at the restriction of encryption technologies.

#### **4.1.1 Fundamental Rights of the Child**

-  
The sexual abuse and exploitation of children are considered “cruel crimes” and constitute serious violations of fundamental rights, as laid down in the Charter of Fundamental Rights of the European Union.<sup>23</sup> The right to human dignity (Article 1) and the right to integrity (Article 3) are some of the fundamental rights violated within this context. Article 24 of the Charter entails a general provision on the right of the child, which states that children shall have the right to the protection and care as is necessary for their well-being.

#### **4.1.2 UN Child Rights**

-  
The rights that ensure the protection of children against sexual abuse and exploitation are further recognized in Article 19 and Articles 34-35 of the Convention. According to these provisions, States Parties shall take all appropriate measures to protect the child from all forms of abuse and exploitation, including sexual abuse and sexual exploitation. Consequently, in 1990, the UN commission appointed the Special Rapporteur on the sale and sexual exploitation of children. The numerous political commitments made by participating States have remained mostly unfulfilled.<sup>24</sup> While there is a potential for concrete action, ongoing initiatives and

<sup>23</sup> European Commission on Child sexual abuse  
<[https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/child-sexual-abuse\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/child-sexual-abuse_en)>

<sup>24</sup> OCHCR, 25 Years Mandate  
<<https://www.ohchr.org/Documents/Issues/Children/SR/25YearsMandate.pdf>>





alliances at an international level need to be more inclusive and ensure further cooperation. Furthermore, it appears that states who are requested to cooperate with the Special Rapporteur do not always do so.<sup>25</sup>

The Convention on the Rights of the Child (CRC) is the world's most widely ratified human rights treaty in history.<sup>26</sup> In the CRC, three of the articles in the Convention are central in requiring states to establish some form of child protection system. First, according to Article 19, children have the right to be protected from all forms of physical or mental violence, neglect, sexual abuse and exploitation, while in the care of parents or any other person. Article 3 Section 2 further ensures the right to such protection and care as is necessary for the well-being of the child. This article is formulated in a positive way. The boundary between protection and provision is not always clear, especially as the right to protection and care goes beyond the right to be protected against violence.<sup>27</sup> Lastly, a positive obligation for states also arises from Article 34 CRC and the Optional Protocol: states must take all appropriate national, bilateral and multilateral measures in any form of professional exploitation.

The developments and growing attention paid by the Committee on the Rights of the Child furthermore resulted in drafting an optional protocol to CRC: The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The provisions of the protocol are critical to the safeguarding of children's rights.<sup>28</sup> The preamble states the concern about "the growing availability of child pornography on the internet and other evolving technologies". Moreover, according to Article 3 of the Optional Protocol, "producing, distributing or possessing for the purposes of child pornography should be fully covered under national criminal law or penal law". Furthermore, Article 10 of the Optional Protocol states that States Parties shall take all necessary steps to strengthen

<sup>25</sup> Rajnaara Akhtar, Conrad Nyamutata, Elizabeth Faulkner, 'International Child Law' Routledge 2020.

<sup>26</sup> European Commission, 'Child Rights - CRC Map'

<<https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/2.4.html>>

<sup>27</sup> K. Sandberg, 'Children's Right to Protection Under the CRC', *Human Rights in Child Protection*, Palgrave Macmillan 2018.

<sup>28</sup> Marta Santos País, 'The United Nations legislative framework for the protection of children from sexual violence, including sexual abuse and exploitation', *Publication "Protecting children from sexual violence - A comprehensive approach"* pt. II.

international cooperation for “the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving child pornography”. However, this is without specifying further measures.

#### **4.1.3 Other Relevant International Child Rights**

To further modernize criminal provisions on online child sexual abuse, the Budapest Convention on Cybercrime was adopted in 2001.<sup>29</sup> The Convention seeks to strengthen protective measures for children against sexual abuse by criminalizing various aspects of the electronic distribution of images of child sexual abuse (Article 9). In 2010, the Council of Europe ratified the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.<sup>30</sup> The Convention stipulates in its preamble that certain types of conduct are classified as criminal offences, such as engaging in sexual activities with a child below national the legal age and child prostitution and pornography. Due to increased information and communication technologies, these practices have grown to worrying proportions. Therefore, the Council encourages the private sector, in particular the ICT sector to participate in the elaboration and implementation of policies to prevent sexual exploitation and sexual abuse of children and to implement internal norms through self-regulation or co-regulation (Article 9).

