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**THE PHENOMENON OF ONLINE LIVE-STREAMING OF
CHILD SEXUAL ABUSE: CHALLENGES AND LEGAL RESPONSES**

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**THE PHENOMENON OF ONLINE LIVE-STREAMING OF
CHILD SEXUAL ABUSE: CHALLENGES AND LEGAL RESPONSES**

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Submitted by: DUSHI DESARA

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“Our lives begin to end the day we become silent about things that matter.”

Martin Luther King, JR.

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Abstract

In the recent years, the importance of Internet in the education of children all over the world has grown enormously. But as every other phenomenon, the easy access to the Internet creates a great number of concerns that should not be neglected. Over the past two decades, the internet has become a new medium through which child exploitation and sexual abuse happens. Technology is being used not only as a means of committing old forms of sexual abuse and exploitation of children, but also for creating new ones. This variety of crime types ranges from child pornography, sexting and sextortion to online grooming, and live-streaming of child abuse.

This dissertation focuses on a very current, fast developing, and not very explored topic, the phenomenon of live-streaming of child abuse. The research includes a perspective of (public) international law, the situation in Europe due to the activities of the Council of Europe and the EU and also a “reality” test with two legal system approaches, Italy and England & Wales, on how to handle online child sexual abuse material and more specifically live-streaming of such abuses. On the basis of this observation, the main objective is to critically analyze the status quo of existing framework in the area of online child sexual abuse and exploitation in order to find out how flexible it is to be applied to this specific crime, if it can be applied, and how can it be improved in order to better respond to this new global reality. Based on all of this I draw conclusions over the insufficiency of existing framework to cover the crime of live-streaming of child abuse and plead for filling the legal lacunae by extending specific criminal provisions -ideally harmonized on an international level- specially made to tackle this crime.

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LIST OF ABBREVIATIONS

AI	Artificial Intelligence
ACPO	Association of Chief Police Officers
AVMSD	The Audiovisual Media Services Directive
Budapest Convention	Council of Europe Convention on Cybercrime
CEOP	Child Exploitation and Online Protection Centre
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COPINE	Combating Paedophile Information Networks in Europe
CPS	Crown Prosecution Services
CRC/UNCRC	The United Nations Convention on the Rights of the Child
EIO	European Investigation Order
EU	European Union
EU Directive	2011/93/EU Directive on combating sexual abuse, sexual exploitation of children and child pornography
EC	European Commission
ECHR	European Court of Human Rights
ECtHR	European Charter of Human Rights
ECPAT	End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes
FBI	Federal Bureau of Investigation
GDPR	General Data Protection Regulation
gTLD	generic Top Level Domain
IANA	The Internet Assigned Numbers Authority
ICANN	The Internet Corporation for Assigned Names and Numbers
ICT	Information and Communication Technologies
ICMEC	International Centre for Missing & Exploited Children

ILO Convention	The International Labour Organization No. 182 Worst Forms of Child Labour Convention
I2P	The Invisible Internet Project
IP	Internet Protocol
IPv4	Internet Protocol version 4
IPv6	Internet Protocol version 6
ISP	Internet Service Provider
IWF	Internet Watch Foundation
Lanzarote Convention	Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
LED	Data Protection Directive for Police and Criminal Justice Authorities
MLA	The European Convention on Mutual Legal Assistance in Criminal Matters
NCA	UK National Crime Agency
NCMEC	National Center for Missing & Exploited Children
NGO	Non-Governmental Organization
OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
P2P	Peer-to-Peer
PC	Penal Code
PCSE	The Committee of Experts on the Protection of Children Against Sexual Exploitation and Sexual Abuse
SNS	Social Networking Sites
Tor	The Onion Router
UK	United Kingdom
UN	United Nations
URL	Uniform Resource Locators
US	United States
VGT	Virtual Global Taskforce
VoIP	Voice over IP applications
WTO	World Tourism Organization

3G

Third-generation technology

4G

Fourth-generation technology

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INTRODUCTION

The exploitation of children as sexual objects is not a new phenomenon. It began with early erotic paintings and then photographs depicting children. The production of pornography in the modern sense began with the invention of the camera in the early nineteenth century. From that period onwards, the production and trade in images with child sexual abuse content began to take place.¹ However, during this period, child pornography was limited, the images were produced locally and they were expensive and difficult to obtain. In the 1960s, weak censorship standards resulted in a considerable increase in the production of pornographic images of children, and during the late 1970s, approximately 250 child pornography magazines were circulating in the United States (US), most of them imported from Europe.² At the same time, however, law enforcement agencies were managing to successfully track down and combat this kind of child abuse material. Complications began with the invention of the Internet in the 1980s, just a few years after the invention of the digital camera in 1975. Only a decade after its invention, pedophiles started making use of the Internet and digital cameras to share sexually explicit content involving children.³ The possibility of transferring photographs from digital cameras to the computer, of communicating across borders, and of doing so anonymously dramatically changed the scale and nature of child pornography and, with it, the scale and nature of child abuse itself, since the two are closely interrelated. The exploitation of new technologies by offenders increased the obstacles to investigating and preventing online sexual exploitation of children.

The Internet gave child pornography and child sexual exploitation a completely new dimension. Now it is not only easy to access and download images and videos with a child sexual abuse content which have been produced in another city, country or continent, but it is even possible to view the live-stream/transmission of a child being sexually abused without even needing to download the stream – in other words, as if one were watching a live TV show. But unlike a live TV show, whose stream gets recorded and saved and can be made publicly

¹ Tyler, R. P., & Stone, L. E. (1985) Child Pornography: Perpetuating the Sexual Victimization of Children. *Child Abuse & Neglect*, 9(3), 313-318; Tate, T. (1990) *Child Pornography: An Investigation*. London: Methuen.

² Crewdson, J. (1998) *By Silence Betrayed: Sexual Abuse of Children in America*. Boston: Little Brown.

³ Akdeniz, Y. (2008) *Internet Child Pornography and the Law: National and International Responses*. Ashgate, Routledge.

available, in the case of live-streaming of child abuse the stream disappears as soon as it is over and no data identifying the viewers is recorded either, making it very difficult for it to be further investigated if it is not detected in real time.

The modernization of Information and Communication Technology (ICT) has produced an unprecedented flow of child sexual abuse material across international borders. The investigation of such large-scale crime gives rise to many jurisdictional problems, considering that jurisdiction on criminal matters, based in international law, is the power of a state to exercise its sovereignty to criminalize conduct.⁴ This criminal jurisdiction is mainly based on the principle of territoriality, meaning that a country can exercise criminal jurisdiction over cases when the actions are caused or done within the territory of that country.⁵ For successful investigations of cases concerning online sexual abuse and sexual exploitation of children, a cross of jurisdictional boundaries is a must in almost all the cases. Local law enforcement agents may uncover evidence relating to wider investigations taking place - or perhaps still unnoticed - in other jurisdictions. Alternatively, they may receive information from other law enforcement agencies about offenders located within their own jurisdiction. For this reason, inter-jurisdictional cooperation is unavoidable. Thus, it is important that all countries develop and implement international and European cooperation strategies for dealing with the problem.

State of the Art and Open Challenges

The legal situation regarding Internet is far from clear and fixed. Its global and borderless nature creates many difficulties when it comes to legislation, especially criminal law which is historically associated with national borders. It gets complicated when dealing with cases within a borderless environment such as the Internet. In such cases an international approach is advisable and regional and international cooperation is essential. The lack of clear legal definitions and the disparities in legal provisions creates many controversies that hinder European and international cooperation. The rapid evolution of Information and Communication Technology and other technical problems makes the investigation of online live-streaming of child sexual abuse and the creation of appropriate strategies very difficult.

⁴ Gillespie, A. A. (2012a) Jurisdictional Issues Concerning Online Child Pornography. *International Journal of Law and Information Technology*. Vol. 20. Nr. 3. 151-177. Pg. 153.

⁵ For further information on jurisdictional issues based on International Law refer to Shaw, M.N. (2008) *International Law*. 6th Edition. Cambridge: Cambridge University Press. Pg. 645-696.

As a result of technological development, there has been an increase not only in videos and images of child sexual abuse and exploitation, but also in the more recent phenomenon of live-streaming of child sexual abuse. As statistics from EUROPOL's European Cybercrime Center (EC3) reveal, the live-streaming of child sexual abuse is no longer a mere trend but a global established reality,⁶ which is here to stay and put down deep roots if it is not addressed quickly and effectively. This phenomenon involves using a webcam to broadcast the real-time abuse of a child who is being forced to engage in sexual acts or is being subjected to sexual abuse for the gratification of an offender who typically pays to view or requests particular types of abusive acts to be perpetrated in real-time. The offenders usually gain access to the child through intermediaries or facilitators, which may sometimes even be the child's own family or community members who force the child to perform in front of the webcam. The facilitators are usually remunerated by means of common legitimate payment services, but other payment means such as blockchains are expected to start being used as well⁷. The payment transactions are generally small so as not to arouse suspicion. There are also many instances of live-streaming of a non-commercial nature. In these cases, the abuse occurs for the sexual gratification of both the abuser and the viewer of the abuse, both being child sex offenders, differently from the commercial live-streaming of child abuse, when the facilitator does not necessarily have sexual interests on the child, but is driven from commercial interests. A number of different platforms are used to broadcast the live-stream and the broadcast does not get recorded, saved or downloaded.

There are a number of international and European instruments which apply in this area of crime, such as the UN Convention on Rights of the Child Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) as well as the Convention on Cybercrime (Budapest Convention), the European Union (EU) Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography and the International Labour Organization (ILO) No.182 Convention on Worst Forms of Child Labour. However, none of these international and European legal frameworks explicitly criminalizes the phenomenon of live-streaming of child sexual abuse. Nevertheless, in some legal instruments the act of engaging in "pornographic performances" is criminalized. For instance, Article 21 of the Lanzarote Convention criminalizes the act of

⁶ European Financial Coalition against Commercial Sexual Exploitation of Children Online (2014) European Financial Coalition Strategic Assessment 2014. Pg. 22

⁷ Europol (2016) Internet Organized Crime Threat Assessment, IOCTA 2016.

causing and coercing a child to engage in pornographic performances as well as knowingly attending child pornographic performances. The ILO Convention 182, in its Article 3 criminalizes the use, procuring or offering of a child for [...] pornographic performances. Similarly, Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography criminalizes the act of offering, delivering or accepting by whatever means, a child for the purpose of sexual exploitation.

These legal provisions could to some extent be interpreted as applicable to the live-streaming of child sexual abuse. But how effective would these provisions be, in conjunction with provisions criminalizing online child pornography in preventing and punishing offenders and their facilitators? Are they sufficient?

Little or no research has been conducted on this issue, either in legal studies or any other related field. Thus, there is no literature on the causes of the phenomenon and the legal responses to it, and many questions remain unanswered. This is both the reason behind the focus of the study on this specific issue of online child sexual abuse and exploitation and one of the main constraints faced. This study argues for a more stringent legal framework specifically addressing the live-streaming of child sexual abuse, and the need for further legal and interdisciplinary research in the field, setting out a future research agenda of unsolved issues in this domain.

Research Questions

Ensuring online child protection from sexual abuse and exploitation by child predators has become a major concern for many societies. But regulating online child protection and safety is not as easy as raising the profile of this topic in the domestic agenda. The global characteristics of the Internet has led to the globalization of potential risks of online sexual abuse and exploitation of children as well. The Internet allows abusers to operate globally in disregard of borders. Thus, also the legal regulation of online child safety and protection includes a wide variety of stakeholders, both national and international, public and private, making online child protection even more complicated.

Many authors from scientific disciplines ranging from law and philosophy to media studies, psychology and even information technology studies have dealt with the variety of issues related to online child safety and online child sexual abuse, and have developed both empirical and theoretical approaches to the issue, thus creating a wide range of multi-disciplinary

literature on this complex topic. Akdeniz, Livingstone, Gillespie, Carr, van der Hof, Wolak and Finkelhor, to mention but a few, have all produced valuable academic research on the matter.⁸ However, the legal regulation of the crimes of sexual abuse and exploitation of children on the Internet, remains an unresolved and complex issue. Online sexual abuse and exploitation of children involves a variety of criminal offences, from child pornography, sexting and sextortion to online grooming, and live-streaming of child abuse.

In this thesis, I treat the issue of live-streaming of child abuse as the newest form of child sexual exploitation and the least studied phenomenon created from the wide opportunities that Internet offers to malicious users. The purpose of this research is to conduct both a vertical and horizontal analyses of the criminalization of online child sexual abuse and exploitation in supranational law and in the legislation of two EU Member States, and to study the extent to which existing legal frameworks can be applied to the crime of live-streaming of child abuse. On the basis of this analysis, my main aim is to critically examine current international and European frameworks on online sexual abuse and exploitation of children in order to determine whether it is sufficiently flexible to cover this specific crime, whether it is feasible to apply it to online live-streaming of sexual abuse of children, and how the law and policy can be improved to provide a better response to this new global reality.

For a deeper understanding of the issue, a comparative analysis between the legislation of three European countries was made, specifically: Italy, and England & Wales. The reasons for the choice of these jurisdictions are set out in the Methodology section. The legal frameworks of these countries were analyzed both in terms of substantive law, mainly focusing on substantive criminal law, and in terms of its application in case law.

Given the multidisciplinary dimension of this research, the issues that were covered include legal frameworks, regulations and standards, international cooperation and technical challenges and requirements. The problem of online live-streaming of sexual abuse and exploitation of children is approached in an interdisciplinary way, having as key themes the legal, technology and law enforcement response. Based on this perspective, the main research question addressed by this study is:

⁸ See for example: Akdeniz, Y. (2008); Livingstone, S., Carr, J. and Byrne, J. (Nov. 2015) One in Three: Internet Governance and Children's Rights. Global Commission on Internet Governance, Paper Series No. 22.; Gillespie, A. A. (2012a).; Carr, J. (2004) Child Abuse, Child Pornography and the Internet. NCH Online; Schermer, B.W., Georgieva, I., Van der Hof, S. and Koops, B.J. (2016) Legal Aspects of Sweetie 2.0. Leiden/Tilburg: Center for Law and Digital Technologies (eLaw) / Tilburg Institute for Law Technology and Society (TILT).; Wolak, J. And Finkelhor, D. (2016) Sextortion: Findings from an Online Survey about Threats to Expose Sexual Images, CACRC.

To what extent is regulation in place addressing the problem of live-streaming of child sexual abuse? Is the current legal system adequate for the effective criminalization of this phenomenon?

In order to address this question, analysis of the current supranational, European and national legal frameworks is conducted. The aim is to assess whether - and how - live-streaming is criminalized in supranational and European legislation and how such legislation as exists, is enforced into the domestic legal frameworks in Italy and England & Wales. The ultimate objective is to understand, should there prove to be no specific legislation in place covering the live-streaming of child sexual abuse, whether and to what extent the existing legal framework applying to child pornography, sexual abuse and sexual exploitation can be used to criminalize live-streaming of child sexual abuse or whether the laws need to be changed in order to address the crime more specifically.

Structure of the Research

In accordance with the research question as defined and its scope and focus, the thesis is divided into four chapters. The first chapter contains a general presentation of the crime of live-streaming of child sexual abuse from an interdisciplinary perspective, including the sociological, psychological, technical and legal contexts. The second chapter of the thesis focuses on the legal response at international and European level to the offence of live-streaming of sexual abuse and exploitation of children on cyberspace. For this purpose, an analysis of the international and European treaties and other legal instruments related to child pornography, child sexual abuse and exploitation was carried out. The main objective of this section is to explore to what extent international and European frameworks on sexual exploitation of children criminalize, if at all, the live-streaming of sexual abuse of children, to what extent the existing crime descriptions and definitions within substantive criminal law can be applied to this phenomenon and whether these laws can be interpreted in such a way as to include acts related to live-streaming of child sexual abuse?

The third chapter of the study comprises an assessment of domestic legal frameworks of Italy and England and Wales. It focuses on recent amendments to the national legislations of these countries to reinforce the criminalization of online child sexual abuse and exploitation, and the way these amendments can be applied to acts involving the live-streaming of child

abuse. This part of the thesis analyses the way international and European legal frameworks related to online child sexual abuse and exploitation are applied in these jurisdictions.

The final chapter of the study deals with the response to the live-streaming of child sexual abuse. To be really effective, even a tightly-drawn legislative framework is not enough in itself. In this chapter I touch briefly upon the question as to whether the legal frameworks of the countries analyzed in this research allow undercover investigation and/or the use of advanced technological tools/methods for the investigation and prosecution of cases involving the live-streaming of child sexual abuse. And if they do, to what extent? Furthermore, in this chapter I also touch upon the Internet Service Providers (ISP) responsibility regarding data retention and data preservation for criminal investigations, and the duty of ISPs to cooperate with law enforcement agencies regarding e-evidence in criminal investigations under the new European Union (EU) and Council of Europe (CoE) proposals for legislation on the matter. The thesis concludes with recommendations for the adoption of legislation and consideration of areas to be addressed by future research.

Research Methodology

The main methodology used for this study is legal analysis, with two case studies and a comparative law approach. The status quo of the rules and the deficits in existing legislation are analyzed in order to assess whether these rules cover this new type of online crime. It is then demonstrated why, in the author's view, these rules are insufficient to cover this new criminal behaviour, and why the author pleads to introduce a new legal rule specifically for the crime of live-streaming of child sexual abuse, which would ideally be harmonized on an international level.

Since the crime studied is inherently international in nature, with technology making it possible to ignore borders of all kinds, the first two chapters of the study are not culturally or geographically specific but encompass a "beyond-nations" research in order to explore the international characteristics and challenges of the problem. Therefore, the first chapter, which is intended to provide background information, covers literature from the fields of social sciences (including criminology, sociology and psychology) in order to embed my legal research into the relevant empirical context. Then, returning to the main focus of the legal research, the second chapter begins with a legal analysis of the international and European legal instruments relating to online sexual abuse and exploitation of children.

Following on from the assessment of international and European harmonization efforts to combat the sexual abuse and sexual exploitation of children, the research continues with two case studies and partially comparative legal analysis. Therefore, this part of the research is more in-depth assessment of national approaches of two specific European jurisdictions: that of Italy and of England and Wales. The selection criteria used in choosing these jurisdictions is based on geographic location, the type of legal system and the incidence of live-streaming of child sexual abuse. With regard to geographic location, the intention was to focus on two European Union Member States: one common-law versus and one civil-law in order to achieve a broader comparison of possible legal approaches. England and Wales were chosen as a common-law jurisdiction and because of the exemplary legal developments there in the field of cybercrime, namely the adoption of strict legislation on online child abuse and exploitation, and the continuous attempts to improve that legislation. Even though the United Kingdom (UK) after Brexit will no longer be part of the European Union, the observation of the reactions of the legal system to the new phenomenon of live-streaming of child sexual abuse under the framework of being bound by EU law and lessons to be learnt from it for the general approach, justify the present selection.

The UK is, perhaps, one of few countries to have abolished the criterion of dual criminality for sexual offences involving children, when perpetrators of these crimes are tried under extraterritorial jurisdiction.⁹ Based on the Criminal Justice and Immigration Act 2008, if a UK National commits an act outside the UK, and the act, if committed in England and Wales or Northern Ireland would constitute a sexual offence, including offences of sexual abuse and sexual exploitation of children, the UK national is guilty in that part of UK of that sexual offence.¹⁰ This means that the fact that country where the crime was committed may not criminalize acts of child sexual abuse and sexual exploitation, does not prevent a UK national from being criminally liable in UK for the crime committed in that country.

Italy was chosen as an interesting case based on the recent legal developments in the Italian domestic legislation and case law regarding protection from online child sexual abuse, more specifically, attempts to criminalize acts of live-streaming of child abuse material under prostitution laws, disregarding the lack of physical contact between the offender and the victim,

⁹ Hillman, H. et al. (2014) Online Child Exploitation: Challenges and future research directions. Hillman, H., Hooper, C., & Choo, K.-K. R. (2014). Online child exploitation: Challenges and future research directions. *Computer Law & Security Review*, 30(6), 687–698.

¹⁰ Criminal Justice and Immigration Act 2008. Section 72(1); Sexual Offences Act (2003) Schedule 2: Sexual offences to which section 72 applies.

as will be treated in the third chapter. Moreover, Italy does not require the verification of double criminality for punishing those who organize travel abroad with the specific purpose of exploiting children in prostitution,¹¹ – otherwise known as child sex tourism – a crime that, as will be explained throughout this study, is the ancestor of the crime of live-streaming of child sexual abuse. Italy has also waived the criteria of double criminality for surrender requests pursuant to a European Arrest Warrant¹² for crimes committed by Italian citizens abroad, when the acts do not constitute a crime under the Italian legislation, but the Italian citizen could have known that those acts constitute a crime in the EU Member State where he/she committed those criminal acts, if those acts are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years.¹³ Therefore, an Italian citizen can be surrendered to a Member State for committing a sexual offence against children, if that offence is punishable for a minimum of three years, irrespective of the double criminality criteria.

It should be noted that Italy ratified the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) - one of the most important international instruments in the fight against sexual abuse and exploitation of children - in 2013. The UK signed the Convention since in 2008 but ratified it only on 20 June 2018, during the finalization of this thesis. In this view, a comparison between these two countries was thought appropriate, in order to show how the fact of being a State Party to the Lanzarote Convention, or not, affects the national fight against the sexual abuse and exploitation of children and how it affects international cooperation in the fight against this type of crime. In fact, Italy and the United Kingdom participate in the majority of international investigations of child pornography and live-streaming of child abuse,¹⁴ with extensive cooperation between the law enforcement agencies of these countries in the investigation and successful prosecution of these cases.

¹¹ Legge 3 Agosto 1998, n. 269 "Norme contro lo sfruttamento della prostituzione, della pornografia, del turismo sessuale in danno di minori, quali nuove forme di riduzione in schiavitù". Article 5.; Working Group on the Convention on the Rights of the Child (2001) *The Rights of Children in Italy: Perspectives in the Third Sector*. Supplementary Report to the United Nations. Rome.

¹² Under the Framework of Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA).

¹³ Legge 22 aprile 2005, n. 69 "Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri". Art. 8

¹⁴ For further information of cases of cooperation among the countries refer to Europol news: <https://www.europol.europa.eu/newsroom>

Several research methods were used for this study, the main ones being desk research, literature study and case law analysis. The second chapter of the thesis also includes a legal analysis of international and European legal frameworks. The research for the third chapter is based on case studies and comparative analyses of national legal frameworks, and desk research of academic work and publicly available documents, reports, case law and legal doctrine.

Throughout the text of this thesis reference is made to the term ‘child pornography’ in order to remain consistent with international and European frameworks which still use this inadequate, stigmatizing term. The use of this term does not imply that the author endorses its appropriateness for referring to such heinous crimes against the most vulnerable members of our society. The author strongly recommends that this term should not be used since it falsely suggests that such activities are normal and acceptable, and somehow insinuates consent on behalf of the child to be part of the abuse,¹⁵ therefore trivializing the abuse. Children cannot consent to their own sexual abuse. The use instead of the term ‘child abuse material’ or ‘child sexual abuse material’ is a much clearer description of the essential nature of the content: namely, the sexual abuse of the child.¹⁶ Child sexual abuse cannot and should not be treated as pornography.¹⁷

This analysis of international, European and national frameworks highlights the need for clear national and international definitions and a specific stand-alone provision criminalizing the live-streaming of child sexual abuse, as the lack of consistency in the international legislative environment creates opportunities for the cross-border sexual abuse and sexual exploitation of children. This becomes crucial especially in the case of an Internet based crime like the live-streaming of child sexual abuse, which poses many challenges to the traditional concept of jurisdiction in respect of crimes. Lack of consistency in the international legislative environment hinders international cooperation in the investigation and prosecution of the perpetrators of this crime. Therefore, in this thesis, I argue that the inclusion of clear and

¹⁵ See CNN interview with Dr. Susanna Greijer on Terminology Guidelines on the Sexual Abuse and Sexual Exploitation of Children on 31 August 2018 available at: <https://edition.cnn.com/2018/08/31/world/child-sex-trafficking-language/index.html>; Interagency Working Group in Luxembourg (2016) Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse, ECPAT International and ECPAT Luxembourg. Pg. 38-40.

¹⁶ Interagency Working Group in Luxembourg (2016) Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse, ECPAT International and ECPAT Luxembourg. Pg. 35-40.

¹⁷ Ibid.; Frangez, D. et al. (2015) The Importance of Terminology Related to Child Sexual Exploitation. Journal of Criminal Investigation and Criminology. Vol. 66. No. 4. Ljubljana. Pg. 291-299.

explicit provisions which outlaw the live-streaming of child sexual abuse as a form of cybercrime, are the best and most effective legal response towards such acts.

CHAPTER 1

IDENTIFYING AND DESCRIBING THE PROBLEM

A. DEFINING ONLINE CHILD SEXUAL ABUSE AND SEXUAL EXPLOITATION

There is no single definition of pornography in laws, resulting also in the lack of such a definition which could be used in an international multi-dimensional environment such as the internet. Cultural, moral and legal differences make it very difficult to construct a common legal definition of pornography on the Internet which could be unanimously accepted by all countries and societies. What is considered pornographic and unlawful in Italy, may well be considered lawful in the United Kingdom. Even more difficulties arise when it comes to formulating a definition of child pornography, considering the differences in the definition of ‘child’ and the age of consent for engaging in sexual activities among nations.

The concern to protect children from sexual abuse and exploitation is a relatively new one. Until the 1880s the age of consent for engaging in sexual activity for girls in the United States was only 10 years.¹⁸ Currently, child pornography is considered illegal almost everywhere: a rare case of unanimous agreement by a large number of countries. However, the situation is different in the online environment, which makes regulation particularly challenging, a challenge which will be addressed further in this chapter.

In the 1990s, sexual exploitation was defined as “a practice by which person(s) achieve sexual gratification or financial gain or advancement through the abuse of a person’s sexuality by abrogating that person’s human right to dignity, equality, autonomy and physical and mental well-being”.¹⁹

The underlying problem in defining child sexual exploitation and child pornography is the ambiguity of the terminology. Many countries lack a clearly identifiable measurement of the definition of ‘child’ which makes it difficult to establish an international standard definition of

¹⁸ Jenkins, P. (2001) *Beyond Tolerance: Child Pornography on the Internet*. New York and London: New York University Press. Pg. 26.

¹⁹ Edwards, L. (2009) *Pornography, Censorship and the Internet*. In L. Edwards, & C. Waelde (Eds.), *Law and the Internet*. 3rd ed. Oxford. Pg. 623-670.

‘child pornography’ and ‘child sexual exploitation’. Today, the legal age at which a person can consent to engaging in sexual activity still varies from country to country, posing a huge challenge for the harmonization at international level of child protection from sexual abuse and exploitation, both online and offline. Even if the same definition of ‘child pornography’ and ‘child sexual exploitation’ existed in all countries, the differences in the age of consent would still cause many jurisdictional obstacles and problems with dual criminality in cross-borders investigations. While a person under the age of 18 may be able to freely consent to sexual relations, that person cannot be deemed legally able to consent to any form of sexual exploitation, including child pornography.

Moreover, in cross-border cases which require “dual criminality” - when a crime committed abroad must also be a crime in the offender’s home country in order for him/her to be prosecuted in his/her home country - agreement on a common age for the definition of “child” is crucial. There can be no agreement if the countries involved define “child” differently. These differences favour child sex offenders by preventing their prosecution in cases involving victims of an age that is considered appropriate for engaging in sexual activities in one country but not in the other. For example, a British citizen who produces pornographic material involving a 15-year-old Italian girl in Italy can escape the law because the legal age for engaging in sexual activities in Italy is 14 years old, despite that age being 16 years old in UK. For these reasons, “child,” for purposes of legislation concerning child pornography, child sexual abuse and sexual exploitation legislation, should mean “anyone under the age of 18 years” as defined in the United Nations Convention on the Rights of the Child.

Currently the most recognized and commonly used term to describe child sexual exploitation is ‘child pornography’.²⁰ However, recently there has been a global move towards using other more specific terms such as “child sexual abuse material,” “child sexual abuse content,” and “child sexually exploitative material,” which more clearly reflect the abuse involved.²¹

There is a tendency among researchers carrying out quantitative research, to create many age group categories in order to produce more accurate age-based results regarding to what age

²⁰ Janis Wolak et al. (2005) Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study VII. n.1. National Center for Missing & Exploited Children.

²¹ International Centre for Missing and Exploited Children (2016) Child Pornography: Model Legislation and Global Review. 8th Edition. ICMEC.; Interagency Working Group in Luxembourg (2016) Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse, ECPAT International and ECPAT Luxembourg. Pg. 35-40.; Frangez, D. et al. (2015) The Importance of Terminology Related to Child Sexual Exploitation. Journal of Criminal Investigation and Criminology. Vol. 66. No. 4. Ljubljana. Pg. 291-299.

groups are more at risk and more vulnerable.²² Some researchers go even further and refer to a third age group above the other two, 18-25 years old, defining this as a phase between teenage and adulthood.²³ However, these age separations are used only for research purposes and do not correspond to any legal definitions of “child”.

The legal age of consent is a clear indicator of how every country perceives adulthood and the age at which a child is assumed to understand what is right or wrong. The age of consent for engaging in sexual activities differs widely from one country to another. It ranges from as low as eleven years of age in certain underdeveloped nations (such as Nigeria)²⁴ to as high as twenty-one (in Bahrein)²⁵. In some countries, generally Muslim countries, there is no legal age of consent but all sexual relations outside marriage are forbidden,²⁶ and there are no laws limiting the age at which a person may get married,²⁷ which raises many other issues related to child marriage, which are out of the scope of this study. In European Union Member States, the age of consent for engaging in sexual activities ranges between 14 and 16. It is 14 in Italy and 16 in the United Kingdom.²⁸

B. THE SCALE OF ONLINE CHILD SEXUAL ABUSE AND SEXUAL EXPLOITATION

The sexual abuse and sexual exploitation of children is a heinous crime. Millions of children around the world are sexually exploited or abused every day. There is no country or region which is immune to this abominable phenomenon. Technological evolution and, in particular, the emergence of the World Wide Web, gave rise to a huge increase in the production and distribution of child sexual abuse images.²⁹ Before the Internet existed, child sexual abuse images were very difficult to obtain in most countries. Someone wishing to obtain such images had to have the right connections or take significant risks.³⁰ Those were the times when an

²² See for example: Livingstone, S. and Haddon, L. (2009) EU Kids Online: Final Report 2009. EU Kids Online, Deliverable D6.5. EU Kids Online Network, London, UK.; Livingstone, S., & Helsper, E. (2007). Gradations in digital inclusion: children, young people and the digital divide. *New Media & Society*, 9(4), 671–696.

²³ See: Jeffrey Jensen Arnett. (2000) Emerging Adulthood: A Theory of Development from the Late Teens through the Twenties. *American Psychologist* Vol. 55(5) 469-480. Pg. 469

²⁴ See: Age of Consent & Sexual Abuse Laws Around the World, <https://www.ageofconsent.net/> last visited (2008/2018) The lowest age of consent 11 years of age, is registered in Nigeria.

²⁵ Ibid.

²⁶ Ibid. See Afghanistan, Iran, Pakistan, United Arab Emirates, etc.; See Mirror News: <http://www.mirror.co.uk/news/uk-news/what-age-consent-around-world-2802173> last visited (17/02/2017)

²⁷ See Mirror News: <http://www.mirror.co.uk/news/uk-news/what-age-consent-around-world-2802173>

²⁸ Age of Consent & Sexual Abuse Laws Around the World, <https://www.ageofconsent.net/>

²⁹ Carr, J. (2004) Child Abuse, Child Pornography and the Internet. NCH Online.

³⁰ Carr, J. (2010) The Internet Dimension of Sexual Violence Against Children. In: *Protecting Children from Sexual Violence: A Comprehensive Approach*, Council of Europe, pg. 278.

offender was found, on arrest, to be in possession of “only” a handful of images,³¹ that never passed the hundreds. Based on the Interpol’s knowledge, before the Internet, the estimate number of child abuse images was around 4000 in total.³² For this reason, at that time child pornography was described as “a cottage industry”.³³ Today, instead, it has become a global industry worth millions of dollars.³⁴ Arrested suspects now tend to possess thousands of child abuse images. In 2016, an arrested man in Ireland possessed over 16,000 images and 300 videos of child abuse material.³⁵ Whereas in a global operation on 2007-2010, an arrested man in the United Kingdom had 60,000 child abuse images in his possession.³⁶

Part of this “sex industry” is also the online circulation, distribution, production, offering, possession and live-streaming of child pornography, created from real life child sexual abuse. Nowadays, thousands of images of sexually abused children exist on internet, with the identity of most of the children remaining unknown and the abuse probably still continuing. Behind each of those images is a crime scene involving a real child victim. This is probably the most dangerous consequence for society of widespread Internet access. While it is impossible to say that the overall effect of the internet is the growth of child sexual abuse, it is obvious that it has had an enormous impact in the growth and expansion of sexual abuse and sexual exploitation of children by facilitating the commitment of existing forms and creating wholly new forms of these crimes.³⁷

In 2016, the Internet Watch Foundation reported to have found 57,335 Uniform Resource Locators (URLs) containing child sexual abuse images,³⁸ and the number increased to 78,589 URLs in 2017.³⁹ 33% of the detected images depicted sexual abuse activity between adults and

³¹ Ibid.

³² Ibid.

³³ Utting, Sir William (1997) *People like us: Report of the Review of the Safeguards for Children Living Away from Home*. London: The Stationery Office.

³⁴ Carr, J. (2010) *The Internet Dimension of Sexual Violence Against Children*. See also: Operation Avalanche for a statement about the largest known commercial child pornography enterprise until 2001, that grossed as much as \$1.4 million in one month from an online site: <http://www.justice.gov/opa/pr/2001/August/385ag.htm>

³⁵ See: The Irish Times. (15 Jul 2016): <https://www.irishtimes.com/news/crime-and-law/courts/criminal-court/man-who-had-thousands-of-child-abuse-images-to-be-sentenced-1.2723649> (last accessed 24 March 2017).

³⁶ See: MCVeigh, K. (16 Mar 2011) *Police Shut Down Global Paedophile Network in Operation Rescue*. The Guardian. Available at: <https://www.theguardian.com/society/2011/mar/16/global-paedophile-ring-smashed> (Last accessed 1 October 2018).

³⁷ United Nations Office on Drugs and Crime (2015) *Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children*. UNODC. Vienna.

³⁸ Internet Watch Foundation (2016) *Annual Report*. IWF. Cambridge. Pg. 8.

³⁹ Internet Watch Foundation (2017) *Annual Report*. IWF. Cambridge. Pg. 15.

children including rape or sexual torture.⁴⁰ Based on the same study,⁴¹ in 2017 the majority of the websites containing child sexual abuse content were registered at the .com generic Top Level Domain (gTLD),⁴² thus the majority of the child abuse material is available through World Wide Web pages. According to IWF 2017 statistics,⁴³ Europe hosts 65% of child sexual abuse content with 86% of the victims of these child sexual abuse materials being girls, of which 43% aged 11-15 years, 55% 0-10 years and 2% under 2 years old. Based on the 2014 annual report of the International Association of Internet Hotlines (INHOPE), most of the sites containing child sexual abuse material are non-commercial sites (91%), there are also a considerable number of sites containing commercial child sexual abuse materials.⁴⁴ Based on INHOPE 2014-2016 annual statistics and reports and IWF 2016-2017 reports,⁴⁵ Netherlands and France are among the top hosting countries from EU Member States. Most of those images remain available online for years and there are often thousands of duplicates of individual images on the internet. One can only guess how often those duplicates get downloaded or shared. Even the surviving victims usually have to live with the knowledge of those images being shared again and again, leaving traces of their past abuse which will always hinder their future development, causing their revictimization.

According to a research made in UK in 2012, 1 in 5 indecent images of children shared online were taken by the children themselves.⁴⁶ Child abuse content online comes in different formats such as pictures, short animated movies, sound files, stories, videos and the most recent trend, live-streaming material. The Internet also makes it possible to organize sexual activities via the computer, an activity which has now become a huge business, leading to the use of children in what is known as child sexual trafficking and child sexual tourism. As already mentioned, recently, these arranged activities have started occurring exclusively online and more frequently, where, instead of having to travel somewhere else to sexually abuse a child, offenders can arrange the online live-streaming of child abuse.

⁴⁰ Ibid. Pg. 16.

⁴¹ Ibid. Pg. 17.

⁴² Generic Top Level Domains are domains at the top of the domain name hierarchy, such as .com, .net, .org and .info. For further information refer to: United States Department of Commerce (1998) White paper on Statement of Policy on the Management of Internet Names and Addresses. National Telecommunications and Information Administration; and Kurbalija, J. (2014) An Introduction to Internet Governance. 6th edition. DiploFoundation. Pg. 42-46.

⁴³ Internet Watch Foundation (2017).

⁴⁴ INHOPE (2014) Statistics and Infographics. Available at: http://www.inhope.org/Libraries/Statistics_Infographics_2014/INHOPE_stats_infographics_for_2014.sflb.ashx

⁴⁵ See: INHOPE (2014); INHOPE (2016) Annual Report; IWF (2016); IWF (2017).

⁴⁶ CEOP (2013) Threat Assessment of Child Sexual Exploitation and Abuse.

In a 2017 study on the distribution of captures of live-streamed child abuse conducted by Internet Watch Foundation, it results that a live-streamed session of child sexual abuse lasts from a few minutes to over an hour, with the majority of the depicted children being 11-13 years of age.⁴⁷ 40% of the images or videos assessed were at the higher levels of severity, out of which 18% depicting penetrative sexual activity, sadism, or bestiality.⁴⁸ Typically the live-stream occurred in home environments, in bedrooms or bathrooms and in the majority of the cases the interaction with the remote abuser (the viewer) was clearly visible.⁴⁹ In some cases, evidence from the video recording of the streams showed that children were being coerced into sexual activity in order to gain ‘likes’ or comments from the viewers; in one of the cases, the child herself declared to having 50 viewers to her broadcast stream.⁵⁰ The sample of this study is very limited (only 2082 images and videos of captures of live-streamed child sexual abuse) and the captures analyzed are based on grooming and coercion.⁵¹ No cases of commercial live-streaming of child abuse to remote buyers were identified and no adults were present in any of the images and videos. Besides the low sample of the study, one of the reasons behind the lack of identification of commercial live-streams and of adults engaged in the streams may be the lack of availability of these kind of streams in public networks and most probably also because live-streams of sexual abuse with a commercial purpose and involving adults are less likely to be recorded, saved and distributed, this considering the main aim behind the live-streams of child abuse being to leave no evidence.

C. LEGAL AND TECHNICAL CHALLENGES OF THE ONLINE ENVIRONMENT

I. Legal Challenges

One of the main challenges and ongoing problems in combating child sexual abuse and sexual exploitation is undoubtedly the variations between the criminal laws of different countries. There are also still many countries around the world with no specific legislation combating the sexual abuse and sexual exploitation of children.⁵² Besides differences in the way offences are

⁴⁷ Internet Watch Foundation (2018) Trends in Online Child Sexual Exploitation: Examining the Distribution of Captures of Live-streamed Child Sexual Abuse. IWF. Cambridge. Pg. 10.

⁴⁸ Ibid. Pg. 11.

⁴⁹ Ibid.

⁵⁰ Ibid. Pg. 13.

⁵¹ Ibid. Pg. 14.

⁵² Akdeniz, Y. (2008) Interantional Child Pornography and the Law. Routledge. Pg. 163.

defined at national level, there may also be different penalties for similar crimes. Equally certain states may decide not to criminalize certain activities.⁵³

This challenge is even greater in the online environment, where more detailed legal regulation is required, both with regard to jurisdiction and the criminalization of the new forms of crime made possible due to the huge opportunities offered by the virtual environment. The globalization of the crime is part of the legal challenges. Online sexual abuse and exploitation of children no longer solely occurs within national borders. In the majority of the cases it crosses national borders meaning that more than one state has to be involved in the investigation process. In such cases, law enforcement agencies are faced with two main challenges: the determination of jurisdiction and the principle of dual criminality.

According to Akdeniz,⁵⁴ the complexity of the Internet environment makes traditional methods of regulation very difficult. He states that “The Internet is a complex, anarchic, and multi-national environment where old concepts of regulation, reliant as they are upon tangibility in time and space, may not be easily applicable or enforceable.”⁵⁵ According to Walker, the development of cyberspace has made regulation of modern society cross the bounds of time and space and the physical boundaries of nationality, sovereignty and government, leading to new kinds of relationships and interactions.⁵⁶ Crimes in or via cyberspace, present many jurisdictional challenges to law enforcement. Regulation of illegal and harmful content on the internet vary from one country to another. As already mentioned in this chapter, there is no precise definition of what constitutes child pornography. Most countries have defined their own limits of what is illegal and what is not. Cultural differences, too, give rise to differences in the regulation of the age of consent for engaging in sexual activity.⁵⁷ These hamper cross-border investigations and the prosecution of offenders, since their acts may be considered criminal in the country of residence, but this may not be the case in the country of the victim’s location and vice-versa.

The problem of uniformization of legislations creates also problems of extradition if similar crimes do not exist in the countries concerned, therefore the requirement of ‘dual criminality’ cannot be satisfied. The principle of ‘dual criminality’, also known as the ‘double criminality’

⁵³ Ibid.

⁵⁴ Akdeniz, Y. (2001) Governing Pornography and Child Pornography on the Internet: The UK approach. In Cyber-rights, Protection and Markets: A Symposium. University of West Los Angeles Law Review, 247-275. Pg. 251.

⁵⁵ Ibid.

⁵⁶ Walker, C. (1997) Cyber-Contempt: Fair Trials and the Internet. Yearbook of Media and Entertainment Law

⁵⁷ Refer to section A of this chapter.

rule or ‘double incrimination’ rule, is a standard requirement in extradition treaties, arising from the *nullum crimen sine lege* principle of criminal law.⁵⁸ According to the dual criminality principle, an accused person can only be extradited from one country for trial on another country, for breaking the later country’s laws, if the alleged conduct constitutes a crime in both the requesting and the requested country. Failure to comply with this principle may make the prosecution of child sexual abusers very difficult and may leave many offenders unpunished and free to continue committing further abuse. Evidently, in these circumstances, agreement on a common age for the definition of ‘child’ is crucial. Any disparity could prevent a child sex offender from being prosecuted.

Similarly, problems arise also in the national criminal investigation and evidence-gathering processes if the suspects are outside the jurisdiction and cross-border investigation is hindered due to differences in criminal laws or due to the inexistence of mutual assistance agreements.⁵⁹ The use of the principle of dual criminality varies from one state to the other, some requiring the principle to be met for all requests of assistance, some for certain measures only, some having discretion to refuse assistance on this basis, and some with no regulation at all for such cases.⁶⁰ Therefore, definitional disparities or the lack thereof, cause obstacles also to the detection and prosecution of offenders at a national level.

Moreover, the lack of [clear and specific] legal provisions dealing with such offences may lead to the creation of commercial markets for child pornography and child prostitution, turning into an organized crime,⁶¹ such as in the case of child sex tourism, where individuals from poor countries supply children for prostitution to interested persons from Europe and the rest of the globe.⁶²

In addition, timely access to evidence is essential for the investigation of online sexual abuse and sexual exploitation of children. Since these crimes involve more than one country, evidence may also be located in various jurisdictions. This causes many challenges in obtaining timely cooperation for evidence gathering, especially when evidence is located in a jurisdiction with

⁵⁸ Grabosky, P. (2007) Requirements of Prosecutions Services to Deal with Cybercrime. *Crime, Law and Social Change*. Vol. 47 (4-5). Pg. 201-223.

⁵⁹ Akdeniz, Y. (2008) *International Child Pornography and the Law*. Routledge. Pg. 164.

⁶⁰ Dandurand, Y., Colombo, G., and Passas, N. (2007) Measures and Mechanisms to Strengthen International Cooperation among Prosecution Services. *Crime, Law and Social Change*. Vol 47(4-5). Pg. 261-289.

⁶¹ Akdeniz, Y. (2008) *International Child Pornography and the Law*. Routledge. Pg. 164.; Pallaras, S. (2011) New Technology: Opportunities and Challenges for Prosecutors. *Crime, Law and Social Change*. Vol. 56(1). Pg. 71-89.

⁶² Hawke, A. and Raphael, A. (2016) *Offenders on the move: The Global Study Report on Sexual Exploitation of Children in Travel and Tourism*. ECPAT International.

no offences concerning online sexual exploitation of children. Discrepancies in criminal procedures among these jurisdictions may also hinder timely cooperation. Harmonization of legislation and procedures ensures transnational cooperation and the punishment of offenders of cybercrime. A successful example of the importance of harmonization is Operation Rescue, which is also an example of how globally widespread can offences of online child sexual abuse and sexual exploitation be.⁶³ This operation, started as a joint investigation between UK and Australia, then led to other countries, including the Netherlands, Thailand, Canada, Italy, the US, New Zealand, Brazil, Chile, France and the involvement of Europol.⁶⁴ The operation led to nearly 200 suspected paedophiles and 230 rescued children.⁶⁵

Undoubtedly, the harmonization of legislation has significant importance in the global fight against the online sexual abuse and sexual exploitation of children. The importance of harmonization has been globally recognized and harmonization efforts are ongoing. However, as will be seen in the second chapter of this study, various legal instruments developed by the United Nations, the Council of Europe and the European Union provide the possibility of reservations for member states and the right not to apply certain provisions at state level. Therefore, the possibility for reservations poses an obstacle to the harmonization process, depending a lot on how each member state implements these provisions.

Media reports of the sexual exploitation of children and young people through the use of the Internet is more and more frequent, showing the increased associated risks for children.⁶⁶ Detecting sexual exploitation of children on the Internet is a very challenging task. The detection rate depends on the awareness, recognition and reporting of the problems experienced.⁶⁷

II. Technical Challenges

End-to-end encrypted platforms coupled with anonymous payment systems, have increasingly facilitated child sexual abuse. They have contributed especially to the escalation of live-

⁶³ See: MCVeigh, K. (16 Mar 2011) Police Shut Down Global Paedophile Network in Operation Rescue. The Guardian. Available at: <https://www.theguardian.com/society/2011/mar/16/global-paedophile-ring-smashed> (Last accessed 1 October 2018).

⁶⁴ Ibid. See also: Australian Government Joint Standing Committee on Treaties (2011) Review into treaties. Parliament of the Commonwealth of Australia. Canberra.

⁶⁵ Ibid.

⁶⁶ Janis Wolak, David Finkelhor, Kimberly J. Mitchell and Michele L. Ybarra. (2008) Online “Predators” and Their Victims Myths, Realities, and Implications for Prevention and Treatment. *American Psychologist*. 111-128.

⁶⁷ Jewkes, Y. and Yar, M. (2009) *Handbook of Internet Crime*, Willan Publishing.

streaming of child abuse.⁶⁸ Offenders tend to target regions with high levels of poverty and weak domestic legislation on child protection.⁶⁹ The live-streaming of child sexual abuse is a rapidly growing area and one of the hardest to detect and investigate. Besides the obstacles caused by encryption and anonymity, the live-streaming itself is huge challenge since the streamed material is not usually stored, leaving therefore little evidence. Criminals are self-aware of the risks so they do not usually store copies of the streamed material. Therefore, the only way of investigating this kind of abuse is to track the source of the request for the material and the destination to which it is sent, which poses the technical challenge of monitoring real-time transmission, which can be done either by undercover investigation by police or by using Artificial Intelligence tools,⁷⁰ methods which will be treated more in detail in the fourth chapter.

The use of one Internet Protocol (IP) address/number by multiple users poses further obstacles to tracing and identifying perpetrators of online child sexual abuse. An IP address is a unique numeric address that each computer connected to the Internet must have.⁷¹ Two computers connected to the Internet cannot have the same IP address, therefore IP addresses are a potentially scarce resource.⁷² The distribution of IP addresses is organized in a hierarchical way, at the top of which is the Internet Assigned Numbers Authority (IANA), a subsidiary of the Internet Corporation for Assigned Names and Numbers (ICANN), which distributes blocks of IP addresses to the regional Internet registries.⁷³ The regional Internet Industries then distribute these IP addresses to the local Internet registries and national Internet registries, which in turn distribute them to Internet Service Providers (ISPs).⁷⁴ It is a common trend for Internet Service Providers to give the same public IP to multiple customers. In 2011 all IP addresses were fully allocated, which caused the launch of a new version of the IP – IP version 6 (IPv6) – as a successor of the previous IPv4 version.⁷⁵ Passing from IPv4 to IPv6 is costly because it requires some technical changes.⁷⁶ For this reason, many ISPs prefer keeping the old version and keep giving new users the same IP address that is already being used by other

⁶⁸ Europol (2016) Internet Organized Crime Threat Assessment, IOCTA 2016. Pg. 25.

⁶⁹ Ibid.

⁷⁰ See for example: Sweetie Project <https://www.savesweetienow.org/>

⁷¹ Kurbalija, J. (2014) An Introduction to Internet Governance. 6th edition. DiploFoundation. Pg. 39.

⁷² Ibid.

⁷³ Ibid. For further information on the regional Internet registries refer to: RIPE NCC website:

<https://www.ripe.net/participate/internet-governance/internet-technical-community/the-riir-system>

⁷⁴ Kurbalija, J. (2014). Pg. 39.

⁷⁵ IPv6 was introduced back in 1996 but it was only in 2011 when its usage started being necessary. See

Kurbalija, J. (2014) Pg. 40.

⁷⁶ Ibid.

customers. This practice confuses investigators who try to find the location of a suspect by identifying the IP address used for the accessing the Internet for illegal activities and finding the location of the computer allocated to that IP address. When more than one user has the same IP address, the identification of the perpetrator of a cybercrime becomes more difficult, slowing down the investigation process.

III. Facilitators of Online Child Sexual Abuse and Sexual Exploitation

1. File Sharing

There is increasing use of file sharing networks – in addition to the World Wide Web - to distribute child abuse material. One of the main platforms for this purpose is still peer-to-peer (P2P) technology⁷⁷ – which makes possible to link different computers directly with each via an Internet connection - because it is easy to use and makes it possible to distribute large volume of data.⁷⁸ Therefore, P2P networks enable users to share digital content with other users without depending on a central server,⁷⁹ resulting in its extensive usage for social networking. This explains why this is the environment in which the highest volume of offending occurs and where specialized units concentrate their investigations.⁸⁰

2. The Darknet

Besides the Surface Web which is the portion of the World Wide Web that is readily available to the general public and searchable with standard web search engines, another part of the Internet is the Deep Web, which is not indexed by search engines and thus invisible to most users.⁸¹ Within the Deep Web is the Darknet, a distributed anonymous network that can only be assessed through special software such as The Onion Router (Tor), the Invisible Internet Project (I2P) and Freenet.⁸² These tools were initially created for legitimate purposes such as

⁷⁷ Jeney, P. (2015) *Combating Child Sexual Abuse Online*. Directorate General for Internal Policies, Study for LIBE Committee. Pg. 40 citing *Child Pornography and Sexual Exploitation of Children Online* contribution of ECPAT International to the World Congress III against Sexual Exploitation of Children and Adolescents Rio de Janeiro, Brazil 25-28 November 2008; Europol (2015) IOCTA 2015; Europol (2016) IOCTA 2016.

⁷⁸ For further information on P2P and other file sharing networks refer to: Peterson, L. and Davie, B. (2011) *Computer Networks: A Systems Approach*. Fifth Edition. Morgan Kaufmann.; and X. Shen et al. (eds.) (2010) *Handbook of Peer-to-Peer Networking*. Springer. USA.

⁷⁹ See: Buford, J. et al. (2008) *P2P Networking and Applications*. Morgan Kaufmann.

⁸⁰ Europol (2015) *Internet Organized Crime Threat Assessment, IOCTA 2015*. Pg. 29.

⁸¹ See: UNICEF (2017) *The State of the World's Children 2017: Children in a Digital World* UNICEF. NY, USA. Pg. 79.

⁸² Europol (2017) *European Union Serious Organized Crime Threat Assessment (SOCTA): Crime in the Age of Technology*. pg. 22; For further information on the Darknet refer to: Sui, D., Cavarlee, J. and Rudesill, D.

the protection of freedom of expression and privacy, but they are now largely misused by criminals for the same purpose, to conceal their identities, locations, forums and markets.⁸³ Although currently there are no studies revealing the scale of the criminality on the Darknet, it has been assessed by Europol as an established criminal environment hosting dark markets and other hidden services.⁸⁴

The greater degree of anonymity and increased networking options on the Darknet makes criminals feel more comfortable in this environment than on the Surface Web about expressing their sexual interest towards children. The features of anonymity and safe networking of the Darknet enable them to feel more secure and relaxed. Criminals with more IT knowledge and security awareness use anonymity-granting software such as Tor which they believe to be safer and which, by the same token, make it significantly difficult for law enforcement agencies to identify and locate them.⁸⁵ Recent developments on Tor include the possibility of downloading online applications onto mobile devices, as well as so called ‘safepug’ hardware which anonymizes web browsing by linking it to wireless routers and streaming data onto Tor.⁸⁶ These highly anonymized tools are increasingly popular among child sex abusers.⁸⁷ A 2015 research on Tor networks conducted by Owen and Savage shows that even though child abuse sites occupied only a small fraction of all sites hosted on the Dark Web, over 80 percent of the actual traffic on Tor went to this portion of sites.⁸⁸ TOR has some restricted areas where hidden online marketplaces of child abuse material are available,⁸⁹ where in order to become a member and gain status, criminals have to contribute with new child abuse material. This leads to the further physical abuse of children. It is believed that the abuse being shared on these areas is of a particularly extreme and sadistic nature.⁹⁰

(2015) *The Deep Web and the Dark Net: A Look inside the Internet’s Massive Black Box*. Woodrow Wilson International Center for Scholars, Washington, DC.

⁸³ *Ibid.*; Europol (2016) *Internet Organized Crime Threat Assessment*, IOCTA 2016. Pg. 47.

⁸⁴ Europol (2017) *SOCTA*. Pg. 23.

⁸⁵ For further information on Tor refer to: Jardine, E. (2015) *The Dark Web Dilemma: Tor, Anonymity and Online Policing*. Global Commission on Internet Governance Paper Series: No. 21. Centre for International Governance Innovation and Chatham House. Ontario, Canada and London, UK. Pg. 2-4.; Owen, G. and Savage, N. (2015) *The Tor Dark Net*. Global Commission for Internet Governance Paper Series No. 20.;

⁸⁶ Europol (2014) *The Internet Organized Crime Threat Assessment IOCTA*. Chapter 3.

⁸⁷ *Ibid.*

⁸⁸ Owen, G. and Savage, N. (2015).

⁸⁹ Jardine, E. (2015) Pg. 1-4.; Europol (2014).

⁹⁰ Europol (2015) *Internet Organized Crime Threat Assessment*, IOCTA 2015. Pg. 29.

3. *Online Hubs*

The hidden services allow offenders to create anonymous social network accounts in order to contact children and initiate discussions with other offenders on how to groom and abuse children, on the “best” travel destinations for child sexual abuse, how to gain access to children there and where live-streaming of child abuse is available. Thus, by the facilitating the sharing of experience, these services promote the normalization of the sexual abuse of children and increase awareness among child sexual abuse criminals as to possible defensive measures for anonymizing and encrypting their illegal activities online in order to avoid detection by law enforcement. Experienced offenders are well aware of many of the investigation methods employed by law enforcement and they share this knowledge with other members of the child sexual abuse community on online hubs within the Darknet. For example, they share their knowledge on how to hide material or mislead investigators, such as how to include misleading background details in the images, or how to use IP anonymization tools, encryption and other protective software.⁹¹ Discussions even go so far as to include information about ways of raping, kidnapping, and murdering children and disposing of their bodies.⁹²

The exchange of this knowledge and experiences not only makes criminals more careful, thus reducing the possibility of their being discovered, but it also makes them less afraid of being caught and may even encourage previously reluctant criminals to risk engaging in physical child abuse.⁹³ While there is little evidence of this cause-effect relationship,⁹⁴ risk assessment studies show that 12,2% of online offenders had an official history of contact sexual offences prior to their online offences.⁹⁵ Nevertheless, researchers and law enforcement believe there are many factors which might be indicators of the potential of passing from online sexual abuse

⁹¹ European Cybercrime Centre EC3 (2014) The Internet Organized Crime Threat Assessment IOCTA 2014, Chapter 3 – Crime Areas, Europol: <https://www.europol.europa.eu/iocta/2014/chap-3-3-view1.html>.

⁹² Ibid.

⁹³ Europol (2016) Internet Organized Crime Threat Assessment, IOCTA 2016. Pg. 26.

⁹⁴ Webb, L., Craissati, J., and Keen, S. (2007). Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters. *Sexual Abuse: A Journal of Research and Treatment*, 19(4), 449–465. Pg. 463; Kim, C. (2004) From Fantasy to Reality: The Link between Viewing Child Pornography and Molesting Children, Based on Data from the US Postal Inspection Service. American Prosecutors Research Institute.

⁹⁵ Hanson, R.K. and Babchishin, K.M. (2009) How Should We Advance our Knowledge of Risk Assessment for Internet Sex Offenders? In: *Global Symposium for Examining the Relationship Between Online and Offline Offences and Preventing the Sexual Exploitation of Children*. University of North Carolina, Chapel Hill.; Seto, M.C., Hanson, R.K. and Babchishin, K.M. (2011) Contact Sexual Offending by Men With Online Sexual Offences. *Sexual Abuse: A Journal of Research and Treatment* 23(1) 124–145.

to physical abuse of the children in the near future, such as individual psychological disorders, engagement with the internet and the offline environment.⁹⁶

Becoming a member of one of these hidden networks is not free of charge. The accepted membership “currency” is fresh, previously unseen child sexual abuse material.⁹⁷ Live-streaming of child abuse may be more highly “valued” than still images or recorded videos because it constitutes fresh, not only previously unseen and original material but also unique and unsubstitutable material. Offenders who can provide the highest volumes of this type of material acquire the highest status among their peers.⁹⁸

4. Methods of Payment

Research shows that the cost of a live-streamed performance varies according to the length of the performance, the age and number of children involved and the sexual acts performed.⁹⁹ Of the various methods used to transfer payment for such performances, the most common is the classic Western Union money-transfer system.¹⁰⁰ However, since Western Union requires customers to provide their name, many “clients” rely on PayPal where accounts can be set up under a false name, thus ensuring anonymity.¹⁰¹ However, the customers of live-streaming do not seem to consider that they are exposing themselves to any great risk.¹⁰² This may be because the amounts transferred for a single live performance are so low that they are confident they will not arouse the suspicions of law enforcement agencies.

