



## **Novel Strategies to Fight Child Sexual Exploitation and Human Trafficking Crimes and Protect their Victims**

**H2020 – 101021801**

[www.heroes-fct.eu](http://www.heroes-fct.eu)

### **D4.2 Legal and ethical issues about the use of Special Investigative Methods to fight CSAM/CSEM**

**Authors:** Carlotta Rigotti, Júlia Zomignani Barboza, Nadine El-Dekmak, Prof. Paul De Hert

Deliverable nature	Report [R]
Dissemination level	Public [PU]
Version	1.5
Date	22 March 2023



## Document information

<b>Project acronym</b>	HEROES
<b>Project title</b>	Novel strategies to fight child sexual exploitation and human trafficking crimes and protect their victims
<b>Grant agreement no.</b>	101021801
<b>Project URL</b>	<a href="http://www.heroes-fct.eu">www.heroes-fct.eu</a>
<b>EU project officer</b>	Markus Walter

<b>Deliverable</b>	<b>Number</b>	D4.2	<b>Title</b>	Legal and ethical issues about the use of enhanced investigative methods to fight CSAM/CSEM	
<b>Work Package</b>	<b>Number</b>	WP4	<b>Title</b>	Project management and coordination	
<b>Date of Delivery</b>	<b>Contractual</b>		M12	<b>Actual</b>	M16
<b>Status</b>	Version 1.5			Final	
<b>Nature</b>	R		<b>Dissemination level</b>		PU

<b>Responsible partner</b>	<b>Name</b>	Carlotta Rigotti	<b>E-mail</b>	Carlotta.Rigotti@vub.be
	<b>Partner</b>	VUB	<b>Phone</b>	N/A
<b>Contributing partners</b>	N/A			
<b>Reviewers</b>	Jana Dilger (TRI), Christopher Nathan (TRI), Maegan Hendow (ICMPD)			
<b>Security Approval</b>	Julio Hernández-Castro (University of Kent)			

**Abstract (for dissemination):** The present deliverable seeks to analyse the legal and ethical issues about the use of Special Investigative Methods to fight trafficking in human beings and child sexual abuse. In this way, it is possible to provide the HEROES operational partners with guidance to assist them in complying with legal provisions and making difficult ethical decisions in their daily fight against trafficking in human beings and child sexual abuse. The deliverable is mostly based on desk research. Its geographical scope lies in Europe and South America, with special regard to the jurisdictions of Spain, Greece, Brazil, and Peru.

<b>Keywords</b>	Child sexual abuse, artificial intelligence, right to a fair trial, right to privacy, risk of entrapment, transparency, accountability, legitimacy, trustworthy AI, human-centric AI
-----------------	--

### Disclaimer:

This document contains information that is treated as confidential and proprietary by the HEROES Consortium. Neither this document nor the information contained herein shall be used, duplicated, or communicated by any means to any third party, in whole or in parts, except with prior written consent of the HEROES Consortium.



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No. 101021801. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the funding body.

## Version history

Version	Date	Change Editor	Changes
0.1	01/06/2022	Carlotta Rigotti (VUB)	First draft
0.2	15/07/2022	Júlia Zomignani Barboza, Prof. Paul de Hert (VUB)	VUB internal review
0.3	18/08/2022	Carlotta Rigotti (VUB)	Second draft
0.4	06/09/2022	Jana Dilger (TRI)	HEROES consortium internal review
0.5	30/09/2022	Maegan Hendow (ICMPD)	HEROES consortium internal review
0.6	02/10/2022	Carlotta Rigotti (VUB), Nadine El Dekmak (VUB)	Third draft
0.7	17/11/2022	Julio Hernández-Castro (University of Kent)	Security clearance with some revisions
0.8	24/11/2022	Carlotta Rigotti (VUB)	Fourth draft
1.0	30/11/2022	Carlotta Rigotti (VUB)	Final version
1.1	08/02/2023	Nadine El-Dekmak (VUB)	First draft Revised version
1.2	10/02/2023	Júlia Zomignani Barboza (VUB), Prof. Paul de Hert (VUB)	VUB internal review
1.3	13/02/2023	Nadine El-Dekmak (VUB)	Second revised draft
1.4	20/02/2023	Christopher Nathan (TRI)	HEROES consortium internal review
1.5	22/03/2023	Nadine El-Dekmak (VUB)	Final revised version approved by security advisory board

# Table of contents

Executive summary .....	1
Abbreviations.....	2
1. Introduction.....	3
2. Discussing UI.....	4
2.1 The purpose of UI.....	5
2.2 Proactive versus reactive UI .....	5
2.3 The performance of UI: Offline versus online UI .....	5
3. Objectives of UI to tackle trafficking in human beings and child sexual abuse.....	7
4. The importance of law and ethics in UI.....	9
4.1 UI and the respect for the right to privacy.....	9
4.2 UI and the respect for the right to a fair trial .....	11
4.3 UI and the risk of turning it into entrapment .....	13
4.4 UI and the well-being of the UA .....	15
4.5 UI and harm to society.....	16
5. Regulating UI at the international, regional and national levels .....	17
5.1 Regulating UI in Europe and South America .....	18
5.2 Regulating UI at the national level .....	22
5.2.1 Regulating UI in Spain .....	22
5.2.2 Regulating UI in Greece .....	24
5.2.3 Regulating UI in Brazil.....	26
5.2.4 Regulating UI in Peru .....	28
5.3 Regulating UI: Some comparative and final remarks.....	29
6. The importance of ethics in UI .....	30
6.1 Police ethics in UI.....	30
6.2 Ethics in the new development of technology-facilitated approaches to UI .....	33
7. Conclusion: Some recommendations for the new development of technology-facilitated approaches to UI.....	35
8. References.....	38

## Executive summary

The main aim of this Deliverable is to establish the boundaries within which the development of new technologies designed to strengthen the capacities of LEAs to perform UI into trafficking in human beings and child sexual abuse can be considered legally and ethically feasible or acceptable. In this way, it is possible to provide the HEROES operational partners with guidance to assist them in complying with legal provisions and making difficult ethical decisions in their daily fight against trafficking in human beings and child sexual abuse.

For this purpose, the Deliverable takes the form of 7 Sections.

The Introduction sets the scene, by contextualising the common fight against trafficking in human beings and child sexual abuse and the HEROES project.

Section 2 defines UI. Special emphasis is put on the difference between its proactive and reactive nature, as well as on the stages of its performance. The definitory analysis is seen in the context of the HEROES project and the supporting role the development of new technologies could play in online UI.

Section 3 explains the necessity of UI in the fight against trafficking in human beings and child sexual abuse, by tracing it back to the severe and cross-border nature of these crimes. Indeed, it is significantly easier for LEAs to gather evidence when the target is not aware of being criminally investigated.

Section 4 starts from the assumption that UI is extremely intrusive and analyses the threat to fundamental rights and values arising from its performance. More precisely, UI is recognised to eventually violate some of the rights to privacy and a fair trial of the person being unknowingly investigated but should still be clearly distinguished from entrapment. Besides, it can negatively affect the well-being of the UA during and after the investigation, due to the stressful and life-threatening situations they might find themselves involved in. Ultimately, there is a high chance for UI to be detrimental to some fundamental values and principles, including state legitimacy, accountability, and transparency.

Section 5 explores the current legislation and case-law governing the performance of UI at the international, regional, and national levels. In this regard, the Section primarily focuses on the ECtHR case-law, as well as the criminal provisions in force in Spain, Greece, Brazil, and Peru, that is to say, the HEROES pilot countries selected for coverage. All the national jurisdictions seemingly share a number of key features, including the provision of substantial and procedural safeguards.

Section 6 discusses the ethical framework underpinning UI. For this purpose, it first analyses ethics in police work and relates it to the principles of integrity, transparency, accountability, and legitimacy. It then moves to the respect for ethics in the development of new technologies that could strengthen the capacities of LEAs to perform UI into trafficking in human beings and child sexual abuse, by building on the notion of human-centric and trustworthy AI.

The Conclusion summarises the main research outputs, to later develop some final recommendations for the development of new technologies designed to facilitate the performance of UI.

The present Deliverable lays down the basis of Deliverable 4.7 that is due in November 2023 and seeks to keep the pace with the development of the HEROES project, to consider the possible adoption of relevant legal reform, judicial decision, and ethical policies, and interview LEAs and scholars working on UI.

## Abbreviations

ACHR: American Convention on Human Rights

AI: Artificial intelligence

CoE: Council of Europe

ECHR: European Convention of Human Rights

ECtHR: European Court of Human Rights

ICTs: Information and communication technologies

IACHR: Inter-American Commission of Human Rights

IACtHR: Inter-American Court of Human Rights

IDB: Inter-American Development Bank

ICCPR: International Covenant on Civil and Political Rights

The Lanzarote Convention: Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse

LEAs: Law enforcement agencies

OECD: Organisation for Economic Co-operation and Development

The EU or the Union: European Union

The EU Charter: Charter of Fundamental Rights of the European Union

The Lanzarote Committee: Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse

The UN: United Nations

The UN Sustainable Goals: Resolution adopted by the General Assembly on 25 September 2015 transforming our world: The 2030 agenda for sustainable development [A/RES/70/1]

UDHR: Universal Declaration of Human Rights

UNESCO: United Nations Educational, Scientific, and Cultural Organisation

The UNODC: United Nations Office on Drugs and Crime

WP: Work Package

WEF: World Economic Forum

# 1. Introduction

After the European Commission took office in 2019, it published its plans for upcoming work, including the EU Strategy on combatting trafficking in human beings (2021-2025)<sup>1</sup> and the EU Strategy for a more effective fight against child sexual abuse (2020-2025).<sup>2</sup>

In both documents, the European Commission makes it clear that trafficking in human beings and child sexual abuse are serious crimes that should have no place in society, due to the life-shattering and long-lasting harm they cause to the victims.<sup>3</sup>

The European Commission also recognises how widespread trafficking in human beings and child sexual abuse are across the Member States and considers the development and usage of ICTs as an ambivalent means to commit and combat these crimes.<sup>4</sup>

With this in mind, the fight against trafficking in human beings and child sexual abuse remains a priority for the European Commission and relies on a comprehensive approach addressing police and judicial cooperation in criminal matters, support and assistance to victims, social awareness, education programmes, and funding for research, to name just a few examples.<sup>5</sup>

The HEROES project fits into the EU strategies for the fight against trafficking in human beings and child sexual abuse, in the sense that its Consortium attempts to reinforce and enhance the coordinated response of LEAs and other stakeholders concerning the prevention, investigation, and victim assistance of these crimes.

In doing so, the Consortium starts from the assumption that the ways trafficking in human beings and child sexual abuse occur are evolving fast, especially online. This calls for LEAs and other stakeholders to adopt special investigative measures, as well as to keep abreast of available tools, services, and technologies in this field.

In this scenario, the HEROES project plans to develop new approaches, which are technology-facilitated and can help to conduct online UIs into trafficking in human beings and child sexual abuse.<sup>6</sup>

The Consortium is aware that the very idea of UI can be of concern.

At first sight, the chance for a law enforcement agent to assume another identity to infiltrate and obtain evidence can be seen as an efficient and even necessary strategy to fight against severe crimes, like trafficking in human beings and child sexual abuse. But it likewise potentially impinges on the rights to privacy and to a fair trial, as well as causes considerable harm and angst to the UA and society at large. A balance between the need for LEAs to investigate severe crimes and the respect for the fundamental values and rights on which society is deeply rooted is therefore required.

For this purpose, the present Deliverable examines legal and ethical issues surrounding the use of UAs to fight trafficking in human beings and child sexual abuse, to later produce a set of recommendations for the new development of technology-facilitated approaches to conduct online UIs into trafficking in human beings and child sexual abuse. The ultimate aim is to provide the HEROES operational partners with guidance to assist

---

<sup>1</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 on the EU Strategy on combatting trafficking in human beings', 14 April 2021, COM(2021) 171 final

<sup>2</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 on the EU Strategy for a more effective fight against child sexual abuse, 24 July 2020, COM(2020) 697 final

<sup>3</sup> European Commission (n 1) 1; European Commission (n 2) 1

<sup>4</sup> European Commission (n 2) 2

<sup>5</sup> European Commission (n 1) 2 ff.; European Commission (n 2) 2 ff.

<sup>6</sup> For more information about these new approaches, see the HEROES deliverables of Work Package 6, whose dissemination level is nonetheless confidential.



them in complying with legal provisions and making difficult ethical decisions in their daily fight against trafficking in human beings and child sexual abuse.

In terms of methodology, this Deliverable is primarily based on legal desk research covering the collection and analysis of relevant legislation and case-law (i.e., primary sources), as well as the corresponding literature (i.e., secondary sources). In this way, it is possible to develop a more complete interpretation of the conceptual bases of legal and ethical principles and rules in UI, as well as the growing regulation of new technologies used for this purpose. A comparative approach to the legal and ethical analysis is also adopted, given the vast geographical scope of the HEROES project. During the Consortium meeting taking place in Madrid in 2022, VUB also liaised with the Spanish, Greek, Brazilian, and Peruvian operational partners to get a better insight into their internal policies on ethics.

Incidentally, it is worth clarifying that the present Deliverable is followed by a next iteration, which is due in November 2023 and attempts to keep the pace with the development of the HEROES project, to consider the possible adoption of relevant legal reform, judicial decision and/or ethical policies, and interview LEAs and scholars working on UI.

The overall structure of this Deliverable takes the form of 7 Sections, this introduction being the number zero. Section 1 begins with the search for a definition of UI. Sections 2 and 3 respectively discuss the reasons behind the need for UI, as well as for the development of legal and ethical requirements setting out the boundaries within which it can be performed. Section 4 focuses on the legal frameworks regulating UI at the international, regional, and national levels. Special emphasis is put on the legal provisions in force in Spain, Greece, Brazil, and Peru, since they are HEROES pilot countries involved in the development of new approaches to the fight against human trafficking and child sexual abuse, especially in WP 9. In the same way, Section 5 investigates the ethical principles governing UI. Section 6 finishes with a set of recommendations to be followed when developing each new technology that could facilitate the performance of online UI.

## 2. Discussing UI

In the literature, various definitions of ‘UI’ are found.<sup>7</sup> *Inter alia*, the glossary of Eurojust describes it as “a technique whereby a law enforcement officer disguises his or her identity or uses a false identity to infiltrate a criminal organisation for the purpose of obtaining evidence for use in the investigation and/or prosecution of suspected targets”.<sup>8</sup>

This definition inevitably raises the question about the timing and deployment of UI. For example, should the UI be used based on reasonable suspicion that a criminal offence has been committed? How is the UA expected to behave during the investigation? Can they engage in unlawful conduct? To what extent can they cause the target(s) to commit a crime?

Other authors provide more details on the matter.

*Inter alia*, Jacqueline E. Ross refers to ‘UI’ to mean an investigation where “police officials or civilian auxiliaries (informants) operating at the direction of law enforcement disguise their true identity and pretend to plan or engage in criminal activity for the purpose of gathering evidence of criminal wrongdoing by others and identifying members of criminal organizations”.<sup>9</sup> For Elizabeth E. Joh, UI involves the engagement into “seemingly illegal activity to gather evidence or to maintain their fictitious identities”.<sup>10</sup> Charles E. and Gregory L. O’Hara likewise agree that an UA “assumes a different and unofficial identity in order to obtain

<sup>7</sup> See *infra*: E. E. Joh, ‘Breaking the Law to Enforce it: Undercover -Police Participation in Crime’ (2009) *Stanford Law Review* 62(1) 155; J. E. Ross, ‘Impediments to Transnational Cooperation in UP: A Comparative Study of the United States and Italy’ (2004) *The American Journal of Comparative Law* 52(3) 569; C. E. O’Hara & G. L. O’Hara, *Fundamentals of Criminal Investigation* (7<sup>th</sup> Edition, Springfield III, Charles C. Thomas, 2003)

<sup>8</sup> Eurojust, ‘Special Investigative Measures’ <<https://www.eurojust.europa.eu/judicial-cooperation/judicial-cooperation-instruments/special-investigative-measures>> accessed 8 August 2022

<sup>9</sup> Ross (n 7) 570

<sup>10</sup> Joh (n 7) 155

information” and clarify that “[i]n its most effective form the investigator wins the confidence of the subject and induces him to reveal the desired information. The investigator, by adopting an identity compatible with the surroundings in which he will work, places himself in a position where he will be able to observe and gain the confidence of the subject”.<sup>11</sup>

The nuances of these definitions show that ‘UI’ remains a rather nebulous term. Moreover, other terms, such as ‘covert policing’, ‘surveillance’, ‘special investigative means’, ‘sting operations’, and ‘deception’, are used interchangeably and without precision, thereby adding to the confusion.<sup>12</sup>

Against this backdrop, the next sub-sections better clarify what counts as UI in terms of time, behaviour, and techniques.

## 2.1 The purpose of UI

Overall, there is a consensus amongst legal scholars and policy makers that the purpose of UI is to obtain evidence. More precisely, Todd G. Shipley and Art Bowker explain that UI includes:

“General intelligence gathering, including establishing information sources, identifying locations and web presence of questionable activities, and mapping online and social relationships/networks;

Seeking out and identifying illegal behaviour and establishing a crime has occurred;

1. Establishing motives for crimes;
2. Identifying relationships between targets, victims, and other subjects;
3. Establishing whether the illegal activity constitutes a criminal enterprise and identifying the structure of that enterprise, including its leadership and assets;
4. Providing location information of the targets, relationships, and victims;
5. Disproving possible alibis of both targets and victims;
6. Plan for and communicate with suspects/targets.”<sup>13</sup>

## 2.2 Proactive *versus* reactive UI

It is a widely held view that UI can be distinguished between proactive and reactive.

For Brendon Murphy, proactive UI targets conduct that takes place prior to the commission of a criminal offence. Reactive UI, instead, concerns crimes that have already been committed based on reasonable suspicion.<sup>14</sup>

## 2.3 The performance of UI: Offline *versus* online UI

Charles E. and Gregory L. O’Hara describe in detail the performance of UI and divide it into the four following stages.