In 2011, the Council and the European Parliament adopted a Directive on combating the sexual abuse and sexual exploitation of children and child pornography, increasing their efforts against child sexual abuse.<sup>31</sup> Compared to other treaties, the Directive is a more practical instrument. It covers procedures on investigation and prosecution of crimes. Furthermore, the Directive provides practical considerations to combat crimes against children by acting on different fronts regarding detection and enforcement.

## **V. The right to privacy**

<sup>29</sup> Council of Europe, ‘Protecting children against sexual exploitation and abuse’ <<https://www.coe.int/en/web/cybercrime/protecting-children>>

<sup>30</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201>>

<sup>31</sup> European Commission, ‘Organized Crime & Human Trafficking – Child sexual abuse’ <[https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/child-sexual-abuse\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/child-sexual-abuse_en)>



An analysis of the positive obligations of states in relation to encryption will also have to discuss the right to privacy and data protection. These rights provide protection for individual autonomy and creating a space for the development of a private sphere. They furthermore enable the enjoyment of other fundamental rights, such as freedom of communication.

### **5.1 The rights to respect for private life and data protection**

The right to respect for private and family life, home and correspondence has emerged as a central right since the adoption of the Universal Declaration of Human Rights in 1948.<sup>32</sup> Since then, Europe has affirmed this right in its legal framework, as seen in Article 8 of the European Convention on Human Rights (ECHR) and Article 7 of the EU Charter of Fundamental Rights (Charter).

The right to the protection of personal data is established in Article 16 of the Treaty of the Functioning of the EU as well as Article 8 of the EU Charter and has also been consolidated in the General Data Protection Regulation (GDPR).

### **5.2 The requirements for justified interference**

The right to private life and the right to data protection are not absolute rights. They may under certain circumstances be restricted.

In the case of Article 8 ECHR, limitations are allowed if they are in accordance with the law, pursue a legitimate aim, and are necessary in a democratic society. Article 7 and 8 of the Charter should be read in light of Article 52(1), where limitations are admissible when they are “provided by law, respect the essence of the right to data protection, subject to the principle of proportionality, and are necessary to meet the objective of general interest recognized by the Union or the need to protect the rights and freedoms of others.”<sup>33</sup> For our purposes, the most important requirement is that an

interference must correspond to a “pressing social need” that is proportionate to

<sup>32</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 12.

<sup>33</sup> Handbook on European data protection law (2018) European Union Agency for Fundamental Rights, 42-43.



the legitimate aim pursued.<sup>34</sup>

### **5.3. The right to privacy in relation to encryption restrictions**

In regards to the protection of private communications, a restriction on encryption appears to be at odds with the primary purpose of the ECHR and the Charter to protect against arbitrary interference. “Tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence.”<sup>35</sup> Furthermore, any measure to monitor correspondence is met with a positive obligation on authorities to accompany such a measure with “sufficient safeguards against abuse.”<sup>36</sup> Arguably, because encryption functions as a shield against arbitrary interference and provides (technical) safeguards against abuse, any restriction on encryption shall at the very least have to be subject to strict scrutiny.

### **5.4 A positive obligation to restrict encryption?**

A related question is whether a positive obligation to restrict encryption can be derived from Article 8 ECHR, which not only protects the right to privacy, but has been interpreted to call for a positive obligation of states to provide adequate safeguards to protect the physical integrity of the child.<sup>37</sup> In particular, a strengthened obligation may arise in regards to securing the effectiveness of a criminal investigation.<sup>38</sup> Furthermore, Article 8 involves the duty to apply criminal law mechanisms of effective investigation and prosecution concerning allegations of serious acts of violence by private parties.<sup>39</sup> In fact, children are considered vulnerable individuals and are thereby entitled to particularly effective protection.<sup>40</sup>

The ECtHR developed a large body of case law dealing with children’s rights. Within these cases, the ECtHR relies frequently on other children’s rights instruments,

<sup>34</sup> *Leander v. Sweden*, 26 March 1987, § 58, Series A no. 116 para. 58; *Z v. Finland*, 25 February 1997, Reports of Judgments and Decisions 1997-I.