5. Parents

Though it is horrific to conceive of, there is an increasing trend for parents to become involved in the sexual exploitation of their own children for commercial purposes.¹⁰³ This has become a very common phenomenon in countries such as the Philippines where Internet access is widely available in spite of high levels of general poverty.¹⁰⁴ Here parents may force their children to

⁹⁶ For more information refer to: Houtepen, J.A. B. M., et al. (2014) From Child Pornography Offending to Child Sexual Abuse: A Review of Child Pornography Offender Characteristics and Risks for Cross-Over. *Aggression and Violent Behavior*, 19(5), 466–473.; Eke, A.W. and Seto, M.C. (2012) Risk assessment of online offenders for law enforcement. In: Ribisl, K. and Quayle, E. (2012) *Internet Child Pornography: Understanding and Preventing On-Line Child Abuse*. Willan Editors.

⁹⁷ Europol (2016) IOCTA.

⁹⁸ *Ibid.*

⁹⁹ *Terre des Hommes* (2014) pg. 33.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Europol (2015) IOCTA.; Europol (2016) IOCTA.

¹⁰⁴ *Ibid.*

perform sexual acts in front of a webcam for clients who are paying to watch, and they may even participate actively by demanding that the children perform certain acts.¹⁰⁵

IV. Offender's Online Behavior: The Demand Side

The online sexual exploitation of children involves a variety of different forms of interaction between offenders and children or young people based on the use of new digital technologies, which may subsequently lead to offline meetings that result to hands-on sexual abuse of the child. The term “internet sex abuser/offender” used in research literature and legal documents encompasses a wide range of situations and crimes. The primary and most commonly used category includes individuals who download, access or disseminate child sexual abuse images.¹⁰⁶ The same terminology is also used to refer to individuals who contact and groom children and young people on the internet with the ultimate intention of meeting them offline in order to sexually abuse them.¹⁰⁷ This category includes offenders who try to involve children in sexually abusive activities such as masturbation, forcing them to watch images or videos of sexual activity and to send sexually explicit images of themselves,¹⁰⁸ or - as most recent trends show - leading them to engage in live-streaming of sexual abuse acts. Other terms like ‘paedophile’ or ‘child molester’ are also widely used in research literature to identify people who use the Internet and digital technology to engage in the sexual abuse of children.¹⁰⁹

Understanding the way online child abusers behave and operate is not an easy. This is mainly because of the secrecy which surrounds these crimes,¹¹⁰ which is the consequence of rapid Information and Communication Technologies developments. While it is not possible to establish a clear profile of the online child abuser, researchers and investigators have, however, managed to identify some distinctive child abuse behaviors.

¹⁰⁵ Terre des Hommes (2013). Fullscreen on View. An Exploratory Study on the Background and Psychosocial Consequences of Webcam Child Sex Tourism in the Philippines. Terre des Hommes Netherlands.;

Terre des Hommes (2014) Webcam Child Sex Tourism Research.

¹⁰⁶ Webb, L., Craissati, J., & Keen, S. (2007). Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters. *Sexual Abuse: A Journal of Research and Treatment*, 19(4), 449–465.

¹⁰⁷ Martellozzo, E. (2012) *Online Child Sexual Abuse: Grooming, Policing and Child Protection in a Multi-Media World*. Routledge. London, UK. Pg. 111-125.

¹⁰⁸ Ibid.

¹⁰⁹ Long, B. and McLachlan, B. (2002) *The Hunt for Britain's Paedophiles*. London: Hodder and Stoughton.; Murray, J. B. (2000). Psychological Profile of Pedophiles and Child Molesters. *The Journal of Psychology*, 134(2), 211–224.; Greenberg, D., Bradford, J., Firestone, P., & Curry, S. (2000). Recidivism of child molesters: a study of victim relationship with the perpetrator. *Child Abuse & Neglect*, 24(11), 1485–1494. Quayle, E., Holland, G., Linehan, C., & Taylor, M. (2000). The internet and offending behaviour: A case study. *Journal of Sexual Aggression*, 6(1-2), 78–96.

¹¹⁰ Smallbone, S. and Wortley, R. (2001) *Child Sexual Abuse: Offender Characteristics and Modus Operandi*. *Trends and issues in Crime and Criminal Justice*. No. 193. 1-6.

The invention of Information and Communication Technology has led to a new method of communication. With computer-mediated social networking, one-to-one, one-to-many and some-to-some communication methods have converged into closed or semi-closed environments known as social networking sites (SNSs).¹¹¹ Research suggests that Social Networking Sites are the favorite environment of online child sexual abusers.¹¹² While creating a profile on any SNS, the user is required to provide some personal information such as their name, sex and age, and even upload an image of themselves. However, the validity of this information is not checked, allowing in this way users to provide any information they may wish about their identity, and even a fake profile picture. Since SNS communication is multimodal, incorporating text messages, chats, images, photos, videos, sound and other applications, it allows child abuse content to circulate in all possible forms, including the live-streaming of child abuse.

In 2009, Livingstone and Haddon divided the online risk exposure of children into three main categories: content, contact, conduct, each of which may result in later sexual abuse of the child.¹¹³ Content refers to the way in which children may receive child pornography material.¹¹⁴ Contact refers to the ways in which children can be exposed to child sexual abuse, which usually happens through solicitation or grooming, which is a prelude to the actual sexual abuse of the child.¹¹⁵ Child solicitation and grooming are usually facilitated through technological devices such as webcams, which make it possible to engage the child remotely.¹¹⁶ The conduct category refers to situations where the child becomes the perpetrator of criminal activities by creating or uploading child pornographic materials on the Internet of their own volition or under coercion.¹¹⁷ The child may be made to engage in such activities through bullying,

¹¹¹ Livingstone, S. Olafsson, K. and Staksrud, E. (2013) Risky Social Networking Practices Among “Underage” Users: Lessons for Evidence-Based Policy. *Journal of Computer-Mediated Communication*. Vol.18. International Communication Association: 303-320. Pg. 303.

¹¹² Martellozzo, E. (2011) Understanding the Perpetrators’ Online Behavior. In Davidson, J. and Gottschalk, P. *Internet Child Abuse: Current Research and Policy*. Routledge. 104-125. Pg. 106; For further information on risks faced by children on SNS refer to: Lievens, E. (2014) Children and Peer-to-Peer Risks in Social Networks: Regulating, Empowering or a Little Bit of Both? 191-209. In Van der Hof, S. et al. (eds.) (2014) *Minding Minors Wandering the Web: Regulating Online Child Safety*. Asser Press and Springer. The Hague, Netherlands.

¹¹³ Livingstone, S. and Haddon, L (2009) *EU Kids Online: Final report*. LSE, London: EU Kids Online. EC Safer Internet Plus Programme Deliverable D6.5. Pg. 10.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Jeney, P. (2015) *Combatting Child Sexual Abuse Online*. Directorate General for Internal Policies, Study for LIBE Committee. Available at: <http://www.europarl.europa.eu/supporting-analyses>.

¹¹⁷ Livingstone, S. and Haddon, L (2009) *EU Kids Online: Final Report*. LSE, London: EU Kids Online. EC Safer Internet Plus Programme Deliverable D6.5. Pg. 10.

harassment and stalking, or as a result of being coerced into subjecting themselves to violent sexual abuse and exploitation,¹¹⁸ as in the case of live-streaming of child abuse.

While most online perpetrators lie about their true intentions, research shows that there is a category of hyper-confident individuals who are more open about their personal details and may even disclose their sexual intentions to the children from the start of the interaction.¹¹⁹ On the other hand, there are hyper-cautious abusers,¹²⁰ who are the most difficult to identify because they are very cautious in not giving any kind of information that may reveal their identity or their intentions. The latter category, are very suspicious and tend to insist on viewing the child only on the webcam to be sure they are talking to a real child. This is why undercover methods of police investigation are particularly unsuited to this type of offender, since undercover police cannot expose children on the webcam to ascertain the criminals that they are talking to a child.

Constant attempts to describe and define the behavior patterns of online child abusers have been frustrated by the very diverse and constantly changing nature of that behavior due to the evolution of the Internet and the tools and opportunities it provides.

V. Key Trends of Online Child Sexual Abuse and Sexual Exploitation

Information and Communication Technologies have put access to child pornographic materials only “a mouse-click away”. They have given perpetrators the opportunity of connecting with each other and creating virtual communities, of producing fake virtual identities, and easily retaining online anonymity, and have facilitated the production and dissemination of child sexual abuse materials so that it can be done in a matter of a second. The accessibility of children via the Internet is higher than ever due to the greater access to broadband internet and mobile devices. Studies indicate that in the next five years there will continue to be a significant increase, with an estimated five billion children from Africa and South-East-Asia going online for the first time.¹²¹ There is a clear link between the widespread Internet coverage, especially

¹¹⁸ Ibid.

¹¹⁹ Martellozzo, E. (2011) Understanding the Perpetrators’ Online Behavior. In Davidson, J. and Gottschalk, P. Internet Child Abuse: Current Research and Policy. Routledge. 104-125. Pg. 106-109.

¹²⁰ Ibid.

¹²¹ Telenor Group (2016) Telenor Group Supports ‘Stop Cyberbullying Day 2016’ Across its Markets in Asia, available at: <http://www.telenor.com/media/press-releases/2016/telenor-group-supports-stop-cyberbullying-day-2016/>.

the broadband access,¹²² and the rapid growth of child sexual abuse and exploitation.¹²³ It has not only resulted in a dramatic increase in child sexual abuse content production and dissemination, but also in the creation of new types of child sexual abuse crimes.¹²⁴

1. Sexual Coercion and Extortion

In 2016, online sexual coercion and extortion (sextortion) of children was found by Europol to be one of the major threats in the field of online child sexual abuse.¹²⁵ Sextortion is defined by Europol as ‘the targeting and commoditization of the child and/or their sexual image for the procurement of sexual gains, such as sexually explicit images of that child and/or sexual activity with the child, or for financial gain’.¹²⁶ Sextortion is usually part of the initial grooming process.¹²⁷ It typically involves the use of coercion, with the abuser threatening to disseminate images already in their possession, but it may also occur through impersonation and hacking of the victim’s personal SNS profile and/or computer.¹²⁸

Europol divides sextortion into two types based on the motive of the crime: content driven when the motive of sextortion is for sexual purposes and financially driven.¹²⁹ A common starting strategy used by most offenders is grooming the child by impersonating another child of similar age in order to gain the victim’s trust. Grooming is the process of befriending a child and making him/her acquiesce in sexual acts,¹³⁰ by maintaining their secrecy in order to avoid disclosure.¹³¹ Grooming is not a new crime, it was not created as a result of new technology, but the Internet made the processes of grooming quicker and changed the grooming techniques by offering to the groomers the anonymity - which is not possible in the offline grooming process –allowing them to represent themselves as being of any age or any sex.¹³²

¹²² Broadband Internet service has very high Internet speed, which facilitated the rapid dissemination of child sexual abuse materials.

¹²³ Gillespie, A. A. (2012a) Jurisdictional Issues Concerning Online Child Pornography. *International Journal of Law and Information Technology*. Vol. 20. No. 3. 151-177. Pg. 152.; Horsman, G. (2018) *Combating Those Who Intentionally Access Images Depicting Child Sexual Abuse on the Internet: A Call for a New Offence in England and Wales*. *Computer Law and Security Review*. Vol. 34. 111-124. Pg. 112.

¹²⁴ Horsman, G. (2018) Pg. 112.

¹²⁵ Europol, *Internet Organized Crime Threat Assessment*, IOCTA 2016, Pg. 24.

¹²⁶ *Ibid.*

¹²⁷ Jeney, P. (2015) *Combating Child Sexual Abuse Online*. Directorate General for Internal Policies, Study for LIBE Committee. Pg. 40. Available at: <http://www.europarl.europa.eu/supporting-analyses>

¹²⁸ Europol (2016) *Internet Organized Crime Threat Assessment*. IOCTA. Pg. 24.

¹²⁹ *Ibid.*

¹³⁰ Gillespie, A. A. (2004a) *Tackling Grooming*. *The Police Journal: Theory, Practice and Principles*, 77(3), 239–255. Pg. 240.

¹³¹ Craven, S., Brown, S., and Gilchrist, E. (2006) *Sexual Grooming of Children: Review of Literature and Theoretical Considerations*. *Journal of Sexual Aggression*, 12, 287–299.

¹³² Gillespie, A. A. (2004a) *Tackling Grooming*. *The Police Journal: Theory, Practice and Principles*, 77(3), 239–255. Pg. 240; Money, J. (2014) *Protecting Children from the Risk of Harm? A critical review of the Law’s*

The second phase of the process is to persuade the child - the victim - to send a sexually explicit photo or video which will then be used for the last stage of the crime, namely the extortion or blackmailing the child to send more materials of an even more sexually explicit content. In the case of content driven sextortion, the offender will demand more photos and/or videos of a more sexually explicit nature. They may even demand the involvement of a third person, such as a sibling or friend, or demand offline meetings for sexual purposes.¹³³ While in the case of financially driven sextortion, the offender asks for money to guarantee no further dissemination of the obtained sexually explicit content. The feature common to both types of sextortion is the threat to disseminate the images online or to send them to family, friends and school. According to the findings of an online survey, 45% of the offenders achieve their objectives.¹³⁴

The first phase of sextortion, the grooming process, typically occurs on social networking sites or in the course of online games, which are largely used by children.¹³⁵ After gaining the victim's trust, the offenders move over to other communication platforms which include file-sharing (photos and videos), such as Viber, WhatsApp or Messenger,¹³⁶ and which ensure a higher level of privacy, especially since the recent introduction of end-to-end encryption now used by default by most applications.

Despite being one of the most rapidly growing threats, sextortion has low reporting rates and is understudied. This is because of the very nature of the crime. Victims tend to feel guilty and ashamed to talk about what is happening to them.¹³⁷ Feelings of complicity, guilt, shame, and embarrassment are one of the reasons why they may continue to be victimized over long periods of time and lack the courage to disclose the problem to their parents or law enforcement agents.¹³⁸ However, Europol data reveal an increase in complaints from parents who believe their children are being groomed and coerced to produce sexually explicit material.¹³⁹

Response(s) to Online Child Sexual Grooming in England and Wales. 283-299. Pg. 287. In Van der Hof, S. et al. (eds.) (2014) *Minding Minors Wandering the Web: Regulating Online Child Safety*. Asser Press and Springer. The Hague, Netherlands.

¹³³ Europol (2016) IOCTA.

¹³⁴ Wolak, J. And Finkelhor, D. (2016) *Sextortion: Findings from an Online Survey about Threats to Expose Sexual Images*, CACRC. Available at: <https://www.wearethorn.org/wp-content/uploads/2016/06/Sextortion-Report-1.pdf>

¹³⁵ Ibid.

¹³⁶ Europol, *Internet Organized Crime Threat Assessment, IOCTA 2016*, Pg. 24.

¹³⁷ Mcalinden, A.-M. (2006). "Setting" Em Up': Personal, Familial and Institutional Grooming in the Sexual Abuse of Children. *Social & Legal Studies*, 15(3), 339–362. Pg. 347.

¹³⁸ Ibid.

¹³⁹ Ibid, Pg. 25.

In a notable example reported by European Cybercrime Centre (EC3), the offender used to coerce children to engage in sexual acts in front of webcams.¹⁴⁰ He would meet children on social media platforms and persuade them to send him sexually explicit images of themselves. He would then coerce them to engage in more serious abuse by threatening to disseminate the pictures to the children's friends and family if his demands were not met. The offender used Tor and proxies – which allow access to websites by the use of an intermediary or 'proxy' computer by this way hiding the origin of the communication¹⁴¹ - to protect his anonymity, but made a number of other mistakes which led to his identification and arrest in the Netherlands. The operation was led by the United Kingdom with the participation of EC3, US ICE, the Netherlands and Canada. Europol findings suggest that this kind of crime can have fatal consequences for the victims, ranging from psychological damage to self-harm and even suicide.¹⁴²

2. *Live-Streaming of Child Sexual Abuse*

Another growing phenomenon of child sexual abuse made possible by ICTs is the live-streaming of child sexual abuse. This is the live remote abuse of children for commercial gain or for sexual gratification, commonly referred to as on-demand abuse or pay-per-view abuse. The live-streaming¹⁴³ is usually committed by a perpetrator who directs the live abuse of the child in a pre-arranged time frame.¹⁴⁴ This is made possible by webcams and video sharing platforms. The abuse occurs at the request of the "clients" who may be located somewhere completely different from the site of the abuse. Children are forced to perform the sexual actions at the request of the viewer, or are abused in real time in exchange for money. Research suggests that live-streaming is also used for the sextortion of the victims.¹⁴⁵

In some cases, the abuse is recorded and disseminated on Darknet sites and peer-to-peer networks (P2P), in order to attract more clients.¹⁴⁶ This dissemination also contributes to the increase of child sexual abuse content on the internet. But in other cases, the live-streaming

¹⁴⁰ European Cybercrime Centre EC3 (2014) The Internet Organized Crime Threat Assessment IOCTA. Chapter 3 – Crime Areas. Europol: <https://www.europol.europa.eu/iocta/2014/chap-3-3-view1.html>.

¹⁴¹ For some background information regarding proxies and their exploitation in committing crimes refer to: Rabinovich, M. and Spatscheck, O. (2002) Web Caching and Replication. Addison-Wesley, 2002.; Jewkes, Y. and Yar, M. (eds.) (2011) Handbook of Internet Crime. Routledge. New York. Pg. 511.

¹⁴² European Cybercrime Centre EC3 (2014).

¹⁴³ in this study 'live-streaming of child sexual abuse' and 'live-streaming' are used interchangeably.

¹⁴⁴ Europol (2016) Internet Organized Crime Threat Assessment. IOCTA. Pg. 26.

¹⁴⁵ Jeney, P. (2015). Combatting Child Sexual Abuse Online. Directorate General for Internal Policies, Study for LIBE Committee. Pg. 41.

¹⁴⁶ Europol (2016) Pg. 26.

abuse does not get recorded, neither disseminated, and disappears from the internet when the live-streaming stops. This makes it extremely difficult to investigate.

This type of abuse is transmitted via end-to-end encrypted platforms, where not even the service providers are able to decrypt the conversation and access their users' communications and files shared among them, due to the end-to-end encryption system which allows only the communicating users to read the messages, preventing third parties from deciphering the data being communicated or stored. This form of communication further hinders the investigation process and prevention of the crime. Various payment methods are employed, from money transfer services to digital currencies or Bitcoins. Payments per session can vary from USD 30 to USD 3000.¹⁴⁷ Thus they are not high enough to trigger alerts and thus start an investigation.

Usually the children abused are located overseas in countries with low economies, such as Eastern Asia, while the requests come from Westerners.¹⁴⁸ In the cases investigated by the European Cybercrime Centre, the payment rates are very low and serve to meet the basic needs of family or group involved. In these cases, the organizers are the parents themselves, family members or neighbours, who perceive the pay-per-view abuse of their children as the only source of income for survival.¹⁴⁹ In the Philippines live-streaming of sexual abuse of children has become a family business.¹⁵⁰

Live-streaming can have even more serious consequences, since it may increase the desire of the client to engage in personal hands-on abuse of the child. Evidence from Europol reports show that there is a clear link between the live-streaming and subsequent travel to the country where the live-streamed abuse occurred in order to personally sexually abuse the child.¹⁵¹ The organizers of the online abuse may well be the persons facilitating hands-on-abuse by offenders. Similarly, abusers who have previously travelled to poor countries to abuse children may, on their return, engage in live-streaming activities.

3. *Self-generated Images*

As already mentioned, the majority of children and young people now have their own social-media profiles and create online identities which include images of themselves. Sexting and

¹⁴⁷ European Cybercrime Centre EC3 (2014) The Internet Organized Crime Threat Assessment IOCTA 2014. Chapter 3 – Crime Areas, Europol: <https://www.europol.europa.eu/iocta/2014/chap-3-3-view1.html>

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ See: The Guardian <https://www.theguardian.com/world/2016/may/31/live-streaming-child-sex-abuse-family-business-philippines>.

¹⁵¹ Europol (2016) Internet Organized Crime Threat Assessment. IOCTA 2016. Pg. 26

creating and choosing to send sexual images of themselves to their peers is very common among adolescents. It is facilitated by the diversity of new technological devices, in particular mobile devices. These voluntarily generated sexual images and the messages, freely sent to a partner, may subsequently become the subject of sexting and unwanted dissemination. This phenomenon is very common among teenagers and it can lead to bullying and harassment. The images which have been disseminated online by an angry partner can be captured by child sexual abuse offenders and then used for sexual extortion and to blackmailing the victim who may resort to self-harm or even attempted suicide.¹⁵²

In this study, the focus is only on one of the three main emerging forms of online child sexual abuse, namely the live-streaming of child abuse, which is one of the least studied and least legally regulated areas of online child sexual abuse. The gravity of the offence and the extensive victimization of the poor by remote means are further factors that guided the decision to focus on this phenomenon. The aim behind this choice was to contribute to a legal and technical debate in order to find new and better legal solutions and policy and technology responses in the face of a phenomenon which is growing very fast and is very difficult to detect.

D. DEFINING AND UNDERSTANDING LIVE-STREAMING OF CHILD SEXUAL ABUSE

Live-streaming of the sexual abuse of children can be said to have evolved from the combination, with the help of ICT, from the combination of two other offences of sexual exploitation of children, namely the child sex tourism, which is the newest form of child prostitution, and from child pornography. Child sex tourism is a specific form of child prostitution which emerged mainly as a consequence of differences in national child protection laws and policies: perpetrators would travel from countries with stricter child protection laws and policies to countries with weaker ones with the intention of sexually abusing children.¹⁵³ As explained in the previous sections, child pornography in its printed manifestation, pre-dates the Internet. However, its massive proliferation over the past few years is a direct result of the development and widespread usage of Internet.¹⁵⁴

¹⁵² Europol (2015) Internet Organized Crime Threat Assessment. IOCTA 2015. Pg. 30.

¹⁵³ Subgroup against Sexual Exploitation of Children NGO Group for the Convention on the Rights of the Child (2005) *Semantics or Substance? Towards a Shared Understanding of Terminology Referring to the Sexual Abuse and Exploitation of Children*. Pg. 21.

¹⁵⁴ US Department of Justice. National Strategy for Child Exploitation Prevention and Interdiction. Report to Congress August 2010; Norland, R. & Barholet, J. (March 2001). The web's dark secret. Newsweek. 137. 44–

The live-streaming of child abuse removes the need for child sex travelers to travel, since it gives them the possibility of watching the live abuse of children from the comfort of their own homes. There is still a payment for the service, but whereas in the case of child sex tourism the payment is remuneration for physical abuse of the child by the offending sex traveler, in the case of live-streaming, the offender pays to watch another person abuse the child in real time. In both cases, an adult (the facilitator) makes the child available for sexual services and another adult pays for the sexual services of the child. The difference however is that, while in the case of child sex tourism the facilitator is only the provider of the services of the child to the child sex offender, in the second case, the facilitator may sometimes also be the person who sexually abuses the child in exchange for money or some other form of remuneration offered by the person watching the abuse live on the Internet. It should be stressed that, the child is always a victim in these crimes, even when the child appears to have consented to the act. Children are the victims and should be treated as such. Believe in Children Barnardo's Scotland, a children's charity, have published a guidance on child sexual exploitation where they introduce what they call the 'triangle of abuse'¹⁵⁵ which represents the reality, in terms of both supply and demand, of child sexual exploitation. Their scope was to change the perception that children are 'criminals' because they seem to be consenting to their exploitation, they should rather be always treated as victims of sexual abuse and exploitation.¹⁵⁶ The 'triangle of abuse' was designed to reflect all forms of child sexual exploitation and therefore it encompasses also exploitation in the form of live-streaming of child abuse. In the case of live-streaming, the abusing adult, represented at the 'triangle of abuse', would be the facilitator and, in some cases, usually on-demand, also the person who sexually abuses the child.

Information currently available suggests that the phenomenon of live-streaming is most widespread in the Philippines.¹⁵⁷ However, lack of statistics and knowledge should not lead to assumptions that other countries are immune to this phenomenon. The Philippines are the major source of supply but, the demand is global, originating mainly in western countries.¹⁵⁸ The rapid and very widespread rise in live-streaming of child abuse,¹⁵⁹ suggests that there is huge

51; Gillespie, A. A. (2012a) Jurisdictional Issues Concerning Online Child Pornography. *International Journal of Law and Information Technology*. Vol. 20. No. 3. 151-177. Pg. 152.

¹⁵⁵ Believe in Children Barnardo's Scotland (2014) *Guidance on Child Sexual Exploitation: A practitioner's Resource Pack*. Barnardo's Scotland. Pg. 6.

¹⁵⁶ *Ibid.*

¹⁵⁷ Terre des Hommes (2014) *Webcam Child Sex Tourism Research*. (WCST) Pg. 13.

¹⁵⁸ *Ibid.*

¹⁵⁹ According to Europol, live-streaming is not an emerging trend anymore, but an established reality. IOCTA (2015).

global demand fostering the increase in supply. Moreover, since there is knowledge of the significant proliferation of live-streaming, and that the phenomenon is continuing to grow, but that there is a lack of measures towards its prevention, it is reasonable to suggest that governments are failing to do enough to detect and prosecute perpetrators located in their own countries, which would lead to lowering the demand for live-streaming of child abuse.

Despite Europol reports indicating that live-streaming is already an established reality,¹⁶⁰ there are no reliable statistics on this form child abuse. Figures for the actual number of victims and the countries with the highest levels of demand and supply do not yet exist. However, from a closer examination of general statistics relating to online child sexual abuse and exploitation and to Internet access, it is reasonable to predict that there will be rapid global growth of live-streaming of child abuse unless action is taken in time.

Statistics from 2009-2011 show that 750,000 child predators connected to the Internet at any given time.¹⁶¹ One can only presume that the numbers have continued to grow since then years. According to statistics from the US Federal Bureau of Investigation there are 40,000 public chat rooms frequented by predators seeking children for sexual abuse purposes.¹⁶² Obviously, public chat rooms are only one of the environments in which live-streaming of child abuse can occur. Child abusers ask children to perform various activities in front of the webcam, ranging from masturbation, sex with another child (often a sibling), to sex with an adult and even bestiality.¹⁶³ The age of children being abused ranges from 2 – 14 years old.¹⁶⁴

Terre des Hommes is the first organization to have conducted research on the phenomenon of live-streaming of child abuse, which they describe as webcam child sex tourism. In 2013, four researchers from Terre des Hommes carried out field research over a period of 10 weeks into 19 public chat rooms by introducing themselves as pre-pubertal Filipino girls.¹⁶⁵ In just 10 weeks, over 20,000 predators from different parts of the world showed interest, seeking webcam sex shows from the researchers posing as children.¹⁶⁶ The data from this experiment

¹⁶⁰ Europol (2015) IOCTA 2015.

¹⁶¹ UN Human Rights Council. (2009). "Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Najat M'jid Maalla." Geneva; United States Federal Bureau of Investigation. (2011). "Child predators: The online Threat Continues to Grow".

¹⁶² Shivley, M. & Hunt, D., et al. (2003). "Survey of Practitioners to Assess the Local Impact of Transnational Crime, Task Order: Final Report." Abt Associates Inc.

¹⁶³ Terre des Hommes. (12 September 2014). Document Submitted for the Day of General Discussion of the Committee on the Rights of the Child: "Digital Media and Children's Rights".

¹⁶⁴ Ibid.

¹⁶⁵ Terre des Hommes (2014) WCST Research. Pg. 14.

¹⁶⁶ Ibid. Pg. 14-15.

are clear evidence of the huge global demand for live-streaming of child abuse and the need for action to put a stop to it.

I. Terminology Related to the Live-Streaming of Child Abuse

In this section are explained the key terminology concepts used throughout this study and the reasons for choosing to use these specific terms rather than other similar terms which may be used by other academics, civil society organizations and/or law enforcement agencies.

1. Child Sex Offenders

For the purpose of this research, the ‘child sex offender’ is defined as an individual who is over 18 years of age, and expresses interest in directing and/or viewing a child, girl and/or boy, engaging in sexual acts, or being sexually abused by an adult in front of a webcam or any other existing or future technology capable of video streaming such acts in real time to or via a computer or any other smart device to another computer or smart device. The terms ‘perpetrator’ and ‘offender’ are used interchangeably with the term ‘child sex offender’.

A child, for the purposes of this research, is defined as any person under the age of 18, in accordance with the definition of child pursuant to Article 1 of the Convention of the Rights of the Child of the United Nations.¹⁶⁷

2. Live-Streaming of Child Sexual Abuse

Since live-streaming of child sexual abuse is a new form of crime against children and is not yet expressly regulated in law, there is no single notion used to describe the phenomenon. The lack of any agreed legal term has led to authors using similar notions which are not at all alike. Despite the scarcity of the literature dealing with the topic, there are a number of concurrent terms used to describe it.

For instance, Terre des Hommes,¹⁶⁸ and some academics,¹⁶⁹ use the term ‘webcam child sex tourism’. According to Terre des Hommes Netherlands, this term was chosen in order to properly reflect the international, cross-border character of the crime, whereby a person using a computer can ask for and watch a child performing sexual acts, or watch the abuse of a child

¹⁶⁷ UN Convention on the Rights of the Child (1989):
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

¹⁶⁸ See: <https://www.savesweetienow.org/>. (last accessed on 21 Nov 2017)

¹⁶⁹ See: Puffer, E. McDonald, K.; Pross, M.; and Hudson, D. (2014) Webcam Child Sex Tourism: An Emerging Global Issue. The Research and Scholarship Symposium. Pg. 15.
http://digitalcommons.cedarville.edu/research_scholarship_symposium/2014/podium_presentations/15

taking place in another country, without having to travel there themselves.¹⁷⁰ And since the abuse happens in front of and via a webcam, Terre des Hommes wanted to specify the tool in the term.

However, while this may be a reasonable justification behind the use of this term, using the word ‘tourism’ to describe a crime – particularly one of this sensitive nature - is inappropriate. The use of this word downplays the dangerous nature of the crime, and diminishes its impact. Second, the term is misleading because it gives the impression that this is a crime related solely to travel or tourism. The Interagency Working Group argues that the use of ‘tourism’ inside the terminology gives the false impression that the response to this type of crime should be within the tourism sector.¹⁷¹

Terre des Hommes also simultaneously and interchangeably uses the term ‘webcam child sex abuse’.¹⁷² The same term is also used by Masri.¹⁷³ Although it is a more general term, it is still problematic: the use of the word ‘webcam’ limits the scope of the definition, since it only covers abuse occurring in front of a webcam. It is important to stress that the webcam is simply the technological tool used to transmit and view the live online child sexual abuse. But, given the speed with which technology continues to evolve, the possibility of such a tool being replaced in the near future by another tool should be born in mind when formulating a long-term response to the crime. Including the word ‘webcam’ in the term used may make the term redundant after a few years if a new device with the same function as a webcam, replaces it.¹⁷⁴ The new device will fall outside the scope of the term, leaving a gap which will hinder an effective legal response to the crime.

Another generally used term is ‘child sexual abuse to order’. This refers to the online sexual abuse of children which takes place as a result of a request from the perpetrator, before or during the abuse, for certain acts to be performed, sometimes in exchange for payment.¹⁷⁵ According to the Interagency Working Group, this is a generally agreed term which can be used without stigmatizing the child.¹⁷⁶ However, this term does not specifically mention the

¹⁷⁰ See: <https://www.savesweetienow.org/faq> (last accessed on 21 Nov 2017)

¹⁷¹ Interagency Working Group in Luxembourg (2016) Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse, ECPAT International and ECPAT Luxembourg. Pg. 48.

¹⁷² See: Terre des Hommes, “Sweetie Campaign in [the] Philippines Intensifies”, (7 December 2015) <https://www.terredeshommes.nl/en/news/sweetie-campaign-philippines-intensifies>.

¹⁷³ Masri, L. (2015) Webcam child sex abuse. CUNY Academic Works. https://academicworks.cuny.edu/gj_etds/64.

¹⁷⁴ Interagency Working Group in Luxembourg (2016).

¹⁷⁵ Ibid. Pg. 47.

¹⁷⁶ Ibid.

fact that the abuse may be viewed in real-time. The abuse may have been previously recorded and still fall within this definition. Moreover, it only applies to cases when the perpetrator takes an active part in the abuse, by demanding/ordering certain acts to be performed by the child or by the adult on the child, thus excluding cases where the perpetrator only views the abuse of the child, without making any specific requests.

Açar uses the term ‘webcam child prostitution’ to describe cases when the child victim satisfies someone else’s sexual needs in real time via the Internet in return for a fee,¹⁷⁷ deeming this is a form of child prostitution, with the only difference being the usage of Internet rather than any physical interaction. Again, in this case the use of the word ‘webcam’ limits the scope of the term.

Lastly, Europol uses the terms ‘live-streaming of child abuse’ and ‘live-distant child abuse’¹⁷⁸ defining this as “the live broadcast of video footage of a child being sexually abused, where the actions of the hands-on offender are directed by the viewer or viewers who are observing remotely”.¹⁷⁹ Both terms adequately describe the crime, the first one highlighting the streaming on the Internet of the sexual abuse of the child, while the second one focusing more on the lack of physical contact between the offender and the victim, but again underlining the fact that despite the lack of physical contact, with the offender viewing via a computer, the sexual abuse of the child still takes place.

In this thesis, the terms ‘live-streaming of child abuse’ and ‘live-distant child abuse’ are used interchangeably so as to underline both the technological and the geographical (physical) aspects of the crime. These two terms were thought to underline more adequately the key aspects of the crime, namely: the live-streaming (the technological aspect), the remote abuse (the jurisdictional implications and the lack of physical interaction) and the result of the committed acts which is the fact that child abuse actually occurs. Another reason for preferring these terms, is the fact that they are generally recognized by law enforcement agencies, and, given the mainly legal perspective of this study, will be more relevant to the main target audience and will eliminate any potential confusion.

¹⁷⁷ Açar, K.V. (2017) Webcam Child Prostitution: An Exploration of Current and Futuristic Methods of Detection. *International Journal of Cybercriminology*. Vol. 11. Issue 1. January – June 2017.

¹⁷⁸ Europol (2017) *The Internet Organized Crime Threat Assessment (IOCTA) 2017*, pg. 39; Europol (2015) *The Internet Organized Crime Threat Assessment (IOCTA) 2015*, Pg. 29.

¹⁷⁹ Europol (2017) *IOCTA*, Pg. 39.

II. Factors Driving the Live-Streaming of Child Sexual Abuse

Live-streaming of sexual abuse of children emerged only recently as a result of the combination of the two factors giving rise to child sex tourism and child pornography, namely: differences in child protection laws and policies among countries and the global increase in Internet usage rates. However, differences in child protection laws and policies and the increase in Internet usage rates are the main, but not the only factors leading to the development of this new form of child abuse. Poverty is another major factor creating a ready supply of children for the commercial live-streaming of child abuse, in countries such as in the Philippines. Usually poor countries have weak laws related to child protection so these two factors are interconnected.

1. *Weak Child Protection Laws Foster Live-Streaming of Child Abuse*

The majority of developed countries have well-established child protection laws which strictly prohibit child pornography, child prostitution and other forms of sexual abuse and sexual exploitation of children. In order to evade these laws, child abuse offenders from developed countries started traveling to less developed countries where child protection laws do not exist, or are not effectively enforced with the intention of sexually abusing children.¹⁸⁰ This led to the phenomenon which is widely known as child sex tourism, a term which indicates the transnational dimension of the crime. According to US State Department statistics, over one million children around the world are victims of child sex tourism.¹⁸¹ According to the US Department of Justice, child sex tourism in South East Asia is so widespread that entire neighborhoods are engaged in this “business” and children can be bought at open-air markets,¹⁸² just like animals. According to the Council of Europe, the development of child sex tourism has been influenced by the massive growth of the travel and tourism industry.¹⁸³

Child sex tourism has many elements in common with the live-streaming of child abuse. The main difference is that, in the case of the latter, there is no physical contact of the ‘client’ with the child. This does not mean that in the case of live-streaming the child is not physically abused. It merely means that the person requesting the the live-stream and the abuser of the child are not one and the same anymore. This similarity between the two offences explains why Terre des Hommes use the terms “virtual child sex tourism” and “webcam child sex

¹⁸⁰ Terre des Hommes (2014) Webcam Child Sex Tourism, *Becoming Sweetie: a novel approach to stopping the global rise of Webcam Child Sex Tourism*.

¹⁸¹ US Department of State, Office to Monitor and Combat Trafficking in Persons. (2008) *The Facts About Child Sex Tourism*. US Department of State.

¹⁸² US Department of Justice. National strategy for Child Exploitation Prevention and Interdiction. Report to Congress August 2010.

¹⁸³ Council of Europe Parliamentary Assembly. (2013) *Fighting ‘Child Sex Tourism’*.

tourism”.¹⁸⁴ The threats posed by live-streaming of child abuse are much higher than in the case of physical child sex tourism because live-streaming allows child abusers to engage in child abuse much more frequently, much more cheaply and with more children, since they do not have to actually travel somewhere else for the abuse to take place. The obvious effect is that even more perpetrators can engage in this new form of child abuse, including those who cannot afford the cost of travel providing that they have access to the Internet. Child abuse thus becomes easier and faster than ever. This is clearly a direct result of the emergence of Internet, especially in poor, less developed countries, since it enables child abuse predators to access child abuse from home, without exposing themselves to the economic costs and other risks posed by the traveling for child sex tourism. However, while the development of the Internet is the immediate factor in the rise of live-streaming of child abuse, we should not ignore the main reason for the cross-border growth of this phenomenon, namely the disparities in national legislation for the protection of children from sexual abuse and sexual exploitation. The main response to the live-streaming of child sexual abuse, should be the harmonization of laws at international level, and the adoption of stricter laws on sexual abuse and sexual exploitation of children in order to ensure more robust protection of children both online and offline. Controlling Internet can never be an effective solution to this global problem if national laws continue differ to such an extent that cooperation between law enforcement agencies and the prosecution of perpetrators is prevented because of the disparity in child protection.

2. *The Internet as a Stimulator*

In exactly the same way as it did with the child pornography market, turning it into a global industry,¹⁸⁵ the Internet is now revolutionizing child prostitution, turning it into an online activity and moreover allowing it to be streamed and viewed live in real time and even allowing ‘clients’ to direct the abuse through personalized requests. Currently the live-streaming of child abuse is managed by individuals in a non-organized way. Action must be taken before it goes completely out of control and becomes a huge industry run by organized criminal groups.

Over the past decade, Internet penetration rates have increased significantly, especially in developing countries. In the Philippines, where the supply for the crime of live-streaming of

¹⁸⁴ See: Terre des Hommes (2014) Supra note 180.

¹⁸⁵ Brockman, J. (April 5, 2006). “Child Sex as Internet Fare, Through Eyes of a Victim.” New York Times.

child abuse is most prevalent, less than 2 % of the population had Internet access in 2000, but by June 2017, that figure had reached 55,5 %.¹⁸⁶

Despite the benefits of the growth in Internet access, research suggests that it has a direct impact in the increase in levels of child abuse because it increases the opportunities and options available to perpetrators.¹⁸⁷ Previously abusers could only access pre-recorded child pornography and child sexual abuse material, but now the Internet has made it possible to view the real-time abuse of children and even participate actively in the abuse by demanding certain acts to be performed by the child or by an adult on the child. The live-streaming of child abuse is relatively easy to access, very cheap, and not as risky as engaging in traditional child prostitution. All this has led to the rapid increase in live-streaming of child abuse over the recent years and it is only too obvious that the increase will continue unless action is taken quickly to prevent it.

3. Poverty as a Trigger for Live-Streaming of Child Abuse

Poverty is another major factor in the emergence of child prostitution. It is known that poor developing countries typically have weak legislation and poor law enforcement, especially with regard to child protection. Sri Lanka, Thailand, Brazil, India and Philippines are among countries with the highest level of prostituted children.¹⁸⁸ According to statistics from the Central Intelligence Agency (CIA), in some of these countries a high percentage of the population lives below the poverty line.¹⁸⁹ In some cases, the level of poverty is so high that parents resort to prostituting their own children, in return to for very little money.

Recently, Internet penetration rates in poor developing countries have increased to a significant extent, with Internet connection available in almost every house or internet café in the neighborhoods. According to Internet World Statistics, India, Thailand, Brazil and Philippines were among the top 20 countries with the highest number of Internet users in 2017.¹⁹⁰ This

¹⁸⁶ UN Data: <http://data.un.org/Data.aspx?d=ITU&f=ind1Code%3AI99H>; Internet World Stats: <http://www.internetworldstats.com/top20.htm>.

¹⁸⁷ Taylor, M., & Quayle, E. (2003). *Child Pornography: An Internet Crime*. New York: Brunner-Routledge; Wolak, J. et.al. (2004). Internet-Initiated Sex Crimes Against Minors: Implications for Prevention Based on Findings from a National Study. *Journal of Adolescent Health*, 35, pg. 424; Seto, M., et. al. (2006). Child Pornography Offenses are a Valid Diagnostic Indicator of Pedophilia. *Journal of Abnormal Psychology*. 115(3). 610–615.

¹⁸⁸ See: Laccino, L. (6 Feb 2014) Top Five Countries with Highest Rates of Child Prostitution. *International Business Times*. Available at: <https://www.ibtimes.co.uk/top-five-countries-highest-rates-child-prostitution-1435448> (last accessed 13 October 2018); Hawke, A. and Raphael, A. (2016) *Offenders on the move: The Global Study Report on Sexual Exploitation of Children in Travel and Tourism*. ECPAT International.

¹⁸⁹ Central Intelligence Agency. *The World Factbook*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html> (last accessed 13 October 2018)

¹⁹⁰ Internet World Stats: <http://www.internetworldstats.com/top20.htm>.

high Internet penetration rate has stimulated the development of the newest form of child prostitution: the live-streaming of child abuse. The Internet has made it much easier to find child predators seeking and willing to pay to view children performing pornographic acts and/or child abuse on real-time. In these poor countries, the facilitators of the live-streaming supply children for ridiculously small amounts of money,¹⁹¹ which indicates that the reason for the live-streaming is economic survival. Child sex offenders exploit this fact by increasing their demands and satisfying their bestial sexual needs at very cheap rates, without having to risk travelling or engaging in physical contact with the children themselves, and remaining anonymous thanks to the encrypted channels of communication offered by the Internet.

Poverty is one of the main factors stimulating the live-streaming of child abuse in countries with high Internet penetration rates. It should be remembered however, that poverty is not always the trigger for live-streaming of child sexual abuse to an audience via the Internet. There are cases where the live-streaming of child abuse does not occur for commercial reasons, especially in cases which do not involve poor developing countries. There are fewer cases of this type than cases driven by commercial gain, but their existence should not be neglected and the same effort should be employed to combat both commercial and non-commercial live-streaming of child abuse, since both forms are crimes against the dignity, and moral and physical integrity of children.

III. Online Environments in Which Live-Streaming of Child Sexual Abuse Occurs

Research shows that the most common used online environments for live-streaming are social networking sites, online dating websites, public chat rooms and adult webcam sites.¹⁹² Usually social networking sites, online dating websites, public chat rooms are used to initiate the first stage of the live-streaming of child sexual abuse, the communication stage. At this stage, the adult offering children for live-streaming performances contacts child predators seeking to view live-streamed footage of children performing sexual acts or being abused by an adult. Prices are agreed on a per-minute or per-show basis.¹⁹³

¹⁹¹ Europol (2016).

¹⁹² Terre des Hommes (2013). Fullscreen on View. An Exploratory Study on the Background and Psychosocial Consequences of Webcam Child Sex Tourism in the Philippines. Terre des Hommes Netherlands. Pg. 32.

¹⁹³ Ibid. Pg. 33.

The second stage is transferred to Voice over IP (VoIP) applications which are safer for the perpetrators and more private environments such as Yahoo!, Messenger and Skype.¹⁹⁴ It is at this second stage that the live-streaming of child abuse occurs, in front of a webcam, for an audience which is usually paying to view and/or direct the “show”.

In the case of adult webcam sites, all phases occur in the same environment. On these sites, women performing live sex shows for payment, offer to include children in the sex shows in exchange for a higher fee.¹⁹⁵ Most of these sites offer a free preview of the child ‘models’ with clothes on.¹⁹⁶ Interested customers can then move to private sessions for a standard fee.

IV. Operative Structures

It is not possible to define one mode of operation which could be said to encompass all existing and potential forms of live-streaming of child abuse, barring effective preventative action. Researchers have so far identified three categories into which different manifestations of the offence may fall: family-run operations, cyber ‘dens’ and individual operations.¹⁹⁷

1. Family-Run Structures

Within family-run structures, parents or other family members are themselves the primary actors or facilitators of the crime of live-streaming. They force or coerce their children into performing sexual acts in front of the webcam for perpetrators located in other countries around the world, usually in exchange for money.¹⁹⁸ Sometimes they order their children to recruit other children to do the same.¹⁹⁹ In some cases, they perform sexual acts on the children themselves, in accordance with the wishes of the “client” viewers. These operations usually occur in private homes.²⁰⁰ Such cases are widespread in developing countries, and are driven primarily by high levels of poverty. Parents see the exploitation of their children for such ‘performances’ as the only way of surviving economically. They persuade their children that they are doing nothing wrong and that it will help their family.

‘Maria, only 11 at the time, was put in front of the camera. They asked her to undress and they told her, “Show me your boobs,” “Show me your butt,” and

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Terre des Hommes (2014) Pg. 25.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

*“Spread your legs.” The first time, Maria did not want to do those things and she started crying, but her mother told her, “It’s not so bad, they can’t touch you anyway. They are on the other side of the world, so it’s all right.”*²⁰¹

In another case, parents forced their 6 children, of whom the youngest was only 4-years old, to perform in front of the webcam over a period of three years.²⁰² Such cases are very common in the Philippines. Parents act as facilitators, talking to the clients overseas in order to arrange ‘the shows’ in exchange of money. They think of it as a job providing what is often the only income the family has.²⁰³

2. Cybersex ‘Dens’

Cybersex dens are places where recruited or trafficked children are held against their will and forced to perform sex show on a regular basis.²⁰⁴ Some cybersex dens are run by locals, some by foreigners,²⁰⁵ who target poor countries with weak legislation and poor law enforcement to carry out their activities. The dens are sometimes run by criminal organizations and they range from houses exploiting children from the same neighborhood, to brothels run by organized criminal groups.²⁰⁶ They operate under the cover of front companies such as Internet cafes or information technology companies.²⁰⁷

3. Self-Generated Material

There are cases where children engage in live-streaming without the direct involvement of a third-party facilitating the communication. These occur in private homes or Internet cafes with a private room.²⁰⁸ The children involved on their own may have found out about this way of earning money from other children or adults.²⁰⁹ According to Terre des Hommes Netherlands, the children who voluntarily perform sex shows in front of a webcam are usually children who have previously been involved in street prostitution, and they see live-streaming as an easier

²⁰¹ Excerpt from a case study in the Philippines conducted by Terre des Hommes Netherlands. See: Terre des Hommes (2013). Fullscreen on View. An Exploratory Study on the Background and Psychosocial Consequences of Webcam Child Sex Tourism in the Philippines. Terre des Hommes Netherlands. Pg. 28.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid. Pg. 30.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid. Pg. 26.

²⁰⁹ Ibid.

way of earning money.²¹⁰ Some of them even hope they will find a long-term “boyfriend” who will come and visit them and pay them more.²¹¹

Terre des Hommes Netherlands researchers use the term ‘individual operations’ to describe this network structure. However, the term ‘self-generated material’ sounds more appropriate as it reflects more accurately the fact that the live-streaming is initiated by children themselves, without the involvement of an adult at all. Moreover, this term is useful in keeping with the terminology related to other child abuse and exploitation offences, such as “self-generated child pornography images”, which refers to situations where children produce images of themselves and send them to people they meet online.²¹² Furthermore, ‘self-generated material’ can include not-for-profit cases when children engage in a live pornographic performance for their supposed online ‘boyfriend’, without any intention of earning money, but are unaware that they are being watched by one or more child predators instead of their supposed similar-aged boyfriend. Such cases are closely related to the offence of child grooming for sexual purposes.

4. Individual Operations

The above-mentioned categories were formulated by researchers of Terre des Hommes Netherlands organization, who carried out research on live-streaming cases in Philippines. However, the Philippines are not the only source of live-streamed children abuse. Developed countries are not immune to this kind of crime. Developed countries are where the majority of demanders of live-streaming of child abuse are located, but in these countries facilitators or live-streaming producers can also be found. In such cases, what drives the live-streaming of child abuse may be something other than commercial gain. The reason for such cases could be self-gratification or for being valued and esteemed within certain pedophile or child perpetrator groups, or in order to gain access, membership and status within a hidden and restricted online pedophile network. Non-commercial instances of live-streaming usually involve a single individual, who is generally a perpetrator of other child sexual abuse crimes online and/or offline, such as child pornography, child grooming and sexual abuse of children. Such offenders, unlike the perpetrators or facilitators in the previously mentioned network models, may have committed the offence of live-streaming of child abuse just once or unsystematically, and not for commercial profit. While the other models are driven by poverty, individual operations are even more worrying because they are the result of sick adult sexual desire.

²¹⁰ Terre des Hommes (2014).

²¹¹ Ibid.

²¹² Europol (2017) IOCTA.

Sometimes these crimes are committed by two or more people in collaboration, aiding and abetting each other. If not effectively tackled in law and through law enforcement, there may be a growth of this crime in even the most developed countries.

E. THE CHAIN OF LIABILITY

Despite the number of different offences related to the online child sexual abuse and exploitation, it is possible to establish a common chain of liability in terms of offenders' behavior related to most of these offences. Akdeniz has identified four types of offender behavior giving rise to liability for child pornography offences,²¹³ which may apply also to other types of offences related to online child sexual abuse and exploitation. He identifies 'the creators' who produce the abusive content involving children as those having the highest responsibility in the production of child pornography offences.²¹⁴ He rightly claims that creators are also abusers of the children depicted in the child pornographic material they create, but that not all abusers record their abuse by producing such content. The second category of offender identified by Akdeniz are the 'distributors' of child pornography on the Internet, whom he then divides into commercial and non-commercial distributors. At the bottom of the chain of liability are the 'possessors' of child pornography, generally considered to be the least serious category of child pornography offenders.²¹⁵ In addition, Akdeniz establishes another category which has an indirect influence in child pornography, namely Internet Service Providers. The liability of ISPs, which will be further examined in the last chapter, is provided for in international conventions and in the national legislation of many countries, and generally depends on the existence or not of knowledge and control over the information being transmitted by the ISP.

All these liability categories are also applicable to the offence of live-streaming of child abuse. In the case of live-streaming the "creator" category would include the person or group of persons who force or coerce a child to appear in front of a webcam and perform sexual acts. In some cases, the creator is one and the same as the person who sexually abuses the child in front of the webcam.

²¹³ Akdeniz, Y. (2008) *Internet Child Pornography and the Law*. Routledge. Pg. 12.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

In live-streaming of child abuse, the distributor is also the person who creates the live-streaming material and/or sexually abuses the child in front of the webcam. Thus, in this type of offence, the “distributor” category merges with the “creator” category. In cases where the live-streaming includes sexual abuse of a child by an adult, the creator/distributor and abuser are the same person, falling within one category. As in the classification adopted by Akdeniz, the merged ‘creator-distributor’ can be divided into a commercial and non-commercial subgroup depending on the reasons underlying the offence.

There is no ‘possessors’ category in offences involving the live-streaming of child abuse since the live-stream does not get recorded, saved and downloaded onto a computer, but disappears immediately once it has been viewed. The exception may be in cases when the person viewing the live-streaming secretly records the live-streamed abuse, but this is rare given that the main reason for the live-streaming is to avoid leaving any traces in order to avoid detection and prosecution.

Instead of possessors, the offence of live-streaming of child abuse has given rise to a new, separate category of offenders who should be held legally liable for this offence: ‘the viewers’. This category encompasses persons who pay to view the live-streaming of child abuse. There are active and passive viewers. Passive viewers are like an audience, just watching the live-streaming of child abuse as it happens. Active viewers on the other hand, take an active part in the process of the live-streamed child abuse by demanding that certain acts be performed by the child or that specific acts be performed to the child by the sexual abuser. Considering this fact, the criminal liability of active viewers and the sentence they receive should be higher than that of passive viewers. The criminal liability of viewers of live-streamed abuse is more significant than that of possessors of child pornographic material since their requests initiate the live-streaming, and thus they directly contribute to the scale and incidence of this crime, because if there was no market for live-streaming of child abuse, children would not be subjected to it.

Whereas the liability of ISPs should be similar to that which they incur in cases of child pornography, as described by Akdeniz²¹⁶ providing that they are aware of and in a position to control the information being transmitted, and have a duty to monitor the data which is being transmitted through their system.

²¹⁶ Akdeniz, Y. (2008) *Internet Child Pornography and the Law*. Pg. 12.

F. INTRODUCTION TO THE LEGAL IMPLICATIONS OF THE CRIMINALIZATION OF LIVE-STREAMING OF CHILD ABUSE

The recent increase in live-streaming of child abuse - evidenced by the annual Europol reports on crime threat assessment,²¹⁷ - raises questions about the low level of arrests and the consequent lack of statistics about the number of victims and the number of perpetrators of this specific crime. But of course, law enforcement agencies can only arrest perpetrators of live-streaming if it is deemed to be a crime. In order for an activity to be considered illegal, it must be clearly and explicitly criminalized in national and/or international legislation. According to the principle of legality, *Nullum crimen, nulla poena sine lege*, enshrined in Article 15 of the International Covenant on Civil and Political Rights, and in Article 7 of the European Convention on Human Rights, no one may be convicted or punished for an act or omission that did not constitute a criminal offence under national or international law in existence at the time it was committed.²¹⁸

I. The Principle of Legality

Therefore, in order for a person to be convicted and punished for an act or omission, the act or omission should constitute a criminal offence under national or international law, at the time it was committed. The existence of a particular crime depends on the existence of legislation stating that that particular act is an offence.²¹⁹ This purpose of this principle is to ensure that legislation is specific and predictable so that people may reasonably foresee the likely legal consequences of their actions.²²⁰

Therefore, for law enforcement agencies to be able to arrest and convict perpetrators of live-streaming of child abuse, this form of child abuse must constitute a violation of national and/or international law applicable at the time the crime is committed. The criminalization of the acts connected to the live-streaming of child abuse should be clearly and specifically stated in national criminal laws or international law.

²¹⁷ Europol (IOCTA) Reports 2014-2017.

²¹⁸ International Covenant on Civil and Political Rights, Art. 15; European Convention on Human Rights, Art. 7 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

²¹⁹ Gallant, K. S. (2008) *The Principle of Legality in International and Comparative Criminal Law*. Cambridge University Press.

²²⁰ Ibid.

The principle of legality is associated with three other principles of criminal law: the principle of non-retroactivity, the principle of specificity and the principle of prohibition of analogy.

II. The Principle of Non-Retroactivity

Pursuant to the principle of non-retroactivity (*nullum crimen sine lege praevia*), the law cannot be applied retroactively: the law criminalizing a certain action, must have been in force before the act in question occurred. Thus, legislators may not enact criminal laws *ex post facto* and judges may not apply criminal provisions that were not in force at the time when the conduct occurred.²²¹

The principle of non-retroactivity applies both to civil and common law. In civil law, the implicit laws are normally codified and published. If no written laws exist criminalizing certain conduct at the time when the acts are committed, there is no legal basis to punish the perpetrators of such acts. In common law, the principle of legality prohibits the retroactive creation of new crimes by the judiciary.²²² This principle does not exclude the possibility of progressive development of the law through judicial modification of the interpretation of the law, as long as this does not change the nature of the offence and is reasonably foreseeable.²²³

III. The Principle of Specificity/Certainty

The principle of specificity requires the definition of the proscribed act be sufficiently precise. While this principle is not explicitly stated in international conventions setting out the principle of legality, it is generally considered to be a natural component of the principle of legality.²²⁴ In practice, courts recognize the need for the law to be expressed in broad terms in order to keep pace with changing circumstances and leave room for interpretation, which possibly explains the vagueness of much legislation.²²⁵

IV. The Principle of Prohibition of Analogy (*Nullum Crimen Sine Lege Stricta*)

The principle of specificity is directly related to the other principle, namely the prohibition of analogy, which requires the definition of each crime to be strictly proscribed by the law. Therefore, a judge cannot apply a provision beyond its wording or extend a precedent through

²²¹ Max Planck Institute for Comparative Public Law and International Law (2010) Max Planck Encyclopedia of Public International Law. Heidelberg and Oxford University Press. Pg. 6.

²²² Ibid.

²²³ *SW v The United Kingdom* [Judgment] [ECtHR] Series A No 335 B para. 36; *Pessino v France* [Judgment] [ECtHR] App 40403/02 Para. 36).

²²⁴ *Kokkinakis v Greece*. Para. 52.

²²⁵ *Cantoni v France*. Para. 31.

the creation of a new unwritten crime.²²⁶ Even where there are gaps in the law, the courts must not try to fill them on the basis of analogy.

G. CONCLUSIONS

There is no doubt that the Internet and new technologies have given the production and dissemination of child abuse material a new, as yet unseen dimension, although this form of child abuse is much older than the Internet itself. However, Internet technology has not only played a part in the huge increase in cases of classic child sexual abuse and sexual exploitation, enabling their much wider proliferation, but has also facilitated the development of new forms of crimes which did not previously exist, such as live-streaming. Live-streaming is a new form of child sexual abuse and sexual exploitation made possible only by Internet technology.

The following chapters of this research study present a critical analysis of the international, European and national frameworks of three countries related to the criminalization of child pornography, sexual abuse and sexual exploitation of children, with a view to determine whether the existing laws specifically criminalize the live-streaming of child abuse to an adequate degree, in accordance with the principle of legality. The following chapter is a critical assessment of the international and European treaties regulating the phenomenon of child pornography, sexual abuse and sexual exploitation of children.

²²⁶ Max Planck Institute for Comparative Public Law and International Law (2010). Pg. 28.

CHAPTER 2

CRIMINALIZATION OF LIVE-STREAMING OF CHILD ABUSE AS A FORM OF SEXUAL EXPLOITATION OF CHILDREN: APPLICABLE INTERNATIONAL AND EUROPEAN FRAMEWORK

Sexual abuse of children is criminalized in most, if not all jurisdictions of the world. Even though different forms of abuse are criminalized in different national jurisdictions, there is a wide international harmonization when it comes to the protection of children from sexual abuse and exploitation. This protection is codified in various international law instruments.

The main international legal instrument addressing the rights of the child, including child pornography and child sexual abuse is the United Nations Convention on the Rights of the Child, adopted in 1989. While it ensures a broad range of child rights, other specific instruments were established for a better protection of the rights of children. Out of these instruments, two are the main international legal instruments that address child pornography and child sexual abuse and exploitation: the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Whereas in terms of European instruments, the most comprehensive legal instrument addressing child abuse and sexual exploitation of children is the European Union Directive of 2011, the Directive 2011/93/EU on combating sexual abuse and sexual exploitation of children, and child pornography.