First, when recruiting the UA, special attention must be given to their profile. This means that their physical appearance and behaviour must suit the particular milieu in which they will find themselves.<sup>15</sup>

---

<sup>11</sup> O’Hara & O’Hara (n 7) 249

<sup>12</sup> See, for instance: European Union and Council of Europe (eds.), ‘Deployment of Special Investigative Means’ (2013) <<https://rm.coe.int/deployment-of-special-investigative-means-eng/16807828fa>> accessed: 8 August 2022; E. W. Kruisbergen, D. de Jong & E. R. Kleemans, ‘UP: Assumptions and Empirical Evidence’ (2011) *The British Journal of Criminology* 51(2) 394; Joh (n 7) 155

<sup>13</sup> T. G. Shipley & A. Bowker, *Investigating Internet Crime. An Introduction to Solving Crimes in Cyberspace*, (Amsterdam, Syngress, 2014) 233-234. See also: O’Hara & O’Hara (n 7) 250

<sup>14</sup> B. Murphy, *Regulating U Law Enforcement: The Australian Experience* (Cham, Springer, 2021) 84

<sup>15</sup> O’Hara & O’Hara (n 7) 251

Second, the UA is required to prepare themselves in advance. More precisely, they will generally make a list of the details of the role they play (e.g., name, personality, hobbies, occupation) and will create their own cover story. Besides, it is necessary for them to examine the geographical areas where the UI will be performed, as well as to familiarise themselves with the socio-cultural milieu in which they will work.<sup>16</sup>

Third, once the UA begins and is performed in the offline world, the law enforcement agent must play their role. Their conduct can vary widely though, the sole lowest common denominator being the lack of knowledge of the person(s) being probed about the investigation activity.

Normally, the law enforcement agent maintains a restrained and passive role, so as to collect information about completed, ongoing, and/or planned criminal activities. But they could also take a more active role, by seeking to stop a crime from occurring or making its commission more complex to name a few examples. Similarly, the UA could impersonate a victim or an accomplice facilitating the commission of a crime,<sup>17</sup> a topic that will be discussed later in this Deliverable.

Amongst the various techniques a law enforcement agent can devise to perform UI, there is the deployment of ICTs and AI-based technologies.<sup>18</sup>

Fourth, it is desirable for the UA not to disappear suddenly. Rather, a plausible reason for departure should be provided. Following the end of the investigation, the law enforcement agent will reintegrate into “normal work and life role”.<sup>19</sup> This is particularly true when the UI has been performed in the offline world.

When an online UI measure takes place, the UA would use what is called an ‘online handle’ in order to conceal his identity. According to Oerlemans J.J., “[A]n online handle may be the real name of an individual. On the Internet, it is also common to use pseudonyms, called ‘nicknames’, as online handles when communicating with other people. Nicknames are often used on online discussion forums or chat channels. Online handles can also consist of the first part of an e-mail address and profile names on social media services.”<sup>20</sup> The author explains that these online handles allow LEAs to gather publicly available information on internet users in a lawful manner. They can also enable LEAs to identify an online service provider, who may have some information on an internet user who might be a person of interest, and to interact with individuals without revealing their identity.

The importance of these online handles lies in the fact that a handle may “provide the information required to identify a suspect. It may also be the beginning of a ‘digital trail’ that may be followed as individuals use the Internet. Such trails may include information about individuals who are of interest to a criminal investigation that is posted by other internet users”.<sup>21</sup> For this purpose, Oerlemans claims that based on the information gathered through a handle, LEAs may have the ability to obtain a data production order that will enable them to collect information stored by online service providers.<sup>22</sup>

---

<sup>16</sup> O’Hara & O’Hara (n 7) 252-255

<sup>17</sup> *ibid.* 257-258

<sup>18</sup> The well-known Sweetie 1.0 and 2.0 projects illustrate this point clearly. Briefly, Sweetie 1.0 involved the creation of an avatar posing as a ten-year-old Filipino girl, which was operated by an UA of the Dutch NGO ‘Terre des Hommes’ and aimed at gathering information about people contacting Sweetie and soliciting webcam sex. The gathered information was later shared with LEAs that could launch investigations all over the world. In Sweetie 2.0, instead, the technology is more developed, insofar as it involves an artificial intelligence software system capable of depicting and acting as a potential victim, without the need for human intervention. For more information see: S. van der Hof, I. Georgieva, B. Schermer & B-J Koops (eds.), *Sweetie 2.0. Using Artificial Intelligence to Fight Webcam Child Sex Tourism* (Cham, Springer, 2019)

<sup>19</sup> O’Hara & O’Hara (n 7) 258

<sup>20</sup> J.-J Oerlemans, ‘*Investigating cybercrime*’. Amsterdam: Amsterdam University Press (SIKS dissertation series, no. 2017, 01) 28

<sup>21</sup> *Ibid.* 31

<sup>22</sup> *Ibid.* 52

In addition to this, and similarly to the passive role LEAs may maintain offline, online UI can also allow UA to passively observe the behaviour of suspects and related individuals on publicly accessible platforms such as public chat services, social media platforms, and others.

### 3. Objectives of UI to tackle trafficking in human beings and child sexual abuse

Overall, it is well-established that the State has a duty to protect people from harm, a duty that might likewise provide the justification for a wide range of preventive and intrusive measures, such as UI.

According to Klaus Günther, the intersection between the State authority and the office of protection traces back to the creation of national states across Europe, where the duty of the citizens to behave peacefully and abide by the law, which is adopted and enforced by the State, has started to correspond to the State duty to protect them.<sup>23</sup>

Nonetheless, the precise contours of the duty to protect are contestable, both in terms of what wrongful conduct should be protected against and in terms of what measures may properly be taken.

It is well established from a variety of studies that trafficking in human beings and child sexual abuse cause serious harm to the victim.

From a fundamental rights angle, this implies that the victim suffers from a significant violation of the absolute principle of human dignity, as well as the right to sexual autonomy, security, integrity, and health. In transposing the violation of these fundamental rights into a real-life situation, it emerges that the victim usually goes through physical and psychological violence leading to long-lasting and life-shattering consequences that are detrimental to their personal growth and self-determination, as well as their participation in society.

Although each experience of human trafficking and child sexual abuse is different and can be influenced by a variety of external factors (e.g., age, the length of the abuse, the response of the social community), it is usually likely for the victim to experience anxiety, panic attacks, a loss of self-confidence and self-esteem, a sense of shame, guilt, and isolation, suicidal tendencies, post-traumatic distress, and so forth.<sup>24</sup>

Trafficking in human beings and child sexual abuse are not only considered serious crimes, but are known to be a growing problem that is cross-border and has been recently facilitated by ICTs technologies.<sup>25</sup>

On this point, both UNODC, the UN Special Representative on Violence against Children, and the Lanzarote Committee start from the assumption that ICTs have turned into a significant, integral part of children's lives and provide them with positive opportunities for their growth and self-determination, including communication channels, entertainment activities, and free access to information for educational purposes.<sup>26</sup>

---

<sup>23</sup> K. Günther, 'Responsibility to Protect and Preventive Justice', in A. Ashworth, L. Zedner & P. Tomlin (eds.), *Prevention and the Limits of the Criminal Law*, (Oxford, Oxford University Press, 2013) 73-74

<sup>24</sup> For a (albeit brief) literary review of the consequences of trafficking in human beings and child sexual abuse, see: P. Goodyear-Brown, *Handbook of Child Sexual Abuse. Identification, Assessment, and Treatment* (Hoboken, John Wiley & Sons, Inc., 2012); K. L. Kinnear, *Childhood Sexual Abuse. A Reference Handbook* (2<sup>nd</sup> Edition, Santa Barbara, ABC Clio, 2007); R. M. Bolen, *Child Sexual Abuse: Its Scope and our Failure* (New York, Kluwer Academic Publishers, 2002)

<sup>25</sup> For more information about the extent of trafficking in human beings, see: UNODC, *Global Report on Trafficking in Persons 2020* (2020) <[https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP\\_2020\\_15jan\\_web.pdf](https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf)> accessed: 8 August 2022. As far as child sexual abuse is concerned, it is possible to refer to the UNICEF datasets: <<https://data.unicef.org/resources/resource-type/datasets/page/2/>> accessed: 8 July 2022

<sup>26</sup> The Lanzarote Committee, 'Implementation Report: The Protection of Children against Sexual Exploitation and Sexual Abuse Facilitated by Information and Communication Technologies (ICTs): Addressing the Challenges by Child Self-Generated Sexual Images and Videos (2022) <https://rm.coe.int/implementation-report-on-the-2nd-monitoring-round-the-protection-of-ch/1680a619c4> accessed: 8 August 2022; UN Special Representative on Violence against Children, 'Releasing Children's Potential and Minimizing Risks. ICTs, the Internet and Violence against Children' (2016) <<https://www.un-ilibrary.org/content/books/9789210582841/read>> accessed: 8 August 2022; UNODC, 'Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children' (2015) <[https://www.unodc.org/documents/Cybercrime/Study\\_on\\_the\\_Effects.pdf](https://www.unodc.org/documents/Cybercrime/Study_on_the_Effects.pdf)> accessed: 8 August 2022

Nonetheless, the same international bodies recognise that ICTs have also increasingly facilitated the commission of trafficking in human beings and child sexual abuse in unprecedented ways. Inter alia, ICTs allow the offender: 1) to gain easier access to a larger population of prospective victims to groom; 2) to collect personal information about the prospective victims, so as to ease the establishment of a 'genuine' relationship; 3) to assume a more credible and appealing, fictional profile; 4) to make easy recruitments through accessible advertisements. Besides, ICTs often limit the possibilities for parental supervision and monitoring.<sup>27</sup>

Because of their severity and spread, human trafficking and child sexual abuse have received the universal condemnation of the international community that has also led to the attempt to harmonise and/or facilitate its legal and extra-legal responses.

In this respect, the Introduction already mentioned that human trafficking and child sexual abuse are one of the policy priorities of the European Commission, in the sense that the EU has consistently sought to promote enhanced police and judicial cooperation in criminal matters, support and assistance to victims, social awareness, education programmes, and research. But the fight against human trafficking and child sexual abuse goes beyond the policy priorities of the Union.

All national jurisdictions have made numerous forms of human trafficking and child sexual abuse criminal by law.<sup>28</sup> More generally, the international community have recognised the urgent need for States to do more to prevent and respond to human trafficking and child sexual abuse, thereby establishing *ad hoc* bodies and treaties. This is the case, for instance, of the CoE Lanzarote Convention (2007), which requires State Parties to criminalise certain forms of sexual abuse, lays down minimum rules for their criminal prosecution and cooperation in judicial matters, and establishes a monitoring mechanism. At the same time, the UN has a long-standing commitment towards the elimination of human trafficking and child sexual abuse that can be traced back to the Convention on the Rights of the Child (1989), but also emerges from the appointment of numerous human rights experts on the matter (e.g., UN Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material) and its policy priorities (e.g., Target 16.2 of the UN Sustainable Goals).

On a practical level, Gregor Urbas explains that most of the responses to human trafficking and child sexual abuse involve criminal investigation that is both online and offline.<sup>29</sup> Whereas the online nature stems from the increasingly frequent online interactions between the offender and the (sometimes prospective) victims, the performance of UI can be traced back to the advantage it gives to LEAs over the people they are criminally investigating.

According to Brendon Murphy, indeed, the best way to gather information is the unawareness of the presence of the law enforcement agent since the intention and conduct of the target(s) can be observed and understood without reservation.<sup>30</sup> In this way, the target(s) continues with their actions, while the UI not only allows LEAs to obtain a vast amount of evidence, but also to neutralise a harmful act from occurring and specifically deter the target(s).<sup>31</sup>

On a general note, Julius Wachtel nonetheless argues that the chance for UI to conceal the real identity of the law enforcement agent and observe the target(s) provides this investigation technique with a "peculiarly intrusive – and, to some, frightening – flavo[u]r"<sup>32</sup> justifying the need for those legal and ethical standards as follows in the next Section.

---

<sup>27</sup> *ibid.*

<sup>28</sup> B. Mathews, *New International Frontiers in Child Sexual Abuse. Theory, Problems and Progress* (Cham, Springer, 2019) 26

<sup>29</sup> G. Urbas 'Protecting Children from Online Predators: The Use of Covert Investigation Techniques by Law Enforcement' (2010) *Journal of Contemporary Criminal Justice* 26(4) 410, 411

<sup>30</sup> Murphy (n 14) 44

<sup>31</sup> *Ibid.*, pp. 95-96

<sup>32</sup> J. Wachtel, 'From Morals to Practice: Dilemmas of Control in UP Policing' (1992) *Crime, Law & Social Change*, 18, 141



## 4. The importance of law and ethics in UI

Criminal law is the most coercive instrument at the disposal of the State. Both the intrusiveness of its criminal investigation powers and the severity of its penalties lead to serious restrictions on numerous fundamental rights. Besides, the involvement with the criminal justice system often causes social stigmatisation and discrimination, which negatively affect both the suspect and their family and friends.<sup>33</sup>

As previously said, UI is a special investigative measure that is deployed to collect evidence in such a covert way that it does not alert the person being criminally investigated. As such, it is extremely intrusive and coercive, meaning that its regulation should carry with it substantive limitations and procedural safeguards in compliance with fundamental values, principles, and rights. In particular, the following Subsections discuss the intersection between UI and the right to privacy, the right to a fair trial, the risk of entrapment, the well-being of the UA, and harm to society.

### 4.1 UI and the respect for the right to privacy

Privacy is a commonly used notion and is currently considered a fundamental right of the individual, which is recognised, *inter alia*, in Article 12 UN Declaration, Article 17 ICCPR, Article 8 ECHR, Article 7 EU Charter, and Article 11 ACHR. Yet, it is a concept difficult to define.

A literary review of the conceptualisation of privacy would be a major project, which falls outside the scope of this Deliverable. Nonetheless, it is possible to identify a *leitmotif* underpinning the competing legal theories, that is to say, “the existence of a private sphere of the individual and the protection against external and undesired interference”.<sup>34</sup> Privacy, indeed, enables each human being to freely develop their personality within a private sphere, so as to join society as a rational, autonomous, and responsible person. But, because it centres around all those intimate situations, sensitive, or confidential information that could undermine the perception of society against the individual, each person should choose how much knowledge of their private sphere to disclose to the public.

For a long time, the scope of the right to privacy has also covered personal data protection. But, to date, numerous scholars tend to regard them as two distinct fundamental rights. In the EU legal order, the EU Charter explicitly distinguishes them in Articles 7 and 8.

In this scenario, both fundamental rights enshrine similar principles and values (namely, the dignity and autonomy of each human being), by granting to each individual a personal sphere whereby everyone can freely and equally develop their personality and exercise other rights and freedoms. Nevertheless, when it comes to their phrasing and scope, the two rights differ. In this regard, Paul De Hert and Serge Gutwirth argue that the right to privacy is framed out of a general prohibition of interference into a private sphere, designed to safeguard citizens against illegitimate and excessive uses of power. The right to personal data protection, instead, is understood as a legal claim capable of empowering the data subject, giving them the chance to control what third parties can do with their personal information.<sup>35</sup>

With this in mind, it is clear that UI stands in opposition to the rights to privacy and to data protection.

When searching for evidence of criminality before acting, the UA keeps the target(s) under observation and infiltrates their life without their knowledge. On this point, Brendon Murphy clarifies that, even though the target(s) are the focus of the investigation, it is also likely that the investigative activities will gather

---

<sup>33</sup> *Inter alia*, I. Wieczorek, *The Legitimacy of EU Criminal Law*, Oxford: Hart Publishing, 2020, 25-26; T. Søbirk Petersen, *Why Criminalize? New Perspectives on Normative Principles of Criminalization* (Cham, Springer, 2020) 4-5

<sup>34</sup> C. Rigotti & A. Calvi, ‘Privacy’, in G. Comandè (ed.), *Elgar Encyclopedia of Law and Data Science* (Cheltenham, Edward Elgar Publishing, 2022) 278

<sup>35</sup> P. De Hert & S. Gutwirth, ‘Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power’, in E. Claes, S. Gutwirth & A. Duff (eds.), *Privacy and the Criminal Law* (Antwerpen, Intersentia, 2006) 71-81

information concerning people interacting with them, thereby unreasonably invading the privacy of innocent citizens.<sup>36</sup>

Moreover, it is important to acknowledge that, although a law enforcement agent traditionally has to prove reasonable and probable grounds that a crime had occurred before a warrant could be obtained to search or seize property or intercept private communications, they can currently access information over the internet, insofar as people constantly leave digital footprints for all to see.<sup>37</sup>

This invasion of privacy, however, is generally justified by the claim that these intrusions into people's lives are necessary to keep society safe. They are part of the State duty to protect people from harm, considering also that both the right to privacy and the right to data protection have a relative nature and certain interferences are possible.

According to Maja Brkan, interference with a fundamental right is like peeling an onion. The outer layer is the fundamental right, without its value being impaired in any way. The next layer amounts to a justified interference with this right, followed by an unjustified interference pertaining to the untouchable core of a fundamental right that cannot be limited. Interference with the essence of a fundamental right makes the right lose its value for the individual and society at large.<sup>38</sup>

For example, in the European context, Art 8 (2) of the ECHR tries to codify the protection of this untouchable core by setting the conditions that need to be met to justify a legitimate interference with the right to privacy, stating that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In practice, it is not hard for States to establish that there is a legitimate aim to justify some investigative methods that are used in criminal investigation when they interfere with the right to privacy.

In relation to the condition that the interference be 'in accordance with the law', the ECtHR has stipulated that "[T]he first requirement for the regulation of investigative methods is 'accessibility', which means that the law gives an 'adequate indication' concerning which regulations apply for using investigative methods in a given case."<sup>39</sup> The second requirement is *foreseeability*, meaning that "the law must indicate with sufficient clarity (1) the scope of the power conferred on the competent authorities and (2) the manner in which the investigative method is exercised".<sup>40</sup> Finally, the Court considered that regulations related to investigative methods must be detailed and include procedural safeguards in order to counterbalance the risk of abuse of power by the State.<sup>41</sup>

As for the condition that the investigative method must be necessary in a democratic society – meaning that there must be a fair balance between the necessity to use these investigative methods and the interference with the privacy right of the individual in question –, this test of balance is done in *concreto*. This means that the ECtHR takes into consideration both the principle of necessity and proportionality to determine if the

<sup>36</sup> Murphy (n 14) 152

<sup>37</sup> V. Steeves & V. Piñero, 'Privacy and Police Powers: Situating the Reasonable Expectations of Privacy Test' (2008) *Canadian Journal of Criminology and Criminal Justice* 263

<sup>38</sup> M. Brkan, 'The Concept of Essence of Fundamental Rights in the EU Order: Peeling the Onion to Its Core' (2018) *European Constitutional Law Review* 14, 332

<sup>39</sup> See, e.g., ECtHR 26 April 1979, *Sunday Times v. The United Kingdom*, appl. no. 6538/74, § 49, ECtHR 12 May 2000, *Khan v. The United Kingdom*, appl. no. 35394/97, § 26, ECtHR 3 April 2007, *Copland v. The United Kingdom*, appl. no. 62617/00, § 46, and ECtHR 10 March 2009, *Bykov v. Russia*, appl. no. 4378/02, § 76.