<sup>35</sup> *Kruslin v. France*, 24 April 1990, § 33, Series A no. 176-A.

<sup>36</sup> *Bărbulescu v. Romania* [GC], no. 61496/08, § 119-120, 5 September 2017 (extracts).

<sup>37</sup> See *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91: ““private life”, a concept which covers the physical and moral integrity of the person, including his or her sexual life”.

<sup>38</sup> *Osman v. the United Kingdom*, 28 October 1998, § 128, Reports of Judgments and Decisions 1998-VIII; *M.C. v. Bulgaria*, no. 39272/98, § 150., ECHR 2003-XII; *Khadija Ismayilova v. Azerbaijan*, nos. 65286/13 and 57270/14, § 117, 10 January 2019.

<sup>39</sup> *B.V. and Others v. Croatia*, no. 38435/13, § 154-155, 15 December 2015.

<sup>40</sup> *X and Y v. the Netherlands*, §§ 23-24 and 27; *August v. the United Kingdom* (dec.); *M.C. v. Bulgaria*



notably the CRC. For example, in *K.U. v. Finland*, the ECtHR held that the positive obligation under Article 8 of the ECHR not only to criminalize offences but also to effectively investigate and prosecute them, assumes even greater importance when the physical and moral welfare of a child is threatened.<sup>41</sup> That said, the ECtHR analyses applications on a case-by-case basis and therefore does not offer a comprehensive overview of children's rights under the ECHR.<sup>42</sup> We will discuss whether such a positive obligation exists in section 5.4.

## VI. Legal Analysis

In determining whether there is a positive obligation on states to restrict encryption in respect of protecting children's rights, a fair balance of the interests at stake is needed.<sup>43</sup> The balancing act should first consider the right of physical integrity of the child and the right of private communications. Next, it should consider this balance in respect of its impact on individuals as well as the community as a whole. To determine how to carry out a fair balance, the necessity, effectiveness and impact of a measure restricting encryption needs to be explored.

### 6.1 Necessity

Children are among the most affected by public policy and practices regarding the internet.<sup>44</sup> Governments have the duty and responsibility to act in the best interests of the child, which entails providing adequate safeguards for children online and reporting concerns.<sup>45</sup>

Child sex offenders are able to take advantage of the internet and online tools to access, produce and distribute images of child sexual abuse, even more so when they stay undetected. The impact of such violence is severe and, for those who have experienced it, likely to be lifelong.<sup>46</sup>

<sup>41</sup> *K.U. v. Finland*, no. 2872/02, ECHR 2008.

<sup>42</sup> European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to the rights of the child*, 2015, p. 23.

<sup>43</sup> *Rees v. the United Kingdom*, 17 October 1986, § 37, Series A no. 106; *Gaskin v. the United Kingdom*, 7 July 1989, § 42, Series A no. 160; *Hämäläinen v. Finland* [GC], no. 37359/09, § 65, ECHR 2014.

<sup>44</sup> Be-Free Center, *Code of Ethics for the Protection of Children from Abuse*; European Commission, 'New studies explore how digital technologies affect children' <<https://ec.europa.eu/social/main.jsp?langId=en&catId=1246&newsId=9072&furtherNews=yes>>; Unicef (2017) 'Children in a Digital World'.

<sup>45</sup> Commissioner Yohansson in the webinar on Preventing and combating child sexual and exploitation: towards an EU Response, European Commission, 10 June 2020.

<sup>46</sup> Ecpat International and Religions for Peace, *Protecting Children from Online Sexual Exploitation*, June



Understanding that the sexual abuse of children constitutes a serious act of violence, Article 8 could at least be construed to call for a positive obligation to take certain measures to protect children against sexual abuse, including better enforcement. However, it is questionable whether these measures also include the obligation to restrict encryption for that purpose, as will be further discussed below.