The first international legal instrument that refers to computer systems and child pornography was adopted in 2001.²²⁷ Since that time, there has been a continuous increase and tightening of child sexual abuse and exploitation laws. The table below provides a short overview of the main international and European legal developments towards a better protection of children from sexual abuse and exploitation. (See Table 1)

²²⁷ Council of Europe Convention on Cybercrime, CETS No.185, Budapest, 23.XI.2001 (Budapest Convention).

Table 2.1: Development of international child sexual abuse and exploitation laws

Date	Legislation	Comment
1989	UN Convention on the Rights of the Child	Prohibits all forms of child sexual exploitation and abuse and all other forms of violence and exploitation
2000	Optional Protocol to the UN Convention on Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	Provides detailed requirements to end the sexual exploitation and abuse of children
2001	Convention on Cybercrime (Budapest Convention)	Covers online child pornography in a broad way; introduces procedural laws to investigate cybercrime and provides a framework for international cooperation
2001	CoE Recommendation Rec(2001)16 of the Committee of Ministers to Member States on the protection of children against sexual exploitation	Includes recommendations related to increased cooperation of Internet Service Providers for the identification and combating of online sexual exploitation of children.
2004	Council Framework Decision 2004/68/Jha on combating the sexual exploitation of children and child pornography	Laid down a set of common minimum rules for EU Member States.
2007	The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)	Contains many references to the use of information and communication technologies in the context of the sexual exploitation and sexual abuse of children
2011	Directive 2011/93/EU of the European Parliament and of the Council on combating sexual abuse and sexual exploitation of children, and child pornography	Replaced the Council Framework Decision 2004/68/Jha
2016	Declaration of the Lanzarote Committee on web addresses advertising or promoting child sexual abuse material or images or any other offences established in accordance with the Lanzarote Convention	Urges parties to identify and remove any web addresses which self-evidently advertise or promote child sexual abuse material or images
2018	Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment and its Appendix	Urges states to have victim-focused policy and to hold business enterprises accountable.

For the purpose of this research the most relevant international and European frameworks and benchmarks are examined: 1) the UN Convention on the Rights of the Child (CRC)²²⁸, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC),²²⁹ 3) the Council of Europe Cybercrime Convention²³⁰, 4) Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)²³¹ and, 5) the European Union Directive 2011/93/EU²³². Further in this chapter, other international and European legal instruments are examined as well, which touch upon the issue of sexual abuse and/or exploitation of children and which are to some extent of relevance to the criminalization and combating of the live-streaming of child abuse and to the protection of children from this type of crime.

A. UNITED NATIONS STANDARDS

As the largest international organization, with 193 Member States, UN can provide an ideal platform for addressing the problem of sexual exploitation of children on the Internet, including the live-streaming of child sexual abuse. Following on from the analysis of regional and supranational approaches to combat the online child sexual exploitation at the European Union and Council of Europe levels, this part is dedicated to the assessment of the important legal developments at the United Nations level.

I. The UN Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC) is an international treaty with a strong normative framework,²³³ that sets out the civil, political, economic, social, health and cultural rights of children. It was adopted and opened for signature, ratification and accession on 20 November 1989 and entered into force on November 1990. The UN CRC is almost

²²⁸ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) (CRC or UNCRC).

²²⁹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted on 25 May 2000, entered into force 18 January 2002) A/RES/54/263.

²³⁰ Council of Europe Convention on Cybercrime, CETS No.185, Budapest, 23.XI.2001 (Budapest Convention).

²³¹ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS 201, Lanzarote, 25.X.2007 (Lanzarote Convention).

²³² Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and replacing Council Framework Decision 2004/68/JHA.

²³³ Santos Pais, M. (2010) The United Nations Legislative Framework for the Protection of Children from Sexual Violence, including Sexual Abuse and Exploitation. 45-54. Pg. 51. In Protecting Children from Sexual Violence: A Comprehensive Approach. Council of Europe.

universally ratified: at the moment of writing there are 196 countries party to the treaty.²³⁴ The United States is the only member of the UN that has not ratified the document.

The adoption of the Convention on the Rights of the Child was a key step in the development of standard-setting towards the protection of children from sexual violence, exploitation and abuse. The provisions of this Convention provide crucial references for legislative, policy and other measures to address sexual abuse and exploitation of children. The convention as well promotes respect for the child dignity and fights inequality and discrimination of the most vulnerable. And most importantly, the provisions of the Convention envisage children as agents of change rather than just passive recipients of care.

The fundamental idea of the CRC is that every child, whom for the purposes of this convention is every human being below the age of eighteen years, is born with fundamental freedoms and the inherent rights of human beings. In this context, the core principles of the convention are basically: the principle of non-discrimination,²³⁵ the prevalence of best interests of the child,²³⁶ protection of economic, social and cultural rights especially the right to life, survival and development,²³⁷ and ensure the respect for the views of the child.²³⁸

Another important point of the CRC is that it recalls that children are entitled to special care and assistance because of their vulnerability.²³⁹ According to the preamble children need to grow up ‘in a family environment, in an atmosphere of happiness, love and understanding.’²⁴⁰ This is supported by article 20 which states that a child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the state. And this protection shall be ensured also in cases of adoption of the child, as stated by article 21. On the other hand, the Convention recognized the importance of creating a culture of respect for children’s rights, within which children should have a central role. In this regard, Article 42 requires states to make the principles and provision of the convention widely known to the children and adults as well.

²³⁴ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en.

²³⁵ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNCRC Art.2.

²³⁶ UNCRC Art.3.

²³⁷ UNCRC Art.4, Art. 6 and throughout the whole text of the Convention.

²³⁸ UNCRC Art.12-15.

²³⁹ UNCRC Preamble. Para 4 and 9.

²⁴⁰ UNCRC Preamble. Para 6.

1. Responsibility to Protect Children's Rights

Based on the CRC, the state is the main but, not the only actor responsible for the protection of children's rights. It identifies two other actors which play a major role as well: parents and industry. The convention draws attention, throughout its various provisions, to the interaction among these actors, highlighting the principal role of the state and its duty in the interrelation and cooperation with all the other actors for ensuring child rights protection.

Responsibility of states is stipulated in articles 3, 4 and 18. Art. 3 para 2 states that: "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures." As it can be noticed, Article 3 regulates states' duties to protect children but at the same time it recognizes and stresses parents' responsibilities as well. Article 4 calls upon states to undertake all appropriate measures by using to the maximum extent their available resources and in the case national resources are not enough, the provision suggests for international cooperation. Besides, states have the responsibility of recognizing common rights and responsibilities to both parents for the development of the child and should assist parents in the performance of parental responsibilities.²⁴¹

It is important to highlight that provisions 3 and 18 provide positive rights of States and parents at the same time, stressing out the need for cooperation and among the two in order to achieve the best results in child protection. On the other hand, Art. 5 provides a negative right from the part of the states by setting their duty to respect the responsibilities, rights and duties of the parents, which in this case hold positive rights to provide "...in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention".

General comment No. 16 draws attention on the responsibility of the business industry in the protection of children's rights:

"At this juncture, there is no international legally binding instrument on the business sector's responsibilities vis-à-vis human rights. However, the Committee recognizes that duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises. Therefore, all businesses must meet their responsibilities regarding children's rights and States

²⁴¹ UNCRC Art. 18.

must ensure they do so. In addition, business enterprises should not undermine the States' ability to meet their obligations towards children under the Convention and the Optional Protocols there to."²⁴²

Again, the CRC Committee stresses the necessity for cooperation between industry and the state. It goes further by acknowledging the importance of voluntary actions of corporate responsibility by industry in advancing children's rights and calls upon states to encourage such actions.²⁴³ But, at the same time it draws the attention of the states by stressing that such actions should not and cannot be viewed as a substitute for State action in ensuring that businesses operate in line with the obligations of the Convention.

A novelty of the Convention is considering children as actors with an impact in the protection of their rights, rather than viewing them only as victims. As such, article 12 provides children with the right to express their views freely in all matters concerning them and the right to be heard in judicial and administrative proceedings. This provision urges states to ensure that children are granted these rights in conformity with their capability of forming their own views, given due consideration to the age and maturity of each child.

2. Rules Against the Sexual Abuse and Exploitation of Children

In the area of sexual abuse and exploitation of children, the convention highlights the importance of combating child-rights violations as well as the need to invest in prevention and assistance to child victims. While the CRC does not criminalize specific acts against the well-being of children, several articles create positive obligations for the states to protect children against sexual abuse and exploitation. The most relevant articles in this context are Article 19 and Article 34. Article 19 acknowledges the right of children to be protected from all forms of violence, such as hurt or maltreatment, being it physical and/or mental, injury or abuse, neglect or negligent treatment, exploitation, including sexual abuse. This right of children is a positive right which should be provided and ensured from the states, which should take all the appropriate legislative, administrative, social and educational measures to guarantee these rights. Children should be cared and protected from violence, abuse and neglect from their parents, legal guardians or anyone else who looks after them.

²⁴² General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights. Para 8.

²⁴³ Ibid. Para 9.

The text of the provision is non-exhaustive and all-inclusive, by providing in paragraph 1 a broad definition of the term of ‘violence’ which is understood to mean “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse”. In contrast to common notions of violence which usually refer only to physical harm or intentional harm, the term used in this provision is much broader than that. This provision recognizes the equal importance of other types of harm as well, such as mental/psychological harm and non-intentional harm such as neglect which in this provision fall under the same umbrella of ‘violence’ providing as such a broader protection of children. Furthermore, General Comment 13 to the CRC underlines the importance that every child’s life must be protected from all forms of violence.²⁴⁴ It explains that under the broad context of Article 19, states have a positive due diligence obligation to actively prevent violence or violations of human rights in general and child rights more specifically. They have the obligation of protecting and assisting child victims and witnesses, to investigate and punish those responsible of child abuse. Based on General Comment 13, the wide formulation of Article 19 was constructed with the intention of forming the basis for discussions and strategies to address and eliminate all forms of violence covered by the CRC.²⁴⁵

The Committee on the Rights of the Child (The Committee), in the General Comment 13 goes further by making a legal analysis of Article 19. In this analysis, importance is given to the detailed description of “...all forms of violence...” which the Article 19 covers.²⁴⁶ First of all the Committee strongly emphasizes the unacceptance of any form of violence against children. No violence against children is legal, however light it might be. Frequency, severity and intent to harm are not definitional prerequisites of violence. Such factors may affect the proportionality in responses against violence, but not the absolute right of the child to human dignity and physical and psychological integrity.²⁴⁷ The definition of violence should not and cannot leave spaces for certain forms of violence to be socially or legally acceptable.

Moreover, the Committee clarifies that Article 19 requires state parties to establish child rights-based legal definitions of the different forms of violence outlined in this article in their national

²⁴⁴ Committee on the Rights of the Child, General comment No. 13 (2011): The Right of the Child to Freedom From all Forms of Violence, CRC/C/GC/13.

²⁴⁵ General Comment No. 13.

²⁴⁶ Ibid. Section IV.

²⁴⁷ Ibid.

legislations.²⁴⁸ These definitions should be clear, operational and applicable in different societies and cultures in the efforts of creating internationally standardized definitions.

Violence against children can be of three dimensions: from adults, from other children, or harm caused by children towards themselves. For the purposes of this research, consideration will be given only to harm caused by adults. Harm caused by other children or by children towards themselves will be included only in cases when there is an adult who by the use of force or coerce causes a child to harm another child or him/herself. As the Committee also recognized, forms of violence often occur in a mixed form, thus in a combination of the forms listed in Article 19. For this reason, below will be provided a detailed analyzes of the types of violence which are not all directly related to the online violence but can occur as a result of online interactions as well.

The most important types of violence in the context of this study is sexual abuse and exploitation. According to the Committee in the General Comment No. 13, sexual abuse and exploitation of children includes:

- “(a)The inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity;
- (b)The use of children in commercial sexual exploitation; and
- (c)The use of children in audio or visual images of child sexual abuse; and
- (d)Child prostitution, sexual slavery, sexual exploitation in travel and tourism, trafficking (within and between countries) and sale of children for sexual purposes and forced marriage.”²⁴⁹

Another directly related type of violence is Mental violence. As referred to in the Convention, mental violence is psychological maltreatment, mental abuse, verbal abuse and emotional abuse or neglect which can be expressed into different ways.²⁵⁰

Sexual abuse can be accompanied by other types of physical violence which in some cases can also be fatal. According to the Committee physical violence includes among others:

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

“(a)All corporal punishment and all other forms of torture, cruel, inhuman or degrading treatment or punishment; and [...] (d)Deliberate infliction of disabilities on children for the purpose of exploiting them for begging in the streets or elsewhere.”²⁵¹

It is interesting to notice that the Committee has divided physical violence and corporal punishment into two separate categories. In General Comment No. 8 the Committee defines “corporal” or “physical” punishment as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.”²⁵²

Self-harm can include eating disorders, substance use and abuse, self-inflicted injuries, suicidal thoughts, suicide attempts and actual suicide.²⁵³

And last and the most important one in terms of this study, violence through information and communications technologies. As already mentioned, violence through ICTs includes overlapping areas which the CRC Committee has listed as such:

“(a)Sexual abuse of children to produce both visual and audio child abuse images facilitated by the Internet and other ICT;

(b)The process of taking, making, permitting to take, distributing, showing, possessing or advertising indecent photographs or pseudo-photographs (“morphing”) and videos of children and those making a mockery of an individual child or categories of children;

(c)Children as users of ICT:

(i)As recipients of information, children may be exposed to actually or potentially harmful advertisements, spam, sponsorship, personal information and content which is aggressive, violent, hateful, biased, racist, pornographic, unwelcome and/or misleading;

(ii)As children in contact with others through ICT, children may be bullied, harassed or stalked (child “luring”) and/or coerced, tricked or persuaded into meeting strangers off-line, being “groomed” for involvement in sexual activities and/or providing personal information;

(iii)As actors, children may become involved in bullying or harassing others, playing games that negatively influence their psychological development, creating and uploading

²⁵¹ Ibid.

²⁵² General comment No. 8 (2006) The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia). Para 11.

²⁵³ General comment No. 13, section IV.

inappropriate sexual material, providing misleading information or advice, and/or illegal downloading, hacking, gambling, financial scams and/or terrorism.”²⁵⁴

This broad, non-exhaustive definition identifies four main forms of sexual abuse through ICTs, basically: sexual abuse before going online, thus the abuse that happens for the purpose of producing images, audios or videos to be disseminated on Internet and other ICTs; sexual abuse after going online, thus the abuse that happens as a consequence of arranging meetings from the virtual world into the real world; online child pornography, which doesn't necessarily involve the abuse of the child and in some cases doesn't necessarily involve real children; and children as actors of child illegal content production. Based on these forms of sexual abuse through ICTs, it can be deduced that Internet and other ICTs in general, can be both an incentive (abuse with the intention of disseminating child abuse content online and a tool (finding and targeting children through the ICTs in order to arrange off-line meetings for the purpose of abuse). In both cases, ICTs influence the increase of demand for real child sexual abuse and exploitation.

3. Protective Measures

For the purpose of a proper and effective implementation of Art. 19, the Committee urges state parties to take all appropriate not only legislative, but also administrative, social and educational measures at both national and local levels. The term ‘appropriate’ in this context implies that measures should be integrated, interdisciplinary and coordinated among all sectors of the government. As the Committee stresses, isolated non-coordinated programmes will have limited effects.²⁵⁵ Legislative measures required by Art. 19 include the budget, and the implementing and enforcing measures, including defining roles and responsibilities of all concerned agencies.

Second paragraph of the same article includes a list of protective measures to be taken by states against child violence: range of interventions; prevention, which should include all stakeholders; identification of risk factors and signs of maltreatment; reporting mechanisms, such as hotlines; referral of violence issues from the reporting agencies to the appropriate agencies able to deal with the issue; investigation by qualified professionals in a child-rights bases and child-sensitive approach; treatment of abused children in order to recover both

²⁵⁴ Ibid.

²⁵⁵ Ibid.

psychologically and physically and reintegrate to the society; follow-up of the intervention and recovery process; child-friendly justice and creation of databases and reviews of practice and causes through clear indicators.

Another important provision regulating sexual abuse of children is Article 34. This article pays specific attention to sexual exploitation and sexual abuse of children. It calls upon States Parties to undertake specific measures to protect children from all forms of sexual exploitation and sexual abuse. For these purposes, this provision enumerates particular cases towards which states should pay specific attention: “(a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials”²⁵⁶. While the provision does not mention ICTs specifically, it does not exclude them either. Since there are no limitations in terms of engagement in the sexual exploitation and sexual abuse of children, if the engagement occurs through the ICTs, it falls under the scope of this article. Therefore, under this provision, state parties are obliged to take all appropriate national, bilateral and multilateral measures to prevent the listed types of crimes also when Internet or other ICTs are involved.

This article is very vague in that it does not provide any detail on how states should proceed in providing protection to children against these types of sexual exploitation. No definition is provided on what constitutes pornographic performances involving children, neither of what constitutes exploitation of children or pornography. According to Gillespie, this article was intentionally constructed in this broad way in order to provide for flexibility.²⁵⁷ However, this wideness causes problems of implementation.²⁵⁸ Nevertheless, the importance of this article cannot be underestimated, as it was a milestone in international legislation as regards the protection of children from sexual exploitation and a drive for international enforcement agencies towards actively investigating this type of crime.²⁵⁹

Article 36 provides additional protection by requiring State parties to protect the child against all other forms of harmful sexual exploitation. As such, this provision provides obligations to

²⁵⁶ UNCRC Art.34.

²⁵⁷ Gillespie, A.A. (2011b) Sexual Exploitation. In Buck, T. eds. (2011) International child law. 2nd edition. Routledge.

²⁵⁸ Gillespie, A.A. (2012b) Child Pornography in International Law. In Quayle, E. and Ribisl, K.M. eds. (2012) Understanding and Preventing Online Sexual Exploitation of Children. Routledge. Pg. 65.

²⁵⁹ Ibid.

address the sexual exploitation of children from a broad spectrum, including thereto potential abuse on cyberspace.

4. National Implementation and International Cooperation

The convention established a new threshold for the realization of children's rights by establishing states' accountability for child protection. For the effective implementation of the provisions envisaged in this Convention, and for the evaluation of its effectiveness, The Committee has suggested the creation of systems of accountability, such as data collection and analysis, indicator construction, monitoring and evaluation as well as support for independent human rights institutions. In order to achieve good systems of accountability, states parties, national and local agencies and organizations, and relevant civil society stakeholders should cooperate with each-other and establish and apply common standards, indicators, tools, and systems of monitoring, measurement and evaluation to fulfil their obligations and commitments to protect children from violence.²⁶⁰ The Committee also recommends States parties to publish annual reports on progress made with regard to the prohibition, prevention and elimination of violence, submit it to parliament for consideration and discussion, and invite all relevant stakeholders to respond to the information contained therein.²⁶¹ However, a weak point of the CRC, which has been criticized by scholars is its enforcement.²⁶² The Committee can only make recommendations, it does not have any enforcement power. Nevertheless, despite the criticism, the CRC remains a very important international instrument that brings countries together into recognizing some basic human rights for children.²⁶³

According to the CRC Committee, no justification in terms of failure to implement any of the obligations stated in the Convention is acceptable.²⁶⁴ States parties are urged to find sufficient resources needed to adopt measures required for the child protection and caregiving. Acknowledging that some states parties may be less capable of others to allocate the necessary resources for the creation of strategic measures for child protection, the Committee calls for

²⁶⁰ General comment No. 13, section VI.

²⁶¹ Ibid.

²⁶² Kendall, V. M. and T. Markus Funk (2011) *Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Responses*. Rowman & Littlefield Publishers. Pg. 131.

²⁶³ Levesque, R. J. R. (1999) *Sexual Abuse of Children: A Human Rights Perspective*. Indiana University Press. Pg. 11.

²⁶⁴ General comment No. 13, section VII.

states parties to increase international cooperation and assistance, which is also regulated in the articles 4 and 45 of the Convention.

Therefore, in order to put a balance among measures taken in each member state and to harmonize the approaches and strategies towards the issue, the Committee recommends states parties to call upon international and regional bodies by creating partnerships for assistance in financial and technical resources. Potential partners could be donor institutions such as the World Bank, UN agencies and organizations and other international and regional bodies. The main component while creating such partnerships should be assistance in child-rights based protection programs.

In order to best assist states in their national efforts in protecting children and fighting all forms of violence against children, better and constantly developing resources are needed at the international level as well. As such, in order to fulfil the obligations of article 19, the availability of human, financial and technical resources is essential.

While recognizing the critical importance of national action, the convention equally acknowledges the transnational nature of this phenomena, and the need for regional and international cross-border cooperation to fight impunity and secure children's protection. Especially with the development of ICTs and the facilities it provides for criminals abusing with children, cross national cases are very common, (such as cross-border trafficking for sexual exploitation and the live-streaming of child abuse). In order to protect children worldwide, child protection should cut national borders. Specific legislation, policies, programmes and partnerships are required to protect children affected by cross-border issues (for example cybercrime regulation and extraterritorial prosecution of those who sexually abuse children through travel).

II. Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

While the Convention on the Rights of the Child ensures a broad range of rights to children, its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (hereafter Optional Protocol or OPSC) focuses extensively on child sexual exploitation by further complementing and reinforcing the strong normative framework of the CRC. Optional Protocol

was adopted by the General Assembly in 2000 and entered into force on 18 January 2002. It is ratified by 163 countries.

The drafters of the Optional Protocol declare that they are ‘*gravely concerned at the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography*’ and about ‘*the growing availability of child pornography on the Internet and other evolving technologies*’.²⁶⁵ The provisions of the Optional Protocol are critical to the protection of children’s rights envisaged in the CRC. The Optional Protocol serves as a blueprint towards future instruments related to Internet child pornography and related matters.²⁶⁶ It provides strategic guidance for the national implementation of its provisions and narrows the gap between international standards and the reality on the ground.²⁶⁷ Its provisions highlight the importance of multi-stakeholder cooperation of both state and non-state actors in realizing child rights and protecting them from exploitation. Furthermore, while stressing the importance of protective measures, the provisions of the Optional Protocol further highlight the role of prevention and promote cross-border cooperation for these purposes.

Moreover, the Optional Protocol stresses the need for legislative reforms to prohibit and criminalise the sale of children, child prostitution and child pornography, to protect child victims and assist in their recovery and reintegration. It also points out the need for child-sensitive services and professional human resources where children can seek counselling and report on violations of their rights without fear of reprisal. To overcome transnational nature of these crimes the protocol promotes international co-operation and mutual assistance between judicial bodies and law enforcement agencies. Besides this, the Optional Protocol underscores the role of prevention, by promoting and highlighting the necessity for the involvement of the civil society and the children and adolescents themselves in awareness raising, information and education initiatives, for higher results in the protection of children.

²⁶⁵ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

²⁶⁶ Kalim, A. (2014) Addressing the Gap in International Instruments Governing Child Pornography. *Comm Law Conspectus*. Vol. 21. 428-252.

²⁶⁷ Santos País, M. (2010) The United Nations Legislative Framework for the Protection of Children from Sexual Violence, Including Sexual Abuse and Exploitation. 45-54. In *Protecting Children from Sexual Violence - A Comprehensive Approach*. CoE Publications.

1. *Definition and Scope of the Optional Protocol*

Article 1 of the OPSC states that parties are to protect the rights and interests of child victims of trafficking, child prostitution, child pornography and child labour. While it does not include any provision related to the use of ICT for committing the crimes it covers, the broad definition of the term ‘child pornography’ allowing for an interpretation which can include the commitment of child pornography through the ICT. As such, in its Art. 2 paragraph c the OPSC effectively defines ‘child pornography’ as “*any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.*” The phrase ‘by whatever means’ is broad enough to include the use of digital technologies for the representation of child pornography. The use of this general broad language makes the provision very flexible and adoptable to the challenges caused to the legislators and law enforcement by the rapid development of the new digital technologies.

Further on, the wording of this provision allows for another broader interpretation of this definition, which provides for the inclusion of the live-streaming of child pornography within the scope of this provision. The phrase ‘*any representation*’ taken in conjunction with the phrase ‘by whatever means’ can be interpreted as including the live representation (live-streaming) of ‘*a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes*’. The added value of this broader interpretation of this definition is that it allows to incorporate the live representation by means of ICT and other digital technologies of a child engaging in real time in sexually explicit activities as well. Since the word ‘representation’ of child pornography does not refer to only static, motionless, material of child pornography (such as images), it can be interpreted as including also moving representations, such as videos and live-streaming of sexually explicit activities.

In the Handbook of the OPSC published by UNICEF’s Innocenti Research Centre is indicated that:

“Pornography can, among other forms, be represented in live performances, photographs, motion pictures, video recordings and the recording or broadcasting of digital images. The Committee is particularly concerned about the widespread distribution and accessibility of child pornography through the Internet. It has strongly and consistently recommended that States Parties and the international

*community urgently tackle the issue. Specific recommendations have been made regarding adoption of legislation on the obligations of Internet service providers in relation to child pornography.*²⁶⁸

Based on the clarification of what constitutes pornography provided in this Handbook, and also on the broad language used in the definition of pornography provided in art. 2 of the OPSC, It can be concluded that the OPSC is flexible enough to cover the newly emerging forms of child pornography and child prostitution including the live-streaming of child abuse. The absence of the expressed mentioning of the live-streaming of child abuse cannot be interpreted as tolerance of it,²⁶⁹its lack however, leaves spaces for interpretation.

The Guidelines for reporting on the OPSC do not provide specific information on the interpretation of the art. 2, however, paragraph 12 takes a broad approach to it:

“Reports should summarize available information concerning the extent to which pornography featuring persons actually or apparently under the age of 18, is produced, imported, distributed or consumed within the territory of the State party and any increases or decreases in the production, importation, distribution or consumption of child pornography that have been measured or detected, including:

- a) Photographs and other printed materials;*
- b) Videos, motion pictures and electronically recorded materials;*
- c) Internet sites containing photographs, videos, motion pictures or animated productions
(e.g. cartoons) depicting, offering or advertising child pornography; and*
- d) Live performances.”*²⁷⁰

It is important to highlight in this paragraph the requirement of a state party to report both the production and consumption of child pornography within its territory, including as such, the act from both parties of the crime: the one who produces the child pornographic materials and

²⁶⁸ Innocenti Research Center (2009) Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. UNICEF, Florence.

²⁶⁹ Terres des Hommes (2017) Webcam Child Sex Tourism, Becoming Sweetie: A Novel Approach to Stopping the Global Rise of Webcam Child Sex Tourism.

²⁷⁰ Committee on the Rights of the Child, (29 September 2006), Revised Guidelines Regarding Initial Reports to be Submitted by States Parties Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

the clients who consume it. ‘Live performances’ is specifically mentioned, thus obliging state parties to keep track of one of the forms of live-streaming of child abuse. Even though the live-streaming of child sexual abuse is not specifically mentioned in the list of the forms of child pornography in the Guidelines, the use of the word “including” indicates that it is a non-exhaustive list, allowing state parties to report other forms of child pornography as well, including in this case the acts of live-streaming of sexual abuse of a child.

OPSC does not define ‘child’ but considering the fact that it is a protocol of the UN CRC, the definition of the CRC applies, this the 18 years old. The OPSC lists a number of actions that states are required criminalize related to child pornography. Based on Article 3, States Parties are required to ensure the criminalization of producing, distributing, disseminating, importing, exporting, offering, selling or possessing of child pornography, as defined in article 2, whether committed domestically or transnationally, on an individual or organized basis. Possession of child pornography is criminalized regardless of the intent to distribute.²⁷¹ Gillespie raises an interesting question to whether importing and exporting could be used in cases of downloading of children pornography from the server of another country in the online environment.²⁷²

Optional protocol encourages each State Party to establish the liability of legal persons for offenses specific to child pornography.²⁷³ It is obvious that the scope of this provision was to establish the liability of ISPs related to availability of illegal content online. However, in 2011, the Special Rapporteur acknowledged that ‘*given the decentralized nature of the Internet over which no one entity has control, traditional legislation penalizing the dissemination of child pornography cannot be applied to those ISPs which may unwittingly facilitate such crimes.*’²⁷⁴

By analyzing the use of the wording of the Special Rapporteur “*unwittingly facilitate*” one may reasonably expect that ISPs would not be held liable in cases of lack of knowledge and no possibility of knowledge and control over such crimes. Therefore, while liability of ISPs is acceptable, the nature of internet and the ISPs technical capacities should be taken into account while developing policies for the implementation of the Optional Protocol by the ratifying states.²⁷⁵

²⁷¹ OPSC. Art. 3(3).

²⁷² Gillespie, A.A. (2012b) Child Pornography in International Law. In Quayle, E. and Ribisl, K.M. eds. (2012) Understanding and Preventing Online Sexual Exploitation of Children. Routledge. Pg. 65.

²⁷³ OPSC. Art. 3(4).

²⁷⁴ Special Rapporteur Report of the Commission on Human Rights on the Sale Of Children, Child Prostitution and Child Pornography, E/CN.4/2001/78, 25 January 2001, presented at the fifty-seventh session of the General Assembly of the United Nations.

²⁷⁵ Akdeniz, Y. (2008) Internet Child Pornography and the Law. Routledge.

2. International Cooperation

The OPSC addresses also the need for international cooperation. As previously mentioned child pornography, and especially child pornography through the ICT is readily distributed across borders, thus international cooperation is crucial for combating this phenomenon. As such, article 5(1) requires state parties to make child pornography offences extraditable through extradition treaties between state parties in order to facilitate the prosecution and conviction of the offenders. In article 10(1) Optional Protocol required state parties to:

'...take all necessary steps to strengthen international co-operation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism'.²⁷⁶

And what is even more important is the requirement for state parties to:

'...promote the strengthening of international co-operation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism'.²⁷⁷

What can be directly noticed from these two provisions is the introduction of a new term, 'child sex tourism', which is not mentioned in the title of the Optional Protocol and neither in its other provisions. Based on the Luxembourg terminology guidelines, the term 'child sex tourism' refers to 'sexual exploitation of children that is embedded in a context of travel, tourism, or both', a term which includes the live-streaming of child abuse or otherwise called 'webcam child abuse'.²⁷⁸ This means that, even though the primary focus of the OPSC is the protection of children from sale of children, child prostitution and child pornography, its article 10 is applicable to the offence of the live-streaming of child abuse as well and it can be used for purposes of criminalization of such conducts.

²⁷⁶ Optional Protocol, Art. 10(1).

²⁷⁷ Optional Protocol, Art. 10(3).

²⁷⁸ Interagency Working Group in Luxembourg (2016) Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse, ECPAT International and ECPAT Luxembourg.

III. The International Labour Organization Convention No. 182 Worst Forms of Child Labour Convention

The convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (the ILO Convention) was adopted by the International Labour Organization (ILO) on 17 June 1999 in Geneva and entered into force on 19 November 2000. As of the time of writing, the Convention was ratified by 181 out of 186 ILO Member States.

The ILO Convention has a significant role in the consolidation of a global harmonization of the worst forms of child labour which has a crucial importance for the protection of children in such situations, such as for e.g. sexually exploitative situations, as in the case of regular live-streaming of child abuse. It calls on Member States to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour and to ensure effective implementation of its provisions.²⁷⁹ The necessary measures range from legal reforms to include penal and other sanctions, and their implementation, to direct help to children and families.²⁸⁰ Furthermore, Art. 6 of the ILO Convention calls upon Member States to consider the elimination of worst forms of child labour as a priority. Article 2 of the convention defines a child as any person under 18.

In relation to the sexual exploitation of children, it is important to point out that the ILO Convention lists such crimes within the definition of ‘the worst forms of child labour’. As such, Article 3 comprises within the worst forms of child labour also:

“(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”²⁸¹

Following the child rights approach, paragraph b of this provision calls on Member States to criminalize child prostitution, child pornography and child pornographic performances as some of the worst forms of child labour. Furthermore, by considering child prostitution, child pornography and child pornographic performances as forms of child labour, it provides for

²⁷⁹ ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Art. 1.

²⁸⁰ Ibid. Art. 7.

²⁸¹ Ibid. Art. 3 paragraphs (b) and (d).

another angle of tackling the issue and an additional angle for prosecution.²⁸² The listing of pornographic performances as a type of worst forms of child labour is important for the scope of this research as it captures the conduct related to the live-streaming in real time of child sexual abuse. Furthermore, without any doubt, live-streaming of child abuse, not only due to the type of crime itself but also due to the circumstances in which it is carried out - pornographic performance in front of a webcam, viewed and or/directed by one or more persons/clients – is harmful not only for the health and safety of the child but also for the morals of the child victim, thus potentially falling under both paragraphs of the Article 3 defining the types of worst forms of child labour.

However, despite its intention of protecting children, there is strong criticism to the ILO Convention as regards the treatment in its Article 3 of some forms of child sexual exploitation (the use, procuring or offering of children for child pornography, child prostitution or pornographic performances) as labour, despite categorizing them as ‘worst forms of child labour’.²⁸³ Gillespie argues that by referring to these forms of child sexual exploitation as a type of work, it may be implied that the object, the labour, is legitimate but the methods are inappropriate, and that is why they are categorized as worst forms.²⁸⁴ Based on this argument, Gillespie stressed the need to categorize commercial sexual exploitation of children as abuse rather than as labour, in order to avoid it from being viewed as a form of employment.

Another criticism of the ILO Convention regards that while the drafters of the Convention have considered commercial sexual exploitation of children as a form of labour, they have failed to take into account that children lack the legal capacity to consent to commercial sexual acts.²⁸⁵ Bakirci argues as well that categorizing commercial sexual exploitation of children as a form of labour leads to child victims being viewed as child sex workers, which leads to many risks in different cultures.²⁸⁶

The ILO Convention, in Art. 8 promotes international cooperation for the effective implementation of the provisions of the Convention, putting special emphasis to the assistance of less developed countries towards social and economic development, poverty eradication and universal education. In this provision, ILO has stressed the importance of social and economic

²⁸² ECPAT International, Programme combating Sexual Exploitation of Children Online, Legal Factsheet

²⁸³ Gillespie, A.A. (2012b) Child Pornography in International Law. Pg. 65.

²⁸⁴ Ibid.

²⁸⁵ Bakirci, K. (2007) Child Pornography and Prostitution: Is this Crime or Work that should be Regulated? Journal of Financial Crime. Vol 14. 5-11.

²⁸⁶ Ibid.

development, poverty eradication and education as crucial factors which have a high influence on worst forms of child labour.

B. COUNCIL OF EUROPE STANDARDS

The Council of Europe (CoE) standard setting method is through elaboration of international conventions which are then opened for signature for states. In principle, the CoE conventions are directed at CoE member states, but not exclusively limited to them. They are often open for accession by non-member states, even non-European states and also International Organizations such as the EU, provided that they are formally invited to accede by the Committee of Ministers of the CoE.²⁸⁷ The CoE conventions related to criminal law have an important common feature: they do not address simply the criminal law aspect of the tackled crimes but include also prevention and assistance to victims. The Council of Europe conventions are intentionally designed to be dynamic in order to be able to respond to the developments and new phenomena.²⁸⁸ This is particularly important for tackling cybercrime and specifically sexual abuse sexual exploitation of children on the Internet.

I. Convention on Cybercrime

The Convention on Cybercrime, also known as the Budapest Convention is the first convention setting a global standard on cybercrime. It was opened for signature in Budapest, on 23 November 2001 and it entered into force on 1 July 2004. This binding international treaty was designed to respond to the growth of risks posed by information and communication technologies. It is one of the first international instruments harmonizing standards related to Internet crime.²⁸⁹ As of September 2018, 61 states are Parties to the convention, 4 others have signed it,²⁹⁰ and 7 more have been invited to accede.²⁹¹ In addition, an approximate of 70 other

²⁸⁷ See: CoE Participation of non-Member States: <https://www.coe.int/en/web/conventions/participation-of-non-member-states>.

²⁸⁸ Jeney P. (2015). Pg 24.

²⁸⁹ Oddis, I. D. (2002) Combating Child Pornography on the Internet: The Council of Europe's Convention on Cybercrime. 16 Temple International & Comparative Law Journal. 477.

²⁹⁰ Council of Europe. Chart of signatures and ratifications of Treaty 185. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=vodcWvz7

²⁹¹ Segel, A (16 July 2018) Enhanced Cooperation on Cybercrime: A Case for a Protocol to the Budapest Convention. Commentary. Italian Institute for International Political Studies (ISPI). Available at: <https://www.ispionline.it/en/pubblicazione/enhanced-cooperation-cybercrime-case-protocol-budapest-convention-20964>.

states have used this convention as a guideline for drafting their domestic legislation on cybercrime.²⁹²

The Budapest Convention covers offences related to computer systems and computer networks, known as computer crimes or cybercrimes, where ICT is used to commit conventional crimes but also to create new types of offences, which would be impossible without the use of ICTs. It regulates illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related forgery, computer-related fraud, offences related to child pornography, and offences related to copyright.

It fosters the harmonization of domestic criminal substantive laws and criminal procedural laws in the area of cybercrime for faster and effective international cooperation regarding cybercrime and electronic evidence. Up to date 55 countries have ratified the convention and 4 have signed but not ratified it. The Convention of Cybercrime has been ratified also by some non- member states of the Council of Europe which are remarkable in terms of size and geographic spread, such as Australia, Canada and the United States,²⁹³ giving an international dimension to the Convention.

1. Criminalization of Online Child Pornography

Relevant to this research is that Budapest Convention is the first international treaty addressing offences related to online child pornography. Even though there is only one provision on the matter and only the offence of online child pornography is addressed, it was a huge improvement at the time it was adopted being the Budapest Convention the first treaty dealing with computer crimes. The convention recognizes the universally accepted definitions of Internet child pornography and encourages signatory parties to incorporate them into their domestic legislations.²⁹⁴ The Convention uses a clear terminology related to child pornography and makes a detailed categorization of Internet child pornography at each step of the chain.²⁹⁵ As such, Article 9 requires state parties to criminalize the following acts:²⁹⁶

- producing child pornography for the purpose of its distribution through a computer system;

²⁹² Ibid.

²⁹³ Council of Europe website: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=H9kaRVx1 accessed 5th June 2017

²⁹⁴ Weber, M. Amalie (2003) The Council of Europe's Convention on Cybercrime. 18 Berkeley Tech. Law Journal 425.

²⁹⁵ Oddis, I. D. (2002). Pg. 513.

²⁹⁶ Council of Europe Cybercrime Convention, Article 9. Para 1.

- offering or making available child pornography through a computer system;
- distributing or transmitting child pornography through a computer system;
- procuring child pornography through a computer system for oneself or for another person;
- possessing child pornography in a computer system or on a computer-data storage medium.

The term “child pornography” means pornographic material that visually depicts:

- a minor engaged in sexually explicit conduct;
- a person appearing to be a minor engaged in sexually explicit conduct;
- realistic images representing a minor engaged in sexually explicit conduct;
- any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes.

The Explanatory Report of the Convention states that it leaves to Member States to determine, based on their national standards, what constitutes ‘pornographic material’ based on what they classify as “obscene, inconsistent with public morals or similarly corrupt” material.²⁹⁷

Nevertheless, the definition of ‘child pornography’ provided by this Convention should not apply only to depictions of sexual abuse of real children but also depictions of a person appearing to be a child engaged in sexually explicit conduct and realistic images which do not involve a real child engaged in sexually explicit conduct. The later one includes pictures which are totally generated by a computer or transfigured images of real persons.²⁹⁸ The Budapest Convention allows Parties the possibility to make reservations to the above provision to not criminalize images depicting a person appearing to be a minor engaged in sexually explicit conduct and “realistic” images which do not in fact involve a real child engaged in sexually explicit conduct.²⁹⁹

There is a long ongoing debate on child pornography versus freedom of expression related to the production of realistic images representing a minor but which do not involve a real child engaged in sexually explicit conduct. In this debate, some argue that speech that does not produce a crime and does not cause any victim cannot be prohibited as no child is been harmed or involved.³⁰⁰ It is interesting to notice the opposite stances between European and United

²⁹⁷ Explanatory Report of Budapest Convention. Para. 99.

²⁹⁸ Explanatory Report of Budapest Convention. Pg. 101.

²⁹⁹ Budapest Convention, Art. 9. Para 4.

³⁰⁰ *Ashcroft v Free Speech Coalition* 122 S Ct 1389 (2002).

States laws. While the European jurisdiction (both Cybercrime Convention and the EU Directive³⁰¹) have included in the definition of child pornography the criminalization of virtual child pornography, the United States Supreme Court decision declared as unconstitutional the provision of the Child Pornography Prevention Act 1996 which had a similar provision with the explanation that it violated the First Amendment right to free speech.³⁰² From the European stance, virtual child pornography, even though does not include any real child, thus no child is harmed, may be used to encourage children to participate in such acts.³⁰³ Moreover, due to technology developments, real child pornography and virtual child pornography have become almost indistinguishable.³⁰⁴ Child pornography is used also for sexual gratification, to establish trust among perpetrators of child abuse and for commercial purposes.³⁰⁵ It may also increase the perpetrators appetite and encourage them to engage into illegal conduct,³⁰⁶ and it may normalize sexual activity with children.³⁰⁷ Therefore, States should be careful when deciding if the final outcome is considered illegal or not, even if there is no physical harm of a child.³⁰⁸ The explanatory report of the Budapest Convention states that “sexually explicit conduct” must include at least the following real or simulated acts:

- a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between children, or between an adult and a child, of the same or opposite sex;
- b) bestiality;
- c) masturbation;
- d) sadistic or masochistic abuse in a sexual context;
- e) lascivious exhibition of the genitals or the pubic area of a child.

Both real and simulated conduct are included in the definition. Images depicting such acts are further governed by national standards concerning body harm or classifications related to what is inconsistent with public morals. Thus, materials having a medical, artistic or scientific purpose do not fall within the scope of this definition.

³⁰¹ See Section on European Union of this chapter.

³⁰² *Ashcroft v Free Speech Coalition* 122 S Ct 1389 (2002).

³⁰³ Budapest Convention, Explanatory Report Para 102.

³⁰⁴ Global project on Cybercrime (Dec. 2012) *Protecting Children Against Sexual Violence: The Criminal Law Benchmarks of the Budapest and Lanzarote Conventions*. CoE. Strasbourg. Pg. 19.

³⁰⁵ *Ibid.*

³⁰⁶ Budapest Convention, Explanatory Report. Para 93.

³⁰⁷ Supreme Court of Canada *R v Sharpe* [2001] 1 S.C.R. 45, 2001 SCC 2.

³⁰⁸ *Ibid.*

There are many criticisms to the Cybercrime Convention, one of them ones being its inability to respond to Internet developments.³⁰⁹ Other claim that it does not provide a long enough list of content-related computer offences.³¹⁰ Despite these criticisms, the Cybercrime Convention remains one of the leading steps towards the criminalization of Internet child pornography.

2. *International Cooperation*

Budapest Convention aims towards fast and effective international cooperation. Chapter 3 of the Convention calls for international judicial and law enforcement cooperation by obliging parties to eliminate the obstacles for a rapid flow of information and evidence about all criminal offences related to computer systems and data, including offences related to the sexual abuse and sexual exploitation of children through computer systems as well as the collection of evidence in electronic form.³¹¹ This means that States parties to this Convention are obliged to cooperate not only for crimes committed through a computer system but also for any other type of offence involving electronic evidence.³¹² Based on Article 27 of the Convention, cooperation will be provided based on relevant international agreements in criminal matters or agreements based on uniform or reciprocal legislation and in absence of these, the provisions of this convention can be directly applicable.

II. The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse was adopted and opened for signature in Lanzarote, Spain, in October 2007. It is for this reason that it is also known as the Lanzarote Convention. It entered into force on 1 July 2010. To date, it has been signed by all 47 CoE member states and ratified by 42.³¹³

The Lanzarote Convention is a major step forward in the protection of children against offences with a sexual nature by requiring the criminalization of all forms of sexual offences against them. According to Bitensky, until that moment, the international legal instruments in general and those of the Council of Europe in particular have followed a “catholic approach” of an all-

³⁰⁹ Rosenzweig, P. (2012) Making Good Cybersecurity Law and Policy: How Can We Get Tasty Sausage? 8 I/S: Journal of Law & Policy for Information Society 388-399.

³¹⁰ Oddis, I. D. (2002). Pg. 512.

³¹¹ Convention on Cybercrime, Art. 23.

³¹² Global Project on Cybercrime (Dec. 2012) Protecting Children Against Sexual Violence: The Criminal Law Benchmarks of the Budapest and Lanzarote Conventions. CoE. Strasbourg. Pg. 81.

³¹³ Council of Europe website: <http://www.coe.int/en/web/children/convention>, (last accessed 1 May 2017).

encompassing prototype, thus guaranteeing a broad spectrum of human rights and including within them the protection of children from sexual abuse and exploitation as one of the many equally important rights.³¹⁴ She considers the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol)³¹⁵ as an exception to this approach since it does not follow an all-encompassing approach but is rather dedicated only to the protection of children from the sale of children, child prostitution and child pornography.

According to her, in spite of the Optional Protocol, the Committee of Experts on the Protection of Children Against Sexual Exploitation and Sexual Abuse (PCSE), established by the Committee of Ministers of the Council of Europe after a review of the then existing international instruments on the protection of children from sexual abuse and sexual exploitation were of the idea that children in Europe were still not being adequately protected.³¹⁶ Thus, there was seen a necessity for a new binding instrument to protect children against sexual exploitation and sexual abuse, the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which entered into force on July 2, 2010. According to Bitensky, this convention represents a major development in the protection of children due to its comprehensiveness, innovation and humanity.³¹⁷

As it will be analyzed below, the text of this convention consolidates the United Nations, European Union and Council of Europe existing standards and goes further into filling their gaps by extending those standards: the first time an international treaty defines and criminalizes sexual exploitation of children in such a broad manner by covering all possible kinds of sexual offences against minors. The Lanzarote Convention sought to harmonize the best practices of Member States.³¹⁸ The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, tackles sexual exploitation and sexual abuse of children in an extensive and comprehensive approach based on the four P-s: prevention of violence, the protection of child victims, the prosecution of offenders and the promotion of national and international co-

³¹⁴ Bitensky, S.H. (2010) Introductory Note to Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse. *International Legal Materials*, Vol. 49, No. 6 (2010), Pp. 1663-1682. American Society of International Law; Cambridge University Press.

³¹⁵ See Part III of this chapter.

³¹⁶ Council of Europe, (July 12, 2007), Explanatory Report on the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse available at: <https://rm.coe.int/16800d3832>.

³¹⁷ Bitensky, S.H. (2010). *Supra* note 28.

³¹⁸ Fredette, K. (2009) International Legislative Efforts to Combat Child Sex Tourism: Evaluating the Council of Europe Convention on Commercial Child Sex Exploitation. *32 B.C. International & Comparative Law Review*. Vol 1. Pg. 43.

operation. It includes the criminalization of sexual abuse of a child, exploitation of children through prostitution, child pornography, grooming and corruption of children through exposure to sexual content and activities. In particular, it notes that child pornography, which was considered as a separate type of crime by the already existing international and regional Conventions, is a form of sexual abuse.³¹⁹

It also covers sexual abuse within the victim's family or close social surroundings and acts carried out for commercial or profit-making purposes. The strength of the text lays on the emphasis given to the prevention stressing the need to put the best interest of children at the forefront, the wide range of protection measures for child victims, protection of all children up to the age of 18 and the criminalization of new forms of violence such as the exploitation of children through the use of information and communication technologies.

Despite not being specifically addressed to the fight against online sexual abuse and exploitation of children, most of the parts of this Convention can be directly applicable to these type of offences, making this Convention one of the main international legal documents in the fight against online sexual abuse and exploitation of children. Moreover, the convention contains many references to the use of information and communications technologies for purposes of sexual abuse and sexual exploitation of children. As such it complements the Convention on Cybercrime in better protecting children from the risks of cyberspace. Thus, it was thought as reasonable to include a detailed analysis of the text of this Convention in this thesis.

1. Purpose and Definitions of the Convention

Lanzarote Convention has three main purposes:

- prevent and combat sexual exploitation and sexual abuse of children;
- protect the rights of child victims of sexual exploitation and sexual abuse;
- promote national and international co-operation against sexual exploitation and sexual abuse of children

Despite the diverse legislations, the member states of Council of Europe have agreed on three common general definitions for the purposes of this convention:

³¹⁹ Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual abuse. Preamble.

- “child” – as based on the United Nations Convention on the rights of the Child, also for the purposes of this convention, a “child” is any person under the age of 18.³²⁰ It should be noted however that in certain articles of the Convention relating to offences a different age limit applies. For example, the solicitation of children for sexual purposes is considered a criminal offence only if the solicited children are below the legal age before which it is prohibited to engage in sexual activities with them. This legal age is not under universal consent yet, and the Convention has left it to the Parties to determine this age limit in their national legislations.³²¹
- “sexual exploitation and sexual abuse of children” – The Convention seeks to criminalize all sexual offences against minors ranging from abuse within the victim’s family to abuse or exploitation for commercial purposes. It includes the following categories of behavior: sexual abuse, child prostitution, child pornography, corruption of children and solicitation of children for sexual purposes.³²²
- “victim” – is any child who is or has been subject to any of the offences listed in this Convention. The negotiators felt the necessity to clearly define this term due to the large use of this term in the text of the Convention, particularly in Chapter IV, which is dedicated to the protective measures and assistance to victims. It is important to note also that it is not necessary that the facts of the sexual exploitation or abuse to be established for a child to be considered a victim.³²³

2. Preventive Measures

The second chapter of the Lanzarote Convention is dedicated to the preventive measures to protect children against all forms of sexual exploitation and sexual abuse. The measures included in this part of the text are intended to be implemented at the national level by each of the state parties to the Convention.

Article 5 of the Convention concerns measures related to the Recruitment, training and awareness raising of persons working in contact with children. These include measures aimed at organizing trainings for raising awareness of persons working with and for children.³²⁴

³²⁰ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Art. 3/a

³²¹ Ibid. Art. 18/2.

³²² See: Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Art. 18-23.

³²³ Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, paragraph 51.

³²⁴ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Art. 4.

Article 5 lists the categories of people towards which this measure is intended: those who work with children in education, health, social protection, judicial, and law enforcement sectors as well as those who deal with children in the fields of sport, culture and leisure activities. It can be noticed that part of this list is also the judicial and law enforcement sectors dealing with children, which require specific training and awareness raising.

Second paragraph of this provision requires persons having regular contacts with children to have the *adequate knowledge* and awareness to recognise cases of sexual exploitation and sexual abuse and of

the possibility of reporting to the services responsible for child protection any situation where they have reasonable grounds for believing that a child is the victim of sexual exploitation or sexual abuse. The provision however does not specify what “adequate knowledge” means and how it can be achieved by thus leaving it to Parties to define and decide their means to achieve it.

Next paragraph of the same provision sets an important restriction for people who can accede to professions who imply regular contact with children. According to this paragraph, state Parties are obliged to make a prior assessment of the candidates’ profiles to ensure that they have not been previously convicted of acts of sexual exploitation or sexual abuse of children. On the extended commentary of this paragraph of Article 5 of the Convention at the Explanatory Report of the Lanzarote Convention, the text of this paragraph, specifically the inclusion of “in conformity with its internal law” is meant to allow States to implement this provision in a way which is in conformity with their domestic laws, even if this means allowing child sex offenders to accede to such professions after rehabilitation or because their criminal records have been deleted after a certain period of time.³²⁵

I am not against systems of rehabilitation of offenders and their reintegration in the society, maybe not even against the deletion of offenders’ criminal record after a certain period of time, but my concerns are on allowing them to reintegrate in the same environment where they committed their offences in the case when those offences include sexual abuse against children. We can never be completely sure that while being surrounded by children, in contact with children (in the case of professions which include online interaction with children, such as hotline or helplines) or working for children, they wouldn’t be tempted to commit another

³²⁵ Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Para. 57.

similar crime. A lion will always be a lion when set free in the jungle, no matter that he was kept and trained for a long time in a circus. Preventing former child sex abuse to work in such professions, should not be seen as an infringement of their right to reintegrate in the society, but as a precaution or preventive mechanism in the best interests of the child which in such cases should prevail over other interests at stake.

The second concerning problem is that based on the Explanatory Report, deleting the criminal records of child sex offenders is viewed as a normal legislative approach. One might reasonably ask how is it determined when is the adequate time to delete those records and on what basis? Who can ascertain that former child sex criminals won't abuse with this rule and take advantage of it to get employed in professions where they can be in contact with children in order to commit the same acts of sexual abuse against children again? Again, there is a necessity of striking a balance between the right of former convicted persons to reintegrate in the society and the rights of children to be protected against all forms of sexual abuse and exploitation from a "best interests of the child" approach. I see a necessity to draw certain limits to the right of former child abuse criminals to reintegration in order to eliminate the risks they might cause to child rights, and child protection.

The Convention has included a provision on the education of children as well. Even though the creators of the Lanzarote Convention thought that it is primarily the responsibility of parents to educate children about sexuality and risks of sexual abuse and exploitation, they also considered that there may be situations where this is not possible for many reasons, such as cultural traditions or in cases where the parent himself/herself are involved in the abuse of the child.³²⁶ For this reason, Article 6 obliges states to provide within the education curriculum at primary and secondary level of information concerning the risks of sexual exploitation and sexual abuse and how to protect themselves in such cases. The information should suit the level of maturity of children and should not affect on parents and state responsibility to protect children against all forms of sexual abuse and exploitation.

The provision does not refer to schools since it takes into consideration also cases when children are educated at home and was designed to cover those cases as well.³²⁷ The information may be provided also in a non-formal framework and collaboration of parents is also required where appropriate.

³²⁶ Ibid. Para. 58.

³²⁷ Ibid. Para. 60.

A special consideration in this provision is given to the risks involving the use of new information and communication technologies. As mediums for transmission of data, especially with the third-generation (3G) and now even fourth-generation (4G) technology which allow fast access to Internet on mobile phones and easy transmission of data (pictures and videos), they pose a high risk for children in cases of transmitting personal data to potential sex offenders. For this reason, while drafting the text of this convention, special attention was paid to ensuring education of children on the safe use of Internet and on how to be informed about its threats.

Part of the preventive measures is also the creation of preventive intervention programmes where persons who fear they might commit any of the offences established in this Convention can seek treatment in order to prevent the risk of such crimes being committed. This preventive measure applies to people who are not being investigated or prosecuted or serving a sentence and who are willing to take advantage of such programs. Each state party should ensure that its citizens have such an opportunity to recover from their unwanted desires.

Part of the preventive measures is also the awareness raising of the general public on sexual violence against children. They should be provided with information and with the need to be more vigilant of the risks from such crimes. Part of this measure is also the prohibition of any advertisement of the offences established in this Convention. While implementing this provision, parties should be careful to not infringe the right to freedom of expression.

Finally, this chapter includes also a provision on the engagement of not only private sector, media and civil society, but also of children themselves, based on their evolving capacity, in the development of State policies and other regulations related to their protection from all forms of sexual abuse and sexual exploitation enumerated in this convention.³²⁸

The same provision, requires state parties to encourage the information and communication technology sector, the tourism and travel industry, the banking and finance sectors and the civil society to participate in the elaboration and implementation of policies to prevent sexual exploitation and sexual abuse of children. The negotiations have used the broad term “information and communication technology” to ensure that any future developments in this field will also be covered.³²⁹ At the time of the drafting of the text of the convention, this term

³²⁸ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Art. 9.

³²⁹ Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Para. 69.

targeted in particular Internet service providers, mobile phone network operators and search engines.³³⁰

The provision has included also the encouragement of engagement of travel and tourism industry with the specific intention of targeting the phenomenon of child-sex tourism. For example, airline companies and airports could provide passengers with audiovisual preventive messages presenting the risks of prosecution to which perpetrators of sexual offences committed abroad are exposed.³³¹ The type of participation which this provision suggests for the various stakeholders mentioned above is by implementing internal norms through self-regulation (by the private sector) or co-regulation (public-private sector partnership). This kind of approach considers the creation of codes of conduct aimed at protecting children from sexual abuse and exploitation. An example of this would be the approach of ECPAT International (End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes) who, in collaboration with the World Tourism Organization (WTO) created the “Code of Conduct to Protect children from Sexual Exploitation in Travel and Tourism”, in 1998, which has been implemented by numerous companies, travel agencies and hotel chains. It is a good approach aiming at informing travelers through various formats (posters, catalogues, brochures, etc.) about child sexual abuse and exploitation.³³²

Another important sector included in the cooperation-necessity list is the finance and banking sector which is very important as well because of the possibility for financial institutions, in cooperation with law enforcement, to disrupt the functioning of financial mechanisms supporting pay-per-view child abuse websites, including websites offering live-streaming of child abuse, and contributing to dismantle them.

Media is another important actor covered by this provision. Its important role lies in educating the general public by informing and raising awareness about the phenomenon and risks of sexual abuse and exploitation. The information it provides on all aspects of sexual exploitation and abuse of children according to this provision, should be appropriate and should respect the privacy of child victims. While demanding this quality, CoE recognized the principle of independence of media and the freedom of press.

³³⁰ Ibid.

³³¹ Ibid. Para. 70.

³³² WTO and Ecpat International (2003) Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism Background and Implementation Examples available at: https://www.unicef.org/lac/code_of_conduct.pdf.

Last actor to be recognized is the civil society, especially through non-governmental organizations (NGOs), and the importance of financing its projects and programmes in the field of prevention and protection of children from sexual abuse and exploitation

Third chapter of the Convention highlights the importance of multidisciplinary coordination by calling upon state Parties to adopt such an approach on a national and local level between the various stakeholders responsible for preventing and combating sexual exploitation of children. In particular, this entails coordination between education and health sectors, social services, law-enforcement and judicial authorities.³³³ However, this list is not exhaustive. In the case of online sexual abuse and exploitation of children, Internet Service Providers and Tech community plays an important role as well. Promotion of the multidisciplinary approach is essential for combating sexual abuse and exploitation of children since the problem, especially when the online environment is involved, is such complex, that no single agency would be able to address it alone.

Second part of this section enumerates some of the specific measures that Parties are required to take in this regard such as the appointment of independent national or local institutions for the promotion and protection of children's rights and for the evaluation of the impact of social policies on children.³³⁴ Many countries have taken such an approach and created positions such as – Children's Ombudsman, Child Rights Commissioner or Committee on Child Rights.³³⁵

Another measure included in this part of the provision is the creation of mechanisms for data collection or focal points both at national and local levels. These mechanisms should be in close collaboration with civil society and their duties would be to observe and evaluate the phenomenon of sexual abuse and exploitation of children. The negotiators of the Convention have in this way, recognized the fact that, despite the increasing problem of sexual abuse and exploitation of children both online and offline, there are no accurate and reliable statistics of the extent of the phenomenon. A lack of accurate and trustful data, hinders the appropriate and effective targeting of the problem. While drafting this provision the negotiators were careful enough to avoid the clash of the need for information with the requirement of personal data protection rules.³³⁶

³³³ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Art. 10/1

³³⁴ Ibid. Art. 10/2/a.

³³⁵ See for e.g.: The Children Ombudsman in Ireland: <https://www.oco.ie/> and Netherlands' Children Ombudsman <https://www.dekinderombudsman.nl/241/english/>.