<sup>40</sup> See, e.g., ECtHR 23 September 1998, *Petra v. Romania*, appl. no. 27273/95, § 38

<sup>41</sup> Oerlemans (n 20) 76

investigative measure is proportionate to the legitimate aim of preventing a crime. However, the ECtHR grants member states a margin of appreciation when evaluating whether the measure infringes the right to privacy.<sup>42</sup>

In this regard, Paul De Hert and Serge Gutwirth claim, any interference is mostly political, thereby involving a certain degree of contingency when it comes to its outcomes.<sup>43</sup>

Regarding online UI, Oerlemans argues that when publicly available online information (personal or not) is collected by the UA for the purpose of investigating a crime, several concepts should be taken into account when assessing the gravity of interference in the right to privacy.<sup>44</sup> He explains that the storage of these data might pose a problem considering the sensitivity of the information at hand and data protection regulations should be applied. To support his argument, the author refers to the ECtHR's 2006 case of *Segerstedt-Wiberg and Others v. Sweden*, where the complainant considered that storing publicly available information about him in the files of the Security Police of Sweden constitutes an unjustified interference with the right to private life (Article 8(1) ECHR).<sup>45</sup> The Court decided that the storage of these information in the register of the Police, even though being public, constitutes an interference in the private lives of the concerned persons. For this purpose, the ECtHR tests "whether the information is (1) *systematically gathered* and (2) *stored in a police system* to determine whether an interference took place with the right to respect to private life".<sup>46</sup> Nonetheless, other factors are also taken into account by the ECtHR when assessing whether the processing of stored personal data for later purposes, such as after the investigation, by the LEA constitutes an interference with the right to privacy and these factors include: "1) the specific context in which the information at issue had been recorded and retained, (2) the nature of the records, (3) the way in which these records were used and processed, and (4) the results that could be obtained with the storage of the information".<sup>47</sup>

Adding to the beforementioned, a question arises in relation to processing personal data: Is merely processing personal data, collected from public sources, without storing it in the police register interferes with the right to privacy? According to the ECtHR case-law mentioned above, the Court would consider that there is no interference since the information are not stored or systematically gathered.<sup>48</sup>

In repeating what was explained above, given the serious interference with the right to privacy of individuals, a balancing test between the legitimate aim and the level of interference should be assessed. Nevertheless, it should be noted that merely observing the online behaviour of persons is not considered to be of a high scale interference since these behaviours can be observed by anyone.<sup>49</sup>

## 4.2 UI and the respect for the right to a fair trial

Considering that the State power to investigate, prosecute, and punish is the most coercive instrument at its disposal in peacetime, the right to a fair trial should be placed at the heart of the protection of the rule of law and fundamental rights. An unfair trial, indeed, could result in serious restrictions on the human dignity and personal liberty of the individual, along with the experience of social stigmatisation and discrimination. Besides, an unfair trial could be used to oppress minority and vulnerable groups within society and, more broadly, undermine democracy and its founding principles.<sup>50</sup>

For this reason, the right to a fair trial has been enshrined in all the main human rights instruments, including Articles 10 and 11 UN Declaration, Article 14 ICCPR, Article 6 ECHR, and Article 8 ACHR.

---

<sup>42</sup> See, e.g., ECtHR 25 March 1983, *Silver and others v. The United Kingdom*, appl. nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, and 7136/75, §97 and ECtHR 4 December 2008, *S. and Marper v. The United Kingdom*, appl. nos. 30562/04 and 30566/04, §102.

<sup>43</sup> De Hert & Gutwirth (n 35) 89

<sup>44</sup> Oerlemans (n 20) 87

<sup>45</sup> ECtHR 6 June 2006, *Segerstedt-Wiberg and others v. Sweden*, appl. no. 62332/00.

<sup>46</sup> Oerlemans (n 20) 88

<sup>47</sup> ECtHR 4 December 2008, *S. and Marper v. The United Kingdom*, appl. nos. 30562/04 and 30566/04, § 67.

<sup>48</sup> *Supra* note 20. 90

<sup>49</sup> *ibid.* 102

<sup>50</sup> A. Clooney & P. Webb, *The Right to a Fair Trial in International Law* (Oxford, Oxford University Press, 2020) 1



Although the right to a fair trial is a commonly used right, it is a concept difficult to define precisely. Indeed, there is not one specific essence of the right to a fair trial that could be described. Rather, it contains a bundle of rights, principles, and interests that inform and nourish its essence, such as the right to be tried by an independent and impartial tribunal, the presumption of innocence, the privilege against self-incrimination, the right to an adequate defence, and the principle of equality of arms.

Overall, the right to a fair trial belongs to each defendant charged with a criminal offence and sometimes extends to people who are convicted and deprived of personal liberty. But, Amal Clooney and Philippa Webb clarify, certain aspects of the right to a fair trial also refer to people other than the defendant and the convicted, who are likewise party to or affected by the trial, including the victim(s), the witness(es), and the general public.

In this scenario, the authors go on, some third party's interests might overlap with the defendant's one. This is the case, for example, of the right to a trial within a reasonable time. But there might also be cases where these interests clash with each other: the right to test witness evidence, for instance, may be balanced against the right of the witness not to testify, especially when vulnerable or based on natural security or any other general interest.<sup>51</sup>

The need to balance the legal interests of the defendant with the ones of third parties demonstrates that the right to a fair trial is not an absolute notion. Accordingly, it is necessary to examine to what extent the right to a fair trial can be legitimately affected by UI, with special regard to the principle of equality of arms and the use of evidence.

In broad terms, the principle of equality of arms guarantees that the same procedural rights are provided to all parties to the criminal case, meaning that each party has a reasonable chance to present their case under conditions that do not place them at disadvantage vis-à-vis their opponent. In this way, both prosecution and defence know and can remark on the observations filed and the evidence given by the other.<sup>52</sup>

Because the right to a fair trial has a relative nature, however, the principle of equality of arms can be limited when a differential treatment can be legitimately justified on objective and reasonable grounds and does not lead to actual disadvantage or any other unfairness to the defendant.<sup>53</sup> This possible restriction could arise in the case of UI, when the UA provides evidence that is the sole decisive evidence in charging a person with a criminal offence or finding them guilty of a crime.

In this scenario, it is likely that the UA will acquire the status of anonymous witness who cannot be effectively cross-examined for the purpose of verifying the credibility of their statements, along with the reliability of the given evidence.<sup>54</sup> This restriction of the right to a fair trial is usually justified, inter alia, by the need to protect the UA and their family members against the risk of retaliation/reprisal, as well as not to prejudice future police operations.<sup>55</sup> In this regard, when relevant evidence is withheld, it is necessary for the prosecution to prove that a valid justification exists, that the restriction is proportionate, and that effective counterbalancing measures are in place to safeguard the defendant's right to a fair trial.<sup>56</sup> For instance, the prosecution should ensure that the UI has satisfied certain requirements (e.g., judicial authorisation) and the case should not be decided just based on the evidence arising from the sole UI.

In the European context, the ECtHR has recognised that the use of special investigative methods including UI does not in itself infringe the right to a fair trial if kept within clear limits of the law. This means that UI is

---

<sup>51</sup> *ibid.* 33, 312-313

<sup>52</sup> *ibid.* 748-749; S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005) 96

<sup>53</sup> Clooney & P. Webb (n 50) 748

<sup>54</sup> L. Stariene, 'The Limits of the Use of [UAs] and the Right to a Fair Trial under Article 6(1) of the European Convention on Human Rights' (2009) *Jurisprudence* 3(117) 276

<sup>55</sup> Clooney & Webb (n 50) 523; B. Emmerson & A. Ashworth, *Human Rights and Criminal Justice* (London, Sweet and Maxwell, 2001) 389-390; Trechsel (n 42) 112

<sup>56</sup> Clooney & Webb (n 50) 258

tolerated if it is subject to clear safeguards and restrictions. For example, in *Ramanauskas v. Lithuania* (2008), the ECtHR established that “[S]uch a use can be acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question”.<sup>57</sup> The Court added that evidence gathered by UA cannot be justified in the case of police incitement<sup>58</sup> and entrapment (this notion will be further developed in the next sub-section), as this kind of justification would deprive the defendant from the right to fair trial.<sup>59</sup>

In order to assess whether a case is an entrapment case, the ECtHR applies substantive and procedural tests, where the Court examines if the UA acted in a passive way while having a fake identity and investigating without inciting the defendant to commit a crime.<sup>60</sup> The Court also takes into account the legality of the UA’s activity and its scope, and it sees if there are reasonable grounds that the investigated person has previously committed or was involved in a similar crime.<sup>61</sup>

Before bringing this Section to an end, it is also important to clarify that the right to a fair trial comes into play after a criminal charge is brought against an individual.<sup>62</sup>

Within the HEROES project, the UA impersonates an individual prone to commit human trafficking and child sexual abuse, so as to infiltrate online fora where these crimes are suspiciously committed. The main aim is therefore to passively gather evidence and identify suspects of trafficking in children and sexual abuse, to later eventually charge them with these criminal offences.

This implies that, in theory, any restriction on the right to a fair trial due to the usage of the UI might arise, on the condition that the result of the UI turns into evidence to bring a charge of child sexual abuse, trafficking in human being, or any other criminal offence against someone.

### 4.3 UI and the risk of turning it into entrapment

In broad terms, entrapment can be understood to mean an investigation strategy whereby a person is encouraged to commit a crime and is later criminally prosecuted for it.<sup>63</sup>

At first sight, entrapment reminds of proactive UI. But, when scratching beneath the surface, it emerges that entrapment differs from UI because its performance is not limited to gathering evidence passively, but leads to the causation of a criminal offence. For this reason, in the literature, the law enforcement agent involved in entrapment is usually defined as ‘the trapper’ or ‘the agent provocateur’.<sup>64</sup>

It is nevertheless complex to draw a clear line between entrapment and UI and therefore to understand whether the law enforcement agent has responded to or played along with the occurrence of the criminal offence, without initiating or instigating it. As said by Brendon Murphy, it is “a complex question of fact and degree, involving an examination of the conduct of the investigator and the suspect, with considerable attention on the conduct of the investigator”.<sup>65</sup>

<sup>57</sup> See ECtHR 5 February 2008, *Ramanauskas v. Lithuania*, appl no [74420/01](https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-84935%22%7D%3E), § 51 <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-84935%22%7D%3E>>

<sup>58</sup> Incitement refers to when the agent exerts an influence on the investigated person as to incite him to commit an offence that would have not been committed without the involvement of the agent.

<sup>59</sup> Supra note 57. §54

<sup>60</sup> ECtHR, ‘Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb)’ (Council of Europe, last updated 31 August 2022) <

[https://www.echr.coe.int/documents/guide\\_art\\_6\\_criminal\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf)> accessed 31 January 2023

<sup>61</sup> Stariene (n 58) 268

<sup>62</sup> P. Mahoney, ‘Right to a Fair Trial in Criminal Matters under Article 6 ECHR’ (2004) *Judicial Studies Institute Journal* 4(2) 109

<sup>63</sup> M. Redmayne, ‘Exploring Entrapment’, in L. Zedner & J. V. Roberts, *Principles and Values in Criminal Law and Justice Essays in Honour of Andrew Ashworth* (Oxford, Oxford University Press, 2012) 157

<sup>64</sup> Stariene (n 58) 267; J. D. Heydon, ‘The Problems of Entrapment’ (1973) *The Cambridge Law Journal* 32(2) 268

<sup>65</sup> Murphy (n 14) 144

Over time, the distinction between entrapment and UI has provided fertile ground for debate in case-law and legal writings.

According to Andrew Ashworth, for example, entrapment can be defined based on an objective or subjective approach. Under the objective approach, the trapper employs methods of persuasion or inducement that create a substantial risk that such an offence will be committed by persons other than those who are ready to commit it. Based on the subjective approach, instead, entrapment stems from the inducement and instigation by the law enforcement agent, along with the pre-disposition of the person to commit a criminal offence.<sup>66</sup> In addition to this, and according to Christopher Nathan, there is the concept of liability to deception and manipulation when it comes to UI. In other words, “those who engage in wrongdoing make themselves morally liable to preventive activities” such as undercover policing activities.<sup>67</sup> The author goes further to explain that, for example, in the case of crimes against minors such as child pornography, the individual being investigated for suspicion of being part of a distribution ring, has made himself liable to state action interventions that are not in his interest.<sup>68</sup> The author continues to say that one of these actions include manipulating him in order to extract information and reveal facts related to the crime.

Liat Levanon, instead, stresses that each interpretation of entrapment ranges over the very idea that its legitimacy depends on the deviation it creates from the otherwise-expected course of events, that is to say, whether the person would have committed a similar crime in the hypothetical course of events lacking police intervention. This means, for the author, that police intervention is expected to increase the likelihood of crime commission in most cases and there is no real difference between entrapment and each UI going beyond mere observation.<sup>69</sup>

Building on a similar distinction between the passive and the active conduct of the law enforcement agent, John D. Heydon clarifies that entrapment occurs when the law enforcement agent in no way causes the crime and merely observes it, but provides suggestions about the commission of a crime, provides the person with an opportunity to commit a crime, or urges the person to benefit from an opportunity to commit a crime.<sup>70</sup>

On the idea of what counts as the creation of a crime, Dan Squires distinguishes three scenarios. First, the creation of crime occurs whenever the person would not have committed the same kind of crime without the involvement of the trapper, who has put temptations and opportunities in front of them. Second, entrapment a fortiori occurs if the person is ‘induced’ or ‘lured’ into committing a crime rather than merely being provided with an ‘opportunity’. Third, there is crime causation whenever the person has never been criminally prosecuted prior to their interaction with the trapper.<sup>71</sup>

When defining entrapment, most of the literature focuses on entrapment occurring offline. Nevertheless, entrapment can also occur in the online world. On this point, Katie Pentney clarifies that, within online entrapment, the trapper seeks to control, infiltrate, manipulate, and warp online discourse in order to make something happen either in the real or cyber world.<sup>72</sup>

In the field of sexual abuse and trafficking in children, the issue of entrapment has been extensively discussed with regard to the development and deployment of the Sweetie 1.0 and 2.0 technologies, where a child-like avatar was designed to gather information about people contacting it and soliciting webcam sex without the need for human intervention. In this regard, much of the available literature agrees that, if Sweetie 1.0 and 2.0

---

<sup>66</sup> A. Ashworth, ‘What is Wrong with Entrapment?’ (1999) *Singapore Journal of Legal Studies* 293, 296

<sup>67</sup> C. Nathan, ‘Liability to Deception and Manipulation: The Ethics of Undercover Policing’, (2017) *Journal of Applied Philosophy*, 34(3), 370

<sup>68</sup> Ibid. 373

<sup>69</sup> L. Levanon, ‘The Law of Police Entrapment: Critical Evaluation and Policy Analysis’ (2016) *Criminal Law Forum* 27, 25, 38

<sup>70</sup> J. D. Heydon, ‘The Problems of Entrapment’ (1973) *The Cambridge Law Journal* 32(2) 268

<sup>71</sup> D. Squires, ‘The Problem with Entrapment’ (2006) *Oxford Journal of Legal Studies* 26(2) 351, 355 ff.

<sup>72</sup> K. Pentney, ‘Licensed to Kill...Discourse? Agents provocateurs and a purposive Right to Freedom of Expression’ (2021) *Netherlands Quarterly of Human Rights* 39(3) 241, 247

do not proactively solicit potential suspects, but wait to be approached, and refrain from pressuring or inducing to steer the conversation in a particular, sexually charged, direction, their use in UI is legally plausible.<sup>73</sup>

Notwithstanding all these nuances and points of disagreement in interpreting the notion of entrapment and distinguishing it from UI, it is important to outline the consensus amongst legal scholars on the reasons why entrapment should be treated with caution.

In broad terms, entrapment is recognised to be a controversial strategy of police investigation because the State seemingly creates the very crime it seeks to prevent, target, and/or punish.<sup>74</sup>

More precisely, Andrew Ashworth argues, entrapment clashes with the foundations of criminal law, where the individual is seen and treated as an autonomous human being capable of accounting for their actions. This means that, when examining the culpability of the person, there is a significant difference between a defendant who has been entrapped and one that has acted according to their will.<sup>75</sup>

Moreover, entrapment is expected to result in overarching and discriminatory policing,<sup>76</sup> which can also carry with it a great danger of oppression and corruption for no reason other than obtaining easy convictions and improving the performance of the prosecution in court.<sup>77</sup> Overall, public fears of entrapment undermine social trust.<sup>78</sup>

Ultimately, entrapment is considered problematic because it turns the enforcement of criminal law into virtue-testing, where the law enforcement agent intentionally presents a target with an opportunity to perform an act that is made criminal by law, in order to discover (or demonstrate) whether the target is willing to perform it.<sup>79</sup> Instead, criminal law should simply censure and punish wrongful conduct rather than “condemning people who are morally lax but who never have and never will commit a crime (other than the one ‘created’ by the state)”.<sup>80</sup>

Due to the negative consequences arising from entrapment, legal scholarship and case-law have sought to control its occurrence.

In particular, it is possible to identify four traditional ways for the criminal justice system to respond to entrapment. First, entrapment could lead to stay of prosecution because it is regarded as an abuse of process, which might undermine public confidence in the judiciary and the executive. Second, the defendant proves to be entrapped and uses this evidence as a defence against criminal liability. Third, the prosecution can provide evidence, which is the result of unlawful conduct, meaning that the court should wholly or partially exclude them. Fourth, because entrapment increases the likelihood of commission and the following expectancy of punishment, the court is expected to mitigate the defendant's sentence on conviction depending on the involvement of the law enforcement agent.<sup>81</sup>

#### 4.4 UI and the well-being of the UA

At this stage it is hardly necessary to repeat that, when performing an UI, the law enforcement agent assumes an identity other than their real one and is drawn into the criminal milieu, so as to obtain evidence.