## **6.2 Effectiveness**

To explore whether a restriction to encryption is feasible, the effectiveness of such a restriction to combat child sexual abuse needs to be considered.

The effectiveness of such a measure is uncertain. One aspect which has to be considered is with the prioritization of encryption over the focus on webhosting (see section TOD). While encryption facilitates the distribution of online child sexual abuse, web hosts are still predominately responsible for publicly available content. This raises the question of whether the focus is rightfully on tackling child sexual abuse in encrypted messaging, which is a highly complex task, rather than eradicating the content on the publicly available website hosts, which seems to be a more pressing issue.

## **6.3 Impact of a restriction to encryption on other interests**

A measure to restrict encryption will conflict with other fundamental rights. There is a wide consensus that encryption is important for privacy and cyber security.<sup>47</sup> Arguably, such a restriction is contrary to the “fundamental values” or “essential aspects” of the right to privacy (see above),<sup>48</sup> This is because innocent individuals are

disproportionality affected<sup>49</sup> and the restriction in its current state is too “broad and indeterminate” to be effectively enforced.<sup>50</sup>

2016.

<sup>47</sup> Minister Grapperhaus in the webinar on Preventing and combating child sexual and exploitation: towards an EU Response, European Commission, 10 June 2020.

<sup>48</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, § 66, ECHR 2014; *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91; *Gaskin v. the United Kingdom*, 7 July 1989, § 49, Series A no. 160.

<sup>49</sup> *Rees v. the United Kingdom*, 17 October 1986, § 37, Series A no. 106; *Gaskin v. the United Kingdom*, 7 July 1989, § 42, Series A no. 160; *Hämäläinen v. Finland* [GC], no. 37359/09, § 65, ECHR 2014.

<sup>50</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, § 66, ECHR 2014; *Botta v. Italy*, 24 February 1998, § 35, Reports of Judgments and Decisions 1998-I.



Restrictions on encryption in light of government access can have serious negative repercussions for the ability to prevent unauthorized access more generally.<sup>51</sup> First of all, it would create a collective risk of weakening the security level, of the general population as well as of commerce and governments.<sup>52</sup> Related to this, restrictions on encryption would be very complex to implement, in a safe way, while the applications are wide-spread and globalized.<sup>53</sup> Thus, the nature of the obligation likely imposes a heavy burden on states, in particular in ensuring the security of mechanisms to gain lawful access to communications.

<sup>51</sup> W. Schulz and J. van Hoboken, *Human rights and encryption*, UNESCO Series on Internet Freedom; No. 8, Paris: United Nations Educational, Scientific, and Cultural Organization (2016) 61.

<sup>52</sup> J.A. Lewis, D.E. Zheng, W.A. Carter, 'The Effect of Encryption on Lawful Access to Communications and Data', February 2017, 1.

<sup>53</sup> What is the CNIL's position in terms of encryption?', *CNIL*, 17 July 2017.

## **VII. Conclusion**

Combating online child sexual abuse is important. But it is difficult to argue that it follows from international human rights instruments that states have an obligation to restrict encryption in the fight against online sexual child abuse. While the international legal framework for children's rights requires states to protect children and defend children's rights, there is no clear requirement to restrict encryption. At the same time, end-to-end encryption affords users the right to data protection and private life and it is important for governments and organisations as well.

A balance must be struck between the state's positive obligation to protect privacy and communications freedom and the positive obligation to protect the physical integrity of the child. The existence of a positive obligation depends on various factors, but ultimately comes down to finding a fair balance between competing interests. Given the impact of restricting encryption on other societal interests, it cannot be argued that the governments can oblige companies to enable access to the content of end-to-end encrypted messages to combat online child sexual abuse. Fortunately, this is not a zero-sum-choice and there appear to remain opportunities to fight the online sexual abuse of children, while still protecting the right to data protection and the right to private life. This is a valuable topic for a follow-up study.