³³⁶ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art. 10/2/b.

The third and last measure included in this provision highlights the necessity of a multidisciplinary approach by requiring State Parties to encourage cooperation between competent state authorities, civil society and the private sector for addressing sexual abuse and exploitation of children.

3. Protective Measures and Assistance to Victims

While the best solution to fight against sexual abuse and exploitation of children would be to prevent the crime from happening, one should be realistic of the impossibility of such an aim to be reached in a short time. For this reason, while fighting the crime it is also essential to ensure that child victims of such offences receive the best support and assistance possible.

Again, similar with the measures of combating sexual abuse and exploitation of children in the national level analyzed in the above subsection, the Convention highlights the necessity for a multidisciplinary approach in assisting child victims of such offenses as well as their families or anyone who is in care of them.

This provision tackles a very important challenge while dealing with child victims, which is the determining whether the victim is over or under 18. Taking into consideration the difficulty of this verification and the timing issues which effect the remedies to the victim, paragraph 2 of Article 11 has established the principle of age assumption. Under this principle, in cases when the age of the victim is uncertain but there are reasons to believe he/she is a child, the Parties should presume that the victim is a child and special protection measures for children should be given to them until their age is verified.

As part of the protective measures for the victims of child sexual abuse and exploitation, the Convention requires state Parties to ensure that professionals who are normally bound by rules of professional secrecy, such as doctors, psychologists, etc., have the right and possibility to report to child protection services when they have reasons to believe that a child is suffering from sexual abuse or exploitation.³³⁷ Even though it should be an obligation, the provision does not impose such an obligation on such professionals to report such cases, but it aims to make sure those professionals are granted the possibility to do so without risking to be accused of breach of confidence.³³⁸ The provision mentions the reporting possibility to child protection services rather than to law-enforcement agencies because the main aim of this provision is the

³³⁷ Ibid. Art. 12.

³³⁸ Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Para. 89.

protection of child victims. But that does not mean that the professionals cannot report to other competent authorities as well. The provision covers professionals who “are called upon to work in contact with children”, leaving it to each Party to determine the specific categories of professionals to which this provision applies.

Second paragraph of the same provision goes even further, by requiring parties to encourage any person who has knowledge or suspicion of a child being sexually abused or exploited to report to competent authorities. Again, determining the competent authorities is the responsibility of each state Party through their domestic laws.

Second protective measure for child victims of sexual abuse and exploitation covered by this Convention is the creation of means whereby people who get to know about a child being sexual abused or exploited but do not know whom to turn to, or even child victims themselves can seek help, such as telephone or Internet helplines, which would provide advice to callers on how to react on such cases.³³⁹ Therefore, state Parties should encourage and support the creation of such helplines which would be as widely available as possible. In many states, these services are available 24 hours a day, 7 days a week. For better results, these hotlines may create cooperation with other hotlines in other countries. A good example of such an activity is the International Association of Hotlines (INHOPE), which is a global chain of hotlines operating in many countries around the world dealing with illegal content on the Internet and online child sexual abuse and exploitation.³⁴⁰ The inclusion of helplines into a legal document of an international level is a very important step into the harmonization of protection of victims of child sexual abuse and sexual exploitation.

Third measure included in this part of the Convention, is of post-abuse support to child victims of sexual abuse and exploitation. Parties must set up assistance measures for such victims, both in the short and long term, to help them recover from their physical and psycho-social damage.³⁴¹ Specification of both short and long-term assistance means that the assistance should continue for as long as necessary for the child to completely recover from the damage caused from the abuse. This would ideally include psychological assistance also to adults who have been sexually abused during their childhood.

It can be noticed that the assistance ensured in this provision is divided into two directions: physical and psycho-social. The physical recovery would involve medical treatment where

³³⁹ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art. 13.

³⁴⁰ See: Inhope website: <http://www.inhope.org/gns/home.aspx>.

³⁴¹ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art. 14.

specific attention should be paid on transmissible diseases and HIV infection.³⁴² While the psycho-social recovery includes assistance to overcome the trauma caused by the abuse and return to the normal life in their society.³⁴³ The provision stresses that the child's views, needs and concerns must be taken into account when taking measures based on this provision.³⁴⁴

The Convention recognizes the important role of the NGOs in victim assistance, by requiring state Parties to take the necessary measures to foster cooperation with non-governmental organizations and any other relevant organizations in victim assistance. Many states have created partnerships to regulate these kinds of cooperation.

Third paragraph of this provision provides for the possibility of removing the child from the family when the parents or carers of the victim are involved in the sexual abuse or exploitation. The removal of the parent who is the alleged perpetrator could also be a solution according to this paragraph. This provision, even though primarily drafted for the cases of domestic child sexual abuse, is now a very useful legal clause to be used in cases of live-streaming of child sexual abuse when the parents or the carers are the ones who offer their children, and force them to engage in such activities online, in their house environment, for commercial purposes. An example of this, are the numerous cases in Philippines, mentioned in the first chapter. Removal of children from their home is the most efficient protective measure and assistance that could be given to those children.

4. Intervention Measures

Many doctors and therapist argue that perpetrators of sexual abuse have been in most of the cases victims of sexual abuse themselves during their childhood.³⁴⁵ Unfortunately, they have never had the possibility of being heard and expressing their traumatic sufferings, which resulted in those traumatic experiences pervading their subconscious and lead them into committing similar abuse themselves in adulthood.³⁴⁶ Other scholars however argue that many abused children do not become abusers themselves as well as there are many child abusers that have not been abused during their childhood.³⁴⁷ Despite the reasons behind their acts, scholars

³⁴² Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Para.95.

³⁴³ Ibid. Para. 96.

³⁴⁴ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Art. 14/1.

³⁴⁵ Council of Europe (2011) Handbook for Parliamentaries. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention). Parliamentary Assembly of the Council of Europe.

³⁴⁶ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art. 14/1.

³⁴⁷ Ibid.

agree that besides putting harsh sentences to these perpetrators, they should also be offered the possibility of having medical and psychological treatment.

Fifth chapter of the Convention addresses exactly this issue, by becoming as such an innovative and added value of the Convention. It introduces the idea of setting up intervention programmes for sex offenders in order to treat them and prevent them from repeating sexual abuse and exploitation offenses against children. The Convention suggests that these programs should have a broad and flexible approach focusing on the medical and psycho-social intervention or measures. These programmes and measures have a non-obligatory nature, of the sense that they can but may not necessarily be included in the penal system as part of the sanctions, but instead can be part of the healthcare systems.³⁴⁸ Cases of mental disorder are not included in this system and should of course be treated differently and separately.³⁴⁹

This provision only sets the general idea, of such intervention measures, without going into details, leaving high flexibility to the states to act and articulate this kind of approach based on their internal legal systems. States who would take this kind of approach, would also have to consider the necessity of creating at the same time also assessment mechanisms which would evaluate the effectiveness and relevance of the implemented programmes and measures.

Despite the flexibility of such programmes, this chapter sets however some general principles to be followed by the states willing to implement such measures:

- the various services responsible, in particular the healthcare and social services, the prison authorities and the judicial authorities must be co-ordinated.³⁵⁰
- there should be arrangements for assessing the dangerousness of the persons concerned and the risk of their re-offending;³⁵¹ in order to evaluate the intervention programmes and measures;³⁵²
- special attention should be paid to the persons concerned who are themselves children;³⁵³

³⁴⁸ Ibid. Art.15/1.

³⁴⁹ Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Para. 101.

³⁵⁰ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art. 15/2.

³⁵¹ Ibid. Art. 15/2.

³⁵² Ibid. Art. 15/3.

³⁵³ Ibid. Art. 16/3.

- persons undergoing intervention programmes or measures must give their prior consent: the intervention programme or measure cannot be imposed on them;³⁵⁴

Article 16 identifies the three categories of persons that should be entitled to such intervention measures:

- persons prosecuted for any of the offences established in accordance with the Convention;
- persons convicted of any of the offences established in accordance with the Convention;
- children (persons under the age of 18) who sexually offend.

5. *Substantive Criminal Law: Criminalization of Acts*

Article 18 to 23 of the Convention enumerate the offences which should be considered as criminal offences in all the state Parties with the aim of harmonizing the legislations for the facilitation of actions against sexual abuse and exploitation of children at the international level. When states ratify the convention, they become legally bound to apply it, which leads to the harmonization of national legislations regarding definitions of crimes covered by this convention. The convention's drafters were of the view that harmonization of domestic laws brings a triple advantage: First, it serves for eliminating gaps in different legislations, thus avoiding preferences of perpetrators choosing to commit a criminal act in a country with a weaker legal system. Second, it facilitates international cooperation in combating sexual abuse and exploitation of children. And third, it serves for comparative research purposes making it easier to create a general picture of the crime of sexual abuse of children.³⁵⁵

Having in mind this harmonization project of the Convention, there has been criticism regarding the lack of a unified minimum age of consent for engaging in sexual activities, as inconsistent with the general harmonization scope.³⁵⁶ Similarly, the Convention does not include provisions concerning the perpetrator's knowledge or ignorance of the victim's age, by thus leaving it to each member state to regulate it in their national legislations. This, on one hand recognizes the diversity of national legislations, but on the other hand causes problems of

³⁵⁴ Ibid. Art. 17.

³⁵⁵ Explanatory report. Para. 112.

³⁵⁶ Fredette, K. (2009) International Legislative Efforts to Combat Child Sex Tourism: Evaluating the Council of Europe Convention on Commercial Child Sexual Exploitation, 32 B.C. Int'l & Comp. Law Review 1. Pg. 36.

harmonization and affects as such, cases of cross-border investigation and prosecution, potentially weakening the Convention's protective effects.

a. Sexual Abuse

Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse is the first international treaty defining the crime of sexual abuse of a child as the intentional conduct of the following two kinds:³⁵⁷

- engaging in sexual activities with a child who has not reached the legal age for sexual activities;
- engaging in sexual activities with a child of whatever age by:
 - using coercion, force or threats;
 - abusing a recognised position of trust, authority or influence over the child, including within the family; or
 - abusing a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.

The first type of abuse concerns children who have not reached the legal age of engaging in sexual activities, and as such, relations with them are a fortiori illegal. While the second type of abuse concerns children who have reached that age, but are still considered minors (under the age of 18), and have not given their free consent in engaging in sexual relations. It is obvious that there is a lack of child consent whenever coercion, force or threat are used. Whereas in cases when there is a relationship of trust, or a position of authority, it enables the abuser to control the child and/or manipulate their consent. Such authorities may exist within natural or adoptive families, within educational, therapeutic or medical services, religious authorities, or persons who work on voluntary basis with children. And last, in cases of children with a particular vulnerability caused by physical or mental disabilities they are considered to be in a situation of dependence and as such, their consent loses its validity. The situation of dependence includes physical, psychological, emotional family-related, social or economic dependence, including drugs or alcohol or being under their influence at the time the abuse is committed.³⁵⁸

³⁵⁷ Ibid. Art.18.

³⁵⁸ Council of Europe (2011) Handbook for Parliamentaries. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention). Parliamentary Assembly of the Council of Europe.

The convention does not set a legal minimum age for engaging in sexual activities by leaving it to each party to determine this definition in their domestic legislations. Neither does the convention define the notion of sexual activities, leaving again space for each state party to draft their own definitions based on the diversity of their cultures and legislations. As already mentioned, while this approach makes it easier for a large number of countries to ratify the convention, by thus creating an international harmonization of the core principles in the worldwide protection of children from sexual abuse and exploitation, it leaves spaces for the existence of a diversity of legal definitions creating problems of international cooperation. And finally, the convention does not criminalize consensual sexual activities between minors, acknowledging their right to sexual development.

b. Offences Concerning Child Prostitution

Article 19 of the convention defines “child prostitution” as the use of children for sexual activities in exchange for money or any other form of remuneration or consideration regardless if this payment or consideration is made to the child or to a third person. As such, the convention criminalizes the following intentional conduct:

- recruiting a child into prostitution or causing a child to participate in prostitution;
- coercing a child into prostitution or profiting from or otherwise exploiting a child for such purposes;
- having recourse to child prostitution.

Since trade of children for sex involves people who encourage, organize and profit from it, the Lanzarote Convention involves in its definition of child prostitution both the demand and supply side.³⁵⁹ It is clear that criminal penalty is applicable both for the recruiters, for the ones who profit from them, and for the customers of child prostitutes. The legal requirements of this offence are met even if the prostitution of the child is occasional and even if the remuneration is only promised.³⁶⁰

The definition of child prostitution provided in this Convention does not mention if physical contact with the child by the recruiter or by the consumer is a necessary element for the crime to be considered as committed. The wording of the definition ‘sexual activities’ leaves space for interpretation, allowing this provision to be used in cases when the child performs sexual

³⁵⁹ Data Protection and Cybercrime Division. (4 December 2012) Global Project on Cybercrime. Protecting Children against sexual violence: The criminal law benchmarks of the Budapest and Lanzarote Conventions. Council of Europe. Strasbourg, Pg. 38.

³⁶⁰ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Art. 19/2.

activities in front of a webcam, or cases when the recruiter abuses the child in front of the webcam in return for remuneration from the person watching the abuse from the other side of a computer device or mobile phone. In this context, there exists a possibility of using the provision on child prostitution to criminalize cases of live-streaming of child abuse. Nevertheless, in this way, not all the elements of the offence of live-streaming would be addressed, such as the broadcasting over the Internet and the viewing of child abuse.

c. Offences Concerning Child Pornography

Following the steps of the Council of Europe's Convention on Cybercrime, the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse seeks to strengthen protection of children regarding the use of computer systems or any other information and communication technology that may facilitate the sexual exploitation and sexual abuse of children.

Similar to the Optional Protocol to the UN Convention on the Rights of the Child, Article 20 of this convention defines "child pornography" as any visual depiction of a child engaging in real or simulated sexually explicit conduct or any representation of a child's sexual organs for primarily sexual purposes. As such, material having medical, scientific, artistic or similar merit, where there is no sexual purpose, is excluded from this definition. Under this offence, the convention has included in its Article 20 the following intentional conduct:

- producing child pornography;
- offering or making available child pornography;
- distributing or transmitting child pornography;
- procuring child pornography for oneself or for another person;
- possessing child pornography;
- knowingly obtaining access, through information and communication technologies, to child pornography.

Such behavior can include for example, uploading images of child pornography on the Internet, distributing, possessing, downloading or purchasing them in whatever form (mobile phones, USB flash drives, CDs, DVDs, etc). The wording used by the explanatory report of the convention does not explicitly mention that child pornography can be in the form of videos. Whenever it talks about child pornography related offences, it mentions only images. Only once, the word 'films' is used when talking about child pornographic material,³⁶¹ but it is not

³⁶¹ Lanzarote Convention's explanatory report. Para. 138.

clear if it talks about video recordings or a collection of images put together to be viewed live a movie, or even old photographic films of child pornographic images. Therefore, both videos and live-streaming of child abuse are excluded from this provision.

It may be noticed that, differently from the CoE Cybercrime Convention, the Lanzarote Convention criminalizes the production of child pornography even when there is no purpose of distribution, which is a requirement in Article 9 of the Cybercrime Convention.

A novelty of this convention, which is not included in the Cybercrime Convention, is the obligation of states to criminalize the intentional access at child pornographic material through ICTs, even when no downloading or saving is done. On the Lanzarote Convention Explanatory Report, it is noted that the intention of this new offense is to catch those who view child pornography online by accessing child pornography sites but without downloading, thus making it impossible to be prosecuted under the offence of procuring or possession of child pornography under some jurisdictions.³⁶² To be liable, the person must both intend to enter a site where child pornography is available and know that such images can be found there. The intent for committing this offence may be deduced by the fact that viewing material from child pornographic websites often requires a payment.³⁶³ Such payment proves the intent of the alleged perpetrator to access those material. The location of images in the cache is not considered as sufficient to be deemed as being in possession without proving the intent of accessing child pornography sites, which prove that the person was aware of the acts he/she was committing.³⁶⁴ However, the convention has reserved the right to state parties not to apply in whole or in part the paragraph criminalizing the access to child pornography through ICTs.

Article 20 of the Lanzarote Convention is very similar to Article 9 of the Cybercrime Convention but, it covers a broader area by not restricting the offence of child pornography only to computer systems but rather using a broader term 'information and communication technologies' (ICTs). This development is future directed, making sure that the provision will be still applicable despite future developments in the field, in particular related to Internet service providers, mobile phone network operators and search engines.³⁶⁵

³⁶² Ibid. Para. 140-141.

³⁶³ Ibid.

³⁶⁴ Salvadori I. (2010) Legal Problems of Possession and Viewing Child Pornography in Internet". In Herczeg, J., Hilgendorf, E., Grivna T. (2010), *Internetkriminalität und die neuen Herausforderungen der Informationsgesellschaft des 21. Jahrhundert*. Praha, Wolters Kluwer CR.

³⁶⁵ Lanzarote Convention, Exp. Rep. 69; Data Protection and Cybercrime Division. (4 December 2012) Global Project on Cybercrime. Protecting Children against sexual violence: The criminal law benchmarks of the Budapest and Lanzarote Conventions. Council of Europe. Strasbourg. Pg. 33.

Differently from the Cybercrime Convention, the Lanzarote Convention does not explicitly criminalize the production or possession of simulated images or realistic images of non-existent children, but it does not either exclude their criminalization. The case is the same with production or possession of images of children who have reached the legal age of consent for engaging in sexual activities when the child has given the consent and the images are solely for private use.

This approach is inferred by the third paragraph of Art. 20 which provides for the possibility of a derogation of the states in these two instances, namely:

- the production and possession of pornographic material consisting of simulated representations or realistic images of children who do not exist in reality;
- the production and possession of pornographic material of children who have reached the legal age of sexual consent, according to the relevant provisions of national laws, where these images are produced and possessed by them with their consent and solely for their own private use.

d. Offences Concerning the Participation of a Child in Pornographic Performances

The convention criminalizes the organization of live pornographic performances involving the participation of children. In particular the following acts are criminalized:

- recruiting a child into participating in pornographic performances or causing a child to participate in such performances;
- coercing a child into participating in pornographic performances;
- profiting from or otherwise exploiting a child for such purposes;
- knowingly attending pornographic performances involving the participation of children.

While the first three acts are elements related to the organization of pornographic performances, intended to prosecute the organizers of such activities, the third act, the knowingly attending pornographic performances involving the participation of children is related to the spectator(s). In this way, the provision on pornographic performances describes the connection between the demand and the supply of such a criminal activity, by providing the criminal liability of both the organizer as well as the costumer of pornographic performances involving children.

The convention does not explicitly determine the environment or the method of access to such performances. However, its Explanatory Report explains that this provision may be broadly interpreted so as to cover the situation of persons attending a pornographic performance involving the participation of children through webcams.³⁶⁶ Thus, the negotiators of this Convention, when interpreting the use of its provisions, have taken into account societal developments, so as to include also the new forms of pornographic performances made possible by the Internet, such as the live-streaming of pornographic performances. Even the sole attending of pornographic performances involving the participation of children is criminalized. It might therefore be reasonably assumed that, when applied to offences of online live-streaming of child pornographic performances, the wording “knowingly attending” pornographic performances should be interpreted as including the criminalization of the viewing of live pornographic performances.

For the criminal responsibility to be applicable, all the acts must be committed intentionally. The wording “knowingly”, which is used in this provision has the scope of emphasizing the element of intent of the criminal offence, which means that a person must not only intent to attend a pornographic performance but must also know that it will involve children.³⁶⁷ The convention however, provides states with the possibility of limiting the application of the criminal liability to the costumer only to cases where children have been recruited or coerced in conformity with the first two forms.

As previously mentioned, pornographic performances involving children is criminalized also by the UNCRC Convention. Neither the UNCRC, nor the Lanzarote Convention provide a definition of what constitutes pornographic performances, leaving it to the Parties to determine. For example, State Parties can determine if it includes public or private performances, of a commercial or non-commercial nature.³⁶⁸ However, the negotiators noted that this provision is intended mainly for cases of organized live performances of children engaged in sexually explicit conduct.³⁶⁹

³⁶⁶ Explanatory Report. Para. 148.

³⁶⁷ Ibid. Para. 149.

³⁶⁸ Data Protection and Cybercrime Division. (4 December 2012) Global Project on Cybercrime. Protecting Children against sexual violence: The criminal law benchmarks of the Budapest and Lanzarote Conventions. Council of Europe. Strasbourg, Pg. 38.

³⁶⁹ Explanatory Report. Para. 147.

e. Corruption of Children

The convention defines corruption of children as the intentional causing of a child who has not reached the legal age of consent for engaging in sexual activities, to witness sexual abuse or sexual activities with other children or adults.³⁷⁰ It is not necessary for the child to participate in any way in the sexual activities for the corruption to happen. Merely engaging in sexual activities in the presence of a child, or causing the child to watch a third person engaging in such an activity, for sexual purposes such as sexual gratification, is enough for a person to be considered to be corrupting a child and held accountable for that.

f. Solicitation of Children for Sexual Purposes

This convention is the first international instrument to criminalize the solicitation of children through information and communication technologies for sexual purposes, also known as “grooming”. It is thus a major step forward in the protection of children from online risks of sexual abuse and exploitation in the digital age we are living, where it has become increasingly common for adults to establish relationships of trust with children through the Internet in order to meet them in the real world and sexually abuse them and even produce child abuse material, including live-streaming of child abuse, for various reasons.

As such, Article 23 of the Lanzarote convention defines grooming as the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the legal age of consent of engaging in sexual activities, for the purpose of gratifying their sexual urges by committing any of the offences established in Art.18/1.a or Art. 20/1.a against the child, in cases where the proposal has been followed by material acts leading to such a meeting.

It can be inferred from this definition that merely exchanging sexual messages or other sexual materials with the child is insufficient to become subject of criminal responsibility under this provision. Obviously, this does not mean that the exchange of sexual materials with children is accepted as normal social behavior from the Convention, but it is covered by other provisions, such as those related to corruption of children, sexual abuse or child pornography, analyzed in the previous sections. Criminal responsibility under this provision emerges when such messages are followed up by a proposal to meet with the child, with the intention of abusing him/her or producing child pornography. In this case, the child has to be under the legal age for sexual activities. Another requirement that has to be met for the offence to be fully

³⁷⁰ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art. 22.

recognized is that the proposal to meet has to be followed by material acts leading to such a meeting. This means that concrete acts have to be taken by the perpetrator, such as going to the meeting place, even if real abuse does not take place.

Intent is another element of this type of criminal act. This makes the criminalization of grooming hard to a certain extent because of the difficulty of proving the intent of the person who proposes the meeting to sexually abuse with the child. In order to overcome the challenges of criminalizing perpetrators of this offence but also in order to broaden the scope of this provision, the Lanzarote Committee has recently adopted an opinion on article 23. In this opinion, the Lanzarote Committee suggests that States Parties to this Convention consider extending the criminalization of solicitation of children to include also cases when the sexual abuse is not the result of a meeting in person but committed online.³⁷¹ The adoption by States Parties of this suggestion would enable for the criminalization of cases of solicitation of children with the intention of producing live-streamed child abuse.

g. Aiding or Abetting and Attempt to Commit an Offence

The Lanzarote convention criminalizes also instances of intentional aiding and abetting another person who intends to commit one of the offences established by this convention and intentional attempts to commit one of the offences established by this convention. For the second scenario, the convention makes possible for the states to enter a reservation and not criminalize the attempt to commit the following offences: offering or making available child pornography, procuring child pornography for oneself or another person, knowingly obtaining access through ICTs to child pornography, knowingly attending pornographic performances involving the participation of children, corruption of children and solicitation of children for sexual purposes.

6. *Jurisdiction*

There are a number of requirements set forth in this convention, which countries must take into consideration when establishing jurisdiction over offences referred to in the Convention.³⁷² These criteria cover the traditional ‘principle of territoriality’ according to which each party is required to punish offences committed on its territory. This includes also on ships flying its flag or on an aircraft registered under its laws. Based on the ‘principle of nationality’ each party

³⁷¹ Lanzarote Committee Opinion on Art. 23 of the Lanzarote Convention and its Explanatory Note. 17 June 2015. European Union Agency for Fundamental Rights FRA (2015) Handbook on European law relating to the rights of the child. Pg. 130.

³⁷² Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art. 25.

is required to punish offences committed by its nationals abroad and in some cases, offences committed against their nationals. This principle was considered of primary importance in combating the use of children in sex tourism, taking into consideration that some nations have become a heaven for this industry because they lack the resources, the will, or the appropriate legal framework to investigate these types of crimes.³⁷³ The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse is among conventions with the widest criteria,³⁷⁴ including also the principle of the perpetrator's or victim's 'habitual residence': each party shall punish acts committed or suffered on their territory. This rule is nevertheless optional and may be subject to reservations. To make it easier to combat cross-border crimes, the Convention also contains provisions designed to waive the principle of dual criminality in cases of the most serious - sexual abuse, child prostitution, production of child pornography and participation of a child in pornographic performances - offences committed abroad if the acts are not criminalized in the country where they are carried out but that are criminalized in their home country. The waiver is extended also to procedural requirements regarding the condition that the prosecution can only be initiated following a report from the victim or a denunciation from the State of the place where the offence was committed. This is a very important step considering the fact that the number of the reported cases of such offences is very low for a various range of reasons.³⁷⁵ Nevertheless, the exceptional nature of the removal of the requirement for dual criminality, is not obligatory, allowing states to make reservations, which limits its scope to certain offences such as child sex tourism.³⁷⁶

The convention acknowledges that it may happen that several parties claim jurisdiction over an alleged offence. In such cases, in order to avoid duplication of procedures, the convention requires the parties concerned to consult each-other, where appropriate, in order to determine the proper jurisdiction for prosecution.³⁷⁷ The broad, unclear phrase "where appropriate" used in the provision leaves space for interpretation. One might assume the legislators' main intention was to leave space for parties to negotiate on a case by case basis, so as to avoid possible conflicts.

³⁷³ Explanatory report, 168; Ruelle, E. (2010) Sexual Violence against Children – The European Legislative Framework and Outline of Council of Europe conventions and European Union Policy. 55-73. In *Protecting Children from Sexual Violence - A Comprehensive Approach*. CoE Publications. Pg. 63.

³⁷⁴ Ruelle, E. (2010) Sexual Violence against Children – The European Legislative Framework and Outline of Council of Europe conventions and European Union Policy. 55-73. In *Protecting Children from Sexual Violence - A Comprehensive Approach*. CoE Publications. Pg. 63.

³⁷⁵ Europol. Threat Assessment Reports.

³⁷⁶ Ruelle, E. (2010). Pg. 63.

³⁷⁷ Explanatory report. Para 8.

7. *Corporate Liability*³⁷⁸

Lanzarote Convention obliges states to include into their domestic legislation corporate liability for sexual offences against children committed on their behalf by any natural person in a leading position within the legal person. Corporate liability should arise also in cases of negligence when a person in a leading position within the entity fails to supervise or control the employee, facilitating in this way the commission of the offence.

Taking into consideration the diversity of national legislations, the convention established that corporate liability does not necessarily have to be criminal. It may as well be civil or even administrative. Furthermore, the convention stresses that corporate liability does not exclude individual criminal liability of the natural person(s) who have committed the offence.

8. *Sanctions*

Parties are obliged under this convention to introduce effective, proportionate and dissuasive sanctions. These sanctions shall include deprivation of liberty, including extradition for individuals or monetary sanctions for legal persons. Measures may also include seizure and confiscation of goods, documents and other instrumentalities used to commit the offence, temporary or permanent closure of any establishment used to carry the offence, prohibition of exercising activities involving contact with children, withdrawal of parental rights or judicial supervision.

The convention provides for tougher sentencing in certain aggravating circumstances such as:³⁷⁹ when the offence seriously damaged physical or mental health of the victim, when acts of torture or serious violence were committed, when the offences is committed against a particularly vulnerable victim, when it is committed by a member of the family or close circle, when the offence was committed by a group of people acting together or within the framework of a criminal organization or when the perpetrator is a recidivist of crimes of same nature. In the latter case, the wording of the provisions is very flexible, take into consideration that the legal traditions of some states do not recognize aggravating circumstances.³⁸⁰

The convention recognizes the transnational level of the offences of sexual exploitation and abuse which leads to perpetrators being tried and convicted in several countries. Considering that some countries may have harsher sentences than others when the person has previous

³⁷⁸ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art. 26.

³⁷⁹ Ibid. Art. 28.

³⁸⁰ Ruelle, E. (2010). Pg. 64.

convictions, the convention asks countries to provide to the courts the possibility of taking into account final sentences from another party's courts.³⁸¹ However, the text of this provision does not have an obligatory nature. Nevertheless, the case of previous convictions is explicitly regulated also by the European Convention on Mutual Legal Assistance in Criminal Matters, which gives to the judicial authorities of each party the right to request for another party's information related to judicial records in criminal matters, if needed.³⁸²

9. Recording and Storing of Personal Data of Convicted Sexual Offenders

For the purposes of preventing and prosecuting sexual abuse and exploitation of children at both national and international level, Lanzarote Convention requires countries to collect and store data related to the identity and genetic (DNA) profile of convicted persons. In other terms, states are required to create a database of perpetrators of the crimes of sexual abuse and exploitation of children enumerated in this convention. Each state is required to appoint a single national authority in charge of creating such a database. The convention goes further by providing for the possibility of countries to exchange information held in these databases with other countries, always in conformity with the international laws in place. Ideally the databases and the processing of information contained therein would be done by an automated process. This is a very good approach towards the creation of a general international database of perpetrators of child sex abuse and exploitation which allows countries to identify more easily abusers in cases of transnational crimes. However, it poses many questions related to the privacy of the convicted persons. The convention has taken into account this issue as well by stating that the process of collecting and storing the data should be done in accordance with the relevant provisions on the protection of personal data and in accordance with other guarantees prescribed by domestic laws.³⁸³

10. Monitoring Mechanism

Lanzarote convention provides for a monitoring mechanism, the Committee of the Parties, which shall ensure the effective implementation of the convention by its parties. As the name infers, this body is mainly composed of representatives of the parties to the convention. However, due to the sensitivity of the offences at stake, the convention provides for the inclusion in the Committee of also a representative from The Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights, the European Committee on Crime

³⁸¹ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art. 29.

³⁸² European Convention on Mutual Legal Assistance in Criminal Matters, Art. 13.

³⁸³ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art.37/1.

Problems, as well as other relevant Council of Europe intergovernmental committees. Civil society organizations are also allowed to have a representative at the Committee of Parties. It should be noted however, that these “external” representatives do not have the right to vote at the Committee meetings.

The Committee does not hold regular meetings. Based on Art. 39 para 3 the Committee of the Parties meets whenever at least one third of the parties or the Secretary General requires so. The body has three main functions:³⁸⁴ to monitor and facilitate the effective implementation of the convention; to facilitate the collection, analyses and exchange of information, experience and good practice on legal, policy and technological developments between states in order to improve their overall capacities to prevent and combat sexual abuse and sexual exploitation of children; and to identify problems regarding declarations or reservations made under the convention and to express an opinion on questions concerning the application of the convention.

11. International Cooperation and Related Matters

Article 38 of the convention calls parties to cooperate based on international and regional instruments, multilateral and bilateral agreements, to the widest extent possible for the prevention and fight of sexual abuse and sexual exploitation of children, the protection and assistance to the victims and for the investigation of offences provided in this convention. In this regard, in order to remove obstacles of cooperation, the convention stresses that, in cases when cooperation is needed among parties of this convention, when one of them is also a party of conventions regulating mutual legal assistance in criminal matters and/or extradition but the other is not, Lanzarote Convention is a sufficient legal basis for the establishment of cooperation among the two in respect to the offences included in this convention.³⁸⁵ This provision facilitates to a large extent the rapid cooperation between parties, allowing the fast circulation of information and evidence for the investigation of offences of sexual abuse and sexual exploitation of children.

Another feature of international cooperation provided in this convention is the obligation of states to enable victims of such offences to file complaints in the territory of their residence also in cases when the offence was committed in the territory of another party. Moreover, the convention requires countries to endeavor to include prevention and fight against sexual

³⁸⁴ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art. 39.

³⁸⁵ Ibid. Art.38/3.

exploitation and sexual abuse of children in development assistance programs benefitting third states. This is a very important step towards the eradication of commercial live-streaming of child abuse produced in third countries as a way of survival from poverty.

The convention has included provisions which regulate its relationship with other international instruments. As such it states that this convention shall not affect rights and obligations arising from provisions of the UN Convention of the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography or other instruments related to matters governed by this convention. As far as European Union is concerned, the convention provides that its member states will apply Community and European Union rules in their mutual relations, as far as such rules governing a particular matter related to sexual abuse and sexual exploitation of children exist, without prejudice to the object and purpose of this convention, and without prejudice to its full application with other Parties. This explicit declaration where the EU applies the “disconnection clause”, makes clear the secondary role of the Lanzarote Convention with EU Member States’ relations, by giving primary role to their Community and European Union rules in such matters, as far as such rules exist. In the lack of such rules, Lanzarote convention gains primary role.

The convention is open for signature by member states, non-member states which have participated in the drafting process and the European Community. However, the Committee of Ministers of CoE may invite any non-member state of the CoE, which has not participated in the drafting process to accede to this convention if it is accepted by a two-thirds majority of its members and by a unanimous vote of the parties sitting on the Committee of Ministers. Parties may issue reservations on provisions of the Convention, when this is expressly established in the Convention. Reservations, which allow countries to preserve some of the fundamental principles of their domestic laws, are provided with the purpose of enabling as many countries as possible to ratify the Convention.

The Lanzarote Convention was supported by a number of non-legally binding instruments such as the CoE Resolution 1099 of 1996 on sexual exploitation of children, Recommendation Rec (2001) 16 on the protection of children against sexual exploitation and the Resolution 1307 (2002) on sexual exploitation of children: zero tolerance.

C. EUROPEAN UNION STANDARDS

European Union (EU) has devoted large attention to the fight against online child sexual abuse, especially since the large boost that the new information and communication technologies gave to the phenomenon. Council Recommendation 98/560/EC on protection of minors and human dignity is the first legal instrument related to the content of audiovisual services and online broadcasting. It follows a bottom-up approach, highlighting the necessity for the creation of national self-regulatory frameworks for the protection of minors and human dignity in the broadcasting and Internet areas through cooperation not only among industry and the public sector in a national level but also by creating an international cooperation between Member States, industry and all those involved in the protection of minors and human dignity.³⁸⁶ The Recommendation encourages Member States also to enact legislation on the prevention of illegal content.

This recommendation was followed by another policy document in this area, the Recommendation 2006/952/EC of the European Parliament and of the Council of 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services industry,³⁸⁷ which is an updated version of the 1998 Recommendation taking into account technological and media developments. In this recommendation, the Commission raises awareness of the community of children to encourage a more responsible use of audiovisual and online information services from them.³⁸⁸ It also focuses on anti-discrimination measures, especially those based on age, and on the fight against illegal activity online, which is harmful for children.³⁸⁹

A Council Decision to combat child pornography on the Internet³⁹⁰ was adopted in 2000 aiming at increasing cooperation among Member States. In 2011 a Directive to combat sexual abuse, sexual exploitation and child pornography³⁹¹ was adopted with the intension of

³⁸⁶ Council Recommendation 98/560/EC of 24 September 1998 on the Development of the Competitiveness of the European Audiovisual and Information Services Industry by Promoting National Frameworks aimed at Achieving a Comparable and Effective Level of Protection of Minors and Human Dignity. OJ L 270: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l24030b>.

³⁸⁷ Recommendation 2006/952/EC of the European Parliament and of the Council of 20 December 2006 on the Protection of Minors And Human Dignity and on The Right In Relation to the Competitiveness of the European Audiovisual and On-Line Information Services Industry. OJ L 378: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l24030a>.

³⁸⁸ Zhilla, F. (February 2004) A Study on Child Online Safety in Albania. World Vision. Pg. 36.

³⁸⁹ Recommendation 2006/952/EC.

³⁹⁰ Council Decision of 29 May 2000 to Combat Child Pornography on the Internet (2000/375/JHA).

³⁹¹ 2011/93/EU Directive on Combating Sexual Abuse, Sexual Exploitation and Child Pornography.

harmonizing the criminal legislation against child pornography, child sexual abuse and child sexual exploitation through the Union.

The following sections analyze two the most significant legal developments towards the establishment of a common EU policy in the fight against sexual exploitation of children on the Internet: the Council Decision to combat child pornography on the Internet and the 2011/93/EU Directive on Combating sexual abuse, sexual exploitation and child pornography.

I. Council Decision to Combat Child Pornography on the Internet

Article 288 of the Treaty on the Functioning of the European Union has given a binding force to the Decisions released by European Union institutions: ‘*A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them*’.³⁹²

On 29 May 2000, the Council of the European Union released its Decision to Combat Child Pornography on the Internet. The Council declared that it was aware of the fact that ‘*the sexual abuse of children and the production, processing, possession and distribution of child pornography material may constitute an important form of international organized crime, the extent of which within the European Union gives cause for ever-increasing concern*’ and stated that further measures were needed within the Union ‘to promote the safer use of the Internet’.³⁹³

Therefore, under article 1(1) of the decision, the Council required Member States ‘*take the necessary measures to encourage Internet users to inform law enforcement authorities, either directly or indirectly, on suspected distribution of child pornography material on the Internet, if they come across such material*’,³⁹⁴ in order ‘*to intensify measures to prevent and combat the production, processing, possession and distribution of child pornography material and to promote the effective investigation and prosecution of offences in this area*’³⁹⁵. Second paragraph of the same article states that Member States may take further measures such as setting-up of specialized units within law enforcement authorities with the necessary expertise and resources to be able to deal swiftly with child pornography offences. In the third paragraph

³⁹² See: Treaty on the Functioning of the European Union: <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-6-institutional-and-financial-provisions/title-1-institutional-provisions/chapter-2-legal-acts-of-the-union-adoption-procedures-and-other-provisions/section-1-the-legal-acts-of-the-union/608-article-288.html>.

³⁹³ Council Decision of 29 May 2000 to Combat Child Pornography on the Internet (2000/375/JHA).

³⁹⁴ Ibid.

³⁹⁵ Ibid.

of Art. 1, the Council recognizes the existence of criminal networks of child pornography and it states that in suspected cases of child pornography rings, law enforcement authorities ‘*may defer taking action if and as long as tactically necessary, for instance with a view to getting at those behind the criminal operations, or at networks (child pornography rings)*’. This is a very important provision in the fight against organized criminal networks dealing with child pornography as it gives law enforcement the power to use a specific case of child pornography for reaching to deeper networks of abusers, rather than simply solving that single case, by thus aiming to a larger number of child victims being rescued and a larger number of abusers being prosecuted.

Article 2 of the decision encourages cooperation among Member States to the widest and speediest possible for the investigation and prosecution of offences of child pornography on the Internet, and for that purpose they shall use existing channels of communication such as Europol and Interpol. It may be noted that, by this provision, the Council fosters international cooperation by specifically referring to international and regional law enforcement bodies which act as facilitators of communication between States.

Apart from cooperation between law enforcement, in article 3 the Council decision stresses also the importance of cooperation with the Internet industry, specifically with ISPs, in both voluntary and legally binding nature. This includes the industry cooperation with law enforcement in taking appropriate measures related to the detection and withdrawal of child pornography material of which they have been informed or are aware that it is distributed through them. Moreover, ISPs are required to retain traffic data ‘*where applicable and technically feasible*’ for criminal prosecution purposes ‘*for such time as may be specified under the applicable national law, to allow the data to be made available for inspection by the criminal prosecution authorities in accordance with the applicable rules of procedure.*’³⁹⁶ This requirement has been criticized as going beyond necessary measures in a democratic society.³⁹⁷ According to Akdeniz, such a measure turns ISPs into private policing organizations and gives little importance to the privacy of Internet users.³⁹⁸

Lastly, in Art. 3(d), the Council decision calls for self-regulatory measures, requiring ISPs to set up their own control systems for the detection of child pornography material.

³⁹⁶ Ibid. Art. 3(c).

³⁹⁷ Akdeniz, Y (2008) Internet child Pornography and the law. Ashgate.

³⁹⁸ Akdeniz, Y and Bohm, N. (1999) Internet Privacy: New Concerns About Cyber-Crime and Rule of Law. Information Technology and Communication Law Journal. Vol. 5. Pg. 20-24.

Article 4 of the decision sets a very important requirement which is of essential relevance in a world of new digital technologies with a high development speed which potentially affect the cybercrime rates and typologies, including the offences of sexual abuse and exploitation of children on the Internet. In this provision, the Council states that:

*‘Member States shall regularly verify whether technological developments require, in order to maintain the efficiency of the fight against child pornography on the Internet, changes to criminal procedural law, while respecting the fundamental principles thereof and, where necessary, shall initiate appropriate new legislation to that end’.*³⁹⁹

Through this provision Member States are obliged to keep their legislation and criminal procedural law related to the investigation, prosecution and criminalization of acts of sexual abuse and exploitation of children on the Internet up to date and in conformity with developments of new digital technologies and to keep track of new threats against children on the digital environment. If necessary, Member States are encouraged to enact new legislation, if the existing one is not sufficient to address the new crimes or the extent of development of the existing crimes as a result of the ICT development.

II. Directive 2011/93/EU on Combating Sexual Abuse, Sexual Exploitation of Children and Child Pornography

The Treaty of Lisbon changed the notion of the EU criminal law by setting out the agenda of the EU's crime fighting mission.⁴⁰⁰ EU gained competences in substantive criminal law in the areas of particularly serious crime with a cross-border dimension, including, but not limited to, the sexual exploitation of children and computer crime.⁴⁰¹ With the abolishment of Framework Decisions by the Treaty of Lisbon⁴⁰² the Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography was replaced by the Directive 2011/93/EU (hereafter The Directive) on combating sexual abuse,

³⁹⁹ Council Decision of 29 May 2000 to Combat Child Pornography on the Internet (2000/375/JHA). Art. 4.

⁴⁰⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 OJ C 306, 17.12.2007. Pg. 1–271. Chapter 4. Judicial Cooperation in Criminal Matters.

⁴⁰¹ Ibid. Art. 69B(1).

⁴⁰² Ibid. Para. 235(a)

sexual exploitation and child pornography. This directive was one of the first directives proposed after the Lisbon Treaty which abolished the third pillar of the European Union, turning police and judicial cooperation in criminal matters a ‘Community policy’.⁴⁰³ It was proposed in 2009 by the European Commission (EC) to the Council and to the Parliament and was adopted in 2011. This Directive is now the main legal instrument under EU law addressing child pornography.⁴⁰⁴

The Directive establishes clear minimum rules concerning definitions of criminal offences their prevention and the protection of victims.⁴⁰⁵ The original intention of the Directive was mainly to transpose the provisions of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, analyzed in the previous sections. However, the Directive went even further, by including provisions of minimum sanctions, common offence definitions and provisions on victim protection. Considering the weaknesses of the existing EU legal instruments in criminal matters and the difficulties they pose in effectively tackling child abuse, the purpose of this Directive was to overcome these weaknesses and create a more robust legal framework than the Lanzarote Convention.⁴⁰⁶

As such this Directive introduced innovations compared to other international instruments by establishing minimum core definitions of criminal offences and minimum levels of penalties and by excluding the possibility for reservations which are allowed by all previous international and regional legal instruments related to the sexual abuse and sexual exploitation of children.⁴⁰⁷ As compared to the previous Framework Decision other improvements include the criminalization of the possession and acquisition of online child sexual abuse material, the introduction of ‘grooming’ as a new offence and a provision related to the removing and/or blocking of websites containing child pornography. These novelties are considered below.

⁴⁰³ Peers S., (2011) EU Justice and Home Affairs, Oxford University Press.

⁴⁰⁴ European Union Agency for Fundamental Rights FRA (2015) Handbook on European Law Relating to the Rights of the Child. Pg. 130.

⁴⁰⁵ Committee on Civil Liberties, Justice and Home Affairs. (27 November 2017) Report on the Implementation of Directive 2011/93/EU of the European Parliament and of the Council Of 13 December 2011 On Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography (2015/2129(INI)) European Parliament.

⁴⁰⁶ European Parliamentary Research Service (2017) Combating Sexual Abuse of Children Directive 2011/93/EU: European Implementation Assessment. Ex-Post Impact Assessment Unit.

⁴⁰⁷ Ruelle E. (2010) Sexual Violence Against Children: The European Legislative Framework and Outline of Council of Europe Conventions and European Union Policy, In Protecting Children from Sexual Violence. A Comprehensive Approach. Council of Europe Publishing.

1. Definitions

The Directive has transposed the definition of the ‘child’ used at the Framework Decision as “a person below the age of 18”.⁴⁰⁸ This definition is in line with the other international instruments of UN and CoE which have been analyzed in the previous sections of this chapter. As concerns the definition of ‘age of sexual consent’, many national legislations of Member States include a different minimum age of consent for engaging in sexual activities, which causes many discrepancies. In order to overcome these conflicts, the Directive, instead of pushing Member States to harmonize their national legislations in accordance with its provision defining the age of the child, takes the opposite approach. Similar to the Lanzarote Convention, it leaves in the discretion of Member States to define in accordance with their national laws the age below which it is prohibited to engage in sexual activities with a child.⁴⁰⁹ This approach leaves unsolved the problem of unification of definitions for the purposes of criminalizing sexual offences against children within the EU.

Moreover, following the same approach as the Lanzarote Convention, the Directive leaves in the discretion of Member States as well, to decide whether to criminalize the possession and/or production of pornographic material by children who have reached the age of sexual consent, provided that the material is for private use, is the result of consensual sexual activities and did not involve any abuse of the child.⁴¹⁰ This approach was made with the purpose of eliminating any discrepancies which would arise from the differences between the definition of age of minor and the age of consent in countries where these ages are not matching. For instance, it may happen that while a person under 18 is able to give consent for engaging in sexual activities, the making or distributing of pornographic images of himself/herself as a result of the engagement in that sexual activity would be criminalized, since under the EU Directive, the making and distribution of pornographic images involving children under 18 is considered a criminal offence.

Compared to the previous Framework Decision, the Directive has expanded the definition of ‘child pornography’ to include not only pornographic material involving children, but also material depicting adults who look like children and simulated pornographic material involving children. The later one includes computer generated /virtual material which look like real

⁴⁰⁸ European Parliamentary Research Service (April 2017) *Combating Sexual Abuse of Children Directive 2011/93/EU: European Implementation Assessment*. Pg. 23.

⁴⁰⁹ Directive 2011/93/EU. Article 2(b).

⁴¹⁰ Directive 2011/93/EU. Article 8.

children.⁴¹¹ This approach is similar to the approach of Council of Europe in its two conventions, the Budapest Convention (Art. 9) and the Lanzarote Convention (Art. 20), leading towards a better unification of definitions between Member States of the two regional organizations, EU and CoE. The criminalization of virtual child pornography increases protection of children from potential risks of sexual abuse. The generally accepted idea behind this decision to criminalize simulated child pornography is to deter a behavior that might lead to the desire to abuse real children, or that might be used to seduce children into participating in such acts by making them believe that this is a normal behavior. This would lead to the creation of a subculture where child abuse is accepted as normal social behavior.⁴¹²

A novelty of the Directive is the introduction of a new term ‘pornographic performance’ in the list of definitions. Even though pornographic performances were criminalized by both UN Conventions and by the CoE Conventions previously analyzed, neither UN nor CoE did provide a definition of what constitutes ‘pornographic performance’. The Directive is the first legal instrument introducing a definition of this term. By ‘pornographic performance’ the Directive refers to:⁴¹³

“a live exhibition aimed at an audience, including by means of information and communication technology, of:

- (i) a child engaged in real or simulated sexually explicit conduct; or
- (ii) the sexual organs of a child for primarily sexual purposes;”

This definition is a very important advancement of the EU law in combating online child pornography as it addresses the most recent trend of this phenomenon, the live-streaming abuse of children. However, it may be noticed that the definition provided by the Directive, does not include within the definition of pornographic performances the engagement of a child in real or simulated sexually explicit conduct with an adult. This is a legal gap which leaves unsolved the problem of live-streaming of a child being sexually abused by an adult and cases of the live-streaming of a child being engaged in sexually explicit conduct with an adult, no matter whether force or coercion is used or not. The current definition of ‘pornographic performances’ provided by the EU Directive, does not include any of these cases.

⁴¹¹ Directive 2011/93/EU Article 2(c)(iii) and (iv).

⁴¹² Jeney P. (2015) *Combatting Child Sexual Abuse Online*, Study for the European Parliament, Policy Department C - Citizens' Rights and Constitutional Affairs, PE 536.481.

⁴¹³ Directive 2011/93/EU. Article 2(e).

2. *Offences*

The Directive lists about twenty criminal offences which are divided into four categories: sexual abuse, sexual exploitation, child pornography and solicitation of children online for sexual purposes, otherwise known as ‘grooming’.

The Directive covers a number of offences related to sexual abuse of children. Similar to the Lanzarote Convention, Article 3 of the EU Directive criminalizes:

- Causing, for sexual purposes, a child who has not reached the age of sexual consent to witness sexual activities and/or sexual abuse, even without having to participate;
- Engaging in sexual activities with a child who has not reached the age of sexual consent;
- Engaging in sexual activities with a child, where abuse is made of a recognized position of trust, authority or influence;
- Engaging in sexual activities with a child, where abuse is made of a particularly vulnerable situation of the child, in particular because of a mental or physical disability or a situation of dependence;
- Engaging in sexual activities with a child, where use is made of coercion, force or threats;
- Coercing, forcing or threatening a child into sexual activities with a third party;

An added value of the EU Directive concerning offences of sexual abuse in comparison with the Lanzarote Convention is the criminalization of ‘causing a child who has not reached the age of sexual consent to witness sexual activities even without having to participate’ and also the offence of ‘coercing, forcing or threatening a child into sexual activities with a third party’, which were not previously criminalized.

Sexual exploitation⁴¹⁴ is a new grouping of offences which is not mentioned in the Lanzarote Convention. However, while the grouping of the offences is new, the offences included in this group are all covered by the Lanzarote Convention as well. The only difference is that the Directive has included all these offences into one single provision, Article 4. The Directive has included as forms of sexual exploitation the offences related to pornographic performances involving children and child prostitution:

⁴¹⁴ Directive 2011/93/EU .Article 4.

- Causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes;
- Coercing or forcing a child to participate in pornographic performances, or threatening a child for such purposes;
- Knowingly attending pornographic performances involving the participation of a child;
- Causing or recruiting a child to participate in child prostitution, or profiting from or otherwise exploiting a child for such purposes;
- Coercing or forcing a child into child prostitution, or threatening a child for such purposes;
- Engaging in sexual activities with a child, where recourse is made to child prostitution.

It may be noticed that the wording within these offences are consistent with the Articles 19 and 21 of the Lanzarote Convention concerning child prostitution and pornographic performances. It is interesting to notice that for both types of offences concerning sexual abuse and sexual exploitation the degree of sanction is based on whether the child victim has not reached the age of sexual consent or is over that age. In the latter case, the sentence is lower, usually almost halved. And what is most appealing is that this rule of lowering the sentencing for cases when the child victim has reached the age of consent applies even for offences where there is use of coercion, force or threat. Does this mean that sexual abuse causes less harmful effects to children who have reached the age of consent?! This regulatory approach may lead to intelligent offenders who have good knowledge of legislation, making it part of their strategy the abuse of only children who have reached the age of consent, so that if they ever get caught, they know the sentencing would be lower.

Another issue with these provisions is the reference to the age of consent in every single type of offence. Considering that age of consent is left in the discretion of each Member State to determine, this would lead to high challenges of cross-border prosecutions due to differences in the definition of age of consent among countries. It also hinders the harmonization of legislation in regard to combating sexual abuse of children at the EU level. However, if we refer to the general scope of the Directive and of the EU mission in general, which is setting minimum standards, in this case minimum substantive criminal law standards this may be considered as an acceptable approach fulfilling the primary goal of the EU. It is then the duty

of states to transpose these minimum standards into their national laws and try to elaborate them better and define higher standards.

a. Offences Concerning Child Pornography

- Acquisition or possession of child pornography;
- Knowingly obtaining access, by means of information and communication technology, to child pornography;
- Distribution, dissemination or transmission of child pornography;
- Offering, supplying or making available child pornography;
- Production of child pornography.

The offences and the wording related to child pornography within Art. 5 of the EU Directive are consistent with the provisions of Lanzarote Convention related to child pornography. Nevertheless, the EU Directive includes some additional offences, such as dissemination and supply of child pornography in addition to the offences provided by the Lanzarote Convention. Furthermore, instead of the term ‘procuring’ used in the Lanzarote Convention, the EU Directive uses the term ‘acquisition’, which are basically synonyms of each other. This use of synonyms instead of the exact wording may cause confusing and ambiguity, by questioning the reason behind such changes. Thus, for the purposes of international harmonization, the wording of international legislations should be kept as exact and consistent as possible.

Continuing on the provision on child pornography, an important step is that the Directive, differently from other international instruments of CoE and UN, excludes the option of opting out from criminalizing simulated child pornography or realistic images of children produced by computer. The only exclusion is in cases when the production of such images is possessed by the producer solely for personal use and there is no risk of dissemination of the material. Simple possession of other types of child pornography is punishable without any right of states to opt-out.

b. Solicitation of Children for Sexual Purposes

The Directive criminalizes also the process of solicitation of children for sexual purposes, or ‘online grooming’. Online grooming is defined by this Directive as “the proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of engaging in sexual activities or to produce child

pornography where that proposal was followed by material acts leading to such a meeting”.⁴¹⁵ This definition is very similar to the definition of ‘solicitation of children for sexual purposes’ provided by the Lanzarote Convention.

3. *The ICT Dimension of the Offences*

The Directive, does explicitly mention in many of its provisions that some of the offences may occur also through means of information and communication technologies. Thus, it refers specifically to the ICT usage for the committing of these offences. For instance, the offences of knowingly obtaining access to child pornography, the online solicitation of children for sexual purposes, the act of causing a child to witness sexual abuse or sexual activities can also be performed through the ICT. The child can be forced to become an online witness of a live-streaming of sexual abuse or sexual activities.

The following section will focus on the ICT dimension of the offences listed in the Directive.

a. Pornographic Performances

According to the Directive, causing or recruiting a child to participate in pornographic performances, or profiting from, or exploiting a child for such purposes shall be punishable. The same applies for forcing, coercing or threatening a child to participate in pornographic performances as well as knowingly attending pornographic performances involving children.⁴¹⁶ As already mentioned, pornographic performance is defined in Art. 2 as “a live exhibition aimed at an audience, including by means of information and communication technology where the child is engaged in real or simulated sexually explicit conduct or, the exhibition of sexual organs of a child for primarily sexual purposes”. ‘Pornographic performances’ was included as an offence also in the previous Framework Decision. The criminalization of such an act was a necessity brought by the new trends resulting from the fast developments of the ICT.

b. Child Pornography

The Directive required Member States to criminalize the acquisition and possession of child pornography.⁴¹⁷ The definition of child pornography is provided in Article 2 of the Directive. While the use of ICTs is not explicitly mentioned in this provision, the definition of ‘child pornography’ covers both online and physical material. This implies that acquisition can be

⁴¹⁵ Directive 2011/93/EU. Article 6.

⁴¹⁶ Directive 2011/93/EU. Article 4(2-4).

⁴¹⁷ Directive 2011/93/EU. Article 5(2).

made through ICT and possession can be of both physical materials and/or online storage of materials. For a more proper relation of this provision to the ICT, the provision should be viewed together with the subsequent provision criminalizing the knowingly obtaining access through ICT to child pornography.⁴¹⁸ Nevertheless, law practitioners should be encouraged and trained to interpret the provision related to acquisition and possession of child pornography in such a way that allows for its implementation and application also to offences occurring through the ICT.

A novelty of the Directive is the introduction of the new offence of knowingly obtaining access, by means of information and communication technologies, to child pornography. This provision, which did not exist in the previous Framework Decision, was incorporated by the Lanzarote Convention. This provision compliments the aforementioned provision of acquisition and possession of child pornography. The European Commission has foreseen, in its explanatory memorandum of the proposal for the Directive⁴¹⁹, the creation of new forms of sexual abuse and exploitation of children through the ICT and has decided to include the criminalization of knowingly obtaining access to child pornography same as in the Lanzarote Convention. Referring to the Lanzarote Convention, the European Commission explains its intention of criminalizing cases of viewing child pornography on the Internet without downloading or storing the images on the computer, thus not falling under the offence of ‘possession’ or ‘procurement’ of child pornography.⁴²⁰ For this purpose, the Commission included the offence of knowingly obtaining access within the EU framework, which in practice includes cases when the user may choose to view child abuse images via ICTs without downloading them into the computer’s hard drive.⁴²¹ It should be noted from the wording used by the Explanatory memorandum and by implementation Assessment reports⁴²² that, the European Commission’s intention was aimed only at viewing of images of child pornography, leaving out of the scope of this provision cases of viewing live-streaming of child abuse and even videos of child sexual abuse and child pornography. This gap that already existed in the Lanzarote Convention, has not been covered by this Directive either.

This offence, as the notion ‘knowingly’ infers, imposes criminal liability only if committed intentionally. As such, a person who accidentally accesses a website that contains child

⁴¹⁸ Directive 2011/93/EU. Article 5(3).

⁴¹⁹ Explanatory Memorandum of the European Commission’s proposal for the Directive 2011/93/EU.

⁴²⁰ Ibid.

⁴²¹ European Parliamentary Research Service (2017) Combating sexual abuse of children Directive 2011/93/EU European Implementation Assessment. Ex-Post Impact Assessment Unit. Pg. 8.

⁴²² Ibid.

pornography is not liable under such provision. The challenge that arises here is how to prove the intention of accessing child pornography, how to distinguish it from the accidental access. Research suggests that intention can be deduced from the reoccurrence of the offence or if a payment is made to access to the services of a certain child pornographic website.⁴²³

The introduction of the offence of knowingly obtaining access to child pornography in the Lanzarote Convention and then in the EU Directive, have caused intensive debate. There are opinions that the mere attempt to view child pornography as a preparatory phase of an offence cannot be criminalized on a legitimate basis as it is not in compliance with the general principles of law, and specifically with the harm principle.⁴²⁴

Production of child pornography and distribution, dissemination or transmission of child pornography are criminalized as well. While in the Framework Decision reference was made explicitly to 'computer systems' being used as a means for the committing of this offence, the Directive does not include that phrase anymore. Instead, through the whole text of the Directive, the used terminology refers to information and communication technologies rather than computer systems, in this way broadening the scope and application of its provisions in comparison to the previous Framework Decision which it has replaced.

Supplying or making available child pornography was also covered by the Framework Decision. The added value in this provision is the offering of child pornography which was not punishable by the Framework Decision.