<sup>73</sup> van der Hof, Georgieva, Schermer & Koops (n 18) 87

<sup>74</sup> Redmayne (n 63) 157; Ashworth (n 47) 298-299; G. Dworkin, *The Theory and Practice of Autonomy* (Cambridge, Cambridge University Press, 1988) 143

<sup>75</sup> Ashworth (n 66) 312. On this point, see also Squires (n 71) 371

<sup>76</sup> D. M. Tanovich, ‘Rethinking the *Bona Fides* of Entrapment’ (2011) *UBC Law Review* 43(2) 417, 418

<sup>77</sup> Squires (n 71) 367

<sup>78</sup> Redmayne (n 63) 163; Heydon (n 70) 272

<sup>79</sup> D. J. Hill, S. K. McLeod & A. Tanyi, ‘Entrapment, Temptation and Virtue Testing’ (2022) *Philosophical Studies*, doi.org/10.1007/s11098-021-01772-4 accessed: 9 August 2022

<sup>80</sup> Redmayne (n 63) 161

<sup>81</sup> Murphy (n 14) 153; Tanovich (n 76) 418-419; Redmayne (n 63) 169; Ashworth (n 66) 311; Heydon (n 70) 285

In doing so, however, the law enforcement agent exposes themselves to numerous dangers and negative consequences that are not generally present in police work and are examined below.

Brandon Murphy and Elizabeth E. Joh outline that the UA is regularly placed in life-threatening and stressful situations.

During the investigation, they might routinely come across people prone to violence, witness violent incidents, and examine disturbing evidence.<sup>82</sup> For example, in the case of criminal investigation concerning trafficking in human beings and child sexual abuse, the law enforcement agent is often exposed to traumatic imaginary and dramatic personal histories.

More generally, research in psychology reports that UI is performed under the assumption of constant risk of physical harm and retaliation, as well as the abrupt end of the assignment, if the true identity of the UA is disclosed. Besides, there is a risk of spill-over to the family, colleagues, and social bonds of these people. For this reason, the UA usually loses their sense of personal safety and lives with increased feelings of anxiety, paranoia, and hypervigilance, which sometimes results in drug and alcohol abuse, sexual indiscretions, and criminal activity.<sup>83</sup>

Maintaining a dual identity is by itself also a difficult task, which negatively affects the psychological well-being of the UA.

Indeed, when performing UI offline, the UA is required to separate themselves from their true persona, isolate themselves from their loved ones for prolonged periods, and assume a completely different identity affecting their language, dressing code, general attitude, and so forth. According to Laurence Miller, this role ambiguity and confusion might lead, *inter alia*, to an attitude of inflated self-importance, a malignant character distortion, and an identity crisis.<sup>84</sup>

Moreover, the UA usually gets up close and personal with the individual(s) they are investigating. According to Liam S. Curran, the engagement in a friendly, intimate, or professional relationship has a detrimental impact on the mental health of the UA, who often feels ashamed and guilty when deceiving people they care about.<sup>85</sup> In this regard, Mark Daly, who has infiltrated the second largest police force in the United Kingdom in order to investigate allegations of institutional racism, explains that the hardest part of the job, the part that no one can prepare for, is the feeling of betraying people you have lived, collaborated, and even liked, notwithstanding their criminal background.<sup>86</sup>

## 4.5 UI and harm to society

So far, this Section has demonstrated that UI can negatively affect the person who is targeted, as well as the law enforcement agent engaging in it.

It is nonetheless the case that some authors likewise stress the detrimental effects UI might have on society since this special investigative measure seemingly amounts to engineering a crime, thereby amplifying unlawful conduct within society.

Brandon Murphy outlines that UI encourages the law enforcement agency to learn how to commit crimes. It entrenches skills that enable official deception and subterfuge, with the potential to erode the ethical and public standing of its agent. At the same time, the public and ethical authority of the judiciary is put on trial every time the judges are seen to receive tainted evidence or fail to censure unlawful executive conduct. Indeed, UI

<sup>82</sup> Murphy (n 14) 148; Joh (n 7) 188

<sup>83</sup> L. S. Curran, 'An Exploration of Well-Being in Former Covert and Uncover Police Officers' (2021) *Journal of Police and Criminal Psychology* 36, 256, 260; L. Miller, 'UP: A Psychological and Operational Guide (2006) *Journal of Police and Criminal Psychology* 21(2) 11, 13

<sup>84</sup> Miller (n 83) 14-20

<sup>85</sup> Curran (n 83) 260

<sup>86</sup> M. Daly, 'Professional and Ethical Considerations for the Role of the U Operative Investigation', in A. MacVean, P. Spindler & C. Solf (eds.), *Handbook of Policing, Ethics and Professional Standards* (London, Routledge, 2013) 108-111



is known to be potentially used as a tool of political and social oppression. Ultimately, once the creation of crime turns into a legitimate and ordinary investigation strategy, it is likely for criminal networks to evolve in direct response to the deployment of UI, meaning that this investigation strategy may contribute to the increasing sophistication of organised crime.<sup>87</sup>

Based on similar grounds, Clive Harfield and Karen Harfield conclude, the failure of integrity within law enforcement, as well as the amplification and sophistication of criminality are expected to frustrate, inhibit, and delegitimise the function of policing and, more broadly, the traditional State power to provide an area of security to its citizens.<sup>88</sup>

Extensive research similarly traces back the negative impact of UI on society to the social contract underpinning the creation of a State, meaning that people transfer a certain amount of their powers (e.g., to protect their rights with force or to punish those who offend against them) to the State and its law enforcement agents in return for greater security, on the condition, however, that certain constraints are set and avoid abuse of power when coercively pursuing crime prevention, investigation, and punishment.

Nevertheless, the secrecy surrounding UI, as well as the said likelihood that law enforcement agents will never have to account for their actions before court seemingly clash with the rule of law and its underpinning values and principles, like accountability and transparency.<sup>89</sup>

Ultimately, UI is seen as part of the drift into a surveillance society, largely informed by a rationality of government driven by risk and the desire for regulation and control,<sup>90</sup> irrespective of the fundamental principles of necessity and proportionality.

Section 4.1 positioned privacy within those fundamental rights and freedoms that can legitimately restrain State power. Through that lens, State surveillance can be seen as causing harm to everyone. Indeed, even when specifically targeted at someone, its methods could encroach on society, in the sense that its members are likely to feel discomfort and unease.

By creating an environment that is similar to Jeremy Bentham's panopticon,<sup>91</sup> surveillance nudges everyone to change their conduct, including the way they act, think, and communicate. In this way, surveillance does not only affect the right to privacy, but is also detrimental to the fundamental principles of personal autonomy and self-determination, as well as the freedom of expression and association to name just a few examples. Overall, surveillance conveys the message that no one can be trusted and prevents people from freely self-growing and participating in society on an equal footing, thereby threatening democracy.<sup>92</sup>

## 5. Regulating UI at the international, regional and national levels

Sections 3 and 4 demonstrated the need for UI to tackle trafficking in human beings and child sexual abuse, along with the negative consequences its performance might have on the fundamental values and rights of our society.

What follows is therefore a brief account of some legislative measures and case-law that have tried to find a balance between the said necessity and risks. The geographical scope of the legal analysis lies in Europe and South America and, more precisely, in the national jurisdictions of Greece, Spain, Brazil, and Peru, since they are some of the pilot countries of the HEROES project.

---

<sup>87</sup> Murphy (n 14) 147-149

<sup>88</sup> C. Harfield & K. Harfield, 'Risk and the Management of Integrity', in A. MacVean, P. Spindler & C. Solf (eds.), *Handbook of Policing, Ethics and Professional Standards* (London, Routledge, 2013) 156-157

<sup>89</sup> Ross (n 7) 574 ff; S. Field & C. Pelsner (ed.), *Invading the Private. State Accountability and New Investigative Methods in Europe* (London, Routledge, 1998); M. G. W. den Boer (ed.), *I Policing and Accountability from an International Perspective* (Maastricht, European Institute for Public Administration, 1997)

<sup>90</sup> Murphy (n 14) 279

<sup>91</sup> For more information about the panopticon, see: J. Bentham, *The Panopticon Writings* (London, Verso, 1995)

<sup>92</sup> N. M. Richards, 'The Dangers of Surveillance' (2013) *Harvard Law Review* 126, 1934, 1945-1958

## 5.1 Regulating UI in Europe and South America

For Cyrille Fijnaut, from the 16th century onwards, the emerging national States in Europe made extensive use special investigative methods to protect their political, military, and economic interests. Authorities in special bureaus opened diplomatic correspondence, recruited informants, and sent spies to learn the secret intentions of their enemies and rivals.<sup>93</sup>

In the 20th century, the author continues, the Nazi and the Soviet Union regime generalised and systematised the use of UI in all fields of policing. In doing so, they blurred the line between criminal conduct and political dissent and associated UI with power abuse and unrestricted use of violence.<sup>94</sup>

For this reason, after War World II and the re-establishment of the rule of law, UI was first looked at with suspicion and was deployed in extreme cases, the only exception being special intelligence services during the Cold War.<sup>95</sup> At the same time, UI has gradually changed its techniques, favouring the use of ICTs.

For Simon Bronitt, this shift has led to a new expansion of UI, especially because this investigation strategy is subject to minimal legal restrictions as compared to others. But, since it is well-established that, no matter how it is framed, UI menaces the rule of law and the fundamental rights of the individual, regional and national case-law have assumed a critical role in limiting UI and providing a normative guide to its regulation.<sup>96</sup>

In this scenario, one could also argue with Simon Bronitt that this process of judicial law reform has a transnational dimension, deriving from the international and regional web of organisations, conventions, and collaboration national States have been drawn into from the 20th century onwards.<sup>97</sup>

At the time of writing, there is no legal instrument providing some guidance on UI at the international level.

At most, the UN Convention against Transnational Organised Crime and the Protocols thereto (2000) encourage State Parties to make use of UI to respond to organised crime. In particular, Article 20(1) provides:

If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime.<sup>98</sup>

Similarly, Article 50 of the UN Convention against Corruption provides for the performance of UI and the acceptance of the gathered evidence, while also encouraging State Parties to assist each other on the matter.

Both provisions stand out in the sense that it makes the performance of UI contingent on the national legislation of the State Parties, which may diverge. Yet, at the heart of this deference to the domestic framework may lie the very idea that the provision of security to citizens through law enforcement has traditionally been part of the essential justification and legitimacy of the State and its sovereignty.

In any case, when narrowing down the focus of this analysis to the regional level, it is possible to identify some common grounds for the regulation of UI.

---

<sup>93</sup> C. Fijnaut, *The Containment of Organised Crime and Terrorism* (Leiden, Brill, 2016) 112

<sup>94</sup> *ibid.* 121

<sup>95</sup> *ibid.* 122

<sup>96</sup> S. Bronitt, 'The Law in UP: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe' (2004) *Common Law World Review* 35, 36

<sup>97</sup> *ibid.* 36-37

<sup>98</sup> The text of the Convention is available at: [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED\\_NATIONS\\_CONVENTION\\_AGAINST\\_TRANSNATIONAL\\_ORGANIZED\\_CRIME\\_AND\\_THE\\_PROTOCOLS\\_THERETO.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf) accessed: 10 August 2022

Located in Strasbourg, the ECtHR is a regional court of the CoE interpreting the ECHR.

More precisely, the ECtHR hears applications alleging that a State Party has violated one or more human rights enshrined in the Convention. At the heart of its establishment and activity lies the ultimate aim to uphold the rule of law and human rights in Europe.

For the purpose of this Deliverable, the case-law of the ECtHR is not only relevant because two pilot countries of the HEROES project (i.e., Spain and Greece) are part of it, but also because it has unprecedentedly and incomparably controlled UI.

In brief, the ECtHR has first heard of UI in the *Lüdi v. Switzerland* case (1992), where a Swiss citizen was criminally charged with trafficking in drugs based on a report by an anonymous UA and transcripts of telephone intercepts. According to the court, in this scenario, UI did not impinge on the right to the private life of the defendant, who knew he was engaging in criminal conduct and could run the risk of encountering an U-LEA. Conversely, the investigation strategy restricted the right to a fair trial since the domestic court could have arranged the chance for the defendant to call the UA as a witness and compare their statement with the defendant's allegations, while balancing the legitimate interest of the police to protect its agents and use them in the future.<sup>99</sup>

A much more detailed account of the balancing between UI and the protection of human rights was provided in the later ECtHR case-law, especially in the *Teixeira de Castro v. Portugal* case (1998) where an UA approached a drug dealer and user pressuring him to introduce his supplier. After procuring 20 grams of heroin for the UA, the supplier was arrested and prosecuted. Like in the *Lüdi v. Switzerland* case (1992), the ECtHR found a violation of the right to a fair trial. But, in this decision, it also drew an explicit line between legitimate UI and illegitimate entrapment based on the very idea that the right to the fair administration of justice holds such a prominent place that cannot be sacrificed for the sake of expedience. Accordingly, the judges held that, in this case, UI went beyond its legal plausibility because 1) the UA did not limit his investigation to essentially passive conduct, but actively incited the commission of a criminal offence; 2) the UA acted on his own initiative, without judicial authorisation and supervision; and 3) the UA had no prior evidence that the defendant could be a drug trafficker, considering also that he had no criminal record.<sup>100</sup>

Since the *Teixeira de Castro v. Portugal* case (1998), the ECtHR has maintained that the ECHR does not refrain its State Parties from performing UI to respond to serious crimes, but this investigative strategy is only legally and ethically acceptable on the condition that the following general principles are respected:

1. The performance of UI is legitimate, on the condition that adequate safeguards against abuse are provided for, since the public interest cannot justify the use of evidence that has been gathered as a result of police incitement;
2. Where the main evidence is obtained through UI, the LEAs must be able to prove that it was reasonable for them to perform it. This means that they should possess concrete and objective evidence proving that some preparatory acts leading to the commission of the crime have already initiated;
3. If LEAs argue that they have acted upon information received from a private person, it is necessary to draw a line between an individual complaint and information coming from such an informant. Because the latter poses a significant risk of turning into an agent provocateur, it is essential to establish whether the unlawful conduct was already under way at the time when the informant began to collaborate with the LEA;
4. Each UI must be performed in an essentially passive way;
5. In order to avoid the risk of entrapment, it is advisable to adopt a clear and foreseeable procedure aimed at authorising and monitoring UI;

---

<sup>99</sup>*Lüdi v. Switzerland*, App. No. 12433/86 (ECtHR, 15 June 1992)

<sup>100</sup> *Teixeira de Castro v. Portugal*, App. No. 25829/94 (ECtHR, 9 June 1998)



6. Any arguable plea of incitement requires the national courts to assess it in a way that is compatible with the right to a fair trial, meaning that the procedure to be followed must be adversarial, thorough, comprehensive, and conclusive on the issue of entrapment, with the burden of proof on the prosecution to prove that there has been no incitement.<sup>101</sup>

As was the case of the CoE, the predecessors of the EU (i.e., the European Coal and Steel Community and the European Economic Community) were established in the aftermath of World War II. Unlike the CoE, though, their first aim was to pursue a common market.

Over time, what began as purely economic cooperation has turned into a union of 27 Member States ranging over various policy areas, such as the establishment of an area of freedom, security, and justice. Indeed, although the EU Member States all remain sovereign and independent countries, they delegate some of their decision-making powers to the Union, so that decisions on common interests can be made at the European level.<sup>102</sup>

Because the maintenance of internal security is among the key tasks and competence of the State, the EU has no legislative competence in policing, in the sense it cannot regulate conduct and enforce order within its territory. Rather, it can just facilitate police cooperation amongst its Member States.

This has been achieved, *inter alia*, by establishing Europol that contributes to the assessment of common security threats, helps define common priorities for operational action, and facilitates cross-border cooperation in detecting, investigating, and prosecuting offenders with regard to the most serious forms of international crime.<sup>103</sup>

For the purpose of the HEROES project, it is important to observe that Annex I of Regulation (EU) 2016/794 establishing conso also includes ‘trafficking in human beings’ and ‘sexual abuse and sexual exploitation, including child sexual abuse material and solicitation of children for sexual purposes’.<sup>104</sup>

Having special regard to UI, this also emerges from Article 29 of Directive 2014/41/EU regarding the European Investigation Order in criminal matters that provides:

1. An EIO may be issued for the purpose of requesting the executing State to assist the issuing State in the conduct of investigations into crime by officers acting under covert or false identity (‘covert investigations’).
2. The issuing authority shall indicate in the EIO why it considers that the covert investigation is likely to be relevant for the purpose of the criminal proceedings. The decision on the recognition and execution of an EIO issued under this Article shall be taken in each individual case by the competent authorities of the executing State with due regard to its national law and procedures.
3. In addition to the grounds for non-recognition and non-execution referred to in Article 11, the executing authority may refuse to execute an EIO referred to in paragraph 1, where:
  - (a) the execution of the covert investigation would not be authorised in a similar domestic case; or

<sup>101</sup> All these principles are summarised in: *Veselov and others v. Russia*, App. no. 23200/10, 24009/07 and 556/10 (ECtHR 2 October 2013) 88-93

<sup>102</sup> For a broad overview of the history, objectives, and competences of the EU, see: D. Chalmenrs, G. Davies & G. Monti, *European Union Law* (3<sup>rd</sup> edition, Cambridge, Cambridge University Press, 2014) 1-56

<sup>103</sup> W. Bogensberger, ‘Article 88 TFEU’ in M. Kellerbauer, M. Klamert & J. Tomkin, *The EU Treaties and the Fundamental Rights: A Commentary* (Oxford, Oxford University Press, 2019) 933-934, 936

<sup>104</sup> Annex I of the Regulation (EU) 2016/ 794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/ 371/ JHA, 2009/ 934/ JHA, 2009/ 935/ JHA, 2009/ 936/ JHA and 2009/ 968/ JHA [2016] OJ L135/ 53.

- (b) it was not possible to reach an agreement on the arrangements for the covert investigations under paragraph 4.
4. Covert investigations shall take place in accordance with the national law and procedures of the Member State on the territory of which the covert investigation takes place. The right to act, to direct and to control the operation related to the covert investigation shall lie solely with the competent authorities of the executing State. The duration of the covert investigation, the detailed conditions, and the legal status of the officers concerned during covert investigations shall be agreed between the issuing State and the executing State with due regard to their national laws and procedures.<sup>105</sup>

This means that, within the EU legal order, the performance of UI mostly remains a national matter, thereby somewhat creating a legal vacuum at the EU level.<sup>106</sup> Some lasting changes, however, may happen following the recent amendments to the Regulation no. 2016/764/EU. In a few words, this legislation allows Europol to better support Member States to use emerging technologies, explores new approaches, and develop common technological solutions, while also more smoothly processing personal data.<sup>107</sup>

Ultimately, it is necessary to mention a last, informal police network called “the European Cooperation Group on UA” established in 2001. It comprises European countries which are not necessarily the EU Member States and/or State Parties to the CoE. The only HEROES pilot country belonging to the network is Spain.

Statewatch and the European Commission indicate that the objective of this network is to exchange expertise and knowledge on undercover techniques and activities amongst LEAs, especially in the field of organised crime. Nevertheless, the extent, as well as the content of this exchange, are shrouded in secrecy.<sup>108</sup>

As far as South America is concerned, the central binding legal instrument for the protection of human rights within the Inter-American system is the ACHR, which came into force in 1978.

Violations of the ACHR can be brought before the IACHR by private people. Cases of violation may also be brought before the IACtHR, where States and the IACHR are nonetheless the sole entities having legal standing to bring proceedings. Furthermore, States must explicitly accept the competence of the IACtHR before the Court can accept cases against them.<sup>109</sup>

Both Brazil and Peru, namely the HEROES pilot countries located in South America, are part of the ACHR and have accepted the jurisdiction of the IACtHR.

While the issue of UI has not been widely discussed in the inter-American mechanisms, in November 2020, the IACHR expressed its concern over police action against protesters and journalists in Peru in the context of the removal of former president Martín Vizcarra from power.

<sup>105</sup> Article 29 of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2015] OJ L 130/1

<sup>106</sup> T. T. Vendius, ‘Proactive UP and Sexual Crimes against Children on the Internet’ (2015) *The European Review of Organised Crime* 2(2) 6, 10

<sup>107</sup> Europol, ‘Europol’s Amended Regulation Enters into Force’ (2022) <<https://www.europol.europa.eu/media-press/newsroom/news/europol-s-amended-regulation-enters-force>> accessed: 02 October 2022

<sup>108</sup> Statewatch, ‘EU: New Information on UP Networks Obtained by German Parliamentary Deputies’, 20 February 2015, <<https://www.statewatch.org/news/2015/february/eu-new-information-on-UP-networks-obtained-by-german-parliamentary-deputies/>> accessed: 10 August 2022; Answer given by Ms. Malmström on behalf of the Commission, 13 August 2013, E-006472/2013, <[https://www.europarl.europa.eu/doceo/document/E-7-2013-006472-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-7-2013-006472-ASW_EN.html)> accessed 10 August 2022

<sup>109</sup> More information about the functioning and differences between the IACHR and the IACtHR can be found in: M. E. Ventura Robles, ‘El Sistema Interamericano de Protección de los Derechos Humanos’ (2016) *Revista do Instituto Brasileiro de Direitos Humanos* 14, 257

In this regard, the IACHR noted that UAs joined the protests to arrest people. According to the Commission, in such situations, law enforcement agents should be in uniforms and identifiable, stressing that infiltration and other similar undercover activities against demonstrators without a warrant are particularly serious.<sup>110</sup>

## 5.2 Regulating UI at the national level

What follows is a brief account of the national legislation and relevant case-law about UI in Spain, Greece, Brazil, and Peru, to be identified as the geographical scope of this Task in agreement with the Project Officer of the European Commission.

### 5.2.1 Regulating UI in Spain

In Spain, UI is regulated by Article 282bis of the Law of Criminal Procedure. The criminal provision was introduced by the Organic Law No. 5/1999 “on improving the investigative action related to the illegal trafficking of drugs and other serious illegal activities” (unofficial translation). It was later amended by Organic Law No. 5/2010 related to procedural guarantees and Organic Law No. 13/2015 regulating measures of technology-facilitated investigation<sup>111</sup>, which respectively set out the scope of the crimes for which UI could be used and clarified UI that is technologically facilitated.

Organic Law No. 13/2015 has consolidated the Constitutional and Supreme Courts case law related to the parameters used by the judicial body to determine the balance between the weight of interference with the fundamental rights of the suspect and the need to use technology facilitated investigations as means to gather information and evidence for a proper prosecution and an effective trial.<sup>112</sup> Indeed, considering the abovementioned fact that UI interferes with fundamental rights of the investigated person, judicial authorisation must be given upon a case by case study and pursuant to the principles of proportionality, legal clarity and specificity. More concretely, paragraph 5 of Article 588 bis a) of the 2015 legislation “states that the investigating judge should take into account all the circumstances of the case and decide that the sacrifice of the rights and interests affected is not greater than the benefit that their adoption provides for the public interest and third parties. In weighing up conflicts of such interests, assessment of public interest will be based on the severity of the case, its social transcendence, the technological environment of the behaviours investigated, the strength of existing *prima facie* evidence and the relevance of the result sought weighed against the restriction of rights involved”.<sup>113</sup>

Speaking of fundamental rights, it has been noted that in UI cases, the need for a judicial order depends on what right is affected, by distinguishing between the fundamental right of privacy enshrined in article 18.1 of the Spanish Constitution or the right to secrecy of correspondences in reference to art. 18.3 of the Constitution. A previous ruling of the Constitutional Court (STC) has set out a general rule regarding prior judicial authorisation of technology-facilitated investigations vis-à-vis these rights. Indeed, and pursuant to Article 18 of the Spanish Constitution<sup>114</sup>: “We have said that the constitutional requirement of judicial monopoly prevails as a general rule concerning the limitation of fundamental rights, although we have admitted, exceptionally, that in certain cases and with sufficient and accurate legal empowerment and development it would be possible for the police to carry out determined practices which could constitute a minor interference in the privacy of individuals.”<sup>115</sup>

<sup>110</sup> Inter-American Commission on Human Rights, ‘Office of the Special Rapporteur Expresses Grave Concern about the Excessive Use of Police Force against Demonstrators and Journalists and about Arrests during Protests in Peru’, 13 November 2020, <<https://www.oas.org/en/iachr/expression/showarticle.asp?artID=1190&IID=1>> accessed: 10 August 2022

<sup>111</sup> J. C. Ortiz-Pradillo. ‘The new regulation of technology-related investigative measures in Spain’ (2017) *ERA Forum*, 18(3), 425 <<https://doi.org/10.1007/s12027-017-0484-1>> accessed: 27 January 2023

<sup>112</sup> Ibid. 430

<sup>113</sup> Ibid

<sup>114</sup> Constitutional Court (STC) no. 70/2002, of 3 April, and no. 123/2002, of 20 May

<sup>115</sup> Ortiz-Pradillo (n 111)

After this decision, and according to paragraph 3 of Article 588 bis c) of the 2015 law, the judicial authorisation of an UI measure should specify the following elements: “the punishable act subject to investigation and its judicial classification, with a statement of the *prima facie* evidence grounding the measure; the extent of the interception measure, specifying its scope, duration, the manner and frequency of police reports, and the grounds justifying the necessity and proportionality of the measure; the identity of those under investigation and of any others affected by the measure, if known”.<sup>116</sup> Following this reasoning, even though third parties might be affected, the court would still grant a warrant based on these elements such as the case of infiltrated communication channels owned by a third individual but used by the suspect, or as Juan Carlos Ortiz-Pradillo explained, when there is a serious risk to a victim’s life that the UA intercepts the victim’s means of communication as a necessary measure.<sup>117</sup> In ending this paragraph, one could wonder about the correctness of accessing and obtaining evidence from outside the jurisdiction of the LEA upon the usage of online UI. The new law of 2015 addressed this in paragraph 3 of article 588.7 a) that states:

where whoever carries out a search, or has access to the information system, or a part of it, has grounded reasons to consider that the data being searched for is stored on a different computer system, or on a part of it, they may widen the search, as long as the data are legally accessible via the initial system or are available to it.

When describing the abovementioned legislation Juan Carlos Ortiz-Pradillo explained that “[T]he principle of speciality demands that a measure must be related to the investigation of a specific crime. The principle of adequacy serves to define the objective and subjective scope and the duration of the measure depending on its usefulness”.<sup>118</sup>

With this in mind, Article 282bis.1 allows for the performance of UI for a maximum period of 6 months (renewable for periods of the same duration) based on a judicial authorisation, in compliance with the principle of necessity.

Pursuant to the specialty principle, Article 282bis.4, UI can simply target organised crime engaging in one of the criminal offences laid down by law, including trafficking in human beings.<sup>119</sup> This restriction comes as a result of the ECtHR caselaw in relation to defining the nature of the crimes that might give rise to the use of UI, specifically in investigating *serious offences*. As far as child sexual abuse is concerned, it can be undercover criminally prosecuted on grounds of Article 282bis.6 that, along with the following clause, adapts the performance of UI to technological development, with reference to Article 588bis(a) of the Law of Criminal Procedure. Indeed, one of the criteria to allow such investigative measures is that the crime is committed against minors.

Juan Carlos Ortiz-Pradillo further explained that such investigative measures may only be ordered, pursuant to the principles of exceptionality and necessity, when no other form of investigation that could be less infringing on the fundamental rights of the accused, are useful to collect sufficient evidence.<sup>120</sup>

In this regard, while Article 282bis.6 and 7 briefly provide that the judge for the preliminary investigation can authorise a law enforcement agent to assume a fictitious identity over the internet and, eventually, take images, record conversations, and share unlawful content, Article 588bis(a) lay down some guiding principles to perform online UI. In particular, the criminal provision makes it clear that the judicial authorisation must comply with the principles of speciality, suitability, exceptionality, necessity, and proportionality. This means that online UI must temporarily target specific conduct based on objective indications of its unlawfulness, is

---

<sup>116</sup> Ibid. 432

<sup>117</sup> Ibid

<sup>118</sup> Ortiz-Pradillo (n 111) 430

<sup>119</sup> On the notion of organised crime and cyber-criminality, see: M. V. Rodríguez Caro, ‘La Infiltración Policial: En el Límite del Estado de Derecho. El Inminente Agente Encubierto Informático’ (*Noticias Jurídicas*, 11 June 2015) <<https://noticias.juridicas.com/conocimiento/articulos-doctrinales/10222-la-infiltracion-policial:-en-el-limite-del-estado-de-derecho-el-inminente-agente-encubierto-informatico/>> accessed: 10 August 2022

<sup>120</sup> Ortiz-Pradillo (n 111) 430

performed as last resort, and is balanced against competing interests (e.g., any restriction of the fundamental rights of the person being investigated).

Other than exempting the UA from criminal liability, Article 282bis seeks to protect their real identity. Notably, Article 282bis.2 balances this legislative objective with the respect for the right to a fair trial, by allowing the law enforcement agent to maintain the fictitious identity when testifying.<sup>121</sup>

As regards the national case-law, it is worth mentioning that, in May 2022, the Spanish Constitutional Tribunal accepted to examine an appeal concerning UIs in the country.<sup>122</sup> The Tribunal aims to determine if UIs violate the right to privacy and the presumption of innocence. The case triggering this appeal involves the criminal conviction of an appellant based on the statements of three UAs who were authorised to act as such by the special anti-drug prosecutor. The decision of the Tribunal could have important consequences for future UI operations in Spain. At the time of writing, the decision is still pending.

### 5.2.2 Regulating UI in Greece

In Greece, Article 254 of the Code of Criminal Procedure regulates UI. This provision was introduced in 2019 to make the national legislation comply with international treaty obligations arising from the said United Nations Convention against Transnational Organised Crime and the Protocols thereto (2000) and, more precisely, Article 20 (which encourages State Parties to resort to UI when addressing organised crime).<sup>123</sup>

In discussing this legal reform, though, the Greek legislator recognised the intrusive nature of UI and sought to balance the international treaty obligation of crime prevention with the legal interests that UI might restrict, with special regard to the fundamental rights of the suspect or the accused. In doing so, the Greek legislator distanced themselves from the national case-law and built on the ECtHR case-law examined in the previous Section. Meaning that, in order to safeguard the rights of the defendant such as the right to fair trial, the accused must have the initiative to commit the criminal act (the execution of the offence is pre-decided by the perpetrator) and there must not be incitement from the UA as explained in previous sections related to the jurisprudence of the ECtHR and the right to fair trial.

As a result of the 2019 legal reform, Article 254 of the Code of Criminal Procedure currently provides substantive procedural safeguards designed to gather lawful evidence through the performance of UI, while likewise protecting the suspect or the accused from an unreasonable violation of their fundamental rights.

More specifically, Article 254.1 of the Code of Criminal Procedure exhaustively lists the crimes that justify the performance of UI based on their severity. For the purpose of the HEROES project, it is important to stress that the crimes defined in the criminal code as trafficking in human beings (Article 323A, Criminal Code), sexual abuse of minors, pornography of minors, and soliciting children for sexual purposes (Articles 348 A-B, Criminal Code) appear on this list.

Article 254.2(a) then makes the performance of UI conditional to the existence of a serious indication that the criminal offence will occur. In Greek literature, the term ‘serious indication’ tends to refer to the existence of probabilities, which are so strong that they give rise to the belief that the target is guilty. This means that, on the contrary, the mere suspicion of the commission of a crime does not count as a ‘serious indication’, nor the criminal background and the life story of the target should be used for this purpose.<sup>124</sup>

Pursuant to Article 254.2(b), for UIs to be legitimate, crime prevention must otherwise prove impossible or particularly difficult to achieve. In this way, UI turns into an appropriate and necessary measure which

<sup>121</sup> *ivi*.

<sup>122</sup> Constitutional Tribunal, ‘Nota Informativa No 48/2022 - El Tribunal Constitucional Admite a Trámite un Recurso de Amparo sobre la Actuación de los Agentes Encubiertos’, 12 May 2022, available at: <https://static.ecestaticos.com/file/d64/b23/09f/d64b2309fcf654c2572087528a178722.pdf>

<sup>123</sup> C. Kourkouli, ‘The Investigative Infiltration’ (2020) 12 <<http://ikee.lib.auth.gr/record/332969/files/GRI-2021-31465.pdf>> accessed: 21 May 2022

<sup>124</sup> *ibid.* 18



complies with the constitutional principles of proportionality and subsidiarity, as enshrined in Articles 5.1 and 25.1 of the Greek Constitution.<sup>125</sup>

Article 253.3 of the Code of Criminal Procedure provides that the performance of UI must come under authorisation and close scrutiny of the judicial authority. Precisely, the public prosecutor must request permission from the competent court to resort to UI. In its written approval, the competent court must indicate: 1) the criminal offence to investigate; 2) the serious indications of guilt against the person who will be investigated; 3) the purpose of the UI; 4) the impossibility or particular difficulty of investigating the criminal offence in another way; and 5) the duration of the investigative measure. At the same, the UA is requested to keep track of their activities and refer it to the competent authority, in compliance with Article 148-158 of the Code of Criminal Procedure.

If, for reasons of extreme urgency, the public prosecutor cannot request the judicial authorisation, UI can start but must be brought to the attention of the competent court within the subsequent three days. Otherwise, the UI will mandatorily be stopped, and any gathered evidence will not be admissible in court. The inadmissibility of evidence also arises from the lack of a judicial authorisation five days after the submission of the request.<sup>126</sup>

Based on Article 254.4 of the Code of Criminal Procedure, the UA can investigate a third party, on the condition that it is necessary to gather evidence on the target. Each information about the third party, however, must be erased after the closure of the UI, unless it emerges that the third party has likewise committed a serious crime. In addition, any investigative act (including UI) conducted against a third party not involved in the crime must be done pursuant to the conditions listed in paragraph 3 of Article 254 as explained above and only under the condition that there is no other way to collect details on the suspects such as to reveal the identity of the suspects or the place of residence. In these situations, evidence and information that concerns the third party must be immediately destroyed after the achievement of the investigation purpose; unless this evidence proves the commission of a felony against life, bodily integrity, personal or sexual freedom, the constitution or the integrity of the country, in which case it is allowed to be used in a trial for the crimes in question.

In this context, Article 254.1 a) of the Greek Code of Criminal Procedure stipulates that a report must be drawn by the UA detailing the activities of the agent and the evidence collected; nevertheless, any evidence not detailed and mentioned in this report will not be taken into account for the conviction of the accused.

Ultimately, Article 254.5 of the Code of Criminal Procedure briefly regulates the use of evidence obtained during the UI, by providing that each evidence must fall within the scope of the authorised criminal investigation and is therefore admissible in the sole criminal trial for the unlawful conduct justifying the UI; otherwise, a special decision of the competent court is required.

In the Greek legislation and case-law, the admissibility of evidence gathered during UI is closely tied to the difference between UI and entrapment. As was the case with the ECtHR case-law, the proactive attitude of the UA draws the line between the two conducts and leads to the inadmissibility of the obtained evidence, also on grounds of Article 177 of the Code of Criminal Procedure.<sup>127</sup>

It should be noted that, according to the Hellenic Code of Police Ethics, the police shall protect the private and family life of individuals and only intervene when necessary and in accordance with the law. Article 2 h) of this Code adds that confidentiality must be respected by police personnel when dealing with information related to private individuals or police matters, obtained while on duty.

---

<sup>125</sup> *ibid.* 21; A. Sarlas, 'The Legal Limits of Investigative Infiltration' (2019) 38-39 <<https://pergamos.lib.uoa.gr/uoa/dl/frontend/file/lib/default/data/2935716/theFile>> accessed: 21 May 2022

<sup>126</sup> C. Kourkouli, (n 123) 23 ff.

<sup>127</sup> *ibid.* 15; Sarlas (n 125) 60

### 5.2.3 Regulating UI in Brazil

In Brazil, the regulation of UI emerges from different pieces of law.

More precisely, Brazil is also a party to the abovementioned United Nations Convention against Transnational Organised Crime, which was transcribed in its entirety in national law under the Decree 5015/2004. Article 3 of the Law no. 12850/2013 on combatting organised crime further allows “the infiltration, by police, in an investigation activity” which, nonetheless, must be requested by the Public Prosecution Office or the representation of the police authority, based on demonstration of the necessity of the measure, the scope of the UA’s tasks, and, if possible, the name of the person investigated and the location of the infiltration, pursuant to Article 11 of the same legislation. In addition, Article 13 of Law no. 12850/2013 requires that principle of proportionality be respected when conducting an UI; therefore, the activity of the UA must be proportionate to the goal of the criminal investigation, otherwise the agent will be liable for any excess unless the UA can prove that it was unreasonable to act in another manner.<sup>128</sup>

Law no. 11343/2006 on combatting drug trafficking authorises the use of UI in Article 53.