While the majority of the above offences were criminalized also by the Framework Decision, the Directive has however imposed an added value, in that it has introduced a much wider definition of 'child pornography' covering not only images of real children but also images of persons appearing to be a child and computer-generated images of children. This wider definition broadens the scope of the above offences and their area of application. This additional offence has made the provisions of the EU Directive related to child pornography more consistent with the Budapest Convention and the Lanzarote Convention which both criminalize these acts. While Member States are obliged to criminalize all of these offences

⁴²³ Jeney P. (2015) Combatting child sexual abuse online, Study for the European Parliament, Policy Department C - Citizens' Rights and Constitutional Affairs, PE 536.481. Pg. 16.

⁴²⁴ Salvadori I. (2010) Legal Problems of Possession and Viewing Child Pornography in Internet. In Herczeg, J., Hilgendorf, E., Gřivna T. (2010) Internetkriminalität und die neuen Herausforderungen der Informationsgesellschaft des 21. Jahrhundert. Praha, Wolters Kluwer CR.

without having the possibility of opting-out of any of them, they may derogate from their criminalization in certain cases.

In a resolution on the implementation of Directive 2011/93/EU released in December 2017, the European Parliament expresses its concern about the partial transposition of the substantive criminal law provisions of the Directive by Member States and is particularly concerned about the online risks posed to children.⁴²⁵ Among these concerns, the European Parliament particularly highlights risks from the increase in live-streaming of child abuse and urges all Member States to innovative technical methods to detect and block access to such content, and to place restrictions on payments made for services of live-streaming of child sexual abuse.⁴²⁶ While the EU Directive does not specifically mention live-streaming of child abuse as a stand-alone offence, with all of its elements, it is noticed that the European Parliament concern is focused mainly in the investigation and technical aspects of live-streaming rather than in the substantive criminal law aspect of the crime. The focus of the European Parliament in this regard is solely on detecting and blocking access to live-streamed content of child abuse, rather than on the identification of perpetrators and victims of such a crime in its broad extent. While it is true that blocking access to such content causes a decrease in the supply of live-streaming of child abuse, but it does not solve the issue of protecting the children who have already been exploited for producing live-streamed material.

D. CONCLUSIONS

As this chapter demonstrates, there have been considerable initiatives to address the problem of Internet child sexual abuse and sexual exploitation at UN, CoE and also EU levels in the last two decades. As the United Nations level, the above-mentioned UN Optional Protocol criminalizes the producing, distributing, disseminating, importing, exporting, offering, selling or possessing of child pornography.⁴²⁷ The ILO Convention includes the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances.

While the Council of Europe Cybercrime Convention requires state parties to criminalize the production and possession of child pornography, the offering or making available, distribution,

⁴²⁵ European Parliament resolution of 14 December 2017 on the Implementation of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography (2015/2129(INI)). Para. 7 and 9.

⁴²⁶ Ibid. Para. 10.

⁴²⁷ Optional Protocol. Article 3 (1)(c).

transmission and procuring of child pornography through a computer system.⁴²⁸ The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse seeks to strengthen protection of children regarding the use of computer systems or any other information and communication technology that may facilitate the sexual exploitation and sexual abuse of children. It includes producing, offering or making available, distributing or transmitting child pornography, and possessing and procuring child pornography and also knowingly obtaining access, through information and communication technologies, to child pornography.⁴²⁹ Moreover, it criminalizes the recruiting a child into prostitution and coercing a child into prostitution or profiting or exploiting a child for such purposes and also having recourse to child prostitution. It includes as well the recruiting of a child into participating in pornographic performances, coercing or profiting and exploiting a child for such purposes and also knowingly attending pornographic performances involving the participation of children.

As it concerns measures taken by the European Union, while the EU generally prefers to play an advisory role to its Member States, calling for common measures to be taken by them in relation to criminal matters, in regards to the fight against child sexual abuse, sexual exploitation and child pornography, the EU has taken another approach. It has used directives rather than recommendations, with the binding policies, starting with the Council Framework Decision and then the Directive 2011/93/EU on combating sexual abuse, sexual exploitation of children and child pornography.

The Directive 2011/93/EU brings some innovation into the area of protection of children from sexual exploitation and sexual abuse as it establishes minimum core definitions of criminal offences and minimum levels of penalties and what is the most significant development, excludes for the first time the possibility for reservations from state parties from any of its provisions. Similar to the Cybercrime Convention, it criminalizes recruiting of a child into participating in pornographic performances, coercing, forcing or profiting and exploiting a child for such purposes and knowingly attending pornographic performances involving the participation of children. It includes as well the acquisition or possession of child pornography, knowingly obtaining access, by means of information and communication technology, to child pornography, distribution, dissemination or transmission, offering, supplying or making available and production of child pornography.

⁴²⁸ Cybercrime Convention. Article 9.

⁴²⁹ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Art. 20 (2).

These international conventions provide up to ten years of imprisonment for the production and distribution offences of child pornography, while up to five years of imprisonment is provided for the possession of child pornography, considering it as a relatively less serious offence in comparison to the production and distribution.

As noted in this brief review and through the whole chapter, it can be concluded that none of these supranational, international and regional instruments specifically address the criminalization of viewing without possessing of live-streaming of child abuse, demanding, offering or making available the live-streaming of child abuse, the creation of live-streaming material of child abuse and its distribution. As a result, they fail to address live-streaming of child abuse as a distinct form of sexual exploitation of children with its own unique elements. A key obstacle, is the lack of a definition internationally agreed upon, which hinders the development and harmonization of legislation related to the criminalization of live-streaming and its enforcement as well, both on international and national levels.

However, there is an indirect obligation for the prosecution of offenders of live-streaming of child abuse. Existing international and regional legal frameworks may serve as the basis for the adoption of specific national legislation to criminalize live-streaming of child abuse. Nevertheless, the lack of specific instruments that address the concrete elements of the crime of live-streaming is still persistent.

The inclusion of live-streaming of child abuse with its various forms into the international conventions as a specific kind of cybercrime would be a significant step forward towards the fight of sexual offences against children and towards a better protection of children from physical and mental harm and towards the protection of their dignity. The lack of specific legislation on live-streaming of child abuse keeps this kind of crime out of sight of the public and policy radar, belittling its importance and fails to protect child victims of such crime.

The harmonization of these legal standards by member states of the above mentioned supranational, regional and international organizations would be an even more important step towards the fight of child sexual abuse, sexual exploitation and child pornography in general and the live-streaming of child abuse in particular. A particular issue of concern is that all these conventions, with the only exception being the EU Directive, provide for reservations and the right not to apply some of the provisions. This issue poses obstacles to the harmonization of legal standards, as it leaves to the Member States to decide how to implement these provisions. Part two of this thesis provides an assessment of how these provisions are implemented into

two different national legislations, shedding light on the extent of legal harmonization to date among England and Wales and Italy.

While I agree with scholars claiming that the total elimination of Internet child pornography is hardly possible,⁴³⁰ I believe it is possible to eliminate the live-streaming of child sexual abuse. This can be done through the explicit criminalization of this offence, the harmonization of laws, their effective implementation and enforcement and through cooperation among countries, among law enforcement and ICT industry.

⁴³⁰ See Akdeniz, Y. (2008) Internet child pornography and the law: National and International Responses. Ashgate. Pg. 13.

CHAPTER 3

CRIMINALIZATION OF LIVE-STREAMING OF CHILD ABUSE AS A FORM OF SEXUAL EXPLOITATION OF CHILDREN: NATIONAL APPROACHES

Recently, there have been some national attempts to combating the phenomenon of live-streaming of child abuse. Some cases have made it to the court and in the lack of an explicit legislation criminalizing the act of live-streaming of child abuse, the courts in different countries have released different interpretations and followed different approaches when sentencing the viewers of live-streaming sessions through the Internet. Some of these interpretations even try to break the standard legal doctrines by creating new interpretations of old legal concepts, in an attempt to fill the legal gaps in the criminalization of the recently emerged phenomenon of live-streaming of child abuse. This chapter of the research focuses on an example of dealing with the criminalization of live-streaming of child abuse from common law and one from civil law system, respectively of Italy, and England and Wales.

Live-streaming of child sex abuse is a crime that combines the legal concepts of child pornography and child prostitution, both of which are criminalized in international conventions as well as by the criminal codes of most countries. Subchapters II and III of this chapter provide a comparative analysis of the national criminal laws of England and Wales, and Italy. The remit of these two subchapters is to identify laws that can be interpreted as outlawing the live-streaming of child sex abuse and may therefore be used in the criminalization of the acts of live-streaming of child sex abuse and the prosecution of offenders who engage in such acts in these countries. It was thought that this can be best achieved through a comparison between civil (Italy) and common law systems (England and Wales). The final aim is to understand if existing laws in these countries are sufficient to address this type of crime or there is a need for new regulations, be it amendments to existing definitions or provisions, new interpretations of the existing provisions, or introduction of new laws. The focus will mainly be in the examination of criminal codes and substantive criminal legislation of each state. These laws will be compared to the supranational legislation analyzed in the second chapter by assessing

the compliance with international standards and the transposition of EU standards into the domestic laws of England and Wales and Italy. A specific focus will be given to the provisions of the EU Directive and the Lanzarote Convention related to offences concerning child pornography, child prostitution and knowingly obtaining access through the ICT to pornographic performances. It will be examined whether the national laws comply with the minimum requirements of these legal provisions or not. If they do, the degree of compliance will be examined, assessing whether they simply provide for the regulation of the minimum requirements set forth in these legal instruments, or they go even further by providing better regulation, better response to the prosecution of the offenders and better protection for the victims.

In seeking to determine whether the criminal laws of Italy and England and Wales contain provisions that can be interpreted as prohibiting the live-streaming of child sex abuse, I focused on answering the above questions:

1. Does the criminal code/law contain provisions that prohibit viewing live-streamed videos depicting a minor performing sexual acts and/or an adult performing sexual acts with a minor? (the demand side)
2. Does the criminal code/law contain provisions that prohibit the act of streaming live on the Internet of a minor performing sexual acts and/or prohibit the act of live-streaming of an adult performing sexual acts with a minor? (the supply side)
3. Does the domestic legislation provide a legal definition of child pornography? If yes, does that definition include the child abuse material transmitted on ICTs on real-time with the abuse.
4. If the answer to question 3 is yes, then are “assessing” or “viewing” child pornography, and specifically live pornographic performances without “downloading”, “storing” or “possessing” the material/file criminalized? (This element of the crime is essential since, as described in the first chapter, the viewing of live-streamed material is possible, and usually occurs, without permanently storing the material on the viewer’s computer.
5. If laws against child pornography did not seem to be applicable to the live-streaming of child sexual abuse, it was attempted to determine whether the provisions related to child prostitution and to knowingly obtaining access through the ICT to pornographic performances in these states include the criminalization of child prostitution through the ICTs.

6. Following question 5, it was sought to determine when does the crime of child prostitution start, in which stage is the crime considered as completed and when does the criminal liability start? In this context, it was determined if physical contact with the child is necessary; or if the sole act of paying a minor or the facilitator of the child prostitution for any sexual act is sufficient for the crime to be committed; or if the communication proving the agreement between the client (viewer) and the facilitator or the child himself/herself (provider) to pay in exchange for child prostitution through the ICTs is sufficient for the crime to be considered as committed, even if the live-streaming does not occur for technical reasons (ex: weak or failed connection through the Internet)

A. LEGAL APPROACHES IN ENGLAND AND WALES

The United Kingdom is a union of England, Wales, Scotland and Northern Ireland. As such, it is composed of three legal systems: England and Wales, Scotland, and Northern Ireland. In some legal areas, different laws apply in each part of the UK. Due to restraints and limitations, this research focuses only on the England and Wales legal system. England and Wales have a common law legal system. There is no single written constitution in the UK. Its constitution is composed of a variety of sources, both written and unwritten such as statutes, precedent and treaties.⁴³¹ The main sources of law are the Acts of Parliament and the case law. EU Law is directly applicable to the UK. After a referendum in 2016 where the UK voted to leave the EU, in 2017 the UK government started the withdrawal process known as Brexit. The ‘divorce’ will be official starting 29 March 2019, date after which EU law will cease to apply to the UK. Until then, UK remains subject to the EU law obligations. The UK is also subject to international law obligations of treaties and conventions that it has signed and ratified. However, international treaties do not have supremacy over Parliamentary Acts. The Parliament enacts legislation regarding the extent to which the international treaties signed by the Government apply. The Supreme Court is the highest court of appeal in the UK, hearing appeals for the whole UK in civil cases, while in criminal cases only for England and Wales and Northern Ireland. In England and Wales, the Court of Appeal is the appellate court divided into Criminal and Civil divisions. The Crown Court deals with indictable criminal cases transferred by the

⁴³¹ Bradley, A.W. and Edwing, K. (2010) Constitutional and Administrative Law. 15th edition. Longman.

Magistrates' Courts. While the Magistrates Courts are first instance courts for all criminal cases.

I. Introduction

The first report on computer related child pornography in England and Wales dates back in 1994.⁴³² At that period of time, the main concern related to such offences was not the Internet but the circulation of obscene images via floppy disks and CD-ROMs and publications in data formats.⁴³³ Concerns related to Internet started growing later during the 1990s, when Internet access starting growing worldwide and child perpetrators started to use Internet to circulate child pornography. This is shown by the significant growth in the number of child pornography prosecutions from 1995.⁴³⁴ In a project on EU Child Online Safety led by professor J. Davidson, providing information about victims and perpetrators of online grooming and online child pornography in UK, Italy, the Netherlands and Ireland, UK results as having the highest number of identified online child abuse cases.⁴³⁵

In recent years, the problem of child sexual exploitation in England and Wales has received increased political and public interest. In 2017, there has been an increase by approximately thirty percent in number or reported cases of child sexual abuse in United Kingdom.⁴³⁶ However, there is no specific category of child sexual exploitation in child protection procedures in England and Wales.⁴³⁷ Thus data related to crimes of child sexual exploitation are even missing or incomplete and are incorporated in other categories of abuse or crime.⁴³⁸ Until 2012, there was no specific crime of child sexual exploitation in legislation of England and Wales. Offenders of these crimes used to be convicted for associated offences such as

⁴³² House of Commons, Home Affairs Committee (1994) First report on computer pornography. HMSO. London.

⁴³³ Y. Akdeniz (2008) Internet Child Pornography and the Law. Pg. 17.

⁴³⁴ Ibid.

⁴³⁵ Davidson, J., et. al. (2016) Enhancing Police and Industry Practice. EU Child Online Safety Project. London: Middlesex University.

⁴³⁶ The Guardian, Cases of child sexual abuse up 31% says NSPCC: <https://www.theguardian.com/society/2017/dec/18/cases-of-child-sexual-abuse-up-31-says-nspcc> (last accessed on 20 Dec 2017).

⁴³⁷ NSPCC. Child Sexual Exploitation. Available at: <https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/child-sexual-exploitation/> (last accessed 23 December 2017).

⁴³⁸ Berelowitz, S. et al (2012) "I thought I Was the Only One. The Only One in The World." The Office of The Children's Commissioner's Inquiry in to Child Sexual Exploitation In Gangs and Groups: Interim Report. London: Office of the Children's Commissioner; Child Exploitation and Online Protection Centre (CEOP) (2011) Out of Mind, Out of Sight: Breaking Down the Barriers to Child Sexual Exploitation: Executive Summary. CEOP. London.

sexual activity with a child.⁴³⁹ Thus, real statistics on the types of crimes falling into child sexual exploitation are impossible to obtain.⁴⁴⁰ In 2015, the Serious Crimes Act amended the Sexual Offences Act of 2003, by replacing the words “child prostitution” with “child sexual exploitation”, giving in this way child sexual exploitation a legal recognition. Reports show that in 2017 there have been around 375 arrests each month for online child sexual exploitation offences.⁴⁴¹ Despite the high number of recorded cases, it has been recognized by the authorities that these data underestimate the real scale of child sexual abuse and exploitation of children because of the low reporting rates which causes most of the abuse to remain hidden and uncovered, and because of under-recording of the cases in child protection data.⁴⁴²

Live-streaming is considered by the National Crime Agency as one of the most serious offences in the group of child sexual exploitation,⁴⁴³ which is highly problematic also because children usually do not realize it is a form of sexual abuse due to lack of physical contact with the viewer.⁴⁴⁴

This chapter explores the current state of the legislation related to Internet child sexual exploitation in England and Wales and assesses the compliance with the provisions of the international and regional legislation, analyzed in the previous chapter, of the domestic legislation of England and Wales. The focus will be mainly in the transposition of the provisions of the EU Directive and the compliance with the provisions of the Lanzarote Convention. Individual offences are examined in order to understand whether they include the criminalization of the phenomenon of live-streaming of child abuse within them. Consideration will be given to case law related to such offences, by analyzing whether the interpretation of courts related to child pornography and child sexual exploitation offences can be used for criminalizing the live-streaming of child abuse through the Internet.

⁴³⁹ Berelowitz, S. Et Al (2012) “I Thought I Was the Only One. The Only One in The World.” The Office of the Children’s Commissioner’s Inquiry into Child Sexual Exploitation in Gangs and Groups: Interim Report. London: Office of the Children’s Commissioner.

⁴⁴⁰ Ibid.

⁴⁴¹ HM Government. (February 2017) Tackling Child Sexual Exploitation, Progress Report. Pg. 13.

⁴⁴² Kelly, L. and Karsna, K. (2017) Measuring the Scale and Changing Nature of Child Sexual Abuse and Child Sexual Exploitation. Scoping Report. Centre of Expertise on Child Sexual Abuse. London Metropolitan University. Pg. 18.

⁴⁴³ The Guardian, Nearly 200 People Held in UK-Wide Online Child Abuse Operation: <https://www.theguardian.com/society/2017/dec/05/nearly-200-people-held-in-uk-wide-online-child-abuse-operation> (accessed on 20 Dec 2017).

⁴⁴⁴ The Guardian, Cases of Child Sexual Abuse Up 31% Says NSPCC: <https://www.theguardian.com/society/2017/dec/18/cases-of-child-sexual-abuse-up-31-says-nspcc> (accessed on 20 Dec 2017).

UK has signed and ratified the UN Convention of Rights of the Child and its OPSC and also the ILO 182 Convention on Worst Forms of Child Labour. It has also signed CoE Convention on Cybercrime since 2001 and ratified it only in 2011. Thus, the Budapest Convention entered into force in UK only in September 2011. While, UK is a signatory to the Lanzarote Convention since in 2008 but did only ratified it until late June 2018, and it will enter into force in the country on 1 October 2018. This means, its provisions have no legal power in the country yet. Evidently, it took a long time for the UK government to finally decide to ratify the Lanzarote Convention. Until the start of 2018, there was no set date of ratification of this convention. In 2012, when asked regarding the ratification and implementation process, the UK Government responded that: “*discussions are taking place across Government to establish a clear picture of current levels of existing compliance. Subject to the successful progression of these discussions, we aim to reach a decision on the steps needed to ratify and implement the convention before the conclusion of this Parliament*”⁴⁴⁵. In another response in 2014 the government declared they were assessing what needs to be done to assure full compliance with the Lanzarote Convention and that a decision would be taken that same year.⁴⁴⁶ Obviously, this aim of the then government was not reached on time. Neither did the next Parliament take any decision on the ratification and implementation of the Lanzarote Convention. It was the recently elected Parliament, created by a snap election in June 2017, that decided to make a step forward in this regard. Now only three CoE Members are left without ratifying it.⁴⁴⁷

As a Member State of the European Union since 1973, the UK is obliged to conform to EU laws and transpose them to its national legislation. Therefore, UK is obliged to transpose the provisions of the Directive 2011/93/EU of the European Parliament and the European Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography as well. Nevertheless, during a debate in the House of Commons regarding sexual abuse and sexual exploitation of children on 26th April 2011, the Parliamentary Under-Secretary of State for Justice, Mr. Blunt declared that there was no need for major changes in the legislation of England and Wales for the transposition of the Directive because the UK already has high standards of protection of children and that the only reason why UK

⁴⁴⁵ House of Commons Hansard Written Answers Index for 11 July 2012.

⁴⁴⁶ UK Government Response to Conclusions and Recommendations Set Out in the Committee's Report on Online Safety of 2014: <https://publications.parliament.uk/pa/cm201415/cmselect/cmcmds/517/51704.htm>.

⁴⁴⁷ Armenia, Azerbaijan and Ireland have signed but not yet ratified the Lanzarote Convention. See: Council of Europe Website https://www.coe.int/en/web/portal/belgianchairmanship-news?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_assetEntryId=37409134&_101_type=content&_101_urlTitle=the-uk-ratifies-the-lanzarote-convention-to-protect-children-against-sexual-violence&inheritRedirect=false.

government opted in to this instrument is only for supporting to raise standards in the rest of Europe.⁴⁴⁸

Nevertheless, the EU Directive is a crucial instrument also for increasing and simplifying cooperation of UK with other EU Member States in matters related to sexual abuse and sexual exploitation of children, especially when dealing with cross-border investigations. However, in June 2016, the UK voted to leave the European Union, a decision which will enter into force in March 2019. This withdrawal of the UK from the Union, means the UK will not be bound by EU laws anymore, including the EU Directive. One could safely say that the decision of UK to ratify the Lanzarote Convention at this moment in time, during its attendance at the Lanzarote Committee in Strasbourg, is no coincidence. Indeed, with the EU Directive's legal power into UK drawing to a close, UK will have no international legal instrument on which to base its international cooperation in matters regarding the combating of the sexual abuse and sexual exploitation of children, causing many problems of cooperation in cross-border investigation cases. Therefore, in the light of a close approach to Brexit, implying a withdrawal from the most prominent and comprehensive legal instrument regulating criminal matters in the field of the sexual abuse and sexual exploitation of children, the ratification of the Lanzarote Convention is a very wise decision of the UK's government towards guaranteeing the continuation of international cooperation in criminal matters and beyond regarding the fight of sexual abuse and sexual exploitation of children. Indeed, this ratification is a credible alternative to the EU Directive, which opens the doors for larger cooperation and information sharing that goes beyond the geographical boundaries of the EU, taking into consideration that 44 CoE members have ratified the Convention and all 47 of them have signed it.

Furthermore, ratifying this convention, ensures cooperation to the best standards, by giving UK the possibility to share best practices with other member states of the CoE and makes it accountable for the implementation and application of the convention within its territory. It gives other CoE members the opportunity to get involved into UK initiatives and to take advantage of evidence and practice sharing from UK and vice versa, especially for cases of online child sexual abuse and exploitation. This means better protection for children all over the CoE member states. Currently, the second monitoring round of the implementation of the Lanzarote Convention has started. In this monitoring cycle, the Lanzarote Committee's focus will be the protection of children against sexual exploitation and sexual abuse facilitated by

⁴⁴⁸ UK Parliament Website, General Committee Debates. 26 April 2011: <https://publications.parliament.uk/pa/cm201012/cmgeneral/euro/110426/110426s01.htm>.

information and communication technologies. Having ratified the Convention, now the UK will be able to share its initiatives in education and awareness on the matter and in best practices into tackling the issue of child sexual abuse and sexual exploitation online and thus contribute into unifying the approaches to the protection of children around the CoE members.

II. Legal Framework

The legal framework of United Kingdom related to sexual exploitation and sexual abuse of children is comprehensive. It is considered as one of the toughest in the world as regards the treatment of sex offenders.⁴⁴⁹ UK is among the 19 countries in the world to have a Sex Offenders Register, and among only seven of them whose legislation allows for sharing information with other countries in cases of transnational child sex offenders.⁴⁵⁰ According to Akdeniz, the UK's policy related to Internet child pornography parallels the EU policies, so the developments at EU level may not have a strong impact on United Kingdom besides improved judicial cooperation with other EU Member States.⁴⁵¹ United Kingdom's work towards the prevention of crimes related to sexual exploitation and sexual abuse of children is a continuously ongoing work with frequent developments allowing the country to keep pace with new developments in the crime area.⁴⁵²

The changes brought to the law regarding sexual offences in England and Wales by the Sexual Offences Act 2003 are considered as the most substantial changes since Victorian times,⁴⁵³ which modernized the law of sexual offences.⁴⁵⁴ The White Paper which was published before the Sexual Offences Act 2003 referred to the then existing law as archaic, incoherent, inadequate and out of date.⁴⁵⁵ Card and Molloy as well referred to the previous laws as lacking coherence and structure, offering inadequate protection and having too light maximum penalties.⁴⁵⁶ There was a wide consensus on the soundness of this piece of legislation,

⁴⁴⁹ Global Alliance Against Child Sexual Abuse Online – 2014 Reporting Form, UK country report. Pg. 5.

⁴⁵⁰ Ibid.

⁴⁵¹ Akdeniz, Y. (2008) Internet Child Pornography and the Law. Pg. 191.

⁴⁵² Ibid.

⁴⁵³ Rook QC, His Honour Judge Peter and Ward CBE, Robert (2010) Rook and Ward on Sexual Offences Law and Practice.

⁴⁵⁴ Card, R. and Molloy, J. (2016) Card, Cross & Jones criminal law. 22nd edn. Oxford University Press. Pg. 317

⁴⁵⁵ Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences. CM 5668 The Stationery Office, 2002.

⁴⁵⁶ Card, R. and Molloy, J. (2016) Card, Cross & Jones Criminal Law. 22nd edn. Oxford University Press. Pg. 317.

especially regarding its appropriateness for tackling child sexual exploitation in the country. Nevertheless, criticism of its interpretation and implementation was not lacking either.⁴⁵⁷

The provisions of the Sexual Offences Act 2003 are written and interpreted to address offences committed both offline and online. But, until the 2015 amendments from the Serious Offences Act 2015 there was no offence on child sexual exploitation. Prosecutors used to use instead other offences such as: sexual assault (section 2 and 3); rape and other sexual offences against children under 13 (s. 5-8); meeting a child following sexual grooming (s. 15A)⁴⁵⁸; causing or inciting child prostitution or pornography (s. 48); and trafficking within the UK for sexual exploitation (s. 59A).⁴⁵⁹ In cases of children being abused in a continuous manner rather than just once, offenders are usually charged for rape, despite the fact that the offence of rape does not depict the on-going abuse, but rather focuses only on one occurrence.⁴⁶⁰ This happened due to the lack of a criminal offence on sexual exploitation of children. While in cases of trafficking offences which involve also offences of sexual exploitation, the National Crime Agency recommends to use the offence of trafficking rather than sexual exploitation since evidence that someone was being moved for purposes of exploitation is enough for the crime to be considered as committed, rather than proving the actual exploitation, which opens other implications related to the age of consent for engaging in sexual activities.⁴⁶¹

Besides the legal framework, the law implementation agencies in UK are constantly developing and organizing their powers so that they can better respond to newest threats. In this direction, the UK government, in October 2013 established the National Crime Agency (NCA) focused on fighting serious and organized crime.⁴⁶² The previously existing Child Exploitation and Online Protection Centre (CEOP) became a dedicated Command within the NCA, gaining in this way more powers into combating child sexual exploitation and sexual abuse. One of the main crimes listed among the serious and organized crime tackled by the NCA together with CEOP is child sexual exploitation and sexual abuse, with a focus on four key threat areas: indecent images of children, online child sexual exploitation, sexual exploitation of children

⁴⁵⁷ See: Report of the Parliamentary Inquiry into the Effectiveness of Legislation for Tackling Child Sexual Exploitation and Trafficking Within the UK (2014) Believe in Children. Barnardo's.. Pg. 15.

⁴⁵⁸ Section 76 of Serious Crimes Act 2015 amended Sexual Offences Act 2003 by introducing in it the section 15A - the offence of grooming 'sexual communication with a child' which entered into force only recently, in April 2017.

⁴⁵⁹ Report of the Parliamentary Inquiry into the Effectiveness of Legislation for Tackling Child Sexual Exploitation and Trafficking Within the UK (2014) Believe in Children. Barnardo's.. Pg. 15.

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid. Pg. 16.

⁴⁶² National Crime Agency: <http://www.nationalcrimeagency.gov.uk/>.

overseas by UK offenders and the contact child sexual abuse.⁴⁶³ UK is also a founding member of the Virtual Global Taskforce (VGT), an international alliance of law enforcement agencies working together to combat online transnational child sexual abuse and exploitation. A significant example of the work of VGT instigated by the NCA is the Operation Endeavor, a joint investigation by the NCA, the Australian Federal Police and the US Immigration and Customs Enforcement against an organized crime group involved in live-streaming of child sexual abuse in the Philippines. In 2014 the operation resulted into 15 children being identified and rescued, 29 international arrests across 12 countries, 17 arrests within the UK among which five convictions and nine investigations still ongoing.⁴⁶⁴

These continuous efforts of improvement show the commitment of the UK towards constant improvements of both the legislative framework and the law enforcement response towards the online child sexual exploitation and sexual abuse. Nevertheless, despite all these efforts, the NCA declared in 2017 that the number of reports of online child sexual exploitation and sexual abuse is higher than ever before.⁴⁶⁵

1. Offences Concerning Child Pornography

In 1998, while discussing about the creation of the Council Decision to combat child pornography on the Internet, the that time UK's Parliamentary Under-Secretary of State for Home Department, Kate Hoey, while welcoming this initiative, declared that UK's law related to child pornography is adequate enough in responding to technical developments enabling law enforcement authorities to combat this activity when it happens on computer networks.⁴⁶⁶ This meant that UK did not need any changes to the legislation to meet the provisions of the Council Decision.⁴⁶⁷

In 2015-2016 only, there have been over 22 thousand prosecutions about offences related to child abuse images in England and Wales, the highest number of prosecutions for such offences for the period 2009-2016.⁴⁶⁸ The new National Cyber Security Strategy of 2016 separates

⁴⁶³ See: <http://www.nationalcrimeagency.gov.uk/crime-threats/child-exploitation>.

⁴⁶⁴ BBC News. Philippines web abuse ring smashed in UK-led operation: <http://www.bbc.com/news/uk-25749326> (last accessed 10 January 2018); Global Alliance Against Child Sexual Abuse Online – 2014 Reporting Form, UK country report. Pg. 8.

⁴⁶⁵ House of Lords (2017) Growing up with the internet. 2nd report of session 2016-17. House of Lords Select Committee on Communications. Pg. 36. Para. 131.

⁴⁶⁶ European Scrutiny Committee Reports, Second Report. (15 Dec 1998) HC 34-ii. Session 1998-99-Child pornography on the Internet. Para. 12.

⁴⁶⁷ Ibid.

⁴⁶⁸ Crown Prosecution Service (2016) Violence against Women and Girls crime report 2015–2016. Crown Prosecution Service.

online child sexual abuse crimes into two categories, distinguishing between cyber-enabled and cyber-dependent crimes. It defines cyber-dependent crimes as “crimes that can be committed only through the use of Information and Communications Technology (ICT) devices, where the devices are both the tool for committing the crime, and the target of the crime.”⁴⁶⁹ While cyber-enabled crimes are defined as “traditional crimes which can be increased in scale or reach by the use of computers, computer networks or other forms of ICT”.⁴⁷⁰ The Crown Prosecution Services lists offences concerning child pornography as cyber-enabled offences.⁴⁷¹ In a 2016 study by Giles and Alison, it results that there are an estimate of 5,042-25,210 individuals in UK who besides accessing images online, pose a risk of contact offending.⁴⁷² This study shows the high link between online only offenders and contact offences.

The UK concept of child pornography, or indecent images of children as it is called in the UK, was described by the Court of Appeal in *R v Land* in 1998 as follows:

*“Its object is to protect children from exploitation and degradation. Potential damage to the child occurs when he or she is posed or pictured indecently, and whenever such an event occurs the child is being exploited. It is the demand for such material which leads to the exploitation of children and the purposes of the [legislation] is to reduce, indeed as far as possible to eliminate, trade in or possession of it. At the same time statutory defenses provide a framework protecting from conviction those whose possession of such material is not prurient”.*⁴⁷³

In this decision, the court recognizes the connection between the production of child pornography and the sexual exploitation of the child, stating that the demand for such material leads to an increase in the sexual exploitation of children. It states that the objective of the legislation should be to reduce and even eliminate the demand, which is the driver for the increase in the supply of child pornography.

⁴⁶⁹ National Cyber Security Strategy 2016. Pg. 17.

⁴⁷⁰ Ibid.

⁴⁷¹ Crown Prosecution Service (2017) Cybercrime - Legal Guidance. <https://www.cps.gov.uk/legal-guidance/cybercrime-legal-guidance> (accessed on 14 January 2018).

⁴⁷² Giles, S. and Alison, L. (2016) Safeguarding children through evidence-based policing of indecent image offenders. *Lancet Psychiatry*.

⁴⁷³ *R v Land* [1998] 1 Cr. App. R. 301.

a. Making an Indecent Photograph or Pseudo-Photograph of a Child

UK has amended its legislation related to child pornography so as to respond to the challenges of new technologies. The main legal document dealing with child pornography in England and Wales is the Protection of Children Act of 1978, which has been amended several times afterwards. For example, the possession of child pornography was criminalized only in 1988 by the Criminal Justice Act. Later on, in 1994 the Protection of Children Act was amended by the Criminal Justice and Public Order Act to include the criminalization of computer-generated pseudo-photographs. In 2000, it was amended again by the Criminal Justice and Court Services Act which extended the maximum imprisonment sentences for child pornography related offences. And last, the Protection of Children Act was amended in 2003 by the Sexual Offences Act, which among other things changed also the definition of ‘a child’. The Sexual Offences Act 2003 has raised the age of a child for the purposes of pornographic images from a person under the age of 16 as it was defined by section 7(6) of the Protection of Children Act 1978 to a person under the age of 18. This change aligned the UK legislation to the international legal framework (European Union, Council of Europe and United Nations requirements) leading towards better harmonization of laws related to child pornography.

The Protection of Children Act 1978 has further been amended regarding the criminalization of indecent images of children. It is now an offence to take, or permit to be taken, to make, to possess, to show, to distribute, to publish or cause to be published an indecent photograph or pseudo-photograph of a child.⁴⁷⁴

Therefore, in order for a photograph to be considered as unlawful under UK law, it must be indecent. There is no explanation of what ‘indecent’ means. One of the reasons behind a lack of such a definition might be because it was thought that there existed a general understanding of the term.⁴⁷⁵ The lack of such a definition however resulted in many difficulties in determining which photographs are indecent and which are not.⁴⁷⁶ While one of the main elements in determining whether an act can be deemed as indecent is the motivation of the offender, according to Gillespie, when dealing with child pornography cases, courts should consider that the existence of motivation cannot make indecent an act that is not capable of

⁴⁷⁴ Protection of Children Act 1978. S. 1.

⁴⁷⁵ Gillespie, A. A. (2018) Child pornography, *Information & Communications Technology Law*. Vol. 27:1. Pg. 30-54. Pg. 35

⁴⁷⁶ See: Gillespie, A. A. (2018) Pg. 35-40

being indecent.⁴⁷⁷ He gives the example of photographs of children in swimming costumes that are not capable of becoming indecent.⁴⁷⁸

Section 7 of the Protection of Children Act 1978, gives a clear interpretation of what constitutes 'image' for the purposes of this act. As such, images can include actual photographs or video footage, drawings or tracings, pseudo-photographs (images created digitally), or data stored on a computer disc or by other electronic means which is capable of conversion into an image. Based on the court judgement in *R v Bowden*⁴⁷⁹ and *R v Jayson CA*,⁴⁸⁰ downloading an image from the Internet amounts to the offence of making a photograph as referred to section 1 of the Protection of Children Act 1978 because the act of downloading causes a new copy of the image to exist on the screen, which did not exist before, thus it amounts to creating a new image. Hence, based on these court rulings, making an indecent image does not just refer to a person taking a photo or video, but it can also refer to a person downloading or printing an indecent image, or even opening an email attachment containing an indecent image.⁴⁸¹ The only exception in the case of opening an email attachment is when the individual did not know and had no possibility to know that the attachment contained or was likely to contain an indecent photograph or pseudo-photograph of a child.⁴⁸²

This offence of making an indecent photograph or pseudo-photograph of a child, covered by section 1 of the Protection of Children Act 1978 is similar to the offence proscribed by Art.5 (3) of the EU Directive on knowingly obtaining access to child pornography. Since as analyzed by the courts in the previously mentioned case *R v Bowden*, the making of an indecent photograph can amount to downloading from the Internet or even simply opening an email attachment, it can be concluded that, despite using completely different wording, this section of the England and Wales legislation is only partially compliant with the Art. 5(3) of the EU Directive. As demonstrated in the second chapter of this research, the offence of knowingly obtaining access via ICTs to child pornography criminalizes acts of intentionally viewing child pornography through the ICTs without downloading the material. Thus, the offence of making of an indecent photograph or pseudo-photograph, as explained by these court judgements, is closer in meaning to the offence of acquisition or possession of child pornography as covered by art. 5(2) of the EU Directive, rather than to the offence of knowingly obtaining access to

⁴⁷⁷ Ibid. Pg. 39

⁴⁷⁸ Ibid.

⁴⁷⁹ *R v Bowden* [2000] 1 Cr App R (S) 26.

⁴⁸⁰ *R v Jayson CA* [2002] EWCA Crim. 683.

⁴⁸¹ CPS. Sexual Offences: <https://www.cps.gov.uk/sexual-offences> (last accessed 20 December 2017).

⁴⁸² Ibid.

child pornography. The fact that the CPS considered the act of opening an email attachment as falling within the offence of ‘making’, caused confusion to whether it can be considered as adhering to art. 5(2) (acquisition or possession) or art. 5(3) (knowingly obtaining access).

It is not explained whether by ‘opening an email attachment’ the CPS refers to cases when opening the file causes its automatic downloading, or also when it simply opens without being downloaded, which in this case would amount only to viewing. Nevertheless, since an email is saved into the email account of the person, it can be reasonably assumed that, even if the file does not get automatically and neither manually downloaded by the person, it can be considered as being in the possession of that person, since the person possessing that email account, is in possession of everything contained in that account. Thus, if the person opening the email attachment does not delete the email after being aware of its content, it is considered as being in possession of the material contained in that email even if the person never downloaded it.⁴⁸³

Since there is no legal definition of what constitutes ‘making’, referring to the Oxford English Dictionary, the verb ‘to make’ means ‘...to cause to exist, to produce by action, to bring about...’. Obviously, ‘making’ is closer to the act of producing and does not have any similarity with the word ‘viewing’. Therefore, the offence of ‘making’ comprises cases of downloading and/or printing of an indecent image from the Internet. However, the Court of Appeal in *R. Smith and Jayson* has extended the interpretation of the ‘making’ to include cases when the image is simply displayed on the screen even without being downloaded:⁴⁸⁴

*“It is no longer necessary for the offender to take any further action to ‘save’ the image, although the prosecution does have to prove that the accused knew what sort of image he was calling for. The effect of this judgment is that a conviction of ‘making’ can be based solely on the locating by a computer expert of an image in the Internet browser ‘cache’, provided there is additional evidence to show that the offender was seeking such material.”*⁴⁸⁵

This court interpretation extends the offence of ‘making’ to include viewing of child pornography if that can be proved by the Internet browser history, which saves in the cache images that are viewed even if those images have not been saved in the computer. Another condition based on this court interpretation is that the prosecution can prove the intent, *mens rea* of the offender to view those images, or visit the website providing child pornography.

⁴⁸³ *R v Graham Westgarth Smith and Mike Jayson*. CA, [2002] EWCA Crim 683.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid.* para. 24.

Thus, the prosecution has to prove that the offender had knowledge of the content of those images before opening them. While, as it concerns to the sentencing, the Sentencing Advisory Panel suggests that sentencing for cases of ‘making’ which amount only to viewing or visiting a website of child pornography should be lower in comparison to cases of ‘making’ which amount to downloading and saving the material.⁴⁸⁶ Despite this clarification of the ‘making’ offence, the previous court decision in *R v Bowden* was not overruled.⁴⁸⁷ As stated by the court in various other cases, also a person who only downloads and views images contributed to the psychological harm suffered by the child included in those images.⁴⁸⁸

Compliant to Art. 5(1) of the EU Directive, which requires the existence of the element of “intent” in the commitment of the criminal conduct, the case law of UK shows that courts put importance to the issue of ‘intention’ when judging a case related to child pornography. In *R v Smith; R v Jayson* joint case,⁴⁸⁹ the court stresses that the act of making should be conducted intentionally and deliberately, having the knowledge that the image was made or was likely to be an indecent photograph or pseudo-photograph of a child. It is clear that unintentionally copying or storing of an image does not constitute a criminal offence. As a conclusion, in order to bring England and Wales domestic legislation in line with the EU Directive, there is a need to amend Section 1 of the Protection of Children Act 1978, by adding the criminal liability in cases of knowingly accessing photographs or pseudo-photographs of children.

The Sexual Offences Act 2003, section 45(3) has included also some exceptions to what is regarded as indecent photographs of children for the purposes of section 1 of Protection of Children Act 1978 and section 160 of the Criminal Justice Act 1988. In cases of photographs of children aged 16 or over, the taking or making of the photograph will not be considered illegal if the child and the adult were married or living together as partners in a family relationship at the moment the photograph was taken.⁴⁹⁰ This fact needs to be accompanied by the second condition where the defendant provides enough evidence showing that the child consented to the photograph being taken, or that the defendant reasonably believed that the

⁴⁸⁶ Sentencing Advisory Panel. (August 2002) Advice to the Court of Appeal-10. Offences involving child pornography. Ministry of Justice. Available at: <https://www.whatdotheyknow.com/request/229837/response/567626/attach/4/SAP%202002%20on%20child%20pornography%20sentencing.pdf> (last accessed 30 January 2018).

⁴⁸⁷ Akdeniz, Y (2008) Internet child pornography and the law, national and international responses. Ashgate. Pg. 72.

⁴⁸⁸ See: Beaney [2004] Crim. L. R. 480; *R v. Monument* [2005] EWCA Crim 30.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ Section 1(A) ‘Marriage and Other Relationships’ of the Protection of Children Act 1978 as amended by the Sexual Offences Act 2003.

child gave the consent.⁴⁹¹ And the third condition is that the photograph should show only the child and the defendant and not any other third person.⁴⁹² These conditions must exist together. If the defendant fails to prove any of these three conditions, he will be considered as guilty. In case of divorce, those photographs of the child are again considered as illegal. Under Protection of Children Act 1978, these conditions apply for offences related to taking or making of an indecent photograph of the child aged 16 or over (section 1(1)(a)), distributing or showing indecent photographs (section 1(1)(b)), being in possession of indecent photographs with the view of distributing or showing them (section 1(1)(c)). A similar provision exists under section 160 of the Criminal Justice Act 1988 related to the offence of being in possession of indecent photographs of a child.

Another exception under section 1(1)(a) of the Protection of Children Act 1978, of not being guilty of making photographs or pseudo-photographs of children is when the defendant proves that he made those photographs for purposes of the prevention, detection or investigation of crime or for purposes of criminal proceedings in any part of the world. It can be noticed that law enforcement agents are allowed under England and Wales law to produce child pornography themselves when this is necessary for criminal proceedings or investigations. Section 46 of the Sexual Offences Act 2003 applied the same defense also to members of the Security Service or Government Communications Headquarters if they prove that it was necessary for them to make the photograph or pseudo-photograph for the exercise of their functions at the Security Service or Government Communications Headquarters.⁴⁹³ While by ‘making’ here is referred only to the downloading an image from the Internet, or making copies of it from a computer hard drive, or sending a downloaded or computer-generated photograph to the suspected perpetrator.⁴⁹⁴

According to the Home Office, the reason behind providing this kind of defense is to reassure law enforcement, police officers, persons working at the Internet Watch Foundation, and persons working in ISPs and systems management who have a role of identifying and securing this kind of material for evidential and investigative purposes, that they will not be prosecuted.⁴⁹⁵ Obviously, this defense does not cover individuals who undertake unauthorized

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³ Home Office Guidelines on the Sexual Offences Act 2003. Para 8.11.

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid. para. 8.12.

investigations. This defense is meant to be always evaluated by a ‘necessity’ test.⁴⁹⁶ For this purpose, the Crown Prosecution Service (CPS) and the Association of Chief Police Officers have signed a Memorandum of Understanding with the aim of clarifying the position of persons professionally involved in the management, operation or use of electronic communications networks and services who may be faced with jeopardy for criminal offences.⁴⁹⁷ In this way, this memorandum reassures persons who under legitimate duties have to deal with images of child abuse that they will not be prosecuted when acting to combat the creation and distribution of such images.⁴⁹⁸

b. Taking or Permitting to be Taken an Indecent Photograph or Pseudo-Photograph of a Child

Section 1(1)(a) of the Protection of Children Act 1978 makes it a criminal offence, besides the ‘making’, also ‘to take’ or ‘permit to be taken’ an indecent photograph or pseudo-photograph of a child. In this section, the actions of taking and permitting to be taken are similar to the act of production of child pornography as penalized by Art. 5(6) of the EU Directive, and Art. 20(1)(a) of the Lanzarote Convention. Despite using completely different wording from the international and regional legislation related to the production of child pornography, it is obvious that the meaning of these words ‘to take’ and ‘to permit to be taken’ is the same as ‘to produce’, making this section of the UK legislation in line with international legislation. UK, together with France⁴⁹⁹ are the only EU Member States that use completely different terms in their transposition of Art 5(6) of the Directive when referring to production of child pornography.⁵⁰⁰

Section 84 of the Criminal Justice and Public Order Act of 1994 amended section 1 of the Protection of Children Act 1978 to include the criminalization of taking and distribution of indecent pseudo-photographs of children. In section 84(3)(c)(7) ‘pseudo-photograph’ is defined as “an image, whether made by computer-graphics or otherwise howsoever, which

⁴⁹⁶ See. Memorandum of Understanding between the Crown Prosecution Service (CPS) and the Association of Chief Police Officers (ACPO) – concerning section 46 Sexual Offences Act 2003. Available at: <https://www.iwf.org.uk/sites/default/files/inline-files/CPS%20ACPO%20S46%20MoU%202014%202.pdf>

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

⁴⁹⁹ France uses the words ‘taking, recording’ and transmitting’ instead of production. See Art. 227-23 of Penal Code of France: “*Le fait, en vue de sa diffusion, de fixer, d’enregistrer ou de transmettre l’image ou la représentation d’un mineur...*”

⁵⁰⁰ Report from the Commission to the European Parliament and the Council assessing the extent to which the Member States have taken the necessary measures in order to comply with Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography. 16.12.2016. COM(2016)871 final. European Commission. Brussels. Pg. 9.

appears to be a photograph”. When such an image gives the impression that the person shown in it is a child, the pseudo-photograph is treated as showing a child for all purposes of the Criminal Justice and Public Order Act of 1994.⁵⁰¹ Similarly, section 84(4) of Criminal Justice and Public Order Act of 1994, has amended section 160 of the Criminal Justice Act 1988, to include the criminalization of the possession of indecent pseudo-photographs of children, besides possession of photographs of real children.

These amendments have been a positive development for England and Wales in harmonizing the domestic legislation to the international norms related to combating online child pornography. The introduction of the indecent pseudo-photographs of children into the domestic criminal legislation since 1994, shows the England and Wales legislation was compliant to Art. 2(c) of the EU Directive which includes within the definition of child pornography also virtual images of child pornography, even before the Directive was drafted. Moreover, it can be observed that, the criminalization of indecent pseudo-photographs of children, makes UK legislation in line with Art. 20 of the Lanzarote Convention which criminalizes virtual child pornography, despite the fact that UK has only recently ratified the Lanzarote Convention.

c. The Possession of a Prohibited Image of a Child

The Coroners and Justice Act of 2009 covers offences related to child pornography as well. Its section 62 outlaws the possession of a prohibited image of a child. It provides a clear list of what is considered as prohibited image, which includes pornographic images, images that are grossly offensive, disgusting or otherwise of an obscene character, images which focus principally in the child genitals or includes acts of a sexual nature.⁵⁰² An image is defined as ‘pornographic’ if it ‘is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.’ Prohibited images also include those which portray any of the following acts:

“(a) the performance by a person of an act of intercourse or oral sex with or in the presence of a child;

(b) an act of masturbation by, of, involving or in the presence of a child;

⁵⁰¹ Criminal Justice and Public Order Act of 1994, Section 84(3)(c)(8).

⁵⁰² Coroners and Justice Act of 2009, section 62.

(c) an act which involves the penetration of the vagina or anus of a child with a part of a person's body or with anything else;

(d) an act of penetration, in the presence of a child, of the vagina or anus of a person with a part of a person's body or with anything else;

(e) the performance by a child of an act of intercourse or oral sex with an animal (whether dead or alive or imaginary);

(f) the performance by a person of an act of intercourse or oral sex with an animal (whether dead or alive or imaginary) in the presence of a child."⁵⁰³

In the context of this provision, the term 'image' is defined as a still image or a moving image such as those in a film, produced by any means, or data stored electronically which is capable of conversion into an image.⁵⁰⁴ Section 62 does not explicitly mention the *mens rea* for the purposes of this offence. According to Gillespie, since this section is similar to provisions regarding indecent photographs and pseudo-photographs of the Protection of Children Act 1978 and the Criminal Justice Act 1988, which pay an important attention to the intent of the offender, the mental element should be similarly considered for this provision as well.⁵⁰⁵ While as it concerns the definition of possession for the purposes of this section, Gillespie again draws a comparison with the case law related to possession of indecent photographs and pseudo-photographs, where possession is defined as having custody or control of the material.⁵⁰⁶ The difference between section 62 of the Coroners and Justice Act 2009 and legislation related to indecent photographs covered by the Protection of Children Act 1978 and the Criminal Justice Act 1988, is that section 62 does not have an equivalent offence of making a prohibited image, thus leaving the issue of viewing prohibited images without downloading an unresolved question.

In 2005 with the entry into force of the new Criminal Justice Act 2003, a new regime of sentences for specified violent sexual offences committed by dangerous offenders was introduced. In the list of these violent sexual offences were included also some of the offences related to child pornography, specifically offences under section 1 of the Protection of Children Act 1978 and section 160 of the Criminal Justice Act 1988.⁵⁰⁷ According to this new Act, from

⁵⁰³ Ibid.

⁵⁰⁴ Ibid. Section 65.

⁵⁰⁵ Gillespie, A.A. (2011a) Child Pornography: Law and Policy. London: Routledge. Pg. 172.

⁵⁰⁶ Ibid.

⁵⁰⁷ See: Criminal Justice Act 2003, Schedule 15 and 15B.

that moment on, offenders who commit any of these offences related to child pornography should be treated as dangerous offenders and their sentencing shall be harsher.⁵⁰⁸

d. Regulation of Illegal Content on the Internet

As it relates to the regulation of illegal content on the Internet, related to the filtering, rating, labeling, blocking and removal, the UK applies the self-regulatory system rather than proscribed by laws. As such, the regulation of illegal content and its takedown measures in UK are coordinated by a collaborative work between the National Crime Agency, the Child Exploitation and Online Protection Centre (CEOP) and Internet Watch Foundation. While the first two are law enforcement actors, the third one is a non-profit British-based charity organization which operates through partnerships with IPS, the police and the government.⁵⁰⁹ The role of IWF is fundamental in that it operated both as a hotline for the public to report online child abuse material, and it also works in detecting child sexual abuse content on websites. Once the content has been detected, IWF notifies CEOP and the relevant ISP who is hosting that content, so that they can take measures to take down that illegal content.⁵¹⁰ Simultaneously, also an investigation of the relevant offence of child abuse material is initiated.

As far as it concerns take-down measures for webpages hosted outside the UK territory, when IWF identifies such webpages, it contacts the hotlines of the specific country, usually through INHOPE, the international network of hotlines dealing with illegal content online.⁵¹¹ It is then the responsibility of that country's hotline to deal with the requests of removal of content and initiation of investigations, based on the legislation of that country. IWF has even created a list of blocked URLs which is distributed to the ISPs so as to block access to those websites. While the blocking and removal of content hosted outside the UK is depended upon the domestic laws of the specific country, IWF can include that website into the blocking URL list, making it possible to block access to that website within England and Wales territory.⁵¹² As such, it can be concluded that the system of self-regulation of take-down and blocking of illegal child abuse content in England and Wales is compliant with Art 25 of the Directive 2011/93/EU regarding measures against websites containing or disseminating child pornography, and that the

⁵⁰⁸ Criminal Justice Act 2003, sections 226-236.

⁵⁰⁹ Internet Watch Foundation: <https://www.iwf.org.uk/what-we-do> (last accessed 20 December 2017).

⁵¹⁰ Ibid.

⁵¹¹ See: <http://www.inhope.org/gns/home.aspx>

⁵¹² Missing Children Europe, Ecpat and eNASCO (2016) A survey on the transposition of Directive 2011/93/EU on combating sexual abuse and sexual exploitation of children and child pornography. Pg. 82.

obligations of the Directive 2011/93/EU on take-down and blocking have been efficiently transposed in the domestic legislation of England and Wales.

2. Offences Concerning Child Prostitution [Child Sexual Exploitation]

Prostitution is considered as a form of sexual exploitation. The fact that some remuneration is provided in exchange for prostitution should not imply that the child has given consent to be used in prostitution.⁵¹³ Children cannot give consent to be abused. The Sexual Offences Act of 2003 treats the abuse of children through prostitution in Sections 47-50. While the Sexual Offences Act does not provide a specific definition of ‘child prostitution’, it provides a definition of ‘prostitute’ which with the amendments of the Serious Crimes Act 2015 is now called as ‘a person who is sexually exploited’. That said, according to section 51 of the Serious Offences Act 2003, a person is sexually exploited if on at least one occasion and whether or not compelled to do so, this person offers or provides sexual services to another person in return for payment or a promise of payment to him/her or to a third person.

Serious Offences Act 2003 lists the following offences as offences concerning child prostitution: paying for sexual services of a child (S. 47); causing or inciting child prostitution or pornography (S. 48); controlling a child prostitute or a child involved in pornography (S. 49); arranging or facilitating child prostitution or pornography (S. 50). Only recently, this legislation was amended with the Serious Crimes Act of 2015 which changed the wording used by the Sexual Offences Act related to child prostitution. All references to ‘child prostitution’ were removed from the law and changed with the term ‘sexual exploitation of children’. The reason behind this change in the law, was in order for the terminology to show the true nature of the activities which were once considered as child prostitution, acknowledging that they are a form of sexual exploitation.⁵¹⁴

The initiative to remove such terminology from the legislation was started by the Office of the Children’s Commissioner for England in 2012 that recommended that the government should review all legislation referring to children as ‘prostitutes’ or involved in prostitution and amend it by rather recognizing children as sexually exploited and victimized through commercial

⁵¹³ Vulnerable children and young people: Sexual exploitation through prostitution. (2003) Scottish Executive. Pg. 1.

⁵¹⁴ Global Alliance Against Child Sexual Abuse Online – 2014 Reporting Form, UK country report. Pg. 2; Home Office (2016) The government response to the third report from the Home Affairs Select Committee Session 2016-17 HC 26: Prostitution. Pg. 2.

sexual exploitation.⁵¹⁵ Another reason was that referring to children as prostitutes implies a level of complicity, thus creating confusion and a perception that the victims of child prostitution have a choice and are culpable.⁵¹⁶ The shift in terminology makes clear the role of children as passive victims of the process of prostitution, rather than active participants.⁵¹⁷ Furthermore, it causes legal and policy implications for the country.

This change in the legislation was not an easy decision to take, since the government had to take into consideration its obligation under international agreements, such as the UN OPSC, and take into consideration also if it would ratify the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse that also uses the term ‘child prostitution’ in its provisions.

a. Paying for Sexual Services of a Child

The Sexual Offences Act 2003 starts the group of offences related to child sexual exploitation with the criminalization of paying for sexual services of a child.⁵¹⁸ Thus, section 47 criminalizes the obtaining for himself or for another person the sexual services of a person under 13 or a person under 18 when the perpetrator does not have a reasonable belief that the victim is older than 18, by paying or promising to pay for those services. Second paragraph of this section defines payment as “any financial advantage including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount”. Furthermore, subsection 6 of section 47 includes the meaning of ‘sexual services’ which, for the purpose of this offence, means penetrative and/or non-penetrative physical contact between the offender and the child.

The offence of paying for sexual services of a child could be considered as similar with the offence of ‘engaging in sexual activities with a child, where recourse is made to child prostitution’ as proscribed by Art. 4(7) of the EU Directive and similarly also with the offence of ‘having recourse to child prostitution’ of Art. 19(1)(c) of the Lanzarote Convention and with the offence of ‘procuring a child for child prostitution’ included in Art. 3(1)(b) of the UN OPSC. The wordings, although different, can be said to mean the same thing. Therefore ‘paying for sexual services of a child’ as expressed in section 47 of the Sexual Offences Act 2003,

⁵¹⁵ The Office of the Children’s Commissioner (2012) “I thought I was the only one. The only one in the world” Inquiry into child sexual exploitation in gangs and groups Interim Report.

⁵¹⁶ Report of the Parliamentary inquiry into the effectiveness of legislation for tackling child sexual exploitation and trafficking within the UK (2014) Believe in children. Barnardo’s. Pg.22.

⁵¹⁷ Chase, E. and Statham, J. (2004) The Commercial Sexual Exploitation of Children and Young People: An Overview of Key Literature and Data. Thomas Coram Research Unit. London. Pg. 7.

⁵¹⁸ Sexual Offences Act 2003. S. 47.

criminalizes the same acts as Art. 4(7) of the EU Directive, Art. 19(1)(c) of the Lanzarote Convention and Art. 3(1)(b) of the UN OPSC, which is the acts of giving some kind of remuneration for having recourse to child prostitution or in other words to the sexual services of the child. Even though the payment is not explicitly mentioned in any of the mentioned international instruments, it is understandable by the definition of ‘prostitution’ provided by these instruments, that payment is an essential element of the crime of child prostitution and of prostitution in general. While the provisions of the international instruments have created minimum requirements for the State Parties/Member States, the UK’s approach evidently was more detail oriented, explicitly mentioning the element of payment when criminalizing the demand side of child sexual exploitation.

The offence of paying for sexual services of a child could have been an appropriate provision for prosecuting the demand side of the live-streaming of child abuse, thus the person paying to view the real-time sexual abuse of a child. But, the clear mentioning of the obligation of having physical contact with the child victim as a definition of sexual services for the purposes of this offence, prevents this provision for being used to criminalize the act of paying for viewing the live-streaming of child abuse. The physical contact, either penetrative or non-penetrative, between the perpetrator paying for the sexual services and the child victim is a constitutive element of this criminal offence, which makes the acts criminalized by this offence differ from the acts constituting live-streaming of child abuse, which does not involve any physical contact between the perpetrator paying to watch the live-streamed abuse and the child victim, which may be abused by another person, the facilitator, or may be performing acts with a sexual nature alone without any physical contact with anyone.

b. Causing or Inciting another Person to be Sexually Exploited

Section 48 of the Sexual Offences Act 2003 criminalizes the act of intentionally causing or inciting another person to become a prostitute, or to be involved in pornography, in any part of the world, if the victim age is between 13 and 18, and the perpetrator did not have a reasonable belief that the victim was older than 18 or if the victim is under 13. With the Serious Crimes Act 2015, the wording of this section was amended so as now causing or inciting another person to be sexually exploited is criminalized, replacing in this way the wordings ‘prostitute’ and ‘pornography’.⁵¹⁹

⁵¹⁹ Serious Crimes Act 2015. (c. 9) ss. 68(3)(b).

While section 47 of the Sexual Offences Act 2003 criminalizes the demand for sexual services of a child, section 48 criminalizes the other side of the chain, the supply side. Hence, this section, criminalizing the act of ‘causing or inciting a child to be sexually exploited in any part of the world’ provides the legal ground for prosecuting the provider of sexual services of a child. The use of the wording ‘in any part of the world’ acknowledges the international character of the offence, recognizing cases when children are transferred outside of the territory of the United Kingdom for the purpose of being sexually exploited. This offence aims to sentence persons who recruit children into prostitution or pornography, no matter if for only one separate case or for a long term.⁵²⁰ According to the explanatory notes, this section covers cases when the offender makes a living from the prostitution of children and encourages new recruited children to work for him or another.⁵²¹ Furthermore, the explanatory notes add that section 48 could also cover cases when the offender lives together with the child whom he forces to become involved in pornography, for various reasons, such as for paying their rent.⁵²² However, the explanatory notes clarify that, for the offences covered by section 48 to be considered as committed, it is not necessary that the recruited child actually engage in pornography or prostitution. Neither is it a requirement that the causing or inciting of a child to sexual exploitation must be done for gain for the crime to be considered as committed.⁵²³ Thus, the mere intention for the sexual exploitation of the child to take place is sufficient for the crime to be considered as committed. Furthermore, the element of gain or profit is not a necessary element of the offence of causing or inciting of a child to sexual exploitation covered by this section.

This provision does not explain what kind of sexual services are included, whether only contact or also non-contact sexual services such as sexual services offered through the webcam. By referring to the old version of this section, which uses the word pornography rather than sexual exploitation, it can be inferred that sexual services which do not involve physical contact with the perpetrator are included within the scope of this section. As such, this section can be applied to prosecute facilitators of live-streaming of child abuse as well. Facilitators of live-streaming can be prosecuted under this section not only in cases of transmitting live-streaming of child abuse to UK nationals located within the territory of UK but also to perpetrators outside the

⁵²⁰ Explanatory notes to the Sexual Offences Act 2003, Section 48. Para 95. Available at: <http://www.legislation.gov.uk/ukpga/2003/42/notes/division/5/1/35>

⁵²¹ Ibid.

⁵²² Ibid.

⁵²³ Ibid.

UK territory. While generally in case law section 48 is taken in conjunction with section 47, to criminalize both parts of the chain of child sexual exploitation – the supply and the demand side – in cases of live-streaming, as already demonstrated above, only section 48 applies, criminalizing only the supply part of the chain of live-streaming of child abuse.

c. Arranging and Facilitating the Sexual Exploitation of a Child

Section 49 of the Sexual Offences Act 2003 makes it a criminal offence to intentionally control a person under the age of 18 in relation to that person’s sexual exploitation in any part of the world.

While section 50 penalizes the intentional arranging or facilitating of the sexual exploitation of a child in any part of the world. It is noticed in both of the offences the highlight of the ‘intent’ as a necessary element of these criminal act, which means that the *mens rea* has to be proven for a person to be guilty for the crimes covered by section 49 and 50. Section 48-50 of the Sexual Offences Act 2003, as it was before being amended by the Serious Offences Act 2015, used for the first time the terms ‘child’ and ‘pornography’ together in a legal document.⁵²⁴ This led to many critiques to the Act on the ground that such a term indicates consent from the part of the child therefore leading to misinterpretations.⁵²⁵

The phrase ‘in any part of the world’ used in sections 48-50, shows that the legislator in England and Wales acknowledges the international scale of the problem of sexual exploitation of children and has made it legally possible to criminalize such offences even when all or part of it is committed outside the territory of England and Wales.

Section 51 defines what constitutes sexual exploitation for the purposes of offences covered by section 48-50. According to this section, a person is sexually exploited if:

- “(a) on at least one occasion and whether or not compelled to do so, B offers or provides sexual services to another person in return for payment or a promise of payment to B or a third person, or*
- (b) an indecent image of B is recorded [or streamed or otherwise transmitted]”*

⁵²⁴ Achilleos, A. (2011) Child pornography and the internet: The technological trafficking of children. Web: Rikkos Mappourides & Associates L.L.C. Available at: http://www.mappourides.com/uk/node/36#_ftnref103 last accessed (27 January 2018).

⁵²⁵ Gillespie, A. (2004b) The Sexual Offences Act 2003: Tinkering with ‘Child Pornography’. Criminal Law Review.

The phrase ‘*or streamed or otherwise transmitted*’ has been added later with the amendments made to the Sexual Offences Act 2003 by the Policing and Crime Act 2017.⁵²⁶ Since as previously explained, the term ‘image’ includes video footage, adding the phrase ‘streamed or otherwise transmitted’ to the definition of sexual exploitation is a big step forward by England and Wales in criminalizing live-streaming of child abuse as it further clarifies that not only recorded video footage but also the video footage that gets streamed but not recorded falls within the scope of the provision, consolidating the criminalization of live-streamed images and videos. Until 2017, a person was considered to be engaged in pornography only if an image of the child was recorded.⁵²⁷ From the moment of entry into force of the Policing and Crime Act 2017, the same provision applying to recorded child pornography under sections 48-50, will now apply also in cases when the images of sexual abuse of children get streamed or transmitted live without them being recorded. This means that sections 48-50 can be used to prosecute also cases of streaming or transmitting live on the Internet images (video-footage) of child abuse,⁵²⁸ whether the streaming happens within the territory of UK or for a viewer located outside this territory. It remains to be seen how this provision will be applied in practice, and how will evidence be gathered to prove the occurrence of the online live streamed or transmitted child abuse if that stream is not recorded anywhere.

A new recently added offence related to the sexual abuse of children is the offence of ‘possession of a pedophile manual’ introduced by section 69 of the Serious Crimes Act 2015. It refers to a pedophile manual as an item that contains advice or guidance on how to sexually abuse children. The possession of such a manual is criminalized even when the possession occurs through information society services. This offence is a novelty that goes beyond any existing international or regional legislation regarding child pornography, making UK legislation jump one step beyond the current international and regional provisions on child pornography, and an example to be followed by other countries.

⁵²⁶ Section 176, Policing and Crime Act 2017. Available at: <https://www.legislation.gov.uk/ukpga/2017/3/section/176>.

⁵²⁷ CPS. Legal Guidance on Rape and Sexual Offences - Chapter 2: Sexual Offences Act 2003 - Principal Offences, and Sexual Offences Act 1956 - Most commonly charged offences. Available at: <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-2-sexual-offences-act-2003-principal-offences-and> (last accessed 16 February 2018).

⁵²⁸ Home Office. Collection: Policing and Crime Act. (10 February 2016). Available at: <https://www.gov.uk/government/collections/policing-and-crime-bill> (last accessed 16 February 2018).

3. Offences Concerning Pornographic Performances

Despite not having explicitly mentioned ‘pornographic performances’ in any part of its legislation regulating child pornography, sexual exploitation and sexual abuse of the child, the Commission of the EU, in its report concerning the transposition of the EU Directive into the domestic legislation of Member States has assessed that UK has legislation in place that transposes the provisions of the EU Directive concerning the ‘causing or recruiting a child to participate in pornographic performances (Art (4(2)), ‘coercing or forcing a child to participate in pornographic performances (Art (4(3)), and knowingly attending pornographic performances involving children (Art. 4(4)).⁵²⁹ The Commission does not however provide further information as to which laws of specific countries regulate ‘pornographic performances’ and to what extent. That is among the reasons that led the European Parliament to criticize this report of the Commission as being devoid of useful data despite being published one year after the deadline.⁵³⁰

Related to this group of offences, UK has followed the same approach as the EU Directive, by including offences related to pornographic performances in the group of offences related to the sexual exploitation of the child. In section 48-50 of the Serious Offences Act 2003, it penalizes intentionally causing or inciting a child to *become a prostitute, or to be involved in pornography* ([to be sexually exploited] as amended by the Serious Crimes Act 2015), intentionally controlling a child *prostitute or a child involved in pornography*, ([in relation to sexual exploitation] as amended by the Serious Crimes Act 2015) in any part of the world, and intentionally arranging or facilitating child prostitution or pornography ([the sexual exploitation of a child] as amended by the Serious Crimes Act 2015), in any part of the world. Provisions covered by sections 48-50 have a double usage in the UK legislation. While these provisions are used for criminalizing acts related to child prostitution, they are at the same time applicable for offences related to pornographic performances. This is understandable by the initial terminology used in the Sexual Offences Act 2003 which included the words ‘prostitution’ and ‘pornography’ which were used under 2015 when the Act got amended by

⁵²⁹ Report from the Commission to the European Parliament and the Council assessing the extent to which the Member States have taken the necessary measures in order to comply with Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography. 16.12.2016. COM(2016)871 final. European Commission. Brussels. Pg. 8.

⁵³⁰ European Parliament resolution of 14 December 2017 on the implementation of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (2015/2129(INI)) para. 3-6. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0501+0+DOC+XML+V0//EN&language=EN>.

the Serious Crimes Act 2015⁵³¹ which changed this terminology with the phrase ‘sexual exploitation’. It can be concluded that section 48-50 cover offences related to pornographic performances involving children to the same extent as they cover offences related to child prostitution, being in this way simultaneously compliant to international provisions related to child prostitution and provisions related to pornographic performances involving children.

Section 10 of the Sexual Offences Act 2003 covering the offence of intentionally causing or inciting a child to engage in sexual activity can be compatible with the offence covered by Art (4(2) of the EU Directive, specifically the ‘causing or recruiting a child to participate in pornographic performances’. Based on the explanatory note,⁵³² sexual activity for the purposes of this section may include cases when the perpetrator causes or incites the child to have sexual intercourse with him, or to perform sexual acts alone for the perpetrator’s gratification, or to engage in sexual activity with a third person. The incitement is considered as committed even if the sexual activity does not take place.⁵³³ For the purposes of this offence, the consent of the child is irrelevant and does not change the position of the child as a victim.⁵³⁴

While the offences covered by sections 48-50 may tackle the supply side of pornographic performances, they fail to criminalize the demand side, specifically the act of knowingly attending pornographic performances. Section 48 covers both the recruitment and coercion of a child into sexual exploitation *in any part of the world* but, does not cover the viewing or attendance into these pornographic performances involving children. Unless, the wording ‘intentionally causing [...] a child to be sexually exploited’ is interpreted in such a broad way that it can be used to insinuate that a person who pays for viewing a child performing pornographic acts, has indirectly caused a child to be sexually exploited, despite the fact that the payment is done to a third person (the facilitator), not directly to the child. Indeed, in this way, the ‘client’ can be claimed to have caused the child to be sexually exploited for pornographic performances because if he did not demand and pay for such performances, the facilitator would not coerce the child into such an activity. Nevertheless, this interpretation fails to cover non-commercial pornographic performances, when payment or any kind of remuneration is lacking.

⁵³¹ Section 68 of the Serious Crimes Act 2015. Available at: <https://www.legislation.gov.uk/ukpga/2015/9/part/5/crossheading/protection-of-children>.

⁵³² Explanatory Note of the Sexual Offences Act 2003. See: <https://www.legislation.gov.uk/ukpga/2003/42/notes/division/5/1/10>

⁵³³ Ibid.

⁵³⁴ Ibid.

III. Definition of Main Legal Terms

1. *The Definition of ‘Child Pornography’*

Until 2003 there was no legal definition of the term ‘child pornography’. Moreover, the words ‘child’ and ‘pornography’ were not used together in any laws concerning child abuse until the enactment of Sexual Offences Act 2003.⁵³⁵ The previous existing provisions of the Protection of Children Act 1978 and the Criminal Justice Act 1988 used the term ‘indecent photographs of children’ and later with the amendments of 1994 also ‘indecent pseudo-photographs of children’ rather than ‘child pornography’. The definition of ‘photograph’ provided by the Protection of Children Act in section 7(4) was amended in 1994 by the Criminal Justice and Public Order Act to include also photographs in electronic data format such as digital images or computer-generated images. This change was designed to close the gaps created by the proliferation of the Internet usage in the 1990s which caused problems in investigations.⁵³⁶ Based on Section 7(5) of the Protection of Children Act 1978, indecent photographs include indecent films, a copy of an indecent photograph or film and an indecent photograph comprised in a film. While ‘film’ refers to any form of video-recording.⁵³⁷

While making decisions on the treatment of offenders for cases related to child pornography, child sexual abuse and sexual exploitation, the courts, the police and other related agencies in United Kingdom rely heavily on the nature of the content of the material found at the disposal of the offender. On this perspective, while determining the type and degree of sentencing, the courts of United Kingdom pay a high consideration to the nature of the material found in the possession of the offender. For this purpose, the Sentencing Advisory Panel strongly suggests that judges should always view themselves the images involved in the case, in order to give their own judgement on the nature of the material. The reason behind this perspective lies in the argument that the severity of the material depicting a child being abused or exploited, reflects the harm suffered by the child being abused or exploited to the production of that material.⁵³⁸ Following this reasoning, it is assumed that while taking into account the severity

⁵³⁵ Akdeniz, Y. (2008) Internet child pornography and the law. Pg. 19.

⁵³⁶ Gibbons, T. (1995) Computer generated pornography. In International Yearbook of Law, Computers and Technology. Vol 9. Pg. 83-95. Pg. 87.

⁵³⁷ Protection of Children Act 1978, section 7(5).

⁵³⁸ Sentencing Advisory Panel (August 2002) The Panel’s Advice to the Court of Appeal on Offences Involving Child Pornography.

of the material for determining the gravity of the offence and thus also the degree of sentencing, the sentencing will as well reflect and be proportionate to the harm suffered by the child victim.

To assess the nature of the material, various classifications have been developed in United Kingdom. The first one is the scale developed from the COPINE (Combating Paedophile Information Networks in Europe) Project. The COPINE Project was founded in 1997 at the University College Cork's Department of Applied Psychology, in Ireland. Even though it was initially developed for therapeutic psychological purposes, later with the cooperation of the London Metropolitan Police from the project was developed a typology of ten levels to describe child abuse images available on websites and newsgroups which started being used by law enforcement.⁵³⁹ The COPINE Scale includes the following levels:

1. Indicative: non-erotic and non-sexualized images
2. Nudist: naked or semi naked images located in legitimate sources
3. Erotica: surreptitious photographs of naked children or children in underwear
4. Posing: posing suggesting sexual interest
5. Erotic posing: sexual or provocative posing
6. Explicit erotic posing: pictures emphasizing genital areas
7. Explicit sexual activity: sexual activity not involving an adult
8. Assault: sexual assault involving a child or an adult
9. Gross assault: penetrative sex involving an adult
10. Sadistic/bestiality: sexual images involving animals or images of a child being subject to something that causes pain

On the basis of this scale, a new scale was later developed by the English Sentencing Advisory Panel and it was recommended to the Court of Appeal in 2002 in the *R v Oliver* judgement. A modified version of this scale was adopted by the Court of Appeal and it was then later modified again by the Sentencing Advisory Panel. This new scale which is known as the "Oliver scale" includes 5 categories, instead of the previously 10 categories of the COPINE Project. As such, according to the court decision and with the later modifications of the Sentencing Advisory Panel, illegal child abuse images were divided into the following levels:⁵⁴⁰

⁵³⁹ Quayle, E. (2008) The COPINE Project. *Irish Probation Journal*.

⁵⁴⁰ *R v Oliver* [2003] 1 Cr App R 28 (463); *Oliver & Others v Court of Appeal - Criminal Division*, November 21, [2002] EWCA Crim 2766. Para. 10.

Level	Description
1	images depicting erotic posing with no sexual activity
2	sexual activity between children, or solo masturbation by a child
3	non-penetrative sexual activity between adults and children
4	penetrative sexual activity between children and adults
5	sadism or bestiality

Table 3.1. The Oliver Scale

The court explains the necessity for the adoption of a scale for illegal images of child abuse in order to create an agreed description of such material so as to reduce the necessity of judges to view themselves all of the material involved, for the purposes of giving an appropriate sentence.⁵⁴¹ The Court of Appeal, in this judgement, explains the reasons behind adopting this typology instead of the COPINE Project typology, which is a broader typology including also legal images which do not constitute child pornography. Obviously, creating a typology of illegal images of child abuse, simplifies the categorization of material, making it easier in this way also the decision on the sentencing of the offenders.

Nevertheless, in cases after the Oliver scale the court has noted that Oliver guidelines, as the word itself infers, are simply guidelines, intended to make sentencing easier, and that they cannot be applied ‘mechanistically’.⁵⁴² The Court emphasizes that, when taking a decision, the judge should not only take into account the nature of the material, but that he/she should look also at other aggravating factors such as the nature of the offender’s activity, the extent of his/her involvement with the material at disposal. As such, the court argues that the seriousness of an offence increases with the offender’s proximity to, and responsibility for, the original abuse.⁵⁴³ Following this line of reasoning, the Court of Appeal establishes levels of seriousness of an offence. An offence including elements of commercial gain is at a higher level of seriousness. Swapping of images is also regarded as commercial activity even without financial gain, since it fuels demand; “wide-scale distribution, even without financial profit, is intrinsically more harmful than a transaction limited to two or three individuals, both by reference to the potential use of the images by active paedophiles, and by reference to the shame

⁵⁴¹ Ibid.

⁵⁴² R v. Kelly [2004] EWCA Crim 256; R v. Bishop [2005] EWCA Crim 829; [2003] EWCA Crim 367, No. 2002/06471/Y3.

⁵⁴³ R v Oliver [2003] 1 Cr App R 28 (463). Para. 11.

and degradation to the original victims.”⁵⁴⁴ Further on, according to the court, merely locating an image on the internet is less serious than downloading it, and downloading it is less serious than taking (producing) an original film or photograph.⁵⁴⁵

While the Oliver scale has been mostly welcomed, criticism of this court’s judgement has been made on the lack of an argument by the court of the importance that the quantity of material found in a person’s disposal ought to have in the seriousness of the offence, when determining the degree of sentencing.⁵⁴⁶ Another critique is the lack of clarification whether the court should base its judgement on considerations whether the offender’s involvement with such images indicates the extent of threat that that individual poses to children in the future and if he was involved in child abuse in the past.⁵⁴⁷

Despite the critique, this judgement was a very important step forward for United Kingdom towards the fight of child pornography, sexual abuse and sexual exploitation of children. The creation of a typology of the illegal material involving children, separating the material into levels based on the severity of the activity depicted in the content of the material and the harm caused to the child victim serves for a more precise classification of offenses and more efficient response to the crime of child pornography, child sexual abuse and sexual exploitation of children. Such a stratification, helps into sentencing and treatment of the offenders based on the severity and seriousness of the crime they committed, and into more effective response to threats they pose to children in the future.

In April 2014, the Sentencing Council released the Sexual Offences Definitive Guideline,⁵⁴⁸ which includes a new scale for assessing the different categories of child sexual abuse material, repealing the previous Oliver scale. This new scale, which was adopted for sentencing in England and Wales for crimes related to indecent images of children, is composed of three categories of child sexual abuse material, instead of the previous 5 levels of the Oliver scale. The categories outlined in The Indecent Photographs of Children section of the Sexual Offences Definitive Guideline are as follows:⁵⁴⁹

⁵⁴⁴ Ibid

⁵⁴⁵ Ibid. Para. 12.

⁵⁴⁶ Carr, J. (2004) Child abuse, child pornography and the internet. NHC, the children’s charity. pg. 14

⁵⁴⁷ Ibid. Pg. 13.

⁵⁴⁸ Sentencing Council (2014) Sexual Offences Definitive Guideline. Available at:

https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Sexual_Offences_Definitive_Guideline_content_web1.pdf.

⁵⁴⁹ Ibid. Pg. 76; Internet Watch Foundation (IWF). The laws and assessment levels:

<https://www.iwf.org.uk/what-we-do/how-we-assess-and-remove-content/laws-and-assessment-levels> (last assessed: 10 January 2018).

Category	Description
A	Images involving penetrative sexual activity; images involving sexual activity with an animal or sadism
B	Images involving non-penetrative sexual activity
C	Other indecent images not falling within categories A or B

Table 3.2. The Sentencing Council Indecent Photographs of Children Categories

Differently from the previous Oliver scale in which classification, the severity of images and seriousness of the crime started from lower into higher (1st-5th level), in this new scale, the Sentencing Council starts with the most serious category, images involving penetrative sexual activity and images involving sexual activity with an animal or sadism (Category A). Seemingly, the Sentencing Council, differently from what was established in the Oliver scale, has come to the conclusion that penetrative sexual activity should be considered as being as serious and causing the same level of harm as sadism or bestiality, by putting these two typologies into the same category, the most serious one. In the second category, less serious than Category A, the Sentencing Council has included images involving non-penetrative sexual activity. All the rest of images which do not include neither penetrative or non-penetrative sexual activity, nor sexual activity with an animal or sadism, were decided to be falling under one category, the less serious one, rather than stratifying those images into further categories. This new categorization obviously serves into simplifying the work of the police, prosecutors and judges while determining the nature of the material, thus serving for a more precise determination of the type of offence and the kind of sentencing for the offenders.

According to the Sentencing Council, this classification is used in cases of possession, distribution and production of indecent photographs of children.⁵⁵⁰ The simple downloading of an image from an online source is considered as falling within the possession for sentencing purposes. The age and vulnerability of the child depicted, the harm caused to the child, the high volume of images possessed, the abuse of trust and commercial exploitation among others, are considered as aggravating circumstances which should be taken into consideration by the court when sentencing.⁵⁵¹

⁵⁵⁰ Sentencing Council (2014) Sexual Offences Definitive Guideline. Indecent Photographs of Children Section. Pg. 76.

⁵⁵¹ Ibid. pg. 78

This categorization of indecent photographs of children is a very important step towards providing for better protection of children from different types of sexual offenders and is thought to help into categorizing the offenders based on the level of threat they pose to children. Nevertheless, there is no research showing that a less serious level of offender cannot in the near future jump to another level of seriousness, posing a higher threat to the child on the future. There is basically no research showing that this classification of indecent images of children has any significance in terms of the sentenced offender being a greater or lesser threat to the child in the future.⁵⁵²

However, this categorization serves well into providing an appropriate and proportionate judgement regarding cases of indecent photographs of children related to the degree of crime committed by the offenders, rather than based only on the perception that they are or not going to pose a higher threat to the children on the future. While this scale applies only to indecent photographic images of children, broadening the scope of this categorization so as to be applicable also to video materials and to live-streaming material of child abuse would be a very valuable step towards the fight of live-streaming of child abuse. Limiting the scope of this categorization only to photographic images does not serve well to the general aim of protecting children from sexual abuse and sexual exploitation in a world where technology develops so rapidly that every now and then new forms of indecent material of child abuse get created. This categorization provided by the Sentencing Council is a clear description also of the kind of child abuse material being streamed live on the internet. All the typologies described by the Sentencing Council are valid typologies of cases of live-streaming of child abuse as well. Thus, widening the applicability of this categorization to cases of live-streaming of child abuse is a necessity, in the view of the rapid increase of cases of child abuse in England and Wales, but also outside this territory.⁵⁵³

2. Definition of 'Sexual Abuse of Children' and 'Child Sexual Exploitation'

While there is a general agreement on definitions of the most serious types of sexual abuse, there is a gap in literature on clear definitions of various types of sexual abuse.⁵⁵⁴ Researchers

⁵⁵² Carr, J. (2004) Child abuse, child pornography and the internet. NHC, the children's charity. Pg. 15.

⁵⁵³ Live-streaming of child abuse for payment has been considered by the UK National Crime Agency as an emerging trend since in 2014 and continued to remain a high threat also in 2016. See: National Crime Agency (2014) National Strategic Assessment of Serious and Organized Crime 2014. Pg. 5 and 16; National Crime Agency (2016) National Strategic Assessment of Serious and Organized Crime 2016. Pg. 19.

⁵⁵⁴ NSPCC. (2013) Child sexual abuse, A NSPCC research briefing. Pg. 1.

are of the opinion that wide definitions are not effective enough because they lack the details needed to cover all forms of sexual abuse, while narrower definitions leave out certain aspects of sexual abuse.⁵⁵⁵ Despite the lack of clear definitions, one clear element included in recent definitions in the UK is the division of child sexual abuse into contact and non-contact abuse. Contact abuse is when the abuser makes physical contact with the child, be it penetrative or non-penetrative. Whereas non-contact abuse includes other acts without a physical contact, such a grooming or forcing children to perform sexual acts on the Internet.⁵⁵⁶ In a definition of ‘sexual abuse of children’ provided by the government’s Home Office statutory guidance for England in 2015, sexual abuse of children is defined as:

“Forcing or enticing a child or young person to take part in sexual activities, not necessarily involving a high level of violence, whether or not the child is aware of what is happening. The activities may involve physical contact, including assault by penetration (for example, rape or oral sex) or non-penetrative acts such as masturbation, kissing, rubbing and touching outside of clothing. They may also include non-contact activities, such as involving children in looking at, or in the production of, sexual images, watching sexual activities, encouraging children to behave in sexually inappropriate ways, or grooming a child in preparation for abuse (including via the internet).”⁵⁵⁷

This is a long, broad and clear definition of sexual abuse. It covers both contact and non-contact offences, highlighting issues of child pornography and sexual exploitation of children. The definition clearly mentions also cases when the child is unaware of being abused.⁵⁵⁸ In this definition the Home Office acknowledges that child sexual abuse can occur also through the internet, by specifically highlighting cases of non-contact offences via the internet.

It can be noted that this wide definition of child sexual abuse, includes within it the crime of child sexual exploitation, recognizing it as a form of child sexual abuse. There is no unified definition of child sexual exploitation in UK. Different definitions are used in England and Wales. The definition used in Wales is established in the 2009 All Wales Protocol on

⁵⁵⁵ Young, T., Riggs, M. and Robinson, J. (2011) Childhood sexual abuse severity reconsidered: a factor structure of CSA characteristics. *Journal of Child Sexual Abuse*, 20(4): 373-395.

⁵⁵⁶ NSPCC. (2013) *Child sexual abuse, A NSPCC research briefing*. Pg. 1.

⁵⁵⁷ HM Government (2015) *Working together to safeguard children: a guide to inter-agency working to safeguard and promote the welfare of children*. Department for Education. London. Pg. 93.

⁵⁵⁸ Whitehead, J. (2010) Back to basics: sexual abuse. *Protecting Children Update*, 71: 8-9.

safeguarding and promoting the welfare of children and young people who are at risk of abuse through sexual exploitation. The definition is as follows:

“Child sexual exploitation is the coercion or manipulation of children and young people into taking part in sexual activities. It is a form of sexual abuse involving an exchange of some form of payment which can include money, mobile phones and other items, drugs, alcohol, a place to stay, ‘protection’ or affection. The vulnerability of the young person and grooming process employed by perpetrators renders them powerless to recognise the exploitative nature of relationships and unable to give informed consent.”⁵⁵⁹

Recent developments in England resulted in a new definition of child sexual exploitation provided by the Home Office which describes child sexual exploitation as follows:

“Child sexual exploitation is a form of child sexual abuse. It occurs where an individual or group takes advantage of an imbalance of power to coerce, manipulate or deceive a child or young person under the age of 18 into sexual activity (a) in exchange for something the victim needs or wants, and/or (b) for the financial advantage or increased status of the perpetrator or facilitator. The victim may have been sexually exploited even if the sexual activity appears consensual. Child sexual exploitation does not always involve physical contact; it can also occur through the use of technology”.⁵⁶⁰

Both definitions highlight the commercial element of the crime and also the vulnerability of the child and the imbalance of power between the child and the perpetrator(s). Another common element is the stress that both definitions pose on the consent of the child which should not be taken into account when deciding on the criminal nature of the activity. The reason behind this, is the acknowledgement that perpetrators use methods of convincing children that the sexual activities they are committing are something normal, making it seem like the child gave consent, which in reality is an uninformed consent. Despite the commonalities, the

⁵⁵⁹ Welsh Assembly Government (WAG) (2009) All Wales Protocol: Safeguarding and Promoting the Welfare of Children and Young People who are at Risk of Abuse through Sexual Exploitation. Cardiff: Welsh Assembly Government.

⁵⁶⁰ HM Government (2017) Child sexual exploitation: Definition and guide for practitioners, local leaders and decision makers working to protect children from child sexual exploitation. Department for Education. London. Pg. 5 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/591903/CSE_Guidance_Core_Document_13.02.2017.pdf. (last accessed 8 January 2018).

England definition is broad in scope and nature, allowing for inclusion of a wide range of crimes.

According to Livingstone, Davidson and Bryce,⁵⁶¹ this definition of the crime of sexual exploitation overlaps with definitions of other types of crimes, specifically with child sexual abuse and grooming and the distinction between them is very difficult. However, despite the critics, this definition stresses some very important elements of the types of crimes that fall under the group of sexual exploitation, such as taking advantage from the imbalance of power between the child and the adult perpetrator or facilitator and the profit (financial or not) made in return for the sexual activities with the child. The Home Office makes clear also that this kind of activity is considered as a criminal activity when conducted towards any child under the age of 18, setting in this way the age limit to 18, for child protection from sexual exploitation, making it fully compliant with the requirements of the international legal instruments related to the protection of children from sexual abuse and sexual exploitation analyzed in the second chapter, which define the child as any person under the age of 18. In this way, within this definition of child sexual exploitation, the Home Office has also provided a certain definition of the ‘child’, confirming adherence to the international definition of ‘child’. In its explanation, the Home Office highlights that all children and young persons under the age of 18 years are protected by this definition, including those of 16 or 17 years of age who can legally consent to engage in sexual relations.⁵⁶²

Another important element of this definition, which is useful for the definition of the crime of live-streaming, is the inclusion of the phrase that explains that the sexual exploitation of children does not always include physical contact. This means that in order for the crime of sexual exploitation of a child to be considered as committed, physical contact between the adult perpetrator and the child is not a requirement. The inclusion of this statement into the definition of the crime is very important, as stated again within this definition, for the criminalization of sexual exploitation occurring through the use of technology. In the explanation of this definition, the Department for Education clarifies that offences falling under the child sexual exploitation group can include both contact and non-contact sexual activity, and that the contact sexual activity can include both penetrative and non-penetrative acts.⁵⁶³

⁵⁶¹ Livingstone, S., Davidson, J. and Bryce, J. (2017) Children’s online activities, risk and safety: A literature review by the UKCCIS Evidence Group. UK Council for Child Internet Safety. Pg. 48.

⁵⁶² Department for Education (2017) Child sexual exploitation: Definition and guide for practitioners, local leaders and decision makers working to protect children from child sexual exploitation. Pg. 5.

⁵⁶³ Ibid.

Another important element of this crime, as explained by the Home Office⁵⁶⁴ is that the crime can take place either in person (hand-on exploitation) or through the use of technology, or a combination of both. The explicit acknowledgement that child sexual exploitation can take place also by a combination of both offline and online abuse is a very important step into recognizing the phenomenon of live-streaming as a specific kind of child sexual exploitation, for the mere fact that live-streaming includes both the offline and the online part of the crime. The online part relates to the preparatory stages of the crime that involve the communication between the perpetrator demanding to watch a live-streaming of a child being abused and the facilitator of the live-streaming offering the activity in return for a remuneration, thus the online agreement for the live-streaming. The offline part relates to the actual sexual abuse of the child by the facilitator or another person collaborating in the crime, or the actual pornographic performance made by the child alone in front of a webcam or other video transmitting device connected to the Internet. This offline part happens simultaneously with the online part of the live streaming/transmission of the sexual abuse or sexual performance for the perpetrator/audience to view in real time. When the viewers actively participate in the abuse by giving instructions to the abuser, the actual abuse is both online and offline. Finally, there is also another last part of this crime, which depending on the case can happen either online or offline, that is the transfer of money or other remuneration, which is done either via technological tools or through bank or other offline methods of transfer.

The definition does not include a list of acts which fall under the group of crimes of sexual exploitation of children. It can however, be argued that this definition encompasses the acts of live-streaming of child abuse within it, since many of the elements included in this definition are elements of the acts of live-streaming of child abuse as well.

The National Crime Agency (NCA) complements this definition of child sexual exploitation provided by the Department of Education by providing a list of crimes which may fall under the group of online sexual exploitation of children: indecent images of children, online grooming, sexual extortion of children and live-streaming of child sexual abuse.⁵⁶⁵ As it can

⁵⁶⁴ HM Government (2017) Child sexual exploitation: Definition and guide for practitioners, local leaders and decision makers working to protect children from child sexual exploitation. Department for Education. London.

⁵⁶⁵ House of Lords (2017) Growing up with the internet. 2nd report of session 2016-17. House of Lords Select Committee on Communications. Pg. 36. Para. 131. Available at:

<https://publications.parliament.uk/pa/ld201617/ldselect/ldcomuni/130/130.pdf> (accessed on 8 January 2018);

National Crime Agency – written evidence (CHI0043)

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/communications-committee/children-and-the-internet/written/36763.html> (accessed on 8 January 2018).

be noticed, live-streaming of child sexual abuse has been listed by the NCA among the crime group of online sexual exploitation of children.⁵⁶⁶

IV. Case Law Related to Live-Streaming of Child Abuse in UK

Cases related to sexual abuse of children and child pornography usually involve more than one type of offence in combination with each other. Practice has shown that the production of child pornography is usually accompanied by the hands-on sexual abuse or sexual assault of the child being portrayed either for the purpose of producing the child abuse material or the material, thus the main purpose being the production and distribution of the illegal material, or the material is a secondary result of the sexual abuse for purposes of sexual gratification of the abuser and/or the collaborator. The case of *Watkins & Anor v R* is a clear example of such a mixture of sexual offences against children and young persons.⁵⁶⁷ The three accused persons, Ian Watkins, 36 years old, P, 25 years old and B 22 years old were charged on 32 counts which comprise: attempt of oral and anal rape (aiding and abetting offence) contrary to section 1 of the Sexual Offences Act 2003, sexual assault of a child under 13 years contrary to section 7 of the Act, taking an indecent photograph of a child contrary to section 1(1)(a) of the Protection of Children Act 1978, distributing the indecent photograph contrary to section 1(1)(a) of the Protection of Children Act 1978, possession of indecent photographs contrary to section 160(1) of the Criminal Justice Act 1988, sexual assault by penetration contrary to section 1 of the Sexual Offences Act 2003, conspiracy to rape a child under 13, conspiracy to sexual assault, possession of extreme child pornography contrary to section 63(1) of the Criminal Justice and Immigration Act 2008, and of making of indecent photographs of children contrary to section 1 of the Protection of Children Act 1978.

Ian Watkins, a lead singer of a band who made many tours used his fame to encounter with fans for sexual purposes and later also with their children. He used to record his sexual encounters and store those recordings. He used to create contacts and appointments with his fans through social media, using different user names and email addresses. He created a continuous sexual contact with P and B, who independently from each other allowed Watkins to commit sexual assaults on their children. They even sexually assaulted their own children

⁵⁶⁶ National Crime Agency – written evidence (CHI0043)
<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/communications-committee/children-and-the-internet/written/36763.html>.

⁵⁶⁷ *Watkins & Anor v R* [2014] EWCA Crim 1677.

with Watkins' request for his gratification. Watkins met B for the first time in 2009. In 2011 B gave birth to a boy IB, the identity of his father being unknown but assumed to be Watkins based on their communications. In 2012 Watkins and B were exchanging messages on how to sexually assault IB, which they put into life when IB was 12 months. Both performed oral sex on the child and masturbated with the child and Watkins recorded it. When Watkins went away B took indecent photographs with her son and sent to Watkins.

P had a 12-month child when she started dating Watkins, who proposed to use her daughter for their sexual gratification. In their messages, manipulated by Watkins, P stated that she would make her daughter KB learn to be Watkins' "fuck toy".⁵⁶⁸ P was also taking indecent photographs of her child and sending to Watkins. She also used to drug the child before abusing with her. One day the pair organized a live-streaming session on Skype via webcam where they sexually abused KB and Watkins recorded the footage. P was performing sexual acts on the child with Watkins' clear instructions while he masturbated himself. They had also planned to meet so that Watkins could sexually abuse her child, but the meetings never happened.

Watkins was found to have in his possession also other recordings and images of him sexually abusing with children aged from 2 to 16 years. Most images were of level 4 and 5 of the Oliver Scale (non-penetrative and penetrative sexual activities), while there were also 22 images classified as extreme pornography, involving bestiality with dogs. He was giving cocaine and methamphetamine to the young fans he abused. Even though he admitted his actions, he was convinced that he did not cause any harm to the victims.

According to the judge, the infant age of the victims was righteously considered as an aggravating factor.⁵⁶⁹ His corrupting influence over his sexual partners was recognized as well but that did not exempt P and B from their culpability. The judge highlighted also the lack of remorse from his part and that the password Watkins used for his hard drive where he has store the content was an encrypted version of "I fuck kids". The judge considered also other aggravating factors related to the guideline on culpability applicable in England and Wales which include: planning; targeting of vulnerable victims; offences committed by two persons acting together; abuse of trust and abuse of power; the use of drugs in association with the offences. As it relates to harm the further aggravating factors were identified: the ages of the victims; repeated assaults on the same victim; the recording of the abuse.

⁵⁶⁸ Ibid. Para. 13.

⁵⁶⁹ Watkins & Anor v R [2014] EWCA Crim 1677.

Noticeably, the recording of the abuse is considered by the judge as an aggravating factor, while the main offences are the rape and the sexual assault of the child. While, the consideration of the recording of the abuse as an aggravating factor is correct, it should be noted that the live-streaming of the sexual abuse of the infant is not taken into consideration at all by the judge, neither as a separate offence, nor as an aggravating factor. The court did not take into consideration that transmitting live the sexual abuse of a child, especially when the person viewing it is instructing the contact abuser on how to proceed, has more severe consequences as it regards the harm caused to the child, than only abusing a child whether or not recording it. While imposing charges on complicity to sexually assault the infants, the court does not distinguish between the acts committed with both persons present at the place where the sexual assault of the child takes place and when only one person is geographically located at the place where the sexual assault is committed while the other is watching live from the Internet through a webcam, and even directing the abuse by giving instructions to the other abuser on which sexual acts to perform on the child for his sexual gratification. While this case involves only one viewer and does not include any commercial purpose, the issue would be much complicated in cases when there is more than one viewer located in different places and when the live-streamed abuse takes place for commercial purposes. It would be interesting to see whether the court would still not consider at all the fact of live-streaming of the abuse, especially in cases where the crime happens only because of the existence of the live-streaming technology and for commercial purposes rather than for sexual gratification. Distinguishing between the crime of sexual assault and rape of the child and complicity to sexually assault or rape the child, and the live-streaming of the sexual abuse of the child would have a significant importance also for the assessment of dangerousness/seriousness and for sentencing purposes, impacting in the imposition of higher sentencing which would further reflect all of the offending behavior and would be even more proportionate in this case.

1. The Case of Regina v Charnley

The court of Appeal in the Regina v Charnley case,⁵⁷⁰ also known as Charnley, treated the use of ICT for the commitment of the crime of live-streaming of child abuse as an aggravating factor. In this case, a British citizen procures the sexual abuse of vulnerable children ages 2-17 by paying adults in Philippines and other countries to sexually abuse the children in front of a

⁵⁷⁰ Attorney General Reference No. 28 of 2010 [2010] EWCA Crim 1996 (17 June 2010).

webcam for his sexual gratification. While assisting the abuse in real time from his computer and filming the activity, the offender used to give instructions to the adults on the kind of abuse he wanted them to perform on the children. Such abuse included horrifying penetrative and non-penetrative sexual acts while the children were tied up, in some cases more than one adult acting together. The duration of the sessions was up to 101 minutes long. The ‘chat logs’ between him and the on-site abusers which he had payed revealed his incitement of the sexual activity.⁵⁷¹

The offender pleaded guilty to nineteen counts of making indecent photographs of a child, three counts of causing or inciting a child under 13 to engage in sexual activity without penetration contrary to section 8 of the Sexual Offences Act 2003 and one count of causing or inciting a child under 13 to engage in penetrative sexual activity contrary to the same provision. In opposing the verdict of only 5 years imprisonment of the Crown Court at the Court of Appeal, the Attorney General correctly points out that the judge made an error in considering the use of ‘modern communications’ to procure the sexual abuse from other parts of the world as a mitigating factor, stressing that it should actually be considered as an aggravating fact.⁵⁷² As also the Attorney General points out, choosing not to travel to those countries to hands-on abuse the children and opting for paying someone else to do that while watching the abuse on real time and giving instructions on the desired kind of abuse cannot and should not be considered as a mitigating fact. Indeed, it should be considered that, when choosing between traveling to sexually abuse children or paying to watch a live-streaming of a child being abused by someone else, the offenders actually tend to prefer to second option because they believe it is less risky, lowering their possibilities of getting caught and prosecuted, due to anonymity, gaps in the legislation, lack of presence in the crime scene, facilities that only Internet can offer. Having these facts into consideration and referring also to the court decision in *Butcher*,⁵⁷³ this court should also have considered as an aggravating fact the use of Internet for a prohibited activity and adding to that, the targeting of young victims through the use of the sophisticated methods that only the Internet can offer, would have well been considered an aggravating feature.

Another important point in this case is the discrimination claim raised by the Attorney General, who tries to draw an analogy of what would have been the public reaction to a sentence as low

⁵⁷¹ Ibid.

⁵⁷² Ibid. Para 19.

⁵⁷³ [2009] EWCA Crim 1458.

as five years of imprisonment for such horrific monstrous crimes if the victims were children from UK.⁵⁷⁴ It is evident here that the Attorney General is accusing the judge of discriminating against vulnerable children victims coming from poor countries such as Philippines, based only on their nationality.

While the sentencing was changed, there offences for which the offender was accused and sentenced were left unaltered. The offender was charged on counts of making indecent photographs of a child, causing or inciting a child under 13 to engage in non-penetrative sexual activity, and causing or inciting a child under 13 to engage in penetrative sexual activity. On deciding upon the verdict, the judges of the Court of Appeal acknowledge the lack of any legal guidance or legislation addressing the gravity of these types of offences, being thus obliged to cope with what already exists.⁵⁷⁵ Evidently, in the lack of a more proper legislation criminalizing the live-streaming of child sexual abuse and recognizing the quality and cruelty of this type of crime, the judges relied on the offence of causing or inciting a child under 13 to engage in [penetrative and/or non-penetrative] sexual activities to sentence the offender for searching on the Internet, identifying and then paying by credit card the adults located in other countries to sexually abuse children in front of the webcam while he gave instructions on the type of abuse to be committed; and on the offence of making indecent photographs of a child for having photographed and recorded the real-time abuse from his computer. While this is the maximum that judges can do with the existing legislation at hand, the use of these provisions clearly fail to encompass the whole phenomenon of the crime committed: they fail to address the “hiring” of another adult for sexually abusing children, with all the steps that the act of “hiring” includes such as searching on the internet, identifying, using ICT to communicate, propose a price and make a deal; they fail to address the fact of the live (real-time) transmission of the sexual abuse; they fail to address the cruelty of the abusive sexual acts committed to the children only for the sexual gratification of the viewer and moreover, they fail to address the real-time active participation of the offender on the crime scene, even though not physically present, by giving instruction of the type of abuse he wants to see when the offence is happening. Finally, failure to address all these crucial parts of the offence, results also in a law sentence which fails to picture the severity of the offence.

⁵⁷⁴ Attorney General Reference No. 28 of 2010 [2010] EWCA Crim 1996 (17 June 2010). Para 19.

⁵⁷⁵ [2010] EWCA Crim 1996. Para 21.

2. The Importance Given by The Court to Production of On-Demand Videos of Child Pornography, Sexual Abuse and Sexual Exploitation of Children

In 2008, after a two-year joint investigation between Federal Bureau of Investigation (FBI), the Australian police and the British police, Christopher Stubbings from Stafford and many other pedophiles from various countries were arrested. Stubbings, a 55-year-old, was the co-founder and treasurer of a large pedophile ring of a network of 60 active contributors around the world. In his home computer, the police found 159,872 images and 6,448 videos of child abuse in two hard drives.⁵⁷⁶ Out of these, 85 were films of level 5, the most serious category, one of the highest numbers ever recorded in UK.⁵⁷⁷ Besides gathering funds for the production of child pornography, Stubbings had a key role in the commissioning and procuring of hard core child pornography and commercially exploited the material also beyond the group in order to get more funds for the production of more child pornography.⁵⁷⁸ Evidence from his e-mail traffic demonstrated that he was encouraging the production of extreme child pornography, with child victims being from different countries, and aged between 8-10, some even younger.⁵⁷⁹ He was engaged also in arrangement and facilitation of custom made child pornography, which included the arrangement and facilitation through funding of the production of on-demand videos and/or live-streaming of child abuse.⁵⁸⁰ In one of these cases, Stubbings was proven to facilitate the production of videos and live-streamed footage of two children in Belgium, sisters ages 9 and 11 being abused on demand from their father. Evidence from his disclosed e-mails showed that between 1 January 2005 and 20 June 2006 he was paying the father of these girls in order to produce videos and live-footage of them being abused with clear suggestions on the activities that the girls should perform, such as “suggesting that the girls should masturbate to orgasm, they should use toys, they should moan with pleasure and engage together in sexual activity”⁵⁸¹. The several films involving these two girls, found in his possession, showed the girls engaged in masturbation alone or with each-other, using

⁵⁷⁶ Delucca, R v (Rev 1) [2010] EWCA Crim 710. 43-63.

⁵⁷⁷ Police usually find one or two films in that category. See: Daily Mail: Paedophile who ran child porn ring jailed after police discover 200,000 images of sex abuse at his home, available at: <http://www.dailymail.co.uk/news/article-1090308/Paedophile-ran-child-porn-ring-jailed-police-discover-200-000-images-sex-abuse-home.html>; and Delucca, R v (Rev 1) [2010] EWCA Crim 710. 43-63.

⁵⁷⁸ Delucca, R v (Rev 1) [2010] EWCA Crim 710. 43-63.

⁵⁷⁹ Ibid.

⁵⁸⁰ Delucca, R v (Rev 1) [2010] EWCA Crim 710. 43-63; The Telegraph: Briton helped run one of the world’s most dangerous paedophile rings, available at: <http://www.telegraph.co.uk/news/uknews/3534177/Briton-helped-run-one-of-worlds-most-dangerous-paedophile-rings.html>.

⁵⁸¹ Delucca, R v (Rev 1) [2010] EWCA Crim 710. 43-63.

vibrators, and also sexual activities including simulated intercourse and oral sex with their father.

The judge sentenced Stubbings on 8 different counts, among which the arrangement and facilitation of child pornography in relation to the two Belgian girls, under section 50(1) of the Sexual Offences Act 2003. It is noticed that, while the judge took into account his guilty plea, and also the fact that he showed no remorse while deciding the final sentence on him, no special consideration was given to the high danger posed by the facilitation and arrangement of on demand video footage production by Stubbings. This offence was considered as an offence of arranging and facilitating child pornography, without specifically highlighting the fact that the arranged abuse was one based on the demands and specific interests of various pedophiles who gained sexual gratification from that specific kind of perverse abuse of the children. More attention should be paid to similar cases of child abuse that involve the facilitation of on-demand and live-streaming footage of child abuse for the following reasons:

- a) On-demand live-streamed abuse of a child allows for various perpetrators to request for their bestial fantasies to be acted upon the same child, rather than simple the fantasies of a single person. This means the abuse is harsher, involving all kinds of activities which a group of sick minds together can generate. Consequentially, the harm caused to the child victim is deeper than in the case of the hands-on abuser acting solely upon his fantasies.
- b) Facilitating on-demand abuse causes an increase in the demand side of this type of offence, raising the awareness of the pedophiles that they have the possibility to watch, even on live stream, the abuse of a child based entirely on their requests rather than already made abuse, which might not entirely satisfy their malicious sick needs. This leads towards an increase on the demand for tailor made child abuse. An increase in demand, leads to an increase in the production of on-demand fresh child abuse, rather than simple circulation of already existing child abuse videos and images. It consequentially increases the number of persons engaging in commercial production of on-demand live-streaming of child abuse
- c) The level of harm and degradation caused to the child is much higher in the case of on-demand abuse where many pedophiles require all kinds of sexual and bestial acts to be performed by the child or to the child, both at the moment of the abuse but also in the future, when the child victim remembers that the abuse was being directed by many

people at the same time, who all enjoyed from her/his sufferings causing psychological scaring and trauma.

- d) Moreover, the focus should not be only on the harm, but also on the right of children to dignity, which in this case is infringed to a high degree and by many people at the same time, each of them having a specific and different role in cases of on demand live-streaming of child abuse, starting from the person who advertises, facilitates and arranges these activities (which may or may not be geographically located at the place where the hands-on abuse takes place), the person who physically abuses the child, the persons who view the abuse either live or recorded, and the persons who not only view but demand for specific abusive activities to be performed by the child for them to see in order to satisfy their sick sexual needs. Every time such an abuse is viewed by someone, there is a denial of the child's right to dignity, and every time judges, law enforcement, society and other responsible people disregard this, this denial is reaffirmed.⁵⁸²

3. *Moving Images v Still Images*

The question related to the difference between moving images and still images in deciding the level of sentencing has been treated by judges in several court decisions. The central debate relates to whether moving images, which include video files or MPEG images, should be considered as more serious than still images, where dealing with cases of child pornography. Surprisingly, no reference to this has been made in the Sentencing Council Guidelines and it is not even listed as an aggravating circumstance. In *Mc Gaffney v HM Adv*, the court held that downloading of moving images should be considered as more serious than downloading still images, that the distribution of such images by exchange or barter is more serious than downloading for personal use, and that distribution for financial gain is even more serious still.⁵⁸³ In *R v Gorringe* in 2004 the Court of Appeal held that videos should be treated differently as every second of a video involved a considerable number of still images.⁵⁸⁴

The position changed in 2006 when the Court of Appeal in *R v Somerset* contradicted the previous decisions with the argumentation that a moving image cannot be more serious *per se*

⁵⁸² Achilleos, A. (2011) Child Pornography and the Internet: The Technological Trafficking of Children. Web: Rikkos Mappourides & Associates L.L.C.

⁵⁸³ *McGaffney v HM Adv* (2004 SCCR 384), Para. 8-9.

⁵⁸⁴ *R v Gorringe* [2004] EWCA Crim 3152. Para. 4.

than a still image or a series of still images depicting the same activity, just because the depiction of the activity has more graphic detail and is accompanied by sound.⁵⁸⁵ In a later decision in 2009, in *R v Handley* the Court of Appeal highlights that each case should be judged on its facts based on the content of the movie.⁵⁸⁶

It is surprising to notice that in a similar case in Scotland, *HM Advocate v Graham*, where the Court of Appeal in its argumentation makes reference to *R v Handley* and other England and Wales case law on the same issue, and also to the Sentencing Council Guidelines, the judge takes a different stance from that of the Court of Appeal of England and Wales stating that a moving image cannot be equivalent to a multiplicity of stills in counting the quantity of the material, and nor should a moving image be regarded as equivalent to one still image.⁵⁸⁷ The court recognizes that a moving image is more vivid and corrupting than a still, but that this fact should not be treated in an arithmetical way.⁵⁸⁸ Eventually, the judge concludes that the only definite guidance he can give on this issue is that the primary factor to be considered while deciding upon the sentence should be “the nature of the indecent activity depicted in the images and the extent of the offender's involvement with it”.⁵⁸⁹

In *HM Advocate v Graham*, the judge correctly argues that moving images and still images cannot be regarded as having the same value neither quantitatively nor in their sensitiveness, but that this does not automatically mean that all moving images should be regarded as more serious than still ones. For example, a moving image depicting a naked child for sexual purposes cannot be considered as more serious than a still image of level 4 or 5 of the Oliver scale, thus depicting penetrative sexual activity of a child with an adult or bestiality. The court though does not clarify in an explicit way how should the balance be in cases when both the moving images and the still images are of the same level of classification. Nevertheless, it can be understood from the judge's words that in such cases when the content is similar, reference will be made to quantitative elements such as length of the video and number of videos found in possession. Based on this court decision, it may be analogically derived that live-streamed videos would likely be considered as even more vivid and corrupting than recorded moving images, and that taken into consideration also other elements of the live-streamed videos of child abuse, which is the real-time transmission of the abuse and the direct participation of the

⁵⁸⁵ *R v Somerset* [2006] EWCA Crim 2469. Para. 10.

⁵⁸⁶ *R v Handley* [2009] EWCA Crim 1827. Para. 12.

⁵⁸⁷ *HM Advocate v Graham* [2010] ScotHC HCJAC_50. Para 33.

⁵⁸⁸ *Ibid.* See also: *R v Somerset* [2006] EWCA Crim 2469, Para 10-13.

⁵⁸⁹ *HM Advocate v Graham* [2010] ScotHC HCJAC_50. Para 33.

viewer into the type of abuse committed to the child, it is submitted that the production, advertisement and facilitation of such video footage would appear likely by the court as more serious than the production and circulation of previously recorded moving images. Besides the *HM Advocate v Graham* Court of Appeal decision, there is no standard method of classification for moving images yet in the UK.

Treating a moving image the same as a quantity of still images would not be appropriate. Gillespie correctly argues that moving images should be considered as an aggravating factor when deciding the appropriate sentence as moving images depict the abuse of the child in a more realistic way, and this should not be ignored in the sentence.⁵⁹⁰

4. Other Cases of Live-Streaming of Child Sexual Abuse

One of the most recent cases of live-streaming of child abuse in England and Wales is the case of a paedophile ring composed of 6 persons, who used to stream the live abuse of children to each-other via a video link. Emerton, aged 33, central to the paedophile network and 4 other men aged 28-54, all located in UK, were sentenced to imprisonment by the Luton Crown Court on 20 December 2017.⁵⁹¹ A sixth person part of the ring was later sentenced on January 2018.⁵⁹² Emerton had used dating and social media websites such as Grindr, Skype and TruNude to contact the other men and arrange with them to stream the live abuse of children on a video-link.⁵⁹³ He had also arranged to meet these men and commit sexual acts with them in front of children. The court sentenced Emerton and the other four men on counts of conspiracy to rape a child, conspiracy to commit sexual activity with a child and engage in sexual activity in the presence of a child.⁵⁹⁴ One of them was sentenced also to possession of indecent images of a child, another also to making indecent images of a child, and causing or inciting the child sexual exploitation of a 17-year-old; the sixth person was sentenced also on counts of causing a child to watch a sexual act.⁵⁹⁵ The severity of the crimes committed by this live-streaming child

⁵⁹⁰ Gillespie, A.A. (2011a) *Child Pornography: Law and Policy*. Routledge. Pg. 256.

⁵⁹¹ Crown Prosecution Services (CPS) News: Paedophile Ring Jailed for Online Abuse Of Children-Hertfordshire. 20 Dec 2017. Available at: <https://www.cps.gov.uk/thames-and-chiltern/news/paedophile-ring-jailed-online-abuse-children-hertfordshire>, (last accessed on 15 February 2018).

⁵⁹² Ibid.

⁵⁹³ CPS News: Paedophile Ring Jailed for Online Abuse of Children-Hertfordshire. 20 Dec 2017; International Business Times: Paedophile Handed Nine Life Sentences as Grindr Child Live-Stream Sex Ring Broken Up 22 Dec 2017. Available at: <http://www.ibtimes.co.uk/paedophile-handed-nine-life-sentences-grindr-child-live-stream-sex-ring-broken-1652494> (last accessed on 15 February 2018).

⁵⁹⁴ CPS News: Paedophile ring jailed for online abuse of children-Hertfordshire. 20 Dec 2017.

⁵⁹⁵ Ibid.

abuse paedophile ring is understood by the statement of the Judge Michael Kay QC: “Never before have I read a police summary of a case which begins with a warning that the reader should be very wary of the content due to the abhorrent nature of the offending”.⁵⁹⁶

Similar to the previously mentioned cases, neither in this case did the court pay a specific attention to the fact that the abuse was being streamed live on the Internet, while deciding on the severity of the sentence. It is obvious that live-streaming is treated as a simple crime of child sexual abuse rather than as a cybercrime to which special attention should be paid because of the specific characteristics which differ this kind of crime from the other traditional crimes of child sexual abuse. The perpetrators of this ring of live-streamed child abuse were sentenced on counts of conspiracy to rape a child even though they were not all present at the place of the rape of the child. Thus, when one was raping a child, the other ones were viewing the rape on real time from their computers, they knew beforehand that the rape was going to happen and accepted to view it live. In the lack of specific legislation related to such an offence of live-streaming of child abuse, sentencing these persons to conspiracy to rape a child can be considered as the most logical and appropriate offence to be used. Nevertheless, this case proves once again the need for a specific offence of live-streaming of child abuse, which would be a concurrent offence with the conspiracy to rape a child in the concrete case, making as such the sentence reflect more clearly the overall criminality involved. The sentence would thus be more appropriate if represented by these concurrent offences rather than only by the offence of rape. Moreover, a specific offence related to live-streaming of child abuse would increase awareness of the judges and the general public on the existence and the effects of such abuse and would give public recognition of the live-streaming of child abuse as a severe offence, sending a signal also to perpetrators of such crimes.

2017 has been a year full of cases of live-streaming of child abuse for UK. In December 2017, a couple S. Gotham and C. Forbes were sentenced by the Plymouth Crown Court to counts of sexually assaulting a girl under the age of 13, while she was asleep after being drugged by them.⁵⁹⁷ They broadcasted this abuse live on Skype on five separate sessions to a paedophile

⁵⁹⁶ International Business Times: Paedophile Handed Nine Life Sentences as Grindr Child Live-Stream Sex Ring Broken Up 22 Dec 2017.

⁵⁹⁷ Independent News Website: Plymouth couple jailed for drugging and sexually abusing child while US paedophile watched on Skype. (27 October 2017). Available at: <http://www.independent.co.uk/news/uk/home-news/couple-drug-sexual-abuse-young-girl-us-paedophile-skype-watch-plymouth-sarah-gotham-craig-forbes-a8022486.html> (Last accessed 16 February 2018); The Guardian: British couple given lengthy jail terms for child sexual abuse. (27 October 2017) Available at: <https://www.theguardian.com/uk-news/2017/oct/27/british-couple-sarah-gotham-craig-forbes-given-lengthy-jail-terms-for-child-sexual-abuse> (Last accessed 16 February 2018).

woman in San Francisco who admitted to have encouraged and directed them on how to abuse the child for her own pleasure.⁵⁹⁸ The couple met with the women on a chat-roulette website called Omegle, and they had then exchanged skype contacts and continues communicating face to face on skype.⁵⁹⁹ The British couple was detected after the American women who watched the live stream confessed and identified them during an investigation led by the FBI.⁶⁰⁰ It is thought to be the first case that FBI agents go to give evidence in a British Court.⁶⁰¹

In her evidence, the American paedophile said that she had googled for the couple to be sure they were not undercover police officers and that she has also asked them hold up fingers on the skype session to be sure that they were real persons and not Artificial Intelligence avatars from automatic programmes.⁶⁰² Her evidence shows her modus operandi and her intelligence and awareness of how police officers operate in detecting child abusers. It proves that she is an experienced, cautious and dangerous child abuser. The Detective Inspector Kingdon of the case stressed the gender sensitiveness of the case, stating that the society tends to not accept the idea of a female paedophile and shifts the blame on male co-defendants, but that this case proves that females can be child abusers to the same extent as males without being influenced by any males at all.⁶⁰³ This case is a steady proof that female child abusers exist and that they even operate on their own initiative, without being influenced by males. While the majority of child abusers are males, paedophilia crosses gender identities, and it is submitted that females should not always be treated as victims under the influence of males.