Even more interestingly for the purpose of the HEROES project, Law no. 13441/2017 enables online UI in order to respond to crimes against the sexual dignity of children and adolescents as follows:

Article 190A I - It will be preceded by a duly detailed and substantiated judicial authorisation, which will establish the limits of infiltration for obtaining evidence, after hearing the Public Prosecutor's Office;

II - It will take place at the request of the Public Prosecutor's Office or the representation of police authority and will contain the demonstration of your need, the scope of the police officers' tasks, the names or nicknames of the persons investigated and, when possible, the connection data or records that allow the identification of these people;

III - It may not exceed the term of 90 (ninety) days, without prejudice to possible renewals, provided that the total does not exceed 720 (seven hundred and twenty) days and its effective need is demonstrated, at the discretion of the judicial authority.

Art. 190-B. Information on the infiltration operation will be forwarded directly to the judge responsible for authorising the measure, who will ensure its confidentiality. Before the conclusion of the operation, access to the case file will be reserved for the judge, the Public Prosecutor, and the police chief responsible for the operation to guarantee the confidentiality of investigations.

Art. 190-C. A police officer who hides his identity does not commit a crime to collect evidence of authorship and materiality of the crimes provided for in arts. 240, 241, 241-A, 241-B, 241-C, and 241-D of this Law and in arts. 154-A, 217-A, 218, 218-A, and 218-B of Decree-Law No. 2,848, of December 7, 1940 (Penal Code).

Art. 190-E. Upon completing the investigation, all electronic acts performed during the operation must be registered, recorded, stored, and forwarded to the judge and the Public Prosecution Office, together with a detailed report.

The registered electronic acts mentioned in the caput of this article will be gathered in separate records and attached to the criminal process and the police investigation, ensuring the

<sup>128</sup> G.Lissa, Wolff R., ‘Undercover Practices: A Comparison’ (*Elisabeth Haub School of Law, Pace University* 18 December 2014) <<https://pcjc.blogs.pace.edu/2014/12/18/undercover-practices-a-comparison/>> accessed 6 February 2023

preservation of the infiltrated police agent's identity and the intimacy of the children and adolescents involved.

It has been argued that, although not expressly mentioned in Law no. 13441/2017, the professional opinion of the Police Deputy must be obtained to inform the online undercover operation (as is prescribed in Article 10 of Law no. 12850/2013). That is because they are the ones responsible for the criminal investigation (Article 2, Law no. 12850/2013) and also the ones aware of the technical capacity to pursue the UI (e.g., in the case of online UI, whether the assigned UA has sufficient computer science knowledge).<sup>129</sup>

It is also worth noting that law enforcement agents do not need previous authorisation to create fake online profiles to obtain access to publicly available information, as that is not considered to be an UI. Instead, UIs aim to obtain data that is shared over the internet in a restricted way, in which the user only accepts to give up their privacy due to the trust placed in the interlocutor. These are the situations that will qualify as UI and thus be subjected to the abovementioned legal limitations.<sup>130</sup> Similarly, in a decision from 2019, the Supreme Federal Tribunal differentiates between an UA and an intelligence agent, the former requiring previous judicial authorisation and the latter not. It was said:

the distinction between [UA] and intelligence agent (a) is due to the purpose and scope of the investigation. While an 'intelligence agent' has a preventive and generic function, seeking information on social facts relevant to the government, the ['UA'] has repressive and investigative purposes, aiming to obtain evidence related to allegedly criminal facts and specific criminal organisations (unofficial translation).<sup>131</sup>

In that case, the Supreme Federal Tribunal found that an officer of the military police engaged in UI without previous authorisation. This is because the concerned military police officer had been designated as an intelligence officer to collect data to support the National Security Force in their strategic action in the face of social movements and protests that took place in Brazil in 2014. He was not assigned to investigate specific individuals, including the one that was convicted due to his testimonies. Nevertheless, in the course of his original activity, he infiltrated the group of which the convicted person was a part, including by joining a Telegram message group created by the convicted person and participating in group meetings in bars, in order to carry out a specific criminal investigation that led to a conviction. By doing so, he became an UA without the required authorisation and thus the Supreme Federal Court ordered that his testimony and any proof deriving thereof be removed from the criminal procedure and the convicted person be retried based solely on the remaining evidence.<sup>132</sup> In other words, to have UI operations become evidence that can be used in an adjudication procedure, previous judicial authorisation is required.

In order to preserve the right of the defendant to a fair trial, all reports drawn by the UA should be made available to the defence after the charge has been brought.<sup>133</sup> During the trial, the UA must testify while keeping his real name changed, his voice and image should also be preserved according to Law no. 9807/99.<sup>134</sup> Meaning that the investigated person does not have the right to access information and evidence collected in an ongoing investigative procedure, thus the investigated person has the right to follow up on the diligences that have

---

<sup>129</sup> H. Hoffmann Monteiro de Castro, 'Lei 13.441/17 instituiu a infiltração policial virtual', *Consultório Jurídico*, 16 May 2017, <<https://www.conjur.com.br/2017-mai-16/academia-policia-lei-1344117-instituiu-infiltracao-policial-virtual>> accessed: 10 August 2022

<sup>130</sup> *ivi*

<sup>131</sup> Supreme Federal Tribunal, HC 147837 / RJ, 26 February 2019, Ministro Gilmar Mendes, 5.

<sup>132</sup> *ibid.* 5-6, 15.

<sup>133</sup> A.B. De Mondonça, 'The Effective Collection and Utilization of Evidence In Criminal Cases: Current Situation and Challenged in Brazil' 61 available at <[https://www.unafei.or.jp/publications/pdf/RS\\_No92/No92\\_07PA\\_Andrey1.pdf](https://www.unafei.or.jp/publications/pdf/RS_No92/No92_07PA_Andrey1.pdf)> accessed 6 February 2023

<sup>134</sup> *ibid.*



already ended pursuant to the rule of secrecy of the investigation stipulated in Law no. 12830/ 2013, Article 23.<sup>135</sup>

Lastly, it is relevant to note that only members of the civil and federal police may participate in UI, no other police or intelligence forces (e.g., military police) may be involved;<sup>136</sup> and that entrapment is explicitly forbidden in Brazilian law.<sup>137</sup>

### 5.2.4 Regulating UI in Peru

In Peru, Article 7 of the Law No. 30077/2013 regulating the fight against organised crime provides that:

“Special investigative techniques may be adopted provided that they are suitable, necessary and indispensable for the clarification of the facts under investigation. Their application is decided on a case-by-case basis. They are issued when the nature of the measure so requires, provided that there are sufficient elements of conviction regarding the commission of one or more crimes linked to a criminal organisation”.

More specifically, Article 341 of the Peruvian Code of Criminal Procedure states that:

“1. The Prosecutor, in the case of preliminary proceedings involving activities related to organised crime, trafficking in persons, crimes against the public administration provided for in Articles 382 to 401 of the Criminal Code, and as long as there are indications of their commission, may authorise specialised members of the Peruvian National Police, using a provision and taking into account their need for the investigation, to act under an assumed identity and to acquire and transport the objects, effects and instruments of the crime and defer the seizure of the same. The assumed identity shall be granted by the Prosecutor for a term of six months, extendable for periods of the same duration as long as the conditions for its use persist, being legitimately authorised to act in everything related to the specific investigation and to participate in the legal and social traffic under such identity [...]

6. The [UA] shall be exempt from criminal liability for those actions that are a necessary consequence of the investigation's development, provided that they are proportional to the purpose of the investigation and do not constitute an apparent provocation to crime.”

A Log of the UA's activities are kept by the Control Officer who is monitoring such activities, and any information obtained by these means should be periodically communicated to the Prosecutor. Once the UI is completed, a report of activities, evidence and other information are recorded in a report. In special cases, where fundamental rights of individuals may be affected by the investigative techniques, the prosecutor must request the Preparatory Investigation Judge for an authorisation.<sup>138</sup>

The identity of UAs is protected by Article 409B of the Peruvian Penal Code, which punishes those who improperly reveal the identity of a witness, protected expert, or undercover or special agent.

Lastly, Peru enacted a regulation to provide guidelines on the use of UAs.<sup>139</sup> The document establishes that undercover operations must follow five principles (Article 3). The first is the ultima ratio, foreseeing that the

<sup>135</sup> E.P De Mello Lima, ‘Undercover Agent: Ensure or Punish (Double Side Principle of Proportionality) (Federal University of Santa Maria, 1 December 2014) 34

<sup>136</sup> Supra note 131. See also Article 144 of the Federal Constitution.

<sup>137</sup> Hoffmann Monteiro de Castro (n 129). See also Article 17 of the Penal Code and Súmula 145 of the Supreme Federal Tribunal.

<sup>138</sup> Peru ministry of the Interior, ‘Operational Guide for the Investigation of the Crime of Human Trafficking’, August 2020, 127

<sup>139</sup> Reglamento de Circulación y Entrega Vigilada Bienes Delictivos y Agente Encubierto (Aprobado por Resolución No 729-2006-MP-FN del 15 de junio del año 2006)

deployment of UAs must be a measure of last resort. The second is necessity, meaning such operations will only be used in accordance with the purposes of the investigation. The third is proportionality, meaning UIs will be used only if the protection of the interest public prevails over the protection of private interest. The fourth is specialty, which determines that the information collected may only be used to prove the accusation that was the subject of the investigation. Exceptionally, it can be used to clarify other crimes. The fifth and last one is confidentiality, which establishes that actions related to special techniques will only be made known to officials authorised by law.

The regulation also sets seven conditions that need to be complied with to deploy UAs (Article 23). The first is that there are reasonable indications of the commission of a crime linked to organised crime. The second is that it is used in controlled risk situations. The third is the voluntary participation of the [UA]. The fourth is the correspondence of the anticipated action circumstances with the investigated crime. The fifth is the real possibility of infiltration of the agent in the criminal organisation. The sixth is the special preparation of the agent. The seventh and last is the absence of disciplinary or criminal record of the agent.

In the jurisprudence, the Constitutional Tribunal of Peru found the use of UAs in the context of combatting drug trafficking to be constitutional in 2008. The Tribunal said that “the use of the [UA] is an effective investigative technique for obtaining probative evidence and identifying those involved in the crime, since the agent, by clandestinely infiltrating the scene of the crime, observes in person the crimes practiced by the perpetrators and participants in the criminal organisation.”<sup>140</sup> This reasoning was confirmed by the Tribunal in a subsequent case in 2012.<sup>141</sup>

### 5.3 Regulating UI: Some comparative and final remarks

So far, this Section has examined how UI is regulated at the international, regional, and national levels.

As a result of this legal analysis, it is possible to briefly identify a number of key features that are most common to the legislations and case-law examined above. Overall, they recognise the intrusiveness of UI and the following need for a balance with competing interests (e.g., the fundamental rights to privacy and a fair trial of the person being criminally investigated) through the adoption of procedural and substantive safeguards.

First, the boundaries within which UI can be performed are normally indicated in a judicial authorisation. The same judicial authority is also responsible for monitoring the UI, so as to ensure that its performance does not cross the line and arbitrarily impinge on competing interests.

Second, the authorisation to perform UI is always granted in compliance with the principles of necessity and proportionality. In brief, this implies that the performance of UI must be instrumental in fulfilling a pressing social need (i.e., in the instant case, the elimination of trafficking in human beings and child sexual abuse) and cannot go beyond what is necessary to reach this goal, meaning, for instance, that there are no less coercive alternative measures and some safeguards against abuse exist.

Third, the performance of UI is usually limited to certain crimes that are considered significantly severe, such as trafficking in human beings and child sexual abuse.

Fourth, the authorisation and performance of UI is contingent on the presence of some indications that the criminal offence is likely to occur.

Fifth, the legislation sometimes starts from the assumption of the dangerousness of UI and seeks to make the conditions right for the [UA], in the sense that it provides special training and protection in court.

Finally, entrapment is normally distinguished from UI and is often explicitly prohibited by law, meaning that all the evidence unlawfully gathered is not admissible. In this sense, the right to a fair trial seems to be respected as long as UI is performed in accordance with the law and no entrapment has occurred.

---

<sup>140</sup> Constitutional Tribunal, case 04750-2007-HC, 9 January 2008

<sup>141</sup> Constitutional Tribunal, case 03154-2011-PHC/TC, 23 October 2012

## 6. The importance of ethics in UI

Generally speaking, ethics is a branch of philosophy concerning a rational and practical reflection on what is right and wrong.

Ethics goes beyond philosophical disquisitions and has turned into a modality of governance and regulation that might be opposed or complementary to legislation. This means that ethical principles and values, as well as ethical committees, advisory groups, and boards are increasingly invoked to guide the regulation of certain phenomena.

As will emerge later in this Section, this is certainly true in the case of the EU regulation of ICTs and AI-based technologies. But, on a micro-level, ethics also helps the EU direct its efforts at societal challenges in alliance with universities and other third parties. In the case of the HEROES project, for example, the proposal has not only been screened before the signature of the Grant Agreement, but the compliance with ethics is continuously assessed through the project implementation, the establishment of the External Ethics Board and the performance of an ethical impact assessment in WP3 being a few examples.

With this in mind, this Deliverable also contributes to the respect for ethics in the HEROES project by discussing ethical principles in UI and complementing the legal standards previously mentioned.

For this purpose, the following analysis centres on ethical principles that will ensure that UAs and society will not be overtly or unnecessarily harmed during the investigation, and on a set of rules to govern the new and technology-facilitated approach to the performance of UI that the HEROES project is expected to develop.

Overall, it is important to complement the previous legal rules with ethical considerations because ethics functions as ‘normative universal glue’, meaning that it can gather communities which are jurisdictionally limited.<sup>142</sup> This is particularly important in the context of the HEROES project, where the pilots are expected to take place in Europe and in South America and no common, formal regulation has been found in the previous Section.

### 6.1 Police ethics in UI

When discussing police ethics, John Kleinig begins with the idea that police ethics matters, insofar as ethical considerations have a normative priority in practical decision-making, particularly where one’s actions will impinge on the lives of others.<sup>143</sup> As repeatedly said throughout this document, UI is recognised to negatively affect the fundamental rights of the person being investigated without their knowledge.

On such premises, the current body of research on police ethics suggests that four normative principles should guide police work and could be applied to the HEROES project *a fortiori*. These principles are integrity, transparency, accountability, and legitimacy.

In broad terms, personal integrity is used to refer to the requirement to act morally, by following certain substantive or normative constraints. At the public level, instead, integrity is equated with the respect for moral values, principles, and norms that are commonly accepted within a given society and vary according to the role of the individual.<sup>144</sup> This means that each member of a given society has a legitimate expectation that other people will behave with integrity and this legitimate expectation will rely on the duties, obligations, rights, competencies, and so forth arising from the position the individual has within society.

Based on the purpose and peculiarities of UI described above, the integrity of the police officer involves the resistance to power abuse, as well as the performance of professional duties without biases and prejudices. The absence of police integrity, though, does not stem from the character failure of the single [UA], but from the

---

<sup>142</sup> N. Van Dijk, S. Casiraghi & S. Gutwirth, ‘The “Ethification” of ICT Governance. Artificial Intelligence and Data Protection in the European Union’ (2021) *Computer Law & Security Review* 43, 6. [doi.org/10.1016/j.clsr.2021.105597](https://doi.org/10.1016/j.clsr.2021.105597); J. Kleinig, *The Ethics of Policing* (Cambridge, Cambridge University Press, 1996) 8

<sup>143</sup> Kleinig (n 142) 6

<sup>144</sup> C. Fijnaut & L. Huberts, *Corruption, Integrity and Law Enforcement* (Leiden, Brill Nijhoff, 2000) 4

way the police is structured and organised. Much of the literature therefore indicates the adoption, communication, and enforcement of official rules prohibiting misconduct in order to ensure police integrity.<sup>145</sup> Unfortunately, in the context of the HEROES project, it seems that no involved LEA has adopted an official code of conduct or a similar soft law instrument for this purpose.<sup>146</sup>

Notwithstanding the presence of these instruments of soft-law and self-regulation, research outlines that it is rare for police officers to report on colleagues' rule-breaking within their force (the so-called 'blue code of silence').<sup>147</sup> An ethical principle which could address this shortcoming is transparency.<sup>148</sup>

Generally speaking, transparency implies being open, clear, and honest with other people. Transparency has therefore the potential to establish a dialogue between law enforcement officers and the citizens they serve and protect, thereby reducing information asymmetries and possible misconduct.