While the British couple were sentenced to charges related to sexual assault of a child under 13, the American women was charged with receipt of child pornography.⁶⁰⁴ Evidentially, neither in the UK court, nor in the American one was the live-streaming of the child abuse highlighted as an aggravating factor of the crime, in the lack of legislation to mention it as a specific crime. The American woman was charged for receipt of child pornography, which

⁵⁹⁸ Ibid.

⁵⁹⁹ The Herald News: Kori Ellis: The horrible sex monster who looked more like a librarian. (26 October 2017). Available at: <https://www.plymouthherald.co.uk/news/plymouth-news/kori-ellis-horrible-sex-monster-673005> (Last accessed 16 February 2018).

⁶⁰⁰ The Times News Website: Sarah Gotham and Craig Forbes jailed for live streaming abuse of young girl. (27 October 2017) Available at: <https://www.thetimes.co.uk/article/sarah-gotham-and-craig-forbes-jailed-for-live-streaming-abuse-of-young-girl-5n7j20xkc> (Last accessed 16 February 2018); BBC News. Sarah Gotham and Craig Forbes jailed for live-streaming child abuse. (26 October 2017) Available at: <http://www.bbc.com/news/uk-england-devon-41770508> (Last accessed 16 February 2018).

⁶⁰¹ Ibid.

⁶⁰² The Herald News: Kori Ellis: The horrible sex monster who looked more like a librarian. (26 October 2017).

⁶⁰³ Ibid.

⁶⁰⁴ San Francisco CBS Local News. SF woman, Novato man charged in International child porn case. (4 September 2015) <http://sanfrancisco.cbslocal.com/2015/09/04/san-francisco-woman-novato-man-international-child-pornography-case/> (Last accessed 16 February 2018).

does not adequately depict her full engagement in the case, leaving aside the fact that she was the one directing the British couple on how to sexually abuse the child. While on the other hand, the British couple are charged only for sexually assaulting the child, which of course fully represents the acts of sexual abuse committed by them towards the child, but this charge fails to represent the acts of broadcasting the abuse live through Internet applications to someone else, who would not be able to view and direct the abuse in any other way if they did not broadcast it. The court once again fails to recognize the deep impact of the live broadcast of the child abuse, when sentencing only on counts related to ordinary sexual abuse of a child, without taking into consideration the online element of the criminal conduct.

In another case of a man who watched the live-streaming of a 4-year-old girl being sexually abused by a man in Denmark, in a chatroom dedicated to sharing child abuse material, was sentenced by the judge at Bristol Crown Court *inter alia* for intentionally encouraging or assisting the commission of an offence.⁶⁰⁵ In another case in August 2017, a primary school teacher aged 43 watched, together with 45 other paedophiles, in an online chat room, the live abuse of a child taking place in America.⁶⁰⁶ An investigation into the chat room by the National Crime Agency led to his arrest together with 4 other persons who watched the live-stream, one of them by even directing the child abuse by requesting the abuser to make the child say ‘hi’ to the camera.⁶⁰⁷ The school teacher was charged to making indecent images of children, due to him downloading more than 200 indecent images of children; while the man who took an active part in the live-streaming of the child abuse was charged on encouraging or assisting the rape of a child and of encouraging or assisting the showing of indecent images of children.

Again, in these cases the perpetrators who watched the live-stream of children being sexually abused got charged for other crimes which only partially represent the full activity carried out by these perpetrators. While charging these offenders on counts of encouraging or assisting the commission of a sexual offence against a child, such as rape or sexual assault, is appropriate in that it depicts their active role in the live streamed abuse despite being geographically located in another place, and while the offence of encouraging or assisting the showing of indecent

⁶⁰⁵ National Crime Agency. Three-year sentence for sex offender who watched live abuse. (11 October 2017) Available at: <http://www.nationalcrimeagency.gov.uk/news/1216-three-year-sentence-for-sex-offender-who-watched-live-abuse> (Last accessed 16 February 2018); Birmingham mail News. Man who watched girl, 4, being abused on live-stream jailed. (12 October 2017) Available at: <https://www.birminghammail.co.uk/news/uk-news/man-who-watched-girl-4-13749701> (Last accessed 16 February 2018).

⁶⁰⁶ Independent News Website. Primary school teacher who watched a live stream of child rape is jailed for 20 months. (2 August 2017) Available at: <http://www.independent.co.uk/news/uk/crime/primary-school-teacher-live-stream-rape-child-jailed-wayne-brooks-a7872136.html> (Last accessed 16 February 2018).

⁶⁰⁷ Ibid.

images of children depicts their role in encouraging the hands-on abuser into broadcasting the abuse live on the internet for their sexual gratification, the charges still lack to represent the live-streaming element of the crime and the fact that they know the crime was being streamed live and they intentionally continued watching it.

B. LEGAL APPROACHES IN ITALY

Italy is a representative democracy in the form of a parliamentary republic. The president of the Republic is elected by the parliament. Italian judiciary system is based on the civil law. The country has a written constitution which entered into force in 1948 and is the fundamental law of the Italian legal system. In the hierarchy of sources of law, the EU legislation comes right after the Constitution and constitutional law, thus prevailing over ordinary law. While international treaties other than those of the EU, may become binding by internal process of enactment. The highest appeal court is the Supreme Court of Cassation (*Corte di Cassazione*) which has the civil and the criminal law division. Nevertheless, lower courts are not bound by its judgements. There are three types of courts of first instance: the lower courts (*giudice di pace*) have jurisdiction over predetermined minor crimes; the courts (*tribunali*) which deal with other crimes; and the court of assizes (*corte d'assise*) that deals with the most serious crimes, such as terrorism and organized crime. The courts of appeal are composed of the court of appeal and the court of assizes of appeal. A judge can refer to case law issued both by the Supreme Court of Cassation and by lower courts but is not bound by them.

I. Introduction

Despite being one of the most developed countries in the world, child pornography, child sexual abuse and exploitation in Italy are very high. This is not only due to the increased movement of people as a result of globalization, which made Italy a destination for a huge number of immigrants, including children, but also due to the loopholes in the child protection system and legislation. In recent years the online sexual exploitation of children has been on the rise in the country, with all the various crime forms that it comprises, including online pornographic material, sexting, and grooming. Recently there has been an increase in the crime

of live-streaming of children abuse as well, whose use by criminal organizations as a kind of business is on the rise.⁶⁰⁸

II. Legal Framework

The criminal legislation in Italy relating to sexual abuse and exploitation has passed huge changes starting from 1996, as a result of the responsibilities imposed by the Convention on the Rights of the Child, which was ratified by Italy in 1991. The amendments started with the Law No. 66 of 15 February 1996 regarding provisions of sexual abuse. Among the main changes imposed by this law is changing the objective element of crimes of sexual abuse from crimes against public morality to crimes against the person.⁶⁰⁹ Another major change is that the two separate crimes of rape and indecent assault were joint together in a single crime of sexual assault. This was a significant achievement in relation to cases of sexual assault against children, which could now be prosecuted without the obligation of proving whether there has been penetration or not, saving children from further traumatization and also acknowledging that for children, sexual act, be it penetrative (rape) or not have an equal destructive effect on children.⁶¹⁰

This Law introduced in the Italian Penal Code new provisions related to sexual violence (Art. 609-bis) and made it an aggravating circumstance if the crime of forcing a person by use of violence or threats, or abuse of authority to carry out or suffer sexual acts was committed against a child of under 14 years of age; and if the child involved is 16 years old and the perpetrator is the parent or guardian of the child (Art. 609-ter).⁶¹¹ Punishments in this case are heavier if the child victim is under 10 years of age.⁶¹² Apparently, this Law considers sexual violence against a minor by the use of force or threat only as an aggravating circumstance of the offence of sexual violence against adults, making the age an aggravating circumstance rather than including it in a special provision specifically dedicated to protecting children from sexual violence.

Nevertheless, besides this provision, Article 5 of the Law of 1996 further adds a new provision to the Penal Code of Italy, the Article 609-quarter, which specific objective is the protection of

⁶⁰⁸ Telefono Azzurro (2017) *Abuso sessuale e pedofilia: Storie, contesti e nuove sfide*. Pg. 17. Available at: <http://www.azzurro.it/sites/default/files/Dossier%20Abuso%20Sessuale%20e%20Pedofilia.pdf>.

⁶⁰⁹ Legge 15 Febbraio 1996 No. 66 “Norme contro la violenza sessuale”.

⁶¹⁰ United Nations, Committee on the Rights of the Child, Consideration of Reports submitted by States parties due in 1998, Italy, CRC/C/70/Add.13, Office of the High Commissioner for Human Rights, Geneva, 12 July 2002, pg. 99. Para. 316.

⁶¹¹ Legge 15 Febbraio 1996 No. 66 “Norme contro la violenza sessuale”, Art. 4.

⁶¹² Ibid.

children from sexual abuse. According to this provision, sexual acts with a child, which do not fall under the previously mentioned provision, are considered a crime under this law also when no violence is used if the child is under 14 years of age, or 16 if the guilty party is the parent or guardian or another person who has care and control of the child. The same provision regulates that if the child is less than 10 years old, the punishment is doubled. The Law No. 66 of 1996 makes sure that sexual acts between minors above the age of 13 when the difference between the age of the minors is not more than 3 years, do not fall under the scope of this provision.⁶¹³ According to Art. 5 of this law, for the purposes of the above-mentioned provisions, when the child victim is less than 14 years old, the perpetrator cannot use the justification of not having known that the child was under 14 at the moment of committing the crime. Article 9 of this law made it a specific offence of group sexual assault in the Italian Penal Code the sexual assault in group by several persons committing acts of sexual assault together as a group.

The various offences concerning child pornography, child prostitution and pornographic performances regulated by the Italian Penal Code are incorporated within the section dedicated to offences against individual liberty and individual personality. Thus, under legal protection in these cases is not only a person's liberty but also the person him/herself in his/her individuality. From a general perspective, the object that is touched by the crimes of sexual exploitation of children according to the Italian doctrine is the human dignity, as an essential value of each human being.⁶¹⁴ While more specifically, sexual exploitation of children damages the sexual integrity of the child, his/her physical, psychological, spiritual, moral and social development, which influence the development of the child's personality related to a healthy emotional and psychosexual profile.⁶¹⁵

1. Offences Concerning Child Pornography

Child pornographic material in Italy is similarly expanded as in the rest of the world. Online videos showing sexual abuse of children by adults are very widespread, some of them involving violent scenes, including the murder of children.⁶¹⁶ The main Italian law regulating sexual

⁶¹³ Ibid. Art. 5.

⁶¹⁴ Musacchio, V. (1998) Brevi considerazioni sulla nuova normativa penale "anti'pedifilia". Giustizia Penale. Vol.2. Pg. 666.

⁶¹⁵ Mantovani, F. (1998) Diritto penale, I delitti contro la liberta e l'intangibilita sessuale. Padova. Pg. 5.

⁶¹⁶ Working Group for the Convention on the Rights of the Child (2001) The rights of children in Italy, Perspectives in the third sector. Supplementary Report to the United Nations. Terre des Hommes Italy and Save the Children Italy, Pg. 41.

exploitation of children and child pornography is the Law against the Exploitation of Child Prostitution, Child Pornography and Sexual Tourism to the Detriment of Minors, as new forms of slavery (Law no. 269/98) adopted by the parliament of Italy in 1998.⁶¹⁷ Differently from England and Wales, Italy did not have any provision related to the exploitation of children for child pornography until 1998 when this law entered into force. Law no. 269/98 introduced into the Italian criminal law regulations related to child pornography and detention of pornographic material, which were incorporated into the Italian Penal Code, in article 600-ter and 600-quarter respectively. Furthermore, it amended the previously existing law no. 66 of 1996 by changing the age of the child under protection from sexual exploitation and abuse from 16 to 18 years old. It is understandable by the title of this law, that it aims into giving sexual exploitation of children a new interpretation, that is that of viewing them as equal to the crime of reduction into slavery,⁶¹⁸ thus as a modern form of slavery.

a. The Production of Pornographic Material

The first paragraph of Art. 600-ter makes it a criminal offence, *inter alia* using children for the production of pornographic material. The active subject of this offence is any person, including minors of under 18 years of age.⁶¹⁹ The terminology used in this provision while referring to the use of ‘children’ for production of pornography, uses the plural instead of the single ‘child’. In order to avoid any misuse of the provision, the Court of Cassation has clarified that the use of plural in the provision does not mean that more than one child has to be used simultaneously for the offence to be considered as committed and thus it should not be considered as a constitutive element of the crime; it is rather used in plural to highlight the high risk of the criminal act.⁶²⁰ This clarification is also confirmed by the law with which the Lanzarote Convention was ratified, of 1 October 2012 no. 172, which added a special aggravating circumstance in paragraph 7 of the article 602-ter of the Penal Code related to cases when the criminal acts within art 600-ter are committed against three or more children under the age of 18.⁶²¹

⁶¹⁷ Legge 3 agosto 1998, n. 269 "Norme contro lo sfruttamento della prostituzione, della pornografia, del turismo sessuale in danno di minori, quali nuove forme di riduzione in schiavitù".

⁶¹⁸ Helfer, M. (2007) Sulla repressione della prostituzione e pornografia minorile: una ricerca comparatista. CEDAM. Padova. Pg. 39.

⁶¹⁹ Corte di Cassazione, Sezione III Penale, Sentenza 5 giugno 2007 (dep. 12 luglio 2007), n. 12551 (Court of Cassation).

⁶²⁰ Corte di Cassazione, Sentenza I. 31 Marzo 2000. No. 13. 2983.

⁶²¹ Legge 1 Ottobre 2012 n. 172. (Ratifica ed esecuzione della Convenzione del Consiglio d'Europa per la protezione dei minori contro lo sfruttamento e l'abuso sessuale, fatta a Lanzarote il 25 ottobre 2007, nonché norme di adeguamento dell'ordinamento interno).

As it regards the consent of the child victim, the doctrine and the jurisprudence has considered it as irrelevant.⁶²² Nevertheless, it should be noted that, there are doctrines considering that when the child victim is of 14 years old and over, which means that according to the Italian law, has reached the age of consent for engaging in sexual activities, should be considered as having an exonerating effect for the active subject, thus for the adult committing any of the acts within article 600-ter.⁶²³ Nevertheless, article 602-quarter of the Penal Code, which was added by the Law no. 172/2012 gives an answer to these doctrinal controversies, by establishing that, not knowing that the victim was under 18 years of age does not exclude from criminal responsibility. The explicit mentioning of 18 years of age, makes it clear that it covers also cases of children aged 14-18, despite having reached the age of sexual consent.

An important constitutive element of the offences embedded in this provision is the ‘usage of a child’ for the production of the pornographic material, which means that material that has been produced by the child, without any influence from a third party, does not fall under this provision. This is derived also from the interpretation given to this provision by case law, where the court states that the pornographic material should be created by someone else by using the minor, and that the person creating the material cannot in any way coincide with the minor, because otherwise the offences covered by art. 600-ter, paragraph 1, cannot be recalled because of a defect in the constitutive elements of the crime.⁶²⁴ As such, by starting the text of this provision with stating the method of the execution of the conduct (“using children of under eighteen”), it seems that the intent of the legislator was to make the instrumental usage of the minor a constitutive element for the consumption of this crime.⁶²⁵

Differently from the English and Wales legislation, Italian legislation does not provide any definition of ‘image’. However, based on the Italian legal doctrine, production of pornographic material means the creation of pornographic material through taking material steps such as making a copy of an existing pornographic material (journal, CV, DVD, digital photograph, etc.) or printing a digital photograph.⁶²⁶ It was ruled that, also the registration of a child

⁶²² Caringella, F., De Palma, M., Farini, S. And Trinci, A. (2016) *Manuale di diritto penale – Parte speciale*. 6th edition. Dike. Rome. Pg. 1036; Corte di Cassazione, sez. III Penale, sentenza 16 aprile - 26 settembre 2013, n. 39872.

⁶²³ Cadoppi, A. (2006) *Commento all’art. 600-ter, I e II coma c.p.*, in A. Cadoppi Eds. (2006) *Commentario delle norme contro la violenza sessuale e contro la pedofilia*. Cedam. Pg. 123.

⁶²⁴ Suprema Corte di Cassazione, Sezioni Unite Penali, sentenza n.13/2000.

⁶²⁵ Cass. Pen., Sez. III, 21.3.2016, n. 11675. Para. 7.

⁶²⁶ Casana, A. (2012) *Il reato di pornografia minorile dopo le modifiche di cui alla legge 6 febbraio 2006 n. 38: la destinazione esclusivamente personale e l’assenza di un concreto pericolo di diffusione del materiale prodotto*. Il Foro Ambrosiano. 53-58.

appearing nude in front of a webcam falls under the offence of producing pornographic material.⁶²⁷ The creation of a material copy of the live webcam performance of the child is what makes the distinction from the other offence of pornographic performances or shows covered by the same paragraph of art. 600-ter, making the distinction between production and exhibition clearer.⁶²⁸

The criminalization by this provision of the mere production of child pornographic material is consistent with the international and regional legislation on the matter, including here the UN OPSC, the Lanzarote Convention and the EU Directive which also criminalize the mere production of child pornography, disregarding whether the production is made with the purpose of further distribution through the ICT (as covered by the Cybercrime Convention) or for the sexual gratification of the producer. In this case, the purpose behind the production of child pornography is not a constitutive element of the crime, thus not important for the criminalization of the act.

Italian legislation uses a terminology which is closer to the international legal terminology than the terminology used by England and Wales to criminalize the production of child pornography. As already analyzed in the previous subchapter, England and Wales instead of the terms 'production' and 'child pornography' use 'take' and 'indecent photographs or pseudo-photographs of a child' and 'prohibited image of a child'. However, despite the different terminology used, the intention of the legislator is the same in both countries: penalizing the production of child pornography as provided in the international legislation.

Besides criminalizing the mere production of child pornography, Italy goes beyond the regulation of production of child pornography covered by the Lanzarote Convention and the EU Directive by criminalizing in the third paragraph of art. 600-ter also the production of child pornographic material when it is done for commercial purposes. The sentencing is the same as for the mere production of child pornography, nevertheless, the legislator wanted to explicitly mention in the legislation that the production of child pornography can occur not only for sexual gratification but also for gaining profit from it. This implies, that producers of child pornography are not always pedophiles, and are not always led by the intention of sexual gratification, they can be led also by the mere scope of gaining money through the selling of the produced material. The legislator does not mention in this paragraph whether the production

⁶²⁷ Ibid.

⁶²⁸ Caringella, F., De Palma, M., Farini, S. And Trinci, A. (2016) *Manuale di diritto penale – Parte speciale*. 6th edition. Dike. Rome. Pg. 1039.

is done for the purpose of distribution through the computer system or through other means of distribution. This is covered by the next paragraph which criminalizes distributing, spreading, disseminating and advertising the child pornographic material mentioned in the paragraphs related to the production of child pornography. These acts are equally criminalized even when committed electronically, through the use of information and communication technologies.

b. The Distribution Dissemination, Spreading and Advertising of Child Pornography
This paragraph of Art. 600-ter of Italian Penal Code, was amended many times in order to comply with international and regional legislation. The current form of the provision is fully compliant with Art. 5(4) of the EU Directive criminalizing the distribution dissemination or transmission of child pornography, Art. 20(1)(c) of the Lanzarote Convention covering the distributing and transmitting of child pornography and Art. 9(c) of the Cybercrime Convention covering the distribution or transmission of child pornography through a computer system. Instead of the term ‘transmission’ used by these two regional legal instruments, Italian legislator uses a slightly different terminology, by using the term ‘spreading’, nevertheless, the criminal conduct covered is the same one. The ‘advertising’ of child pornography covered by this paragraph can be considered as similar to the ‘making available’ of child pornography as covered by Art. 5(5) of the EU Directive, Art. 20(1)(b) of the Lanzarote Convention and Art. 9(b) of the Cybercrime Convention. This provision of the Italian legislation is similar to the section 1 of the UK Protection of Children Act 1978 which criminalizes showing, distributing, publishing or causing to be published an indecent photograph or pseudo-photograph of a child. Again, the terminology is different, having in common only the ‘distribution’, but the scope and the target of both provisions are the same.

The formulation of this paragraph of Art. 600-ter of the Italian Penal Code is intentionally constructed in such a broad language in order to cover all possible activities related to child pornographic material.⁶²⁹ However, drawing a distinction between the acts of distributing, spreading, disseminating and advertising mentioned in this paragraph is not that easy. According to Italian jurisprudence, ‘distribution’ refers to physical delivery of the pornographic material, such as in CD-room, DVD, flash drive, to one or more predetermined subjects, while the spreading and advertising occur only through the use of ICTs.

The distinction between spreading and advertising is that the first one occurs when the files are sent through the use of ICT to a certain number of persons, such as by electronic mail, while

⁶²⁹ Destito, V.S., Dezzani, G. and Santoriello, G. (2007) *Il diritto penale delle nuove tecnologie*. CEDAM. Milano. Pg. 147.

advertising does not include sending files to anyone, it rather means making it possible for the others to access and watch the materials online, such as by uploading the material in websites. Moreover, the world ‘advertising’ pornographic material implies that a person disseminating any kind of information to the public relating to such material can be subject to liability under this provision.⁶³⁰ The ‘dissemination’ was added later by Law 38/2006 and refers to spreading child pornographic material to an undetermined number of persons,⁶³¹ which in the case of committing these acts through the ICTs, can be done by sharing the materials in Peer to Peer networks.

The doctrine does not clarify what happens in cases when advertising is done towards a pre-determined number of individuals, such as in a closed chat group or in a mailing list. This is somehow clarified by the next paragraph, art. 600-ter paragraph four, which criminalizes also the offering or giving/transferring of child pornographic material to others even if without any profit. Based on jurisprudence, this paragraph covers only cases when the offering or giving/transferring of such material is done towards only one person or a pre-determined, definite number of individuals, including through the ICT,⁶³² and the giving or transferring is occasional, or even a single time.⁶³³ But how to understand if the purpose of the distributor was to distribute the material to a pre-determined number of individuals rather than to an undetermined group of people? Based on the Court of Cassation Decision Nr. 5397 of 11.02.2002, this can be understood by investigating if the subject of the offence has published the pornographic material in an open-access website or in a group list/chat line from where anyone can download them, or whether he sent them by email to one or a number of persons, so that only those persons could access the material.⁶³⁴ Furthermore, the Supreme Court clarifies that the mere use of the Internet cannot be considered enough for classifying it as the more serious crime covered by art. 600-ter, paragraph 3; it is the destination of the offer for pornographic material that draws the distinction between the offences covered by third paragraph and fourth paragraphs of art. 600-ter. Thus, if the offer is made towards an indeterminate number of persons, the third paragraph applies, whereas if the offer is directed

⁶³⁰ Caringella, F., De Palma, M., Farini, S. And Trinci, A. (2016) *Manuale di diritto penale – Parte speciale*. 6th edition. Dike. Rome. Pg. 1039.

⁶³¹ Cassano, G. and I. P. Cimino eds. (2009) *Diritto del’Internet e delle nuove tecnologie telematiche*. CEDAM. Pg. 614.

⁶³² Destito, V.S., Dezzani, G. and Santoriello, G. (2007) *Il diritto penale delle nuove tecnologie*. CEDAM. Milano. Pg. 151; Corte di Cassazione. Sez. Penale III. 3.12. 2001-11.02.2002. N. 5397.

⁶³³ Tribunale Civile e Penale di Perugia, Ufficio del Giudice per le Indagini Preliminari, Sentenza 8 luglio - 30 dicembre 2003.

⁶³⁴ Cass. Pen. 11.02.2002 n. 5397.

towards a determinate number of persons, the fourth paragraph applies, irrespective of the use or not of the ICT.⁶³⁵ Italian case law goes deeper into clarifying the difference between these two offences by stressing that, chat lines give the users also the opportunity to communicate in private with one another, and thus, when the pornographic material gets exchanges in such private communications, it falls under the offence of giving or transferring child pornography.⁶³⁶

The main difference between third and fourth paragraph is that in the latest one, the offering or giving/transferring of pornographic material has a pre-determined target group, while the distribution, disclosure, dissemination and advertising occurs towards an undetermined number of people. This derives another difference between the two paragraphs: in the second case, the subject can control, and intentionally controls the number of persons to whom he/she passes the material, while in the first case, the subject of the offences, by passing the material to the undetermined public, refuses to exercise any kind of control over the child pornographic material, committing this way a higher-level crime.⁶³⁷ Another important element highlighted by the court in the case of uploading of the pornographic material in chat lines or other open access sites outside of a dialogue with a pre-determined number of persons, is the need to determine whether that site makes possible for everyone accessing it to automatically download or access that material, or whether the persons accessing the site need to give their prior consent in a private conversation in order to gain access to the material, constituting in the latter case the less serious offence covered by the fourth paragraph.⁶³⁸

Distributing or spreading information for the purposes of solicitation or sexual exploitation of children under the age of 18, by whatever means, even electronically, are also criminalized by the same paragraph of the Italian Penal Code. This part of the provision brings the Italian legislation closer to the UN OPSC which requires State Parties to criminalize the offering, by whatever means, of a child for the purpose of sexual exploitation (Art. 1(a)(i)(a)) as a measure to prevent the selling children for sexual exploitation, and the requirement to criminalize the offering or providing of a child for child prostitution (Art. 1(b)) as a measure to prevent child prostitution.

⁶³⁵ Cass. Pen. Sez.V. 11.12.2002-03.02.2003. No. 4900.

⁶³⁶ Ibid.

⁶³⁷ Destito, V.S., Dezzani, G. and Santoriello, G. (2007) *Il diritto penale delle nuove tecnologie*. CEDAM. Milano. Pg. 152.

⁶³⁸ Ibid.

c. Offering of Pornographic Material

The criminalization of the ‘offering’ of pornographic material which was added by Law 38/2006 caused many debates. Some consider the offering as a separate type of offence, while others consider it as a mere tentative of the act of giving/transferring, which remains in tentative because the other person did not accept the offer.⁶³⁹ Despite the legal debates in Italy, the ‘offering’ of child pornography is explicitly criminalized also by the international and regional legislation on the matter, such as Art. 5(5) of the EU Directive, Art. 20(1)(b) of the Lanzarote Convention and Art. 9(b) of the Cybercrime Convention. Thus, this modification of the law was necessary in order to bring the Italian legal framework on child pornography closer to international and regional legal framework.

It should be noted that, for a person to offer or transfer child pornographic material to another, that person should first procure or possess that material for him/herself. Nevertheless, as the Italian Court has declared, when dealing with the offence of offering or transferring child pornographic material, the act of possession is considered as part of the process of the act of offering or transferring the material, taking the connotation of a non-punishable pre-fact, since without the possession the offering or transferring is impossible in itself.⁶⁴⁰ In this view, there is no concurring of crimes; the conduct of procuring the material will remain absorbed within the crime of offering or transferring that material, because the person guilty of offering or transferring the material had to first procure that material.⁶⁴¹

Additionally, the divulgation occurs occasionally and without any commercial purpose, differently from the first case which usually occurs regularly as a business. Such a distinction has very important consequences not only regarding the sentencing, but also regarding the investigation procedures. In cases covered by third paragraph, due to its consideration as an offence with more severe consequences, provocation through undercover investigation is allowed.⁶⁴² The quantity of distributed pornographic material is an important element for offences covered by paragraph three and four of article 600-ter, in determining the sentence. Accordingly, when a huge quantity of material is involved, the punishment can be increased up to two thirds.⁶⁴³

⁶³⁹ Destito, V.S., Dezzani, G. and Santoriello, G. (2007) *Il diritto penale delle nuove tecnologie*. CEDAM. Milano. Pg. 152.

⁶⁴⁰ Cass. Pen., sez. III, sentenza 10 luglio 2008, n. 36364.

⁶⁴¹ Ibid.

⁶⁴² Cassano, G. and I. P. Cimino eds. (2009) *Diritto del’Internet e delle nuove tecnologie telematiche*. CEDAM. Pg. 617.

⁶⁴³ *Codice Penale e Leggil Complementari*. (2017) Hoepli. Art. 600-ter. Para 5.

It should be highlighted that, the usage of children for the realization of the pornographic material mentioned in all of the above analyzed offences, is a constitutive element of the crime, applying the same way to all these offences as for the offences covered by the first paragraph of art. 600-ter.⁶⁴⁴ Thus, also the giving/transferring of child pornographic material to others is punishable only when the pornographic material has been created from a third person in respect to the person portrayed in the material.⁶⁴⁵ With this interpretation, the Court of Cassation has made clear that no child shall be punished for giving to someone else pornographic material created by themselves, depicting themselves, protecting them from criminal liability for such an offence.

As it concerns the tentative of committing any of the above-mentioned acts, it is necessary to prove that that subject was ready to consume any of the acts covered by art. 600-ter, but the consumption was interrupted by unpredicted occurrences. The legislation should pay careful attention to the limit between tentative of committing an offence and the preparatory acts towards committing and offence, the second one being not punishable by the Italian law.⁶⁴⁶

d. Intentionally Procuring or Possessing of Child Pornographic Material

The next provision, art. 600-quarter, criminalizes the demand side of child pornography, by punishing the intentionally procuring or possessing of child pornographic material, which is considered by some as less severe than the offences covered by the previous section.⁶⁴⁷ Until 2006, this provision used the Italian term ‘detenzione’ which means ‘possession’ only in the title, while in the text of the provision, ‘obtain’ and ‘dispose’ were used. With the law 38/2006, the term dispose was substituted with the term ‘possess’. According to Cadoppi, this change makes possible to exclude from criminal responsibility the non-material disposals,⁶⁴⁸ which in other terms made clear the exclusion from criminalization of the simple viewing of child pornographic images also via the Internet, when the viewed file does not get intentionally downloaded.⁶⁴⁹ While the introduction of the term ‘detention’ was a step forward for the Italian legislation, as it is thought the legislator’s intention with this term was to make possible the

⁶⁴⁴ Corte di Cassazione, sezione III penale, sentenza 18 febbraio 2016 (dep. 21 marzo 2016) n. 11675.

⁶⁴⁵ Ibid.

⁶⁴⁶ Ibid. Art. 56.

⁶⁴⁷ Destito, V.S., Dezzani, G. and Santoriello, G. (2007) *Il diritto penale delle nuove tecnologie*. CEDAM. Milano. Pg. 154.

⁶⁴⁸ Cadoppi, A. (2006) *L’assenza delle cause di non punibilita mette a rischio le buone intenzioni*. Guida al Diritto. Il sole 24 ore. Vol. 9. 37-44. Pg. 43; Cadoppi A. (Ed) (2006) *Commentario delle norme contro la violenza sessuale e la pedofilia*. Cedam. Pg. 228.

⁶⁴⁹ Lorusso, S. and Manna, A. (2007) *L’abuso sessuale sui minori: prassi giudiziarie e novita normative introdotte dalla Legge 38/2006 sulla pedopornografia*. Giuffre Editore. Pg. 42.

criminalization of possession of pornographic material also in non-traditional format, such as CD-ROMs, USB memory, physical disk of a personal computer, or any other electronic format, so as also images downloaded from the internet could fall under this wide term and be criminalized,⁶⁵⁰ the provision stresses the need for the files to be possessed, thus excluding from criminal liability the mere access to those files without downloading them. As in UK, also in Italy, there is a long debate on whether viewing a pornographic image without downloading is covered by existing legislation or not. As such, the jurisprudence and case law in Italy differ in opinions on whether accessing the child pornographic images from the Internet without saving or downloading them can be considered as being in possession of such images. According to Destito, Dezzani, and Santoriello, accessing the images continuously from the Internet for a long term, without ever saving or downloading anything on the computer, does not make any difference from having those images saved on the computer, as long as the person can view them as easily and as many times as wanted, same as if those images were located in his personal computer.⁶⁵¹ They further support this argument by claiming that electronic images are simply mathematical combinations that if properly combined create the visual image of child pornography, thus, they cannot be physically possessed in any way.⁶⁵²

The court, in a decision of 2004, has expressed a different opinion on the issue, clearly stating that the scope of this provision is not to criminalize also those that through navigating on the Internet 'enter in contact' with child pornographic images, by only viewing it without saving the material; the provision, according to this court, covers only cases when the person gains possession on the files by saving them on any means that allows for the viewing or the reproduction of the files, such as on a hard disk or physical disk of the computer.⁶⁵³ The court further clarifies that the downloading and saving of the files should occur intentionally and consciously, excluding in this way any criminal responsibility over material that the computer saves automatically when the person views such material online, such as is the case with cache.⁶⁵⁴ This is supported by the argument that, having those files saved on the personal computer without being aware of having them, excludes the possibility of the person to freely

⁶⁵⁰ Casella, M. Il reato di detenzione di materiale (pedo)pornografico alla luce delle modern tecnologie. 3 March 2015. Dirittiweb.it. Available at: <http://www.dirittiweb.it/2015/03/il-reato-di-detenzione-di-materiale-pedopornografico-alla-luce-delle-moderne-tecnologie/> (last accessed May 2, 2018).

⁶⁵¹ Farina, M. (2012) Fondamenti di diritto dell'informatica. Experta. Forli. Pg. 293-294.

⁶⁵² Ibid.

⁶⁵³ Tribunale Ordinario di Brescia, Sezione Seconda Penale, Sentenza 22 aprile - 24 maggio 2004 n. 1619.

⁶⁵⁴ Ibid.

use those files at any given time, like in the case of intentional downloading and possession.⁶⁵⁵ But if the person gets to know about those files existing in his/her computer, he/she is excluded from criminal liability only if he/she immediately deletes those files from the computer. The provision and the court emphasize as a constitutive element the knowledge and consciousness that the material includes child pornography. Nevertheless, it is not clarified whether knowledge refers only to the nature of the material, or also to the fact that the material is the result of sexual exploitation of children.⁶⁵⁶ Based on this judgement, the mere accession to child pornographic material is not covered by the Italian legislation, if no intention of saving the material is proved, and despite any fact that the accession to the material has occurred more than once.

Such intention of the legislator was confirmed also by a court judgement of 2006, where it was held that the simple viewing of child pornographic material on the Internet does not constitute a criminal offence, since based on the domestic legislation, the detention of the pornographic material is necessary, by saving the file in a paper or electronic format, so as to be able to see it at any desired time.⁶⁵⁷ The court established that the existence of the pornographic material at the Internet temporary files (cache), due to automatic saving which results when a person accesses the files online, is not sufficient to criminalize the user of that computer for detention of child pornographic material because those files are automatically downloaded from the system and not intentionally from the person, thus they are not considered to be at that person's disposal to view them at any desired time.⁶⁵⁸ This court decision, interpreting art. 600-quarter of the Italian Penal Code, makes clear the Italian stance of the (non)criminalization of viewing child pornography without downloading the material. Obviously, such a stance shows that Italy failed to implement Art. 5 (3) of the Directive 93/2011/UE, which requires Member States to criminalize the knowingly obtaining access to child pornography via ICT, thus failing to fulfil its duties under EU law. Despite criminalizing the use of Internet for the purpose of distribution and dissemination of child pornography, Italian criminal law does not cover the mere access to child pornography,⁶⁵⁹ leaving this way unregulated the online viewing of child pornography

⁶⁵⁵ Cass. Pen., Sez. III, 7 giugno 2006, n. 20303; Destito, V.S., Dezzani, G. and Santoriello, G. (2007) *Il diritto penale delle nuove tecnologie*. CEDAM. Milano. Pg. 156.

⁶⁵⁶ Farina, M. (2012) *Fondamenti di diritto dell'informatica*. Experta. Forli. Pg. 294.

⁶⁵⁷ Lorusso, S. and Manna, A. (2007) *L'abuso sessuale sui minori: prassi giudiziarie e novità normative introdotte dalla Legge 38/2006 sulla pedopornografia*. Giuffrè Editore. Pg. 42.

⁶⁵⁸ Ibid.

⁶⁵⁹ Piccotti, L. (2012) *Preparatory Colloquium Session II, Report-Italy*. Pg. 15-16 and 18; Missing Children Europe, Ecpat and eNASCO (2016) *A survey on the transposition of Directive 2011/93/EU on combating sexual abuse and sexual exploitation of children and child pornography*. Pg. 8.

without downloading, notwithstanding the long debates in the jurisprudence, some of which favoring the criminalization of such an act. Such a gap in the law can be used by the child sexual abuse perpetrators in their favor: instead of downloading the images, they can limit themselves into viewing the illegal material online without saving it, thus avoiding any criminal liability and sanctions. It is obvious that the viewing without downloading does not have any distinction from the downloading and saving (procuring and possession) of child pornographic material in terms of the effect that these two actions have on the proliferation of the production of child pornographic material. The demand for the production of such material continues to be the same, the only thing that changes is that, in order to avoid criminal liability, the clients will limit themselves into watching without downloading the child abuse material. Hypothetically, this can even lead to an increase in the production of new child pornographic material, since potentially, the client who limits themselves to only viewing, would be willing to view always new material rather than already viewed ones. This would be the case especially for material available in pay-per-view sites where in order to access child pornographic material, there is the need to pay a fee. It is more than reasonable to assume that the clients will not be willing to pay for viewing the same material more than once, and if they do not want to save that material, in order to avoid criminal sanctions, then they would demand for new, fresh material, which would lead to the increase in the production of child pornographic material, evidently leading toward more children being abused for the production of such material.

‘Procuring’ has been defined by jurisprudence as the act of gaining possession of files containing child pornographic images such as by downloading such images from the Internet.⁶⁶⁰ These images should have been produced through the sexual exploitation of minors.⁶⁶¹ Intention is considered as a constitutive element of the crime. The legislator has distinguished between the *dolus directus* of intentionally procuring and possessing child pornography (art. 600-quarter PC), and the *dolus directus* of intentionally spreading and distributing the illegal content intentionally procured and possessed (art. 600-ter, para.3). This distinction has further been interpreted by the Court of Cassation which has declared that the existence of the *dolus directus* to procure and possess child pornography, does not automatically presume also the existence of *dolus directus* to distribute such material.⁶⁶² The intention to

⁶⁶⁰ Destito, V.S., Dezzani, G. and Santoriello, G. (2007) Il diritto penale delle nuove tecnologie. CEDAM. Milano. Pg. 154.

⁶⁶¹ Farina, M. (2012) Fondamenti di diritto dell’informatica. Experta. Forli. Pg. 293-294.

⁶⁶² Proving the use of file-sharing applications does not constitute sufficient evidence for sentencing for the offence under art. 600-ter, para.3, even in cases when downloading of material from these applications,

distribute, as clarified by a previous judgement of the Court of Cassation back in 2008, is proven by the fact whether the suspect has put the material in the shared file, rather than only by the objective fact of that person using file-sharing P2P applications.⁶⁶³ Neither is it sufficient to prove the intent of distribution, the initiation of downloading pornographic material from P2P applications, and not even searching for such material.⁶⁶⁴

The criminalization of the mere detention or possession of child pornographic material without the intention of distributing has been the cause of many debates in Italy, resulting even into a recourse of a court judgement to the Court of Cassation. The recourse was based on the idea that a person viewing and possessing child pornographic materials without demonstrating any clear intent to distribute the material to others, could not be punished because that person was simply exercising his right express his personality and sexual liberty. The court of Cassation ruled against this recourse with the argument that the freedom of expressing one's personality and sexual liberty is not unlimited; based on constitutional law, a person is free to express his/her personality and sexual liberty to the extent that this freedom does not cause any damage to other people, and especially in the case of people that are incapable of protecting themselves, such as children.⁶⁶⁵ The Court of Cassation goes on by highlighting that the activity of production, distribution and commercialization of child pornography exists and continues to grow only because there exists a demand for it, thus, a public of consumers that are ready to buy and possess such material.⁶⁶⁶

e. The Criminalization of Virtual Child Pornography

While UK has incorporated legislation that criminalizes virtual child pornography since 1994 with the Criminal Justice and Public Order Act, Italy incorporated virtual child pornography in its domestic legislation only in 2006 with the adoption of Law No. 38 on Provisions to Fight the Sexual Exploitation of Children and Child Pornography. This law introduced a new type of child pornographic material, the virtual child pornography, thus the computer-generated or modified images that resemble children as well as representations of actual children. This new law made possible for art. 600 *ter* and 600 *quarter* to be applied also in cases involving virtual child pornography when this material has been produced by using images or parts of images of children under 18 years old. Second paragraph of art. 600 *quarter* 1, introduced by Law No.

automatically puts that material into a shared file. See: Cass. Pen. Sez. III, 12 gennaio 2010, n. 11082; Cass. Pen., sentenza 7 novembre 2008, n.11169.

⁶⁶³ Cass. Pen., sentenza 7 novembre 2008, n.11169.

⁶⁶⁴ Ibid.

⁶⁶⁵ Cass. Pen., Sez. III, 20 Settembre 2007, n. 41570.

⁶⁶⁶ Ibid.

38, gives an explicit definition of what constitutes virtual child pornography: “images realized with graphical techniques, partially or totally unassociated with real situations, the representation of which makes them seem like real situations”. The wording of this definition covers modified images of real children, such as a mixture of parts of the body or face of a real existing child with the other parts of the body being computer generated, but it clearly excludes entirely computer-generated images which even though representing children engaged in sexually explicit behavior, do not resemble real children and cannot be confused with real images of children. This view was embraced by the Court of Milan in 2010, in a sentence declaring that the possession of drawings or animated cartoons representing child pornography does not constitute a crime under Italian criminal law.⁶⁶⁷ In this decision, the Court of Milan interpreted the definition of virtual child pornography provided in Art. 600-*quarter* 1 as covering images that represent parts of the body of a real, even though unidentified child, which in the concrete case represented “*an absolutely recognizable part of the body, which is the face, [...] characteristics of proportion, plasticity and movement of the subjects represented as engaged in sexual acts, is representative of a situation similar to the real and detrimental to the honor, dignity and balance of the minor, existing but unidentified, whose image has been exploited and associated with a sexual context...*”⁶⁶⁸.

The judge further examines the reasons behind criminalization of virtual child pornography, stressing that the object of protection of this provision is not public morality but the preservation of the minor from sexual exploitation, thus the legal good protected by the provision, which the Italian legislation has incorporated in the group of crimes against the person, is the physical, psychological, spiritual, moral and social development of minors. Therefore, according to the judge of the Court of Milan, from a constitutional analysis of the provision “*pornographic drawings and therefore cartoons representing fantasy children and adolescents must therefore be excluded from the normative provision...*”, because, the possession of such images, even though reprehensible for their contents contrary to public morality, does not fall within the object of protection of Art. 600-*quarter* 1. This argument can be reasonably deduced also by the language of the provision of art. 600-*ter* para. 1 and 600-*quarter* which clearly require the usage of minors for the creation of child pornographic material as a constitutive element of the crime. Thus, all pornographic material created without the usage of real children, fall under the scope of this provision. Since Art. 600-*quarter* para.1

⁶⁶⁷ Tribunale di Milano. Sez. Pen. IX. Sentenza 11 Novembre 2010.

⁶⁶⁸ Ibid.

makes art. 600-ter and 600-quarter applicable also in cases of virtual child pornography, and virtual child pornography is criminalized by the Italian Penal Code only for cases covered by these two provisions, it is reasonable to deduce that virtual child pornography created completely by technological or other means that do not require the usage of real children for such purposes, cannot be criminalized, as they fall outside the scope of these provisions and outside of the object of protection of these provisions. Nevertheless, there are views in the jurisprudence that still consider the criminalization of child pornography as not consistent with the requirements of art. 600-ter, specifically with the use of a child for the production of the virtual child pornography. As such, Castagna claims that even though images of persons that seem like minors are not criminalized, the criminalization of representations of situations that look like real situations fails to comply with the requirement of putting at risk a legal good protected by law, and even worse according to her is the fact that these cases lack a victim.⁶⁶⁹ While, it might be true that the production of virtual child pornography lacks a direct victim, because no child is harmed, Castagna fails to consider that based on the Italian definition of virtual child pornography, the images are created by combining images of certain body parts of real children with other parts created by graphical techniques. In these cases, even though the situation of abuse of the child is not real, some elements of the images represent a real child. Moreover, those representation might influence their viewers to produce real child pornography or to demand from other the production of real child pornography, thus leading to real children being victimized, indirectly influenced by the existence of virtual child pornography.

The amendments regarding virtual child pornography brought the Italian criminal law regarding child pornography closer to the international and regional legislation. The Italian definition of virtual child pornography is similar to the definition provided by Art. 20 (3) of the Lanzarote Convention, art. 2 (c) of the EU Directive and Art. 2(c) of the OPSC. Despite not being as detailed and developed than the definition provided by the EU Directive, the Italian definition does not limit the scope of applicability of the provision.

f. Public Incitement to Commit Crimes Related to Child Pornography and Child Prostitution

Law N. 172 of 2012 ratifying the Lanzarote Convention and amending the Italian legislation so as to bring it closer to the Convention, added a new provision, art. 414-bis, which

⁶⁶⁹ Castagna, D. (May 2006) Dalla legge 269/98 alla legge 38/06: innovazioni, perplessità ed innovazioni. Available at: <http://www.penale.it/page.asp?mode=1&IDPag=279> (Last accessed 26 April 2018).

criminalizes the public incitement to commit any of the crimes provided in art. 600-bis (child prostitution), 600-ter (child pornography) and 600-quarter (possession of child pornography) even when these crimes are related to virtual child pornography. It is interesting to notice that this provision is specifically addressing incitements made in public. Apparently, the Italian legislation found it necessary to include a stand-alone provision for incitements addressing specifically practices of pedophilia and child pornography, when the incitement is made in public, despite already having a provision (Art. 414) criminalizing the incitement to commit any of the crimes listed in the Penal Code. The incitement in this case should have the power to induce to commit the crime, thus there should be a concrete dangerousness of that conduct.⁶⁷⁰ Therefore, there should be a link that connects the instigation to the commission of the instigated fact.⁶⁷¹ In this new provision, the legislator made the method of committing the crime – the *public* incitement - a constitutive element of this crime. The method and the form in which the incitement is expressed is irrelevant, thus whether the incitement is made online or offline does not make any difference to the legislator for the criminalization of the act. Second paragraph of this provision criminalizes also “*chi pubblicamente fa l’apologia*”, thus whoever publicly apologizes for any of the aforementioned crimes. This means that the Italian legislator has criminalized also the public justification of the commitment of those acts, considering it as an indirect way of incitement to the commitment of those crimes.⁶⁷²

Differently from the other offences analyzed in this section, the offence of public incitement to practices of pedophilia and child pornography was included in the group of offences against public order, rather than offences against the individual personality. This new provision was apparently added by the legislator in order to comply with the requirement set forth in article 8 of the Lanzarote convention. This provision requires State Parties to take measures towards preventing the dissemination of materials advertising the offences established by the Lanzarote Convention.⁶⁷³

The introduction of this new provision did not bring that big change as it appear to bring at first sight, since, as already mentioned, the incitement to commit crimes was already criminalized by the Italian Penal Code. Basically, the only change that this reform made was the introduction

⁶⁷⁰ Tessa, O. Protezione dei minori contro lo sfruttamento e l’abuso sessuale. Centro Nazionale di Documentazione e Analisi per l’Infanzia e l’Adolescenza Website. 22 May 2013 Available at: https://www.minori.it/it/minori/protezione-dei-minori-contro-lo-sfruttamento-e-labuso-sessuale#_ftn7. (Last accessed 9 May 2018).

⁶⁷¹ Ibid.

⁶⁷² Ibid.

⁶⁷³ CoE Lanzarote Convention. Art. 8/2.

of a more severe penalties for the incitement to commit the crimes listed in art. 414-bis, than the one for the other crimes covered by the previously existing art. 414. Even in this direction, the change is only partial, since the maximum limit of punishment remains the same, five years, but the starting level of punishment increases with 6 months (from one year, it became one year and six months). Thus, one may come to the conclusion that, with this “reform” that creates a stand-alone offence criminalizing the incitement to pedophile practices and child pornography, even though these acts were already covered by the general provision of instigation to criminal practices of the domestic legislation, the Italian legislator was trying to show their efforts towards bringing their legislation closer to the international framework, by slightly raising the minimum sanction.

The most appealing part of this new provision is its third paragraph that excludes any exemption from liability under this provision under the pretense of artistic, literature, historic or customary reasons. The intention of the legislator in this case was to clarify that messages that instigate pedophilia cannot be made neither in an artistic context, highlighting in this way that the freedom of expression is not unlimited and that it should be balanced with the right of children to be protected from violence, including sexual abuse. It can be noticed however, that religious instigation to pedophilia is not prohibited by this provision, leaving the text of art. 414-bis open for debate regarding its effectiveness and whether it really brought something new to the domestic legislation regarding the protection of children from child pornography. It remains to the jurisprudence to interpret this provision in order to clarify whether religion was left out intentionally, or mistakenly or, whether the legislator has incorporated it within the customary and historic reasons. There has been no such interpretation by the jurisprudence so far.

The reform of the legislation made by Law N. 172 of 2012 lead also to the specific criminalization of the association for committing any of the offences regarding child pornography and child prostitution. In this case, the legislator did not introduce a new provision, preferring to add a new paragraph to the general provision criminalizing association to commit crimes.⁶⁷⁴ The sentencing for the association to commit these crimes is more severe for the organizers and promoters, while less severe for the simple participants.⁶⁷⁵ With this provision, the legislator aimed to tackle the pedophile networks that operate through the

⁶⁷⁴ Codice Penale e Leggi Complementari. (2017) Hoepli. Art. 416/7.

⁶⁷⁵ The sentencing for organizers and promoters is from four to eight years, while for simple participants it ranges from two to six years of imprisonment. See: Art. 416/7 of the Italian Penal Code.

internet by circulating child pornographic material,⁶⁷⁶ recognizing in this way the high threats posed to children by the new media. Again, the reform did not bring any substantial change to the legislation, besides isolating a specific group of crimes from the general provision and creating a new autonomous section with more severe penalties.

An interesting initiative of the Italian legislation regarding child pornography can be found in the law no. 269 of 1998 which provides for using a part of the fines and seized materials from crimes involving the sexual exploitation of children as funds for victim rehabilitation and a smaller part for rehabilitation of offenders of such crimes, if they request such help.⁶⁷⁷ Thus Italian legislation does not only include measures regarding assistance and support towards the victims of child sexual exploitation and sexual abuse, but it has also incorporated measures towards the rehabilitation of child sex offenders. Nevertheless, the rehabilitation of child sex offenders occurs only upon request of those offenders themselves, not towards all of them. There is no data related to the number of offenders requesting such support. It also remains to be seen how effective such rehabilitation might be. A research on the effectiveness of such rehabilitation measures, with clear data on the reintegration of child sex offenders in the society, their behavior afterwards and their recidivism if any, would be very valuable for evaluating the importance or not of such measures.

2. Offences Concerning Child Prostitution

Until before entry into force of the law no. 269/1998, offences related to child prostitution, thus including the incitement into prostitution, facilitation of child prostitution and exploitation for prostitution were regulated by law no. 75 of 20 February 1958, commonly referred to as the Merlin law. According to this law, the minor age of the victim of offences concerning prostitution was considered as an aggravating circumstance.⁶⁷⁸ In 1998, the Law no. 269 turned child prostitution into an autonomous offence under Italian criminal law, including therein also the organization and advertisement of exploitation of children into prostitution through travel and

⁶⁷⁶ Albamonte, E. (2013) Ratifica ed esecuzione della Convenzione di Lanzarote. Parte I: Le principali modificazioni al codice penale, esclusi i nuovi art. 414 bis e 609 undecies. In *Giurisprudenza di Merito*. Pg. 753

⁶⁷⁷ Italian Working Group for the Convention on the Rights of the Child (2001) *The Rights of Children in Italy: Perspectives in the third sector – Supplementary Report to the United Nations*. Rome. p. 42 Available at: www.crin.org/docs/resources/treaties/crc.32/Italy_ngowg_report.pdf; Committee on the Rights of the Child (2012) Consideration of reports submitted by States Parties under Article 44 of the Convention: Italy. CRC/C/70/Add.13. 12 July 2002. Pg. 101.

⁶⁷⁸ Legge 20 Febbraio 1958, n. 75 (gu n. 055 del 04/03/1958) Abolizione della regolamentazione della prostituzione e lotta contro lo sfruttamento della prostituzione altrui. Art. 4(1)(2).

tourism.⁶⁷⁹ Converting the offence of child prostitution into a stand-alone autonomous offence, instead of an aggravating circumstance of a more general provision, was a move that the Italian legislator took in order to align the national legislation to the international principles which provide stronger regulation of the protection of children from physical, psychological and sexual integrity.⁶⁸⁰

Article 600-bis of the Italian Criminal Code, introduced, as already explained, in 1998, was later amended in 2012 by law No. 172, which ratified the Lanzarote Convention. Aiming towards adopting the Italian legislation to the Lanzarote Convention, the amended law criminalizes the material acts consisting in actions that aim towards gaining profit from sexual activities with children. It introduced the recruitment into prostitution, the organization and the controlling of prostitution and any other activity that allows the subject to gain profit from child prostitution. This provision does not criminalize only the sexual exploitation of minors but also the fact that this exploitation occurs for commercial purposes, making the commercial purposes a constitutive element of the crime. That said, the main purpose of the legislation in this case is the prevention of the creation of a business industry of sex with children,⁶⁸¹ which turns the child into not only a sexual object but also an object for profit. Inspired from the final declaration of the World Congress against Commercial Sexual Exploitation of Children which took place in Stockholm in 1996, where sexual exploitation of children for commercial purposes was defined as a modern form of slavery, the Italian legislator has incorporated the provisions regarding child prostitution right after art. 600 of the Criminal Code, which regards the offence of reduction into slavery, and thus also within offences against individual freedom and personality.⁶⁸²

The first two paragraphs of the provision punish the person which recruits or incites a child into prostitution and the person which organizes the child prostitution, in other words, the one who facilitates child prostitution, exploits the child into prostitution, manages or controls the prostitution of a child or the person that even though does not participate in any of these

⁶⁷⁹ Legge 3 agosto 1998, n. 269 "Norme contro lo sfruttamento della prostituzione, della pornografia, del turismo sessuale in danno di minori, quali nuove forme di riduzione in schiavitù".

⁶⁸⁰ Helfer, M. (2007) Sulla repressione della prostituzione e pornografia minorile: una ricerca comparatista. CEDAM. Padova. Pg. 66; Working Group on the Convention on the Rights of the Childhood and Adolescence. I diritti dell'infanzia e dell'adolescenza in Italia. 3rd Supplementary Report to the UN on the monitoring of the Convention on the rights of children and adolescents in Italy. November 2017. Pg. 197.

⁶⁸¹ Helfer, M. (2007) Sulla repressione della prostituzione e pornografia minorile: una ricerca comparatista. CEDAM. Padova. Pg. 66.

⁶⁸² Working Group on the Convention on the Rights of the Childhood and Adolescence. I diritti dell'infanzia e dell'adolescenza in Italia. 3rd Supplementary Report to the UN on the monitoring of the Convention on the rights of children and adolescents in Italy. November 2017. Pg. 197.

activities, at least takes some economical profit from the prostitution of a child. Clearly, these two paragraphs aim towards punishing the supply side of the chain of industry of child prostitution. While, incorporated into the Italian Criminal Code in order to comply with the requirement of Art. 19 of the Lanzarote Convention, this provision has made possible, at the same time, also the transposition of the provisions of the EU Directive concerning child prostitution and even made the domestic legislation more consistent with the UN OPSC. Whereas on a horizontal comparison, this provision is similar to the provisions of sexual exploitation of children of the Serious Offences Act 2003 of England and Wales, specifically, causing or inciting a child to be sexually exploited (S. 48), controlling a child for the purpose of sexual exploitation (S. 49); arranging or facilitating the sexual exploitation of a child (S. 50) While the terms ‘coercing’, ‘forcing’ or ‘causing’ a child into prostitution are not explicitly used within the text of this provision, it can be inferred that ‘exploitation’ of a child into prostitution, the ‘management’ and ‘control’ of the prostitution of child cover the acts of causing, coercing and/or forcing a child into prostitution. The Italian legislation goes beyond the minimum threshold provided by these international and regional instruments, by criminalizing also the acts of facilitation, organization and management of child prostitution, thus taking into consideration that child prostitution can be represented also in the form of an organized crime by a criminal organization, besides cases of a single person taking care of the whole process of prostituting a child.

While the third paragraph of the same provision criminalizes the demand side of this crime, punishing the client that engages into sexual activities with a child in exchange for money or any other economic profit. This part of the provision incorporates into the domestic law Art. 19(1)(c) of the Lanzarote Convention which criminalizes having recourse to child prostitution. At the same time, it incorporates also art. 3(1)(b) of the OPSC criminalizing the obtaining and procuring a child for child prostitution and transposes Art. 4(7) of the EU Directive which criminalizes engaging in sexual activities with a child where recourse is made to child prostitution. This provision is identical to the offence of paying for sexual services of a child covered by section 47 of the Sexual Offences Act 2003 of England and Wales.

Similar to the legislation of England and Wales, also according to the Italian legislation, it is not necessary for the profit to have been payed/given in advance of the sexual activities with the child. It is enough that a certain profit has been promised for the crime to be considered as

prostitution of a child.⁶⁸³ The criteria of a promised payment or remuneration being enough for the exploitation of the child to be considered as prostitution is similarly regulated by the UN, EU and CoE, in their legal definition of child prostitution provided within the UN OPSC, the Lanzarote Convention and the EU Directive.

It is noticed that in the third paragraph, which tackles the demand side of the problem of child prostitution, there is no mentioning of the term “child prostitution”, instead the term “sexual activities with a child” is used. In this case, there is a need to draw the borders of the term “sexual activities” in order to better understand which acts may fall under child prostitution based on the Italian legislation. The dominant doctrine, defines sexual activities as any physical contact of any part of the body of a person with the genitals, anal or oral of the partner.⁶⁸⁴ As such, all the touching (made with the genital organ, with a hand or with any other part of the body) towards the genital organ or its peripheral parts, or towards the anus or the mouth are considered as falling under the term ‘sexual activity’.⁶⁸⁵ This definition however, encompasses only the minimum threshold of the sexual activities in terms of criminal relevance.⁶⁸⁶

The Italian Penal Code does not include a definition of ‘prostitution’ into the related provision. However, various definition of the term can be found in the legal doctrine. The definition in the vocabulary describes prostitution as the act of giving oneself to the others for money or for any other material interest.⁶⁸⁷ Helfer defines it as “indiscriminate and professional offering of one's own body for profit”.⁶⁸⁸ Helfer apparently adds to the vocabulary definition a legal nuance, the non-discrimination, both in qualitative and quantitative terms: the non-discriminatory choice of ‘clients’, which is based only on the material interest, thus the amount they are willing to pay; and the non-discrimination in terms of quantity of sexual activities offered. In another similar definition, the element of continuity is added, thus highlighting the fact that prostitution is an activity that occurs in a continuous way, rather than in single solicited cases.⁶⁸⁹ Despite the lack of a single legal definition, there are some common elements which

⁶⁸³ Codice Penale e Leggi Complementari. (2017) Hoepli. Art. 600-bis. Para. 3.