Overall, the respect for transparency deals with the institutional arrangements and current practice on the provision of information about the organisation, planning, budgeting, administration, and operations of the law enforcement agency. Transparency in police work can take many forms. *Inter alia*, it can be proactive, by providing information to people through official websites and social media platforms, or it can be reactive in the sense that institutional arrangements are designed to accommodate any demand for information by people.<sup>149</sup> In this regard, Peter Murphy et al. argue that the effectiveness of transparency is contingent on the type and accessibility of data that are published, and whether recipients are able to understand them, access channels for complaint and enforce penalties in the event of malpractice.<sup>150</sup>

Nonetheless, we previously outlined that, for UI to be effective and safe, the maintenance of secrecy is a fundamental rule. This implies that this ethical principle will be balanced with this competing interest and is thus likely to its untouchable core, without which transparency would lose its value for the suspect or the accused, as well as society as a whole. In the HEROES project, all the LEAs agree that transparency and its balance are enshrined in the law, in the sense that the performance of UI is always contingent on judicial monitoring, which normally requires continuous maintenance of records of undercover activities.<sup>151</sup>

Overall, it is important to maintain the untouchable core of transparency because it can increase police accountability, thereby promoting trust between the police and the society it serves. At the heart of police accountability lies the very idea that the law enforcement agency and its officers are answerable for their actions and can be sanctioned for their misconduct. As such, this ethical principle presumes a two-way relationship between the law enforcement agency and society, which expects it to act in a manner reflecting its purpose in promoting public safety and upholding the rule of law.<sup>152</sup> In this aspect, T. T. Vendius claims that the use of UI in the context of the internet is in itself transparent since all conversations that the UA has engaged in are documented in the log files of the police; therefore, all activities are evidence in these files which means that there is no problem related to accountability and secrecy.<sup>153</sup>

---

<sup>145</sup> S. Kutnjak Ivković & M. R. Haberfeld, 'Exploring Empirical Research on Police Integrity', in S. Kutnjak Ivković & M. R. Haberfeld (eds.), *Exploring Police Integrity. Novel Approaches to Police Integrity Theory and Methodology* (Cham, Springer, 2019) 4

<sup>146</sup> Based on interviews that were internal to the HEROES Consortium and took place during the Consortium Meeting (8-10 July 2022)

<sup>147</sup> L. Westmarland & S. Conway, 'Police Ethics and Integrity: Keeping the 'Blue Code' of Silence' (2020) *International Journal of Police Science and Management* 22(4) 378

<sup>148</sup> J. Chanin & S. Espinosa, 'Examining the Determinants of Police Department Transparency: The View of Police Executives' (2016) *Criminal Justice Policy Review* 27(5) 499

<sup>149</sup> *ibid.* 506

<sup>150</sup> P. Murphy, P. Eckersley & L. Ferry, 'Accountability and Transparency: Police Forces in England and Wales', (2017) *Public Policy and Administration* 32(3) 199

<sup>151</sup> Based on interviews that were internal to the HEROES Consortium and took place during the Consortium Meeting (8-10 July 2022)

<sup>152</sup> Murphy, Eckersley & Ferry (n 150) 198, 200

<sup>153</sup> T.T. Vendius, 'Proactive Undercover Policing and Sexual Crimes Against Children on the Internet', (2015) *The European Review of Organised Crime* 2(2) 6

According to Carol A. Archbold, however, police accountability also refers to the professional relations amongst law enforcement agents, in the sense that they should feel confident that their colleagues will conduct their work in a lawful manner that does not jeopardize their safety or the safety of others and, if that is not the case, they can take actions.<sup>154</sup> This is particularly true in the context of UI, where the [UA] constantly runs the risk of harm, retaliation, and the abrupt end of the assignment, if their true identity is disclosed. Besides, the risk of harm and retaliation could have a spill-over effect on their family, colleagues, and social bonds.

For police accountability to be ensured, LEAs have traditionally developed organisational and management processes of control, including “flow of orders from executives down to line personnel, layers of dense supervision, unity of command, elaborate rules and regulations, elimination of discretion, and simplification of work tasks”.<sup>155</sup> Amongst the HEROES pilot partners, the LEAs are hierarchically structured, provide continuous and tailor-made training to their staff, and evaluate its performance. Nevertheless, all of them agree that, when it comes to UI, the key feature to ensure the accountability of UI is the independent judicial authorisation and monitoring.<sup>156</sup>

The ethical principle of accountability is central to the legitimacy of the police and serves to limit its power, by providing people with a means to challenge its eventual misconduct. This is certainly true in the case of the suspect or the accused at the core of UI, as well as society at large.

According to John Kleinig, the inextricable intersection between police accountability and legitimacy traces back to social contractarianism, meaning that the LEA is the most immediate and visible expression of State authority and power over citizen, who have consented to cede some part of their liberty to the State in exchange for the protection of their rights. Because law enforcement power is normatively limited, though, its legitimacy and authority will derive from the way its officers are expected to behave, meaning with integrity, transparency, and so forth.<sup>157</sup> This means that, if a police officer menaces fundamental rights rather than protects them, their misconduct will inevitably affect how citizens understand the role of their State and their relation to it.

In the previous Section, it was explained that judicial authorisation and supervision is a compulsory requirement for the performance of UI within the pilot countries of the HEROES project, whose LEAs consider it of the utmost importance.<sup>158</sup> As outlined by Brendon Murphy, both judicial authorisation and supervision can be considered a specific aspect of the logic of accountability.<sup>159</sup>

In bringing this Section to a conclusion, it is important to emphasise that there is a power asymmetry between the LEA and the citizens. Ethical principles are therefore necessary to provide some assurance that the law enforcement and, in this case, UI, will be performed in a way that will not exploit or otherwise take advantage of citizens’ vulnerability. Yet, because the HEROES project relies on online UI and, for this purpose, its Consortium will develop a Profile/Content Generator, the next Subsection discusses the ethical principles applicable to technological innovation and designed to guide how they are expected to shape the future of law enforcement.

<sup>154</sup> C. A. Archbold, ‘Police Accountability in the USA: Gaining Traction or Spinning Wheels?’ (2021) *Policing: A Journal of Policy and Practice* 15(3) 1665-1683

<sup>155</sup> G. L. Kelling, R. Wasserman & H. Williams, ‘Police Accountability and Community Policing’ (1988) *Perspectives on Policing* 7, 2 <<https://www.ojp.gov/pdffiles1/nij/114211.pdf>> accessed: 10 August 2022

<sup>156</sup> Based on interviews that were internal to the HEROES Consortium and took place during the Consortium Meeting (8-10 July 2022)

<sup>157</sup> Kleinig (n 107) 13, 18

<sup>158</sup> Based on interviews that were internal to the HEROES Consortium and took place during the Consortium Meeting (8-10 July 2022)

<sup>159</sup> Murphy (n 14) 240



## 6.2 Ethics in the new development of technology-facilitated approaches to UI

Although WP3 involves the performance of a legal, ethical, and social impact assessment of the whole HEROES project, it is still important to unfold some specific ethical considerations about the new development of technology-facilitated approaches to UI.

In this regard, ethics is beneficial for the HEROES researchers and law enforcement agents, since it stimulates reflection on the need to protect the fundamental rights of the individual (be it the victim of trafficking in human beings and/or child sexual abuse, the person being undercover investigated, or the law enforcement agent) and facilitates acceptance of online UI within society.

For this purpose, this Section examines the turmoil of ethical principles that have been recently developed across the world, in order to provide some guidance on the regulation of AI. More specifically, according to Costanza Gómez Pont *et al.*, by the end of 2019 over 90 documents on AI principles had been published by governments, companies, and other players towards this goal, including the EU, the IDB, the WEF, the OECD, and UNESCO.<sup>160</sup>

As far as the EU is concerned, it has traditionally brought forward an ethical approach to AI and robotics.<sup>161</sup> This was particularly evident in 2018, when the European Commission established the High-Level Expert Group on AI to support the implementation of the EU strategy through the elaboration of two documents, namely the Ethics Guidelines on Artificial Intelligence and Policy and Investment Recommendations.<sup>162</sup>

The aim of the Guidelines was to promote ‘Trustworthy AI’, to be understood as the chance for society to trust AI and be protected against unwanted consequences, and be composed of three components, namely, lawfulness, ethics, and robustness. As regards ethics, the Guidelines identify four ethical principles and their correlated values that must be respected in the development, deployment, and use of AI.

First, the development, deployment, and use of AI must guarantee human autonomy, meaning that each person interacting with the AI system must be able to keep full and effective self-determination and be able to partake in the democratic process. The allocation of functions between humans and AI systems should follow human-centric design principles and leave meaningful opportunities for human choice.<sup>163</sup>

Second, AI should never cause nor exacerbate harm or otherwise adversely affect human beings.<sup>164</sup>

Third, the development, pilot, and deployment of AI must be fair. As such, it must ensure an equal and just distribution of both benefits and costs, and protect the individual against unfair bias, discrimination, and stigmatisation. Moreover, AI should never lead to people being deceived or unjustifiably impaired in their freedom of choice and its development should be the result of a balancing mechanism between competing interests and objectives (*i.e.*, as the end does not justify the means).<sup>165</sup>

Fourth, AI should comply with the explicability principle, in the sense that its programming must be transparent, the capabilities and purpose of AI systems openly communicated, and decisions – to the extent

<sup>160</sup> C. Gómez Pont, C. May del Pozo, C. Martínez Pinto & A. V. Martín del Campo Alcocer, ‘Artificial Intelligence for Social Good in Latin America and the Caribbean: The Regional Landscape and 12 Country Snapshots’ (2020) 33, <<https://publications.iadb.org/en/artificial-intelligence-for-social-good-in-latin-america-and-the-caribbean-the-regional-landscape-and-12-country-snapshots>> accessed: 25 May 2022

<sup>161</sup> See *infra* the European Parliament Resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies (2020/2012(INL)); European Commission, White Paper on Artificial Intelligence – A European approach to excellence and trust, 19.02.2020, COM(2020) 65 final

<sup>162</sup> Independent High-Level Expert Group on Artificial Intelligence set up by the European Commission (ed.), ‘Ethics Guidelines for Trustworthy AI’ 08 April 2019 <<https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>> accessed: 25 May 2022

<sup>163</sup> *ibid.* 12

<sup>164</sup> Independent High-Level Expert Group on Artificial Intelligence set up by the European Commission (n 132) 12

<sup>165</sup> *ivi*

possible – explainable to those directly and indirectly affected.<sup>166</sup> Without this information, for example, a decision to bring a criminal charge against an individual subject to online UI could not be fully contested. Again, it is possible for the explicability principle to be restricted due to the balancing between the competing interest of crime prevention and the fundamental rights of the individual.

After having developed the ethical principles, the Guidelines go on to transpose them into concrete requirements. Besides, they have underpinned the European Commission Proposal for a Regulation that establishes harmonised rules on AI based on a risk-based approach and is likely to be adopted during the life of the HEROES project.<sup>167</sup>

In any case, because WP3 is specifically aimed at the legal and ethical compliance of the HEROES project, it is possible to refer the reader to all its Deliverables, especially D3.2 on the ethical, legal, and social audit of component technologies.

At the time of writing, there is no comparable ethical framework in South America, meaning that it is necessary to narrow down the geographical scope and explore the national jurisdictions of Brazil and Peru, namely the two HEROES pilot countries located there.

In Brazil, the national AI strategy (Estratégia Brasileira de Inteligência Artificial)<sup>168</sup> presents the debate surrounding ethical AI, highlighting the issues of human-centric AI and trustworthy AI. In this regard, the strategy discusses more at length the challenges of automated decision making and human intervention as well as explainability in AI systems, also repeatedly mentioning the need to respect data protection laws. Overall, the strategy recommends the investment in AI systems that abide to ethical principles, in particular fairness (especially in relation to AI bias), accountability, and transparency.

Peru also mentions ethics in the first draft of its National Artificial Intelligence Strategy,<sup>169</sup> highlighting the issues of biases, the challenges of automatisisation (mainly the possible loss of jobs and the need to provide training) and the need for guidelines, especially in the fields involving vulnerable populations, such as health.

In bringing this Section to an end, it is worth mentioning that all the HEROES pilot countries are part of numerous international organisations fostering the development of ethical AI, such as the OECD,<sup>170</sup> which adopted in 2019 its own Recommendation on AI and set ethical standards similar to the ones just described.<sup>171</sup> Briefly, the document reiterates the need for the development, deployment, and use of trustworthy AI to respect human rights and diversity, to be transparent, and refrain from causing harm to the individual. Although the Recommendations are not binding, they still show a common approach to the regulation of AI across the world.

Similarly, UNESCO released its Recommendation on the Ethics of Artificial Intelligence in 2021 unfolding some ethical values and principles. *Inter alia*, the document makes it clear that the respect, protection, and promotion of human dignity and rights are essential throughout the life cycle of the AI system, AI should not

<sup>166</sup> *ibid.* 13

<sup>167</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, 21 April 2021, COM(2021) 206 final, 13

<sup>168</sup> Ministério da Ciência, Tecnologia e Inovações Secretaria de Empreendedorismo e Inovação, Estratégia Brasileira de Inteligência Artificial – EBIA (2021) <[https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/arquivosinteligenciaartificial/ebia-documento\\_referencia\\_4-979\\_2021.pdf](https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/arquivosinteligenciaartificial/ebia-documento_referencia_4-979_2021.pdf)> accessed: 10 August 2022

<sup>169</sup> Government and Digital Transformation Secretariat, National Artificial Intelligence Strategy (2021) <<https://cdn.www.gob.pe/uploads/document/file/1909267/National%20Artificial%20Intelligence%20Strategy%20-%20Peru.pdf>> accessed: 10 August 2022

<sup>170</sup> In this regard, it is necessary to clarify that Brazil and Peru still candidate countries and, on 25 January 2022, the Council decided to begin with the accession discussions. For more information, see: <<https://www.oecd.org/about/members-and-partners/>> accessed: 10 August 2022

<sup>171</sup> OECD, ‘Recommendation of the Council on Artificial Intelligence’, 22 May 2021, <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>> accessed: 25 May 2022

harm, AI should safeguard fairness and non-discrimination, and its transparency and explicability should be at the forefront of the development and deployment of AI.<sup>172</sup>

## 7. Conclusion: Some recommendations for the new development of technology-facilitated approaches to UI

This Deliverable discussed the legal and ethical feasibility of UI, considering that the HEROES Consortium plans to develop new approaches to the performance of UI in the fight against trafficking in human beings and child sexual abuse, which are technology-facilitated.

Section 2 attempted to understand what counts as UI and position it within the HEROES project.

In this regard, it was argued that UI could generally mean a special investigative measure where a law enforcement agent assumes a fictitious identity, in order to infiltrate and obtain evidence to respond to serious crimes.

Section 3 moved on to explain why UI is necessary.

In brief, it was made it clear that trafficking in human beings and child sexual abuse are commonly understood to be serious crimes resulting life-shattering and long-lasting harm to the victim and having a cross-border dimension.

The latter feature, it was argued, does not only lead to the need for a transnational collaboration in criminal matters, but is also inextricably intertwined with the spread of ICTs that have recently facilitated the commission of trafficking in human beings and child sexual abuse, while likewise triggering new law enforcement responses.

With this in mind, UI was regarded as an effective means to fight against trafficking in human beings and child sexual abuse, especially online. Nonetheless, the chance for the law enforcement agent to conceal their real identity and gather evidence without reservation makes this investigation strategy extremely intrusive and its performance should be treated with caution.

Section 4 highlighted that, when keeping an individual under observation without their knowledge, UI can severely impinge on their fundamental rights to privacy and to a fair trial.

Besides, it was recognised that the negative consequences arising from UI do not only negatively violate the fundamental rights of the target, but have also a detrimental impact on the [UA] and society at large. Indeed, while the former is placed in life-threatening and stressful situations that negatively affect their well-being during and after the operation, the latter experiences the simultaneous amplification of criminality and surveillance, to the detriment of fundamental values.

Ultimately, Section 4 distinguished UI from entrapment, where the law enforcement agent does not only gather evidence, but also encourages and/or help the target commit a crime.

Section 5 examined all those legislations and case-law that attempt to find a balance between the necessary performance of UI and the risk arising from it within the geographical scope of the HEROES project.

At the time of writing, there was no legal instrument providing some guidance on UI internationally, with few exceptions.

At the regional level, the IACHR has simply voiced some concerns about the performance of UI during a political demonstration in Peru. In contrast, the case-law of the ECtHR has repeatedly made it clear that the performance of UI is legitimate, on the condition that the State provide substantive and procedural safeguards (e.g., the issuing of judicial authorisation, the respect for the principles of necessity and proportionality, and the independent monitoring of the undercover activities). Moreover, although the euro does not have

---

<sup>172</sup> UNESCO, 'Recommendation on the Ethics of Artificial Intelligence', 23 November 2021, 17-20, <<https://en.unesco.org/artificial-intelligence/ethics>> accessed 25 May 2022



competence in policing, EUROPOL could facilitate the performance of UI responding to trafficking in human beings and child sexual abuse, while Article 29 of Directive 2014/41/EU allows for the issuing of a European investigation order during the performance of UI.

As far as the national jurisdictions of Spain, Greece, Brazil, and Peru were concerned, the legal analysis identified a common threat, in the sense that all the legislations and case-law agreed on the intrusiveness of UI and the following need for a balance with competing interests (*e.g.*, the fundamental rights to privacy and a fair trial of the person being criminally investigated) through the adoption of substantive and procedural safeguards. In this scenario, for example, the performance of UI was always contingent on the issuing of a judicial authorisation and was later followed by the continuous monitoring of the judicial authority. The UI usually relied on the presence of some indications that a crime was likely to occur. The legal protection and well-being of the [UA] was of the utmost importance. Entrapment was separated from UI and was prohibited by law.

Section 6 explored the respect for ethics in UI, by focusing on the ethical principles applicable to the conduct of LEAs.

For the purpose of this Deliverable, police ethics in UI relied on four ethical principles, that is to say, integrity, transparency, accountability, and legitimacy. In a nutshell, this means that the [UA] is expected to refrain from power abuse, as well as possible biases and prejudices in the performance of their professional duties. In order to further avoid the risk of police misconduct, it should be possible to keep track of the performance of the UI and held the [UA] accountable for their actions. Ultimately, UI should be performed in a way that does not negatively affect how citizens understand the role of their State and their relation to it.

Against this background, what follows is a set of recommendations that should inform every new development of technology-facilitated approaches to UI, be it within or outside the HEROES project:

1. The design, pilot, and future use of new technologies should not deceive the user of the targeted online communities, in respect of their personal autonomy;
2. The design of new technologies should not perpetuate unfair biases, when creating and managing the fictitious profile of the [UA] that, to be effective, is expected to impersonate a possible offender of trafficking in human beings and child sexual abuse;
3. The design of new technologies should be done in a way that allows both its developers (*i.e.*, the HEROES researchers) and users (*i.e.*, the LEAs involved in the HEROES project and beyond) to address the asymmetry of information between the [UA] and the target and explain how the technology works;
4. The design of new technologies should start from the assumption that their development is necessary, and its deployment is proportionate. Whereas this Deliverable has already explained that these technologies could be considered necessary to fulfil a pressing social need (*i.e.*, the fight against trafficking in human beings and child sexual abuse), the people who will develop and use it should check its deployment does not go beyond what is strictly necessary to reach this goal. For this purpose, for instance, they could look at alternative measures, as well as the effectiveness of the existing substantial and procedural safeguards within the national jurisdiction;
5. Before the pilot and any future deployment of new technologies, it is necessary to rely on one of the existing legal bases, such the ones outlined in Section 5 with regard to the HEROES pilot countries;
6. The design, pilot, and future use of new technologies should not lead to entrapment. For this purpose, it is essential for the technology to be programmed to simply facilitate evidence gathering in a passive way;
7. In order to minimise privacy breaches, the pilot and future use of new technologies should only target online fora based on the presence of some indications that these community channel trafficking in human beings and child sexual abuse;

8. The design, pilot, and future use of new technologies should start from the assumption that this technology should not simply aim at successful investigation and prosecution, but should respect the fundamental rights of the person being investigated without their knowledge and the [UA], as well as the fundamental values of society;
9. The pilot and future use of new technologies should further rely on ethics, which, at the time of writing, appears to be often missing. To reach this goal, it would be advisable to adopt specific guidelines and/or organise a special training to explain ethical principles and implications on the matter;

On a final note, it is necessary to stress that the research outputs and recommendations of this Deliverable lay down the basis of Deliverable 4.7 that is due in November 2023. In brief, the aim of Deliverable 4.7 is to keep the pace with the HEROES project, to consider the possible adoption of relevant legal reform, judicial decision, and/or ethical policies, and interview LEAs and scholars working on UI to: 1) better understand how UI works in practice; 2) discuss the research outputs and recommendations unfolded in the present Deliverable; and 3) collect further best practices and recommendations, based on their professional experience.

## 8. References

- C. A. Archbold, 'Police Accountability in the USA: Gaining Traction or Spinning Wheels?' (2021) *Policing: A Journal of Policy and Practice* 15(3) 1665-1683
- C. Nathan, 'Liability to Deception and Manipulation: The Ethics of Undercover Policing', (2017) *Journal of Applied Philosophy*, 34(3) 370–388
- A. Ashworth, 'What is Wrong with Entrapment?' (1999) *Singapore Journal of Legal Studies* 293-317
- J. Bentham, *The Panopticon Writings* (London, Verso, 1995)
- M. G. W. den Boer (ed.), *UP and Accountability from an International Perspective* (Maastricht, European Institute for Public Administration, 1997)
- W. Bogensberger, 'Article 88 TFEU' in M. Kellerbauer, M. Klamert & J. Tomkin, *The EU Treaties and the Fundamental Rights: A Commentary* (Oxford, Oxford University Press, 2019) 935-937
- R. M. Bolen, *Child Sexual Abuse: Its Scope and our Failure* (New York, Kluwer Academic Publishers, 2002)
- M. Brkan, 'The Concept of Essence of Fundamental Rights in the EU Order: Peeling the Onion to Its Core' (2018) *European Constitutional Law Review* 14, 332-368
- S. Bronitt, 'The Law in UP: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe' (2004) *Common Law World Review* 35-80
- D. Chalmers, G. Davies & G. Monti, *European Union Law* (3<sup>rd</sup> edition, Cambridge, Cambridge University Press, 2014)
- J. Chanin & S. Espinosa, 'Examining the Determinants of Police Department Transparency: The View of Police Executives' (2016) *Criminal Justice Policy Review* 27(5) 498-519
- J. C Ortiz-Pradillo. 'The new regulation of technology-related investigative measures in Spain' (2017) *ERA Forum*, 18(3), 425–435. <<https://doi.org/10.1007/s12027-017-0484-1>>
- J.-J Oerlemans, '*Investigating cybercrime*'. Amsterdam: Amsterdam University Press (SIKS dissertation series, no. 2017, 01)
- A.B. De Mondonça, 'The Effective Collection and Utilization of Evidence In Criminal Cases: Current Situation and Challenged in Brazil' 58-62 available at <[https://www.unafei.or.jp/publications/pdf/RS\\_No92/No92\\_07PA\\_Andrey1.pdf](https://www.unafei.or.jp/publications/pdf/RS_No92/No92_07PA_Andrey1.pdf)>
- A. Clooney & P. Webb, *The Right to a Fair Trial in International Law* (Oxford, Oxford University Press, 2020)
- Constitutional Tribunal, 'Nota Informativa No 48/2022 - El Tribunal Constitucional Admite a Trámite un Recurso de Amparo sobre la Actuación de los Agentes Encubiertos', 12 May 2022, available at: <https://static.ecestaticos.com/file/d64/b23/09f/d64b2309fcf654c2572087528a178722.pdf>
- Constitutional Tribunal, case 03154-2011-PHC/TC, 23 October 2012
- Constitutional Tribunal, case 04750-2007-HC, 9 January 2008
- L. S. Curran, 'An Exploration of Well-Being in Former Covert and Uncover Police Officers' (2021) *Journal of Police and Criminal Psychology* 36, 256-267
- M. Daly, 'Professional and Ethical Considerations for the Role of the UO Investigation', in A. MacVean, P. Spindler & C. Solf (eds.), *Handbook of Policing, Ethics and Professional Standards* (London, Routledge, 2013) 102-112
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2015] OJ L 130/1

- G. Dworkin, *The Theory and Practice of Autonomy* (Cambridge, Cambridge University Press, 1988)
- G. Lissa, Wolff R., 'Undercover Practices: A Comparison' (*Elisabeth Haub School of Law, Pace University* 18 December 2014) <<https://pcjc.blogs.pace.edu/2014/12/18/undercover-practices-a-comparison/>>
- B. Emmerson & A. Ashworth, *Human Rights and Criminal Justice* (London, Sweet and Maxwell, 2001)
- European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, 21 April 2021, COM(2021) 206 final
- European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on combatting trafficking in human beings', 14 April 2021, COM(2021) 171 final
- European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy for a more effective fight against child sexual abuse, 24 July 2020, COM(2020) 697 final
- European Parliament Resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies (2020/2012(INL)); European Commission, White Paper on Artificial Intelligence – A European approach to excellence and trust, 19.02.2020, COM(2020) 65 final
- European Union and Council of Europe (eds.), 'Deployment of Special Investigative Means' (2013) <<https://rm.coe.int/deployment-of-special-investigative-means-eng/16807828fa>> accessed: 8 August 2022
- P. De Hert & S. Gutwirth, 'Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power', in E. Claes, S. Gutwirth & A. Duff (eds.), *Privacy and the Criminal Law* (Antwerpen, Intersentia, 2006) 61-104
- S. Field & C. Pelsaert (ed.), *Invading the Private. State Accountability and New Investigative Methods in Europe* (London, Routledge, 1998)
- C. Fijnaut, *The Containment of Organised Crime and Terrorism* (Leiden, Brill, 2016)
- C. Fijnaut & L. Huberts, *Corruption, Integrity and Law Enforcement* (Leiden, Brill Nijhoff, 2000)
- C. Gómez Pont, C. May del Pozo, C. Martínez Pinto & A. V. Martín del Campo Alcocer, 'Artificial Intelligence for Social Good in Latin America and the Caribbean: The Regional Landscape and 12 Country Snapshots' (2020) 33, <<https://publications.iadb.org/en/artificial-intelligence-for-social-good-in-latin-america-and-the-caribbean-the-regional-landscape-and-12-country-snapshots>> accessed: 25 May 2022
- P. Goodyear-Brown, *Handbook of Child Sexual Abuse. Identification, Assessment, and Treatment* (Hoboken, John Wiley & Sons, Inc., 2012)
- Government and Digital Transformation Secretariat, National Artificial Intelligence Strategy (2021) <<https://cdn.www.gob.pe/uploads/document/file/1909267/National%20Artificial%20Intelligence%20Strategy%20-%20Peru.pdf>> accessed: 10 August 2022
- K. Günther, 'Responsibility to Protect and Preventive Justice', in A. Ashworth, L. Zedner & P. Tomlin (eds.), *Prevention and the Limits of the Criminal Law* (Oxford, Oxford University Press, 2013) 69-90
- C. E. O'Hara & G. L. O'Hara, *Fundamentals of Criminal Investigation* (7<sup>th</sup> Edition, Springfield III, Charles C. Thomas, 2003)
- C. Harfield & K. Harfield, 'Risk and the Management of Integrity', in A. MacVean, P. Spindler & C. Solf (eds.), *Handbook of Policing, Ethics and Professional Standards* (London, Routledge, 2013) 156-166

- J. D. Heydon, 'The Problems of Entrapment' (1973) *The Cambridge Law Journal* 32(2) 268-286
- D. J. Hill, S. K. McLeod & A. Tanyi, 'Entrapment, Temptation and Virtue Testing' (2022) *Philosophical Studies*, doi.org/10.1007/s11098-021-01772-4 accessed: 9 August 2022
- S. van der Hof, I. Georgieva, B. Schermer & B-J Koops (eds.), *Sweetie 2.0. Using Artificial Intelligence to Fight Webcam Child Sex Tourism* (Cham, Springer, 2019)
- H. Hoffmann Monteiro de Castro, 'Lei 13.441/17 instituiu a infiltração policial virtual', *Consultório Jurídico*, 16 May 2017, <<https://www.conjur.com.br/2017-mai-16/academia-policia-lei-1344117-instituiu-infiltracao-policial-virtual>> accessed: 10 August 2022
- C. Kourkouli, 'The Investigative Infiltration' (2020) 12 <<http://ikee.lib.auth.gr/record/332969/files/GRI-2021-31465.pdf>> accessed: 21 May 2022
- Independent High-Level Expert Group on Artificial Intelligence set up by the European Commission (ed.), 'Ethics Guidelines for Trustworthy AI' 08 April 2019 <<https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>> accessed: 25 May 2022
- Inter-American Commission on Human Rights, 'Office of the Special Rapporteur Expresses Grave Concern about the Excessive Use of Police Force against Demonstrators and Journalists and about Arrests during Protests in Peru', 13 November 2020, <<https://www.oas.org/en/iachr/expression/showarticle.asp?artID=1190&IID=1>> accessed: 10 August 2022
- E. E. Joh, 'Breaking the Law to Enforce it: UP Participation in Crime' (2009) *Stanford Law Review* 62(1) 155-198
- E.P De Mello Lima, 'Undercover Agent: Ensure or Punish (Double Side Principle of Proportionality) (Federal University of Santa Maria, 1 December 2014)
- G. L. Kelling. R. Wasserman & H. Williams, 'Police Accountability and Community Policing' (1988) *Perspectives on Policing* 7, 2 <<https://www.ojp.gov/pdffiles1/nij/114211.pdf>> accessed: 10 August 2022
- K. L. Kinnear, *Childhood Sexual Abuse. A Reference Handbook* (2<sup>nd</sup> Edition, Santa Barbara, ABC Clio, 2007)
- J. Kleinig, *The Ethics of Policing* (Cambridge, Cambridge University Press, 1996)
- E. W. Kruisbergen, D. de Jong & E. R. Kleemans, 'UP: Assumptions and Empirical Evidence' (2011) *The British Journal of Criminology* 51(2) 394-412
- S. Kutnjak Ivković & M. R. Haberfeld, 'Exploring Empirical Research on Police Integrity', in S. Kutnjak Ivković & M. R. Haberfeld (eds.), *Exploring Police Integrity. Novel Approaches to Police Integrity Theory and Methodology* (Cham, Springer, 2019) 3-34
- Lanzarote Committee, 'Implementation Report: The Protection of Children against Sexual Exploitation and Sexual Abuse Facilitated by Information and Communication Technologies (ICTs): Addressing the Challenges by Child Self-Generated Sexual Images and Videos (2022) <https://rm.coe.int/implementation-report-on-the-2nd-monitoring-round-the-protection-of-ch/1680a619c4> accessed: 8 August 2022
- L. Levanon, 'The Law of Police Entrapment: Critical Evaluation and Policy Analysis' (2016) *Criminal Law Forum* 36-73
- Lüdi v. Switzerland, App. No. 12433/86 (ECtHR, 15 June 1992)
- P. Mahoney, 'Right to a Fair Trial in Criminal Matters under Article 6 ECHR' (2004) *Judicial Studies Institute Journal* 4(2) 107-129
- Ms. Malmström on behalf of the Commission, 13 August 2013, E-006472/2013, <[https://www.europarl.europa.eu/doceo/document/E-7-2013-006472-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-7-2013-006472-ASW_EN.html)> accessed 10 August 2022



- B. Mathews, *New International Frontiers in Child Sexual Abuse. Theory, Problems and Progress* (Cham, Springer, 2019)
- L. Miller, 'UP: A Psychological and Operational Guide (2006) *Journal of Police and Criminal Psychology* 21(2) 1-26
- Ministério da Ciência, Tecnologia e Inovações Secretaria de Empreendedorismo e Inovação, Estratégia Brasileira de Inteligência Artificial – EBIA (2021) <[https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/arquivosinteligenciaartificial/ebia-documento\\_referencia\\_4-979\\_2021.pdf](https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/arquivosinteligenciaartificial/ebia-documento_referencia_4-979_2021.pdf)> accessed: 10 August 2022
- Peru ministry of the Interior, 'Operational Guide for the Investigation of the Crime of Human Trafficking', August 2020
- B. Murphy, *Regulating U Law Enforcement: The Australian Experience* (Cham, Springer, 2021)
- P. Murphy, P. Eckersley & L. Ferry, 'Accountability and Transparency: Police Forces in England and Wales', (2017) *Public Policy and Administration* 32(3) 197-213
- OECD, 'Recommendation of the Council on Artificial Intelligence', 22 May 2021, <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>> accessed: 25 May 2022
- K. Pentney, 'Licensed to Kill...Discourse? Agents provocateurs and a purposive Right to Freedom of Expression' (2021) *Netherlands Quarterly of Human Rights* 39(3) 241-257
- M. Redmayne, 'Exploring Entrapment', in L. Zedner & J. V. Roberts, *Principles and Values in Criminal Law and Justice Essays in Honour of Andrew Ashworth* (Oxford, Oxford University Press, 2012) 157-170
- Reglamento de Circulación y Entrega Vigilada Bienes Delictivos y Agente Encubierto (Aprobado por Resolución No 729-2006-MP-FN del 15 de junio del año 2006).
- Regulation (EU) 2016/ 794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/ 371/ JHA, 2009/ 934/ JHA, 2009/ 935/ JHA, 2009/ 936/ JHA and 2009/ 968/ JHA [2016] OJ L135/ 53
- N. M. Richards, 'The Dangers of Surveillance' (2013) *Harvard Law Review* 126, 1934-1965
- C. Rigotti & A. Calvi, 'Privacy', in G. Comandè (ed.), *Elgar Encyclopedia of Law and Data Science* (Cheltenham, Edward Elgar Publishing, 2022) 275-280
- M. V. Rodríguez Caro, 'La Infiltración Policial: En el Límite del Estado de Derecho. El Inminente Agente Encubierto Informático' (*Noticias Jurídicas*, 11 June 2015) <<https://noticias.juridicas.com/conocimiento/articulos-doctrinales/10222-la-infiltracion-policial:-en-el-limite-del-estado-de-derecho-el-inminente-agente-encubierto-informatico/>> accessed: 10 August 2022
- J. E. Ross, 'Impediments to Transnational Cooperation in UP: A Comparative Study of the United States and Italy' (2004) *The American Journal of Comparative Law* 52(3) 569-623
- A. Sarlas, 'The Legal Limits of Investigative Infiltration' (2019) 38-39 <<https://pergamos.lib.uoa.gr/uoa/dl/frontend/file/lib/default/data/2935716/theFile>> accessed: 21 May 2022
- T. G. Shipley & A. Bowker, *Investigating Internet Crime. An Introduction to Solving Crimes in Cyberspace*, (Amsterdam, Syngress, 2014)
- T. Søbirk Petersen, *Why Criminalize? New Perspectives on Normative Principles of Criminalization* (Cham, Springer, 2020)
- D. Squires, 'The Problem with Entrapment' (2006) *Oxford Journal of Legal Studies* 26(2) 351-376
- L. Stariene, 'The Limits of the Use of [UAs] and the Right to a Fair Trial under Article 6(1) of the European Convention on Human Rights' (2009) *Jurisprudence* 3(117) 263-284



- Statewatch, 'EU: New Information on UP Networks Obtained by German Parliamentary Deputies', 20 February 2015, <<https://www.statewatch.org/news/2015/february/eu-new-information-on-up-networks-obtained-by-german-parliamentary-deputies/>> accessed: 10 August 2022
- V. Steeves & V. Piñero, 'Privacy and Police Powers: Situating the Reasonable Expectations of Privacy Test' (2008) *Canadian Journal of Criminology and Criminal Justice* 263-269
- Supreme Federal Tribunal, HC 147837 / RJ, 26 February 2019, Ministro Gilmar Mendes
- D. M. Tanovich, 'Rethinking the *Bona Fides* of Entrapment' (2011) *UBC Law Review* 43(2) 417-446
- Texteira de Castro v. Portugal, App. No. 25829/94 (ECtHR, 9 June 1998)
- S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005)
- UN Special Representative on Violence against Children, 'Releasing Children's Potential and Minimizing Risks. ICTs, the Internet and Violence against Children' (2016) <<https://www.un-ilibrary.org/content/books/9789210582841/read>> accessed: 8 August 2022
- UNESCO, 'Recommendation on the Ethics of Artificial Intelligence', 23 November 2021, 17-20, <<https://en.unesco.org/artificial-intelligence/ethics>> accessed 25 May 2022
- UNODC, *Global Report on Trafficking in Persons 2020* (2020) <[https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP\\_2020\\_15jan\\_web.pdf](https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf)> accessed: 8 August 2022
- UNODC, 'Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children' (2015) <[https://www.unodc.org/documents/Cybercrime/Study\\_on\\_the\\_Effects.pdf](https://www.unodc.org/documents/Cybercrime/Study_on_the_Effects.pdf)> accessed: 8 August 2022
- G. Urbas 'Protecting Children from Online Predators: The Use of Covert Investigation Techniques by Law Enforcement' (2010) *Journal of Contemporary Criminal Justice* 26(4) 410-425
- N. Van Dijk, S. Casiraghi & S. Gutwirth, 'The "Ethification" of ICT Governance. Artificial Intelligence and Data Protection in the European Union', *Computer Law & Security Review*, 2021, Vol. 43 [doi.org/10.1016/j.clsr.2021.105597](https://doi.org/10.1016/j.clsr.2021.105597)
- T. T. Vendius, 'Proactive UP and Sexual Crimes against Children on the Internet' (2015) *The European Review of Organised Crime* 2(2) 6-24
- M. E. Ventura Robles, 'El Sistema Interamericano de Protección de los Derechos Humanos' (2016) *Revista do Instituto Brasileiro de Direitos Humanos* 14, 245-261
- Veselov and others v. Russia, App. no. 23200/10, 24009/07 and 556/10 (ECtHR 2 October 2013) 88-93
- J. Wachtel, 'From Morals to Practice: Dilemmas of Control in UP' (1992) *Crime, Law & Social Change* 18, 137-158
- L. Westmarland & S. Conway, 'Police Ethics and Integrity: Keeping the 'Blue Code' of Silence' (2020) *International Journal of Police Science and Management* 22(4) 378-392
- I. Wieczorek, *The Legitimacy of EU Criminal Law* (Oxford, Hart Publishing, 2020)