⁶⁸⁴ Cadoppi, A. (1999) Commentari delle norme contro la violenza sessuale e della legge contro la pedofilia, parte II, Commentario delle “Norme contro lo sfruttamento della prostituzione, della pornografia, del turismo sessuale in danno di minori, quali nuove forme di riduzione in schiavitù” L. 3 August 1998, 269. CEDAM. Padova. Pg. 409-508.

⁶⁸⁵ Ibid.

⁶⁸⁶ Fiammella, B. and Briciafreddo, L. (2009) Pedofilia e sfruttamento sessuale dei minori: Dalla prostituzione minorile alla pedopornografia on-line. Experta edizioni. Forli. Pg. 30.

⁶⁸⁷ Ibid. Pg. 111

⁶⁸⁸ Helfer, M. (2007) Sulla repressione della prostituzione e pornografia minorile: una ricerca comparatista. CEDAM. Padova. Pg. 67.

⁶⁸⁹ Dolcini, E. and Marinucci, G. (1999) Codice Penale commentato, Parte Speciale. Rozzano. Pg. 3123

can be noticed in each of those definitions, such as the element of profit, the continuity of such a commercial activity, and the non-discrimination in regard to the clients.⁶⁹⁰

Regarding the element of profit, it has been clarified by the jurisprudence that, it is not necessary that the commercialization of child prostitution, thus the payment or payment agreement is done between the child and the client.⁶⁹¹ Neither is it necessary for the child to know that they are being used for commercial purposes or that they are selling their body.⁶⁹² In this way, the jurisprudence has shown to be aware of and has recognized that the prostitution of children often occurs through a mediator who communicates with potential clients and makes the commercial deals for sexual services of the child.

Art. 600-bis of the Penal Code does not explicitly mention the continuity of the conduct of prostitution as a necessary element of the crime, thus implying that also single one-time acts can be considered as child prostitution, differently from the previous regulation of prostitution by the Merlin law which required continuity as a constitutive element of the crime.

3. Offences Concerning Pornographic Performances

Italian criminal law, differently from the law of England and Wales, refers explicitly to pornographic performances involving children. Article 600-ter of the Italian Penal Code, besides criminalizing the production of child pornography, criminalizes also the use of children under the age of 18 for the creation of pornographic performances or pornographic shows. The recruitment or incitement of children into participating in pornographic performances or pornographic shows is also criminalized.⁶⁹³ Noticeably, Article 600-ter criminalizes a series of different acts which are equally sentenced. The legislation has included within the same paragraph, a mixture of different and separate criminal activities, each of which, if committed, is sufficient for the crime to be considered as committed. It should be highlighted that, these are not criminal activities depending on each other, rather, each of them stands alone and one can be committed without the need for the other ones to be committed. Nevertheless, it should be stressed that, if more than one of these acts are committed together, at the same time frame, by the same person, they will not be treated as concurring crimes, they will rather be considered

⁶⁹⁰ Helfer, M. (2007) Sulla repressione della prostituzione e pornografia minorile: una ricerca comparatista. CEDAM. Padova. Pg. 67.

⁶⁹¹ Cass. Sent. n. 165878/84 C.E.D.

⁶⁹² Ibid.

⁶⁹³ Codice Penale e Leggi Complementari. Art. 600-ter. Para. 2.

as one single crime.⁶⁹⁴ The inclusion of these separate acts into the same paragraph of the same provision, eliminates the possibility of them being treated as concurring crimes for sentencing purposes.

Originally, the language of the provision included only pornographic performances, until it was amended in 2012 to include also the term pornographic ‘shows’.⁶⁹⁵ Until before this amendment, the doctrine and case law were interpreting the term ‘pornographic performances’ in a broad way, which would include any representation of a pornographic nature in front of an audience, even if the audience was only one person.⁶⁹⁶ The new added term ‘pornographic shows’, aside from a change in terminology, did not bring much change to the until then doctrinal interpretation of the provision. Nevertheless, rather, in order not to be viewed as a simple synonym of the pornographic performances, it was made explained that with ‘pornographic shows’ reference should be done to any pornographic representations that are held in front of an audience with an undetermined number of persons; while with ‘pornographic performances’ reference is given to representations addressed exclusively to a determined subject,⁶⁹⁷ which can be even a single person, such as in the case of pay-per-view pornographic performances.⁶⁹⁸ It is not clear however whether in the latter case, the offer for providing pornographic performances can be made to the public and then the execution of the act only towards a specific viewer, or if also the offer should be made from the starting point to only one specific person, the latter being considered as closer to the intention of the legislator.⁶⁹⁹

The provision acknowledges that the purpose for the commitment of these acts can be non-commercial and commercial as well, thus making sure to criminalize both cases. There is no difference in sanctions between commercial and non-commercial pornographic performances, making the purpose of this offence not a constitutive element of the crime of pornographic performances. In the case of inciting a child to be engaged in child pornography, based on the

⁶⁹⁴ Gizzi, L. (2007) Il delitto di pornografia minorile, in Coppi, F. eds. (2007) I reati sessuali, I reati di sfruttamento dei minori e di riduzione in schiavitù per fini sessuali, 2nd edition. Torino. Pg. 430-431.

⁶⁹⁵ Legge No. 172/2012.

⁶⁹⁶ Cadoppi, A. (2006) Commento all’art. 600-ter, I e II comma c.p., in A. Cadoppi Eds. (2006) Commentario delle norme contro la violenza sessuale e contro la pedofilia. CEDAM. Pg. 143; Aprile, S. (2006) I delitti contro la libertà individuale. CEDAM. Padova. Pg. 195.

⁶⁹⁷ Fiadaca, G. and Musco, E. (2007) Diritto Penale parte speciale. Vol.2. 4th edition. Bologna: Zanichelli. Pg. 174.

⁶⁹⁸ Andreazza, G. and Pistorelli, L. (2012) Novità legislative: L. 1 ottobre 2012, n. 172, recante “Ratifica ed esecuzione della Convenzione del Consiglio d’Europa per la protezione dei minori contro lo sfruttamento e l’abuso sessuale, fatta a Lanzarote il 25 ottobre 2007, nonché norma di adeguamento dell’ordinamento interno. Rel. n. III/10/2012. 19 October 2012. Pg. 10. Available at: <https://www.penalecontemporaneo.it/d/1790-legge-1-ottobre-2012-n-172-ratifica-ed-esecuzione-della-convenzione-del-consiglio-d-europa-per-la-p> (Last accessed 11 May 2018).

⁶⁹⁹ Ibid; Bricchetti, R. and Pistorelli, L. (2012) Carcere per chi assiste a spettacoli pornografici. GD. 43. 95

Italian doctrine, the crime is considered as committed if the pornographic performances are in the stage of preparation or have been completed.⁷⁰⁰ The solicitation of minor for taking part in future pornographic performances that have not yet been planned is not sufficient.⁷⁰¹

The active and passive subjects of the offences related to pornographic performances within this provision are the same as for the acts of production of child pornography regulated by the same provision as discussed in the section related to the offences of child pornography. Previously, this the terminology of this provision was such that it criminalized the exploitation of children for the production of pornographic performances or shows or for the production of child pornography, a similar terminology with Art. 4(2) of the EU Directive and Art. 21(1)(b) of the Lanzarote Convention. But this terminology has caused many debates related to its compliance with constitutional principles of specificity and certainty (*nullum crimen sine lege stricta*) because the term ‘exploitation’ was thought to have a very broad meaning which caused problems when trying to define the extent of criminal conduct falling within the provision.⁷⁰² Debates included also the necessity of specifying the purpose of profit if “exploitation” was the term used, obviously since exploitation in itself means that there exists a kind of profit. These debates led to the amendment of the terminology of the provision in 2006 by the Law No. 38/2006 “Provisions on combating the sexual exploitation of children and child pornography, including via the Internet”. This law, despite the fact that it uses the term ‘exploitation’ in its title, substituted the term ‘exploitation’ by the term ‘use’ in the first paragraph of the article 600-ter, so that now it is enough for the child to be used, rather than exploited, for pornographic performances for the crime to be considered as committed.⁷⁰³

Previously, the investigating agents had to prove a specific intent: that the child was exploited and not only used. This meant that the activity could not be occasional and had the scope of producing child pornographic material or pornographic performances for gaining some kind of

⁷⁰⁰ Cadoppi, A. (2006) Commento all’art. 600-ter, I e II comma c.p., in A. Cadoppi Eds. (2006) Commentario delle norme contro la violenza sessuale e contro la pedofilia. CEDAM. Pg. 162-163; Piccotti, L. (2007) La legge contro lo sfruttamento sessuale dei minori e la pornografia in internet (L. 6 Febbraio 2006, n.38). SJ. 1059 ss.

⁷⁰¹ Ibid.

⁷⁰² Pittaro, P. (1998) Le norme contro la pedofilia, A) Le norme di diritto penale sostanziale. DPP. 1226 ss.; Aprile, S. (2006) I delitti contro la liberta individuale. CEDAM. Padova; Romano, B. (1998) Profili penalistici dell’ abuso sessuale sui minori. Diritto familiare. Pg. 1133-1564; Antolisei, F. (2008) Manuale di diritto penale: parte speciale. Vol. I. XV edition. Milano: Giuffre. pg. 175; Mantovani, F. (2014) Diritto penale parte speciale. Vol. I. 5th edition. Padova: Cedam. pg. 495.

⁷⁰³ Legge 6 febbraio 2006, n. 38 "Disposizioni in materia di lotta contro lo sfruttamento sessuale dei bambini e la pedopornografia anche a mezzo Internet" pubblicata nella Gazzetta Ufficiale n. 38 del 15 febbraio 2006 (Provisions on combating the sexual exploitation of children and child pornography, including via the Internet) Article 2(1)(a).

profit, and not necessarily for sexual gratification purposes.⁷⁰⁴ While with the new term ‘using minors’, only a generic intent is necessary to be provided and there is no need for the existence of an economic profit anymore for the crime to be considered as committed, as long as the sexual personality and the fragility of the minor has been offended.⁷⁰⁵

As it regards the subjective elements of the crime, until 2012 also the knowledge of the minor age of the child was a constitutive element of the crime. The perpetrators could be justified of not having known the age of the child and deemed not guilty for these offences. Nevertheless, with the amendments entered into force in 2012 with the Law no. 172, lack of knowledge of the age of the child, known as error of age, cannot be used as a justification anymore and it does not exclude from criminal liability, unless in cases when there is no possibility of knowing that the victim is a child, thus the error of age is inevitable.⁷⁰⁶ Law no. 172, which ratified the Lanzarote Convention, included within also the necessary changes to the Italian legislation which would make possible the implementation into the national law of the requirements of the Lanzarote Convention. While the Lanzarote Convention does not contain any provisions regarding the error of age, apparently the Italian legislation found it appropriate to extend the reform made from this piece of legislation also to the general principles of the criminal liability related to the error of age in offences regarding *inter alia* child pornography and child prostitution. In a judgement in 2007, the Constitutional Court of Italy had already expressly stated that the simple declaration from the minor that he/she is over 14 years of age cannot be used as a justification by the accused if the accused has not taken any steps into verifying the truth of that information.⁷⁰⁷ But until 2012, this regulation was applicable only to offences regarding sexual violence against children and child corruption.⁷⁰⁸ Law no. 172, extended the applicability of this regulation also to the other offences against the individual personality of children. Moreover, the law no. 172 did not stop at the removal of error of age justification for children under 14 years old but went even further by raising the age of the child in these cases

⁷⁰⁴ Castagna, D. (May 2006) Dalla legge 269/98 alla legge 38/06: innovazioni, perplessità ed innovazioni. Available at: <http://www.penale.it/page.asp?mode=1&IDPag=279> (Last accessed 26 April 2018)

⁷⁰⁵ Ibid.

⁷⁰⁶ Art 602-quarter of Italian Penal Code, as amended in 2012 by Law No. 172 of 1 October 2012 “(Ratifica ed esecuzione della Convenzione del Consiglio d’Europa per la protezione dei minori contro lo sfruttamento e l’abuso sessuale, fatta a Lanzarote il 25 ottobre 2007, nonché norme di adeguamento dell’ordinamento interno”, Para. 4(p); Ciocola, M. Error aetatis e atti sessuali con minorene. 3 December 2007. Percorsi Giuffrè. Available at: <http://www.percorsi.giuffre.it/psixsite/Esercitazioni/Pareri/Diritto%20penale/Elemento%20soggettivo/default.aspx?id=1943#> (last accessed 25 February 2018); Corte di Cassazione, Sez. III Penale, Sentenza 2 Ottobre 2013 40748 Pres. Teresi – Est. Rosi, N.40748.

⁷⁰⁷ Corte Costituzionale, sentenza 24 luglio 2007 n. 322.

⁷⁰⁸ Art 609-sexies of Italian Penal Code, as amended in 2012 by Law No. 172.

to eighteen. Thus, since after the entry into force of this law, not knowing that a child is under eighteen years old cannot be used as a justification in court to ones favor anymore, unless in cases when the ignorance of the age of the child was unavoidable.

In cases when there is no financial or other profit purpose for the commitment of pornographic performances, for the crime to be considered as committed the Court of Cassation has clarified that:

“the notions of 'production' and 'performance' require the insertion of the conduct in a context of at least embryonic organization and of destination, even potential, of the pornographic material for subsequent use by third parties.”⁷⁰⁹

This means that in the cases of non-commercial pornographic performances transmitted through information and communication technologies, the transmission should have a kind of diffusive character. The court has even provided a real example of such a case stating that the transmission of a material of a pornographic performance to more than one person through the cell phone potentially augments the diffusive character of the transmission, because it can be easily saved and multiplied by each of the receivers.⁷¹⁰ In a later case, in 2015, the court, while referring also to the above mentioned case, stated that, the large number of relationships with minors from the part of the accused, and the nature and the way in which those relations developed through the exchange of videos and photographs and the tone of the conversations, seem to be indicative elements of a potential for diffusion of such material.⁷¹¹

The necessity for proving the potential for diffusion and a form of organizational conduct, does not exclude from criminal liability under this provision perpetrators who commit pornographic performances in a single case.⁷¹² The commitment of such a crime only once, should not be enough to establish that there is no potential for diffusion and no organizational element from the part of the offender. The judge should analyze the risk of diffusion in such cases based on other indicative elements of the criminal conduct such as the existence of an organizing structure, even an elementary one, suitable of satisfying the demand side of the market of child pornography; the relation of the offender with other pedophiles who can be potential receivers of the pornographic material, the possession or availability of technical tools for the

⁷⁰⁹ Cass. Pen., Sez. III, 12 Luglio 2007. n. 27252.

⁷¹⁰ Ibid.

⁷¹¹ Corte di Cassazione, sez. III Penale, sentenza 25 marzo 2015 – 21 aprile 2015, n. 16616.

⁷¹² Caringella, F., De Palma, M., Farini, S. and Trinci, A. (2016) Manuale di diritto penale – Parte speciale. 6th edition. Dike. Rome. Pg. 1037.

reproduction and/or transmission, even via the Internet of the pornographic material, the use of more than one children for the pornographic performances, the criminal record of the offender, previous conduct of the offender and any other facts that may result from experience with previous cases.⁷¹³ The court has provided similar arguments in a case in 2000, stating that the act shows the nature of a concrete risk if the behavior of a person that uses one or more minors for the production of pornographic performances or pornographic material, that does not fall under other criminal offences, is such that it can imply a concrete risk of diffusion of the material.⁷¹⁴ In another case in 2005, the court based its decision of the existence of such a concrete risk on the possession by the accused of an impressive computer system, of a huge amount of child pornographic material in his possession, and on the fact that he had used a digital camera to take many photographs of the genitals of a child whose face had been hidden, and then those photographs were transferred into a hard-disc of the computer with the intention of diffusion.⁷¹⁵

The provision does not require the audience to be physically present at the place where the crime is committed, it allows for the criminalization also of cases when the audience is viewing the pornographic performance or show in distance, provided that the exhibition is not a previously registered one but is rather transmitted live, on real time, because otherwise it would constitute another crime, that of production and distribution of child pornographic material rather than pornographic performances.⁷¹⁶ It is understood by this doctrinal interpretation that the live transmission through the Internet via video-streaming platforms and devices, of pornographic performances involving children falls under the scope of article 600-ter of the Italian Penal Code. This interpretation of the provision is a clear statement that cases of live-streaming can be easily prosecuted within the Italian jurisdiction by referring to Art. 600-ter of the Penal Code.

But how does the Italian doctrine respond to cases when the viewer, stops being only a passive viewer and starts engaging in the show by requiring the child to perform certain desired acts for him/her? The Italian doctrine has analyzed such cases as well and the interpretation is rather surprising. Accordingly, such cases are not considered as falling under the scope of art. 600-ter anymore, but they are instead considered as exploitation for child prostitution, online

⁷¹³ Picciche, F. (2009) *La pornografia minorile*. RP. 787 ss.

⁷¹⁴ Suprema Corte di Cassazione, Sezioni Unite Penali, sentenza n.13/2000.

⁷¹⁵ Cass. Pen., Sez. II. 21 Gennaio 2005. N. 5774.

⁷¹⁶ Caringella, F., De Palma, M., Farini, S. And Trinci, A. (2016) *Manuale di diritto penale – Parte speciale*. 6th edition. Dike. Rome. Pg. 1038.

prostitution respectively,⁷¹⁷ as treated in the above section. Thus, cases of live-streaming of child abuse where the viewer plays an active role in the abuse by demanding/ordering the child to perform certain specific sexual acts for his sexual gratification, are treated by the Italian legislation as cases of child prostitution rather than pornographic performances involving children.

a. Recruiting, Inciting, Coercing, Forcing or Threatening Children to Participate in Pornographic Performances

Second paragraph of art. 600-ter of the Penal Code criminalizes the recruitment or incitement of children for participation in pornographic performances or shows, as well as the commercial exploitation of children in pornographic performances or shows. Differently from the first paragraph which criminalizes the direct use of children for pornographic performances or shows, this paragraph criminalizes the indirect participation in these activities, by recruitment, incitement or simply by profiting commercially in any other way from the engagement of children in such activities.

This provision is fully compliant to the provision of the EU Directive concerning sexual exploitation of children (Art. 4(2)) and the Lanzarote Convention provision on pornographic performances (Art. 21(a)). Incitement is explained as the activity of persuading, convincing, or forcing a child to take part in pornographic performance, through the use of stimulation or motivation as methods of convincing the child.⁷¹⁸ This requires an active role from the perpetrator. Allowing a child to participate in pornographic performances by taking a passive stance, or simply proposing the child to participate in pornographic performances, is not enough for it to be considered a crime under this provision. Rather, the acts of the perpetrator should have a determining causal effect or at least a reinforcing effect on the decision of the child to participate in the pornographic performances.⁷¹⁹

The Italian Penal Code does not explicitly penalize the coercing, forcing or threatening a child to participate in pornographic performances as required by the Lanzarote Convention and the EU Directive. This does not however mean that these acts are not punishable. Deducing from

⁷¹⁷ Monaco, L. (2003) Commentario all'art. 600-ter c.p. in Crespi, A., Stella, F. and Zuccala, G. (2003) Commentario breve al codice penale. Padova. Pg. 1659; Gizzi, L. (2007) Il delitto di pornografia minorile, in Coppi, F. eds. (2007) I reati sessuali, I reati di sfruttamento dei minori e di riduzione in schiavitù per fini sessuali, 2nd edition. Torino. Pg. 435; Cass. pen., sez. III, 22.6.2010, n. 37188.

⁷¹⁸ Gizzi, L. (2007) Il delitto di pornografia minorile (art. 600 ter, primo e secondo comma, c.p. e art. 600 quater.1 c.p.), in F. COPPI eds. (2007) I reati sessuali. I reati di sfruttamento di minori e di riduzione in schiavitù per fini sessuali, Torino. Pg. 434.

⁷¹⁹ Lattanzi, G. Lupo, E. eds. (2005) Codice Penale, Rassegna di giurisprudenza e di dottrina. Giufree. Milano. Pg. 513.

the interpretation of ‘incitement’ by the Italian doctrine, it can be concluded that these acts are criminalized by the wide interpretation of this term, despite not being mentioned in the legislation with the precise terminology used by the EU and the CoE.

Whereas the act of recruiting children for pornographic performances was introduced in the Penal Code only in 2012 by the Law No 172.⁷²⁰ Recruiting differs from inciting in that in recruiting, the acts of the perpetrator are such that he puts the victim at his disposal for the use for pornographic performances.⁷²¹ Tovani contradicts this explanation, claiming that the concept of recruitment should be considered as included in the wider term ‘incitement’.⁷²² Recruitment and incitement are however, used as different criminal acts also by the England and Wales legislation that criminalizes both acts. The same approach of criminalizing both recruitment and incitement as separate criminal acts is taken also by the international community, reflected in the international and regional legislation that use both terms in their provisions.

The law No. 172/2012 further amended art. 600-ter by adding also the commercial element to the offence of pornographic performances, criminalizing thus also the act of profiting from the use of children in pornographic performances or shows,⁷²³ an act which was not covered by the Italian criminal law so far. This amendment, besides giving recognition to a very crucial element of the offence of pornographic performances, that is the commercial purpose behind the crime, brought the domestic legislation closer to the Lanzarote Convention and the EU Directive, both of which penalize the commercial use of pornographic performances involving children.

It should be highlighted that, the commercial element stands alone rather than as part of the other acts of recruiting, inciting or making pornographic performances. This is understood by the use of the adverb ‘otherwise’ used in the text of the provision: “...recruits or incites minors to participate in pornographic performances or shows, or from the aforementioned shows otherwise profits.” As such, it means that this part of the provision can be used in cases when a person that has not taken part in any other way in the realization of the pornographic performances, in any way profits from those performances.⁷²⁴

⁷²⁰ Legge 1 Ottobre 2012 n. 172. Art. 4(h)(1).

⁷²¹ Denora, G. (2012) Il oggettivo e soggettivo nell’induzione alla prostituzione minorile. *Minorigiustizia*. 4. Pg. 221-227.

⁷²² Tovani, S. (2013) Un ampio spettro di modifiche al codice penale. *LP*. Pg. 49. Ss.

⁷²³ Legge 1 Ottobre 2012 n. 172. Art. 4(h)(1).

⁷²⁴ Caringella, F., De Palma, M., Farini, S. And Trinci, A. (2016) *Manuale di diritto penale – Parte speciale*. 6th edition. Dike. Rome. Pg. 1040.

b. Attending Pornographic Performances involving the Participation of Children

The most significant amendment made by Law 172 regarding offences of pornographic performances is definitely the criminalization of attending pornographic performances involving the participation of children, which was added to art. 600-ter as a sixth paragraph.⁷²⁵ Until that moment, there was no provision criminalizing the spectator of such crimes, thus criminalizing only the offer but failing to properly criminalize the request side of the phenomenon. Such an approach was unjustifiable for a judicial system that guarantees the protection of children from prostitution, pornography and sexual abuse, which had created a handicap in the Italian criminal law system regarding these crimes. It was only due to the ratification of the Lanzarote Convention - which requires state parties to criminalize the viewers of pornographic performances - rather than due to the realization of such a gap by the legislators themselves, that this more than necessary change was made to the domestic system. Indeed, this amendment increased the level of harmonization of the Italian legislation concerning sexual exploitation of children with the Lanzarote Convention and at the same time with the EU Directive, both criminalizing such activity. It is not specified in the text of the provision whether by ‘assisting’ to pornographic performances or shows the legislator has intended to refer to being at the location of the crime in person, or also to the viewing of the performance from distance through methods of transmission such as the ICTs. While there is no reason to differentiate between attending a crime while being in the same location where the crime occurs, and viewing the crime occur in real time through a video-transmitting device, and especially to criminalize one and not the other of these acts, apparently the Italian doctrine does not share this opinion. That said, based on the Italian doctrine, this paragraph is applicable only in cases when the person is attending pornographic performances or shows in person, thus located at the place where the pornographic performances or shows take place.⁷²⁶ This excludes the applicability of this paragraph of art.600-ter for sentencing persons who watch live-streaming of child from home via the Internet. While by a literary analyzes of the text of the provision, the criminalization of viewing pornographic performances through the ICT is not excluded, taking into consideration that the Italian legislator, when referring to online crimes, generally tends to highlight the online element of the crime, by specifically mentioning in the text of the provisions that the crime is criminalized also when committed via the ICT, it can be deduced that, since in this paragraph the legislator did not specifically refer to the ICT, the

⁷²⁵ Legge 1 Ottobre 2012 n. 172. Art. 4(h)(2).

⁷²⁶ Caringella, F., De Palma, M., Farini, S. And Trinci, A. (2016) *Manuale di diritto penale – Parte speciale*. 6th edition. Dike. Rome. Pg. 1055.

doctrine came to the conclusion that intention could have been to leave the online part of the crime unregulated and rather to criminalize only the attendance in person of pornographic performances or shows.

Referring back to the art. 600-quarter, analyzed in the section regarding child pornography offences, the Italian legislator does not criminalize the viewing of child pornography through the ICT without downloading the material. Having this in mind, it seems reasonable to deduce that neither was it the intention of the legislator to criminalize the viewing of pornographic performances or shows through the ICT, otherwise the two provisions would have been controversial to each other.

While knowledge of the age of the child involved in the pornographic performances or shows is not a constitutive element of this criminal act, not being explicitly mentioned in the text of the provision, based on general rules of Italian criminal law, the viewer must know that the pornographic performance or show he/she is attending involves children.⁷²⁷ In any case, as previously mentioned, based on art. 602-quarter of the Penal Code, the error of age does not exclude from criminal responsibility, except in cases when the error was inevitable.

III. Definition of Main Legal Terms

1. Child Pornography

Until 2012, there was no legal definition of pornography in Italy. It was the law No. 172/2012 that introduced a definition of child pornography into the Italian Penal Code, within the provision related to offences of child pornography (art. 600-ter). This change was a necessary step for Italy in order to comply with the recommendation of the UN Committee on the Rights of the Child, which required Italy to include the definition of child pornography in the national legislation as a step towards fully implementing the Optional Protocol of the CRC.⁷²⁸ This change happened six years after the release of the recommendation from the CRC Committee, a demonstration of how slow are the improvements of legislation regarding child pornography in Italy.

Until then, the doctrine and jurisprudence were using two different interpretations of child pornography, one objective and one subjective. The subjective interpretation was based on the

⁷²⁷ Ibid.

⁷²⁸ Committee on the Rights of the Child, forty-second session Concluding Observations: Italy. CRC/C/OPSC/ITA/CO/1. 21 June 2006.

effects that child pornography has on a person.⁷²⁹ While the objective interpretation relates to the content of the material having an objectively sexual nature.⁷³⁰ This second interpretation was more generally accepted since it was more coherent with the objective of the criminal offence, which is the damage caused to the minors from the pornographic material and not the sexual perversity of the offender or the public moral.⁷³¹ That said, taking a photograph of a child in a bath costume in the pool cannot be considered a crime only because it can sexually excite persons with a sexual interest in children (paedophiles).⁷³² If this would be the case, then all the nude photographs of children, including those for advertising purposes and photographs taken by parents would fall under child pornography and would be illegal. The distinguishing element between these images and the illegal ones is the committing of sexual acts by the child or to the child.⁷³³

Furthermore, it is clarified by the Italian case law and jurisprudence that child pornography does not include only material showing a child engaged in sexual activity or a child being sexually abused by an adult, it rather includes also representations of children that are partially or completely nude, in a sexually explicit behavior, without including any sexual contact with an adult.⁷³⁴ These representations should be focused in the genital or anal area of the body of the child.⁷³⁵ Fiammella and Bruciafreddo provide examples of both of the cases: the first one is when the child is the “single” protagonist of the sexual acts and the second is when the child commits sexual acts with another person.⁷³⁶ In the first case, in order for the act to be considered as sexual, the child should perform the act towards his genital or anal area, what is in other words known as masturbation. While in the second case, in the act, which should again focus on the genital or anal area, the child and the partner commit sexual acts together, or one of them commits sexual acts in front of the other, including cases when the child causes the adult to masturbate. It should be noticed that Fiammella and Bruciafreddo righteously put the word “single” in quotation marks, when mentioning that the child is the “single” protagonist in the

⁷²⁹ Folla, N. (2011) Pornografia minorile: per la Cassazione, anche alla luce del Diritto Comunitario, costituisce reato solo una condotta sessualmente esplicita, che coinvolga minori. *Famiglia e Diritto*. Pg. 153.

⁷³⁰ *Ibid.*

⁷³¹ Caringella, F., De Palma, M., Farini, S. And Trinci, A. (2016) *Manuale di diritto penale – Parte speciale*. 6th edition. Dike. Rome. Pg. 1030.

⁷³² Cass. pen., Sez. III, 9 dicembre 2009-3 marzo 2010, n. 8285; Buono, M. (2010) Non è reato la condotta di chi fotografa bambini in costume. *Strumentario Avvocati. Rivista di diritto e procedura penale*. Pg. 65-69.

⁷³³ Fiammella, B. and Bruciafreddo, L. (2009) Pedofilia e sfruttamento sessuale dei minori: Dalla prostituzione minorile alla pedopornografia on-line. *Experta edizioni*. Forli. Pg. 30.

⁷³⁴ Tribunale di Chieti. 8 Novembre 2006. N. 803; Cass. pen., Sez. III, 4 Marzo 2010. N. 10981.

⁷³⁵ Fiammella, B. and Bruciafreddo, L. (2009) Pedofilia e sfruttamento sessuale dei minori: Dalla prostituzione minorile alla pedopornografia on-line. *Experta edizioni*. Forli. Pg. 30.

⁷³⁶ *Ibid.* Pg. 31.

sexual acts, to show that despite the fact that the child is committing the acts alone, it should be obvious that there is someone else behind the camera telling, forcing, or coercing the child to commit such sexual acts.

A clearer interpretation is provided by the Court of Cassation, which in its decision n. 25464 of 8 June 2004, stated that in order to decide whether an image should be considered as having a child pornographic nature or not, consideration has to be given not to whether the genitals of the child shown in the images were partially or fully covered but, rather to the destination of the representation for sexual arousal of others and by its purpose. Consideration in this case is given to the erotic nature of the images and of the movements of the child or children involved.⁷³⁷ In a later decision, the Court of Cassation specifies that, photographing children in bath suite, when there is no explicit sexual conduct by the children in the photographs, or no exhibition of the genitals, thus lacking any pornographic element, cannot be considered as a criminal offence of producing child pornography under Italian national law.⁷³⁸ In this decision, the Court of Cassation declared that, in the lack of a national legal definition of ‘child pornography’ within the Italian Penal Code, the Italian judges should refer to the definition of ‘child pornography’ provided by the Council Framework Decision 2004/68/JHA, which was in force that time, thus interpreting national laws in conformity with this legislation. Thus, based on this court decision, in the lack of a national legal definition, Italian judges are required to rely and apply the definitions provided by the EU legislation on the same matter, to which Italy is obliged to comply, an obligation which derives from the binding character of the framework decisions, as has also been made clear by the Court of Justice Pupino Decision of 2005.⁷³⁹

This interpretation is in line with definitions of child pornography by international and regional legal framework, such as the UN Option Protocol definition and the EU Directive definition.

Currently, with the ratification and implementation of the Lanzarote Convention, by the Law No.172 of 2012, the Italian Penal Code includes this definition of child pornography:

“For the purposes of this provision, child pornography refers to any representation, with whatever means, of a child under the age of 18 engaged in real or simulated, sexually explicit behavior, or any representation of the genitals of a child under the age of 18 for sexual purposes”⁷⁴⁰

⁷³⁷ Cass. Pen. Sez. III. 08.06.2004 N. 25464.

⁷³⁸ Cass. pen., Sez. III 4 Marzo 2010. N. 10981.

⁷³⁹ See: Court of Justice, Judgement of 16.06.2005. *Pupino*. C-105/03 ECLI:EU:C:2005:386, Para. 34.

⁷⁴⁰ Codice Penale, Art. 600-ter, para. 7.

It can be noticed by this definition that Italy has decided to criminalize also the simulated representation of child pornography, compliant with Lanzarote convention. Moreover, the wording ‘by whatever means’ means that Internet child pornography is covered as well. It is unclear from this definition however, if images of adults looking like children are included or not within the scope of child pornography. Neither did the legislator clarify the position regarding pornographic material created for artistic or other similar purposes, leaving it open for interpretation.

Differently from UK, there is no categorization of child pornographic material in Italy based on the severity of the content within it. Following the example of UK would be a very good approach for Italy because it would simplify both the investigation process and the decision making of the judges in cases of child pornography. It would allow for the creation of a stratified sentencing of child pornography cases based on the severity of the content of the material, rather than only on the quantity of the material found in possession of the offender. Such a classification would make possible for perpetrators of more severe child pornographic material to be given a higher sentence than perpetrators of less severe material even if the quantity of the material would be less. Such an approach would allow judges to focus on the content rather than only on the quantity, giving this way more importance and focus to the type and harshness of sexual abuse suffered by the child depicted in that material.

2. Sexual Abuse and Sexual Exploitation of Children

While there is no legal definition of ‘sexual exploitation’ in the Italian legislation, there exist two types of interpretation of this term in Italian doctrine and jurisprudence. In a restricted interpretation, the Italian doctrine refers to ‘exploitation’ as any kind of usage of children taking advantage of their age, due to which they are unable to protect their own interests.⁷⁴¹ While another interpretation, which is based on the English term of exploitation, refers to achieving a personal advantage from using children, when such an advantage is achieved only due to the age of the child.⁷⁴²

In 2000, after long discussions in the Court of Cassation, the interpretation of the term ‘exploitation’ was sent to the United Session of the Supreme Court.⁷⁴³ The Court of Cassation

⁷⁴¹ Tinello, G. La tutela del minore,pg. 423-442. In Cassano, G. ed. (2001) Internet, Nuovi problemi e questioni controverse. Milano. Giuffrè Editore. Pg. 434.

⁷⁴² Ibid.

⁷⁴³ The United Session of the Italian Supreme Court is the most authoritative judiciary body of the Supreme Court of Cassation, who releases legal interpretations which are definite and should be followed by all court instances. The United Session is required to release interpretations in two occasions: if there is a dispute

requested an interpretation of the term ‘exploitation’ from the United Session, even though there was no dispute or debate regarding the term, which demonstrates that a clear interpretation of this term was considered to have a significant importance. The Court of Cassation noticed an uncertainty in the interpretation of ‘exploitation’ in terms of whether the exploitation should be considered as having an economical interpretation of a sociological one. From the economical point of view, exploitation would be regarded as using children for profit purposes, while from a sociological point of view, only the usage of children would be enough to consider it as exploitation, regardless of the economical profit from this usage.

Based on the United Session interpretation, it is considered as exploitation of children even when there is no profit from it, as long as there is divulgation or a potential risk of divulgation of pornographic material to the public.⁷⁴⁴ This interpretation was a mixture between the previously existing economical and sociological doctrinal interpretations, but shifting the focus on the publicity of the pornographic material, highlighting that exploitation means that the produced pornographic material does not remain only within personal use.

This new interpretation can be derived also from the article 600-ter which in its first paragraph covers the production of pornographic material where profit is not a constitutive element of the crime. Meanwhile, its second paragraph highlights the commercial element behind the production of pornographic material. Whereas the fourth paragraph covers cases of offering or giving pornographic material for free, with a complete absence of any commercial purposes.

IV. Case Law Related to Live-Streaming of Child Abuse in Italy

In a judgement in 2004, the Supreme Court gave a novel, more developed and modern definition of ‘prostitution’. According to this definition, there is a shift in focus on what is considered to be the fundamental element of the offence of prostitution. The Supreme Court stated that prostitution should be qualified not anymore based on the typology of sexual activities carried out by the child, but based on the commercial element of those sexual activities involving a child.⁷⁴⁵ The Court further clarifies that, this way, the until then characterizing element of prostitution, the physical contact between the child and the adult, is

between parties in the court for a certain legal term, or if the question is considered of having a significant importance.

⁷⁴⁴ Tinello, G. La tutela del minore.pg. 423-442. Cassano, G. ed. (2001) Internet, Nuovi problem e questioni controverse. Milano. Giuffre Editore. Pg. 435.

⁷⁴⁵ Cass. Pen. Sez. III. 08.06.2004 N. 25464.

not as crucial anymore; the fact that a sexual act is committed in return for payment, and the act is committed in a direct and immediate way, with the possibility of the client to ask for specific acts to be performed, are the characterizing elements of the offence of prostitution.⁷⁴⁶ Hence, according to this ruling, it is only necessary that the client can interact on real-time with the child victim, directing the acts of the child, despite not being located at the same room with the victim. Therefore, Italy recognizes the existence of a form of virtual sex with children, which according to the courts, can be tackled based on the provisions on child prostitution.

By excluding the necessity of physical contact between the parties, thus the child and the ‘client’, the Court has given a completely new dimension to the definition of the offence of prostitution, broadening the scope of the offence. In this way, all kinds of sexual offers made in return for money or any other material remuneration can be considered as prostitution, including touching, or even sexual activities held in distance which do not include any physical contact between the parties. Based on this interpretation, the Italian doctrine has acknowledged the modern phenomenon of “online prostitution” which means, the offering of sexual services or sexual performances in distance, through the internet infrastructure to anyone willing to pay for it. Indeed, this wide definition of prostitution tends to recognize the non-materialization of interpersonal relations that have now started occurring in distance through the ICT in front of a webcam.⁷⁴⁷

Further, the court has declared that selling sexual services through the Internet can be considered as prostitution and thus those who recruit persons for such services or give consent to the exhibition of such services by creating the necessary facilities through the Internet, or even those that gain profit from such activities, can be criminalized for facilitation of prostitution or exploitation for prostitution.⁷⁴⁸ The conditions for these activities to be considered as a form of prostitution, are that the sexual services should be committed in distance, and the activities should be transmitted live over the Internet, such as through videoconference, to the client, who is paying for the services, in such a way that the client can interact with the victim in real time, asking the victim to perform certain sexual acts for him.⁷⁴⁹

⁷⁴⁶ Ibid. Cass. pen., sez. III, 12.2.2003, n. 13039, CED, 224116.

⁷⁴⁷ Bernasconi, C. (2017) I rischi insiti nell'utilizzo del Web come possibile strumento di sfruttamento sessuale dei minori: l'attuazione in Italia della Convenzione di Lanzarote e il potenziamento degli strumenti repressivi. “Annali online della Didattica e della Formazione Docente” – Vol. 9, n. 13/201. 59-71. Pg. 67.

⁷⁴⁸ Sesso virtuale a pagamento puo costituire sfruttamento della prostituzione. Available at: <http://www.ristretti.it/areestudio/giuridici/studi/internet.htm>; Cass. Pen. Sez. III. 08.06.2004 No. 25464; Cass. Pen. Sez. III. 09.04.2015. No. 17394.

⁷⁴⁹ Cass. Pen. Sez. III. 09.04.2015. No. 17394.

This kind of activity, which has been called by Italian doctrine as ‘virtual sex’,⁷⁵⁰ is thus considered as a type of prostitution. The court has made it a constitutive element of the crime, the live transmission of such sexual services, excluding from this regulation cases of pre-registered videos of similar activities, which would normally fall under provisions regarding child pornography. Furthermore, the court clarifies that it can be considered as child prostitution also in cases when the client merely views the child performing sexual acts over himself/herself without directly interacting with the child, as long as the transmission happens in real-time and the user is able to interact in real-time with the child.⁷⁵¹ This court interpretation which changes completely the traditional concept of ‘prostitution’ makes possible for the live-streaming of child sexual abuse to be criminalized as a type of online prostitution or virtual sex.

The Supreme Court has even tried to clarify the distinction between online prostitution and pornographic performances. Indeed, according to the Supreme Court, the element of **interaction** between the victim and the client distinguishes prostitution (even when in distance, online) from the mere pornographic performance. In the first case the client interacts live with the victim, asking them to perform certain acts on themselves or on another person, while in the second case, the client is part of the audience, only viewing the performance without interacting with the victim.⁷⁵² Nevertheless, this judgement of the court is contradictory in that in the same case the court rules that in the lack of a legal definition of prostitution, referring to dominant jurisprudence, physical contact between the client and the victim is a constitutive element of the crime prostitution, thus determining that live on-demand sexual exhibition does not fall under provisions regarding prostitution.⁷⁵³

It should be taken into consideration however, that interpretations of the Court of Cassation are not binding,⁷⁵⁴ the other courts may refer to these sentences, as well as they may disregard them completely. Thus, unless the Constitutional Court releases an interpretation of prostitution which adopts the stand of the Court of Cassation, this interpretation remains a unique non-binding interpretation, which can be considered as a precedent for other courts to follow. But in this case, the interpretation of prostitution in such a broad, innovative way, will most

⁷⁵⁰ See: Sesso virtuale a pagamento puo costituire sfruttamento della prostituzione. Available at: <http://www.ristretti.it/areestudio/giuridici/studi/internet.htm>; Fiandaca, G. and Musco, E. (2007) Diritto Penale. Parte Speciale: Delitti contro la persona. Bologna: Zanichelli. Pg. 138.

⁷⁵¹ Cass. Pen. Sez. III. 08.06.2004 No. 25464.

⁷⁵² Corte di Cassazione. Sez. Pen. III. 21 March 2006. N. 00346/2006.

⁷⁵³ Ibid.

⁷⁵⁴ See: Supreme Court of Cassation website, The functions of the Court: http://www.cortedicassazione.it/corte-di-cassazione/it/funzioni_della_corte.page (last accessed: April 6, 2018).

probably not be embraced by other courts and judges in Italy, taking into consideration the long history of prostitution being considered as having the physical contact as a constitutive element of the crime.

C. OTHER EXAMPLES OF THE TREATMENT OF LIVE-STREAMING OF CHILD SEXUAL ABUSE

I. The example from Sweden

A recent case of live-streaming of child abuse raised many debates in Sweden in 2017. The decision by a judge of the District Court of Uppsala to sentence someone who has watched live-streaming of child abuse from his computer for the offence of rape was very controversial. The offender forced child victims to commit sexual acts in front of the webcam for his sexual gratification and for the production of images and videos by using threats against the victims and their families. Instead of sentencing him for offences such as the production of child pornography and incitement to engage in sexual activity, the judge in the District Court of Uppsala decided to convict him of the very serious offence of child rape. The reasoning underlying this decision, as explained by the court, was the seriousness of the sexual acts the child victims were forced to commit which according to the judge, are tantamount to forced sexual intercourse.⁷⁵⁵ The court acknowledged that, generally, acts performed by an offender on victims have in practice been considered as more serious than acts performed by victims on their own. In this case, some of the victims of the offender were forced to perform certain acts that were more harmful than those suffered by his other of his victims. Such was the case of victim D who was coerced by threats into performing sexual acts with the family dog. These bestial sexual acts were considered by the judge of this case as equivalent to a forced sexual intercourse.⁷⁵⁶ Moreover, the fact that he forced the girl to continue committing the sexual act even after she clearly stated that she was unwilling was considered to be an aggravating fact. On these grounds, the offender was convicted on serious rape against children and of sexual exploitation of children for production of child pornographic images.

In another similar occasion, the offender forced victim C to perform sexual acts in front of the webcam which included placing her fingers and other objects in her vagina and performing

⁷⁵⁵ Rättelse/komplettering Dom, 2017-11-30. Uppsala Tingsrätt (District Court of Uppsala).

⁷⁵⁶ Ibid. Pg. 86-87.

sexual acts on a dog.⁷⁵⁷ He watched the live-streaming of these acts in real time via Skype, giving instructions to the child-victim as to which acts to perform. He even tried to incite C to perform oral sex to a passerby in front of her house, but she refused. Again, the court argued that these were very serious offences and that the severity of these act was comparable to a forced intercourse. The same decision was taken by the judge also in the case of victim N who was forced by the offender to use objects to penetrate her vagina and anus simultaneously in a prolonged way.⁷⁵⁸ In all the three cases mentioned, the reasoning of the judge was the same, leading to a conviction of nothing less than child rape.

Evidently, the judge of this case based the verdict on the severity of the harm caused to the child victims, reaching to the conclusion that, even though there was no physical contact between the offender and the victims, the harm caused to the victims by the acts they were forced to perform under threats from the offender, was so severe that it can be considered comparable to the pain that would have been caused had the offender physically raped the victims. This was the first Swedish case in which the court disregarded the lack of physical contact between the offender and the victim, not holding it to be an essential constitutive element of the crime, and convicted a viewer of online live-streaming of child abuse of rape. It led to huge controversy in the country as to how rape should be defined,⁷⁵⁹ whether physical contact with the victim should be a constitutive element of the crime or not, and whether the charge of rape could also apply in cases of online sexual abuse and “cybersex” where there is no physical contact because the offender and the victim are in different places, possibly even in different countries. Prior to this case, online abuse was ruled by the courts to be sexual assault.⁷⁶⁰ This is the first ruling of its kind to consider live-streaming of child abuse as rape, on the grounds that the acts involved of a gravely serious nature.

Despite the controversy, the argumentation of the judge regarding the degree of harm caused to the child is a very applaudable and necessary approach to the phenomenon of online sexual abuse and sexual exploitation of children, underlining the fact that there is no distinction between online abuse and offline abuse. The psychological and physical harm caused to the child is real in both situations. The arguments adduced in this case underline the need to stop treating online abuse as less important and less harmful than offline abuse. It is an appeal to

⁷⁵⁷ Ibid. Pg. 109.

⁷⁵⁸ Ibid. Pg. 27-28.

⁷⁵⁹ See: The Local.se: <https://www.thelocal.se/20171201/swede-convicted-of-online-rape-of-children-from-us-canada-and-scotland> (last accessed 28 May 2018); <https://www.thelocal.se/20170928/swede-accused-of-sexually-abusing-children-online-in-us-uk-and-canada> (last accessed 28 May 2018).

⁷⁶⁰ Ibid.

society to acknowledge that behind all online child abuse material there is a real child being subjected to sexual abuse, a crucial fact which is sometimes “forgotten”. The intention of the judge was clearly to ensure that online abuse crimes are recognized as being as serious as offline crimes.

Nevertheless, notwithstanding the excellent line of reasoning adopted by the court in this regard - an example to be followed by all the countries - while deciding on a verdict, which was commensurate with the level of harm caused to the child-victim, the judge was faced with a legal lacuna, there being no offence serious enough to reflect the degree of harm caused to the child in a case not involving physical contact. Criminalizing the offender for the offence of forcing a child to engage in child pornography or in pornographic performances would not be a severe enough punishment. A conviction for forcing a child to engage in child pornography or in pornographic performances would not lead to a sufficiently severe penalty. Thus, the court decided that the most appropriate conviction adequately reflecting the serious harm caused to the victim, would be a finding of rape, which in this case carried a sentence of 10 years imprisonment.

This ruling clearly exemplifies the need for specific legislation on the online live-streaming of child abuse in order to distinguish this offence from other offences such as rape, specify the constitutive elements of the crime, and establish an adequate sentencing range, so that judges do not need to go beyond the general interpretations of traditional offences in order to impose a sentence fitting for crime.

The Swedish case, however controversial, was the first one in its kind, and set a precedent for online crimes to be treated as seriously as offline crimes. It remains to be seen, however, if it will lead to online crimes being prioritized differently by the police in criminal investigations. It also raises the question whether a similar sentence and conviction would be possible in other jurisdictions.

II. The example from Belgium

In September 2018, a Brussels court of first instance decided to sentence a perpetrator of online live-streaming of child sexual abuse for rape. This is the first time a court in Belgium applies the rape provision on an Internet crime where the perpetrator did not have any physical contact with the child victim, therefore following the same approach as the Uppsala Court in Sweden.

Based on the facts of the case, the perpetrator contacted young girls through false Facebook profiles, WhatsApp and Viber, enticing them and forcing them to carry out indecent acts, including masturbation and self-penetration in front of the webcam.⁷⁶¹

The Belgian Criminal Code, defines rape as any act of sexual penetration, of any nature whatsoever and by any means whatsoever, committed without consent.⁷⁶² According to this definition, in order for a crime to be considered rape under Belgian law it must satisfy two conditions: the existence of an act of sexual penetration, and the lack of consent from the victim. Based on the wording of this definition, the act of rape is interpreted broadly “of whatever nature and by whatever means”. The physical contact between the perpetrator and the victim is not mentioned at all, meaning that physical contact is not a constitutive element of the offence of rape. Among the fact proving the lack of consent of the victim, the provision includes inter alia the concept of deception or trickery.⁷⁶³ When the victim is a child under fourteen years of age, lack of consent is not a constituent element anymore, equating the act to violent/forced rape.

Despite this broad definition of ‘rape’ by Belgian laws, the Belgian courts always based their decision on rape sentences on the existence or not of physical contact between the offender and the victim. Until September 2018, cases of sexual abuse and sexual exploitation via the Internet were mainly considered as indecent assault.⁷⁶⁴ For the first time, in this judgement the judge argued that the definition of rape is broad enough to punish cases on online sexual abuse despite the absence of physical contact – there was penetration and there was no consent, in this case because the victim was under fourteen years old.⁷⁶⁵ The fact that the perpetrator had incited, forced or manipulated the victim, even though remotely, to penetrate herself was considered enough for the judge to sentence him for rape of a child.⁷⁶⁶

Currently, the decision is not binding and it is subject to appeal. It is likely that this decision will raise many debates as to the new interpretation of the definition of rape. It will be interesting to follow whether this case, together with the Uppsala case in Sweden, will open up new legal fronts in these countries, where future live-streaming of child abuse cases will be

⁷⁶¹ Hope, A. (26 Sep 2018) Five years in Jail for “Rape at a Distance” for Online Abuser. The Brussels Times: <http://www.brusselstimes.com/belgium/justice/12640/five-years-in-jail-for-rape-at-a-distance-for-online-abuser> (last accessed 16 Oct 2018).

⁷⁶² Criminal Code of Belgium. Art. 375.

⁷⁶³ Ibid.

⁷⁶⁴ Wery, E. (25 Sep 2018) Condamne pour Viol... Commis via Internet. Droit & Technologies. Available at: <https://www.droit-technologie.org/actualites/condamne-viol-via-internet/> ((last accessed 28 Sep 2018).

⁷⁶⁵ Ibid.

⁷⁶⁶ Ibid.

considered as rape of a child, or whether they will lead to new legislation specifically addressing the phenomenon of online live-streaming of child abuse.

III. The Example from USA

In a judgement in the USA 15 individuals were prosecuted for the sexual abuse of a 6-year-old child and the live-streaming of that abuse on a video-conferencing platform.⁷⁶⁷ These offenders, located in different states, had collaborated to create a secure space on a video-conferencing website, which would leave no evidence on their computer devices, and where they would then share live-streamed of sexual abuse, including of infants. In 2015, an undercover police investigation led to the discovery of this platform on which the offenders not only watched the live abuse but also commented and encouraged the abuse on real time. Twelve of the offenders pleaded guilty prior to trial, two died before trial, while the remaining two were found guilty on charges of conspiracy to advertise child pornography, conspiracy to receive/distribute child pornography and aiding and abetting the reception/distribution of child pornography.⁷⁶⁸

Evidently, the USA legislation considers the live-streaming of child abuse to be child pornography. There is no distinction in the way cases of pre-recorded child pornography and participation in real-time transmission of child sexual abuse on the Internet are dealt with, despite the fact that in the case in question, the viewers were able to interact with the hands-on abuser and encourage him to continue with the abuse. The USA federal jury did not even consider charging the offenders with the offence of causing or inciting the sexual abuse of a child, simply limiting their verdict to a finding of offences relating to child pornography.

On the other hand, the judgement of the person who physically abused the 6-year-old child while live-streaming the abuse to the 15 men in real-time, was more accurate. He plead guilty to multiple charges involving the production of child pornography and child rape.⁷⁶⁹ While the offences with which the 15 offenders were charged do not, by definition, accurately reflect the nature of the crime of live-streaming of child abuse, the sentences they received – ranging from 10 to 60 years imprisonment followed by a lifetime of supervised release- are severe enough

⁷⁶⁷ US Department of Justice: <https://www.justice.gov/opa/pr/two-men-convicted-engaging-child-exploitation-conspiracy> (last accessed 28 May 2018).

⁷⁶⁸ Ibid.

⁷⁶⁹ See: http://www.pennlive.com/news/2017/02/byers_augusta_recorded_rapes.html.

to reflect the severity and the brutality of their acts, especially when compared with European sentencing ranges which are, in relative terms, much lower.

CHAPTER 4

COMBATING THE LIVE-STREAMING OF CHILD SEXUAL ABUSE AND SEXUAL EXPLOITATION

A. THE SHORTCOMINGS OF EXISTING LEGISLATION FOR TACKLING THE PHENOMENON OF LIVE-STREAMING OF CHILD ABUSE

I. Live-Streaming of Child Abuse in International and European Legal Instruments

To summarize the previous chapters, it can be concluded that the international and European community has made some efforts to incorporate in legislation regarding sexual abuse and sexual exploitation of children the criminalization of the act of viewing of child sexual abuse material without being in possession of such material, which includes the viewing of live-streaming of child abuse over the internet. At UN level, the Optional Protocol to the UN CRC on Sale of Children, Child Prostitution and Child Pornography defines ‘child pornography’ as ‘any representation’ made by ‘whatever means’, thus suggesting that live representations via the ICT can be considered to fall within the scope of this legal instrument. Furthermore, the OPSC reporting guidelines require State Parties to include in their national reports statistics regarding ‘live performances’ of child pornography. However, there is no definition of what constitutes a live performance in the guidelines. Nevertheless, it is safe to say that a live performance, as referred to by the OPSC reporting guidelines, certainly covers one of the forms of live-streaming, namely cases where a child is forced to perform certain sexual acts in front of a webcam or any other live video transmitting device and the performance is viewed in real time by predators connected to the Internet. While this type of abuse definitely can be said to come within the meaning of ‘live-performance’, it is not clear whether the drafters of the guidelines intended to include cases of live-streaming of the sexual abuse of a child by an adult in this term. Nor is there any indication as to how the state parties should deal with cases when the viewer takes an active role in the live-streamed abuse by interacting in real time with the

child victim or the hands-on abuser and asking for certain specific actions to be performed by the child or by the adult to the child.

In the same vein, the ILO Convention on the Worst Forms of Child Labour lists in its Article 3 “the use, procuring or offering of a child for pornographic performances” as one of the worst forms of child labour and calls on member states to criminalize such actions. The inclusion in this ILO Convention of pornographic performances involving children and other forms of sexual exploitation of children as examples of child labour has been the subject of much debate among scholars because it is felt that referring to these forms of child sexual exploitation as a form of work, may imply that the object, the labour, is legitimate but the methods are inappropriate, and that is why they are categorized as “worst forms”.⁷⁷⁰ Moreover, in considering these forms of child sexual exploitation as labour, the authors of the convention give the impression that there is a kind of child consent to them being used for commercial purposes, and thus ignore the fact that children, because of their age and vulnerability, lack the legal capacity to consent to involvement in commercial sexual activities.⁷⁷¹ Furthermore, Bakirci raises another important argument in criticism of the ILO convention by arguing that its authors failed to take into account the cultural differences among the Signatory States. He claims that categorizing commercial sexual exploitation of children as a form of labour leads to child-victims being viewed as child sex workers, which exposes them to many risks in a number of different cultures.⁷⁷²

Nevertheless, despite the controversy and debate, the importance of ILO Convention in paving the way for initiatives to tackle the commercial sexual exploitation of children at international level should not be undermined. As explained in the first chapter of this study, one of the main factors fostering the proliferation of live-streaming of child sexual abuse is poverty. Commercial gain is the main reason for the significant supply of live-streaming of child sexual abuse from poor countries such as the Philippines – that country being the major source of supply. Moreover, by including the use, procuring or offering of children for pornographic performances in the ILO Convention, the authors increased the chance of combating the commercial live-streaming of child sexual abuse in cases where the viewer has to make some payment in order to be able to view a live-stream of child sexual abuse. Again, there is no definition of pornographic performances in the Convention, leaving it to each member state to

⁷⁷⁰ Gillespie, A.A. (2012b) Child pornography in international law. Pg. 65.

⁷⁷¹ Bakirci, K. (2007) Child pornography and prostitution: Is this crime or work that should be regulated? *Journal of Financial Crime*. Vol 14. 5-11.

⁷⁷² *Ibid.*

adopt their own legal definition. This results in major differences among national legislations which hinder the fight against the live-streaming of child abuse, given the inherently global nature of this phenomenon.

Turning to the regional legal initiatives to tackle online sexual abuse and sexual exploitation of children, Council of Europe and European Union have played a very important role in shaping the legal frameworks of their Member States. At CoE level, the Convention on Cybercrime was the first legal instrument regulating Internet crime. Among other things, it addressed the crime of child pornography via computer systems, limiting it to imposing the requirement that State Parties criminalize the production, offering, distribution, procurement and possession of child pornography via a computer system. No mention was made of criminalization of any kind of viewing not involving possession of the child abuse material. The importance of this legal instrument as the first attempt to address computer crimes and even include the criminalization of virtual child pornography should not be neglected. However, the convention recognizes the right to issue reservations regarding the criminalization of virtual child pornography, leading to inconsistencies between national legislations between parties of the same convention.

The Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, known as the Lanzarote Convention, was a major step forward in the protection of children from offences of a sexual nature. The Lanzarote Convention consolidated the existing UN, CoE and EU legal standards and reinforced them by filling the lacunae. It requires statutory countries to criminalize all types of sexual offences against children in keeping with Article 19 of the UN Convention of the Rights of the Child which states that governments must do all they can to protect children from abuse. Further, at Article 20(1)(f), the Lanzarote Convention requires state parties to criminalize the “knowingly obtaining access to child pornography through the ICT”. As further explained in the Explanatory Report to the Convention, the scope of this paragraph was intended to give States the possibility of prosecuting those offenders whose acts do not otherwise fall under the offence of procuring or possession of child pornography. Thus, it was made clear by the authors of the convention that the intention of this provision was to criminalize the viewing of child abuse material when the offender does not download or save the viewed material in any way, and therefore cannot be said to possess the material. Furthermore, since the Lanzarote Convention was drafted more than ten years ago, at a time when online crimes were not so widespread, it was clearly written for an unconnected world. It was impossible for the drafters of the convention to predict which new crimes would

be associated with the highly connected world of today and create a legal text broad enough to encompass as yet non-existent offences. At that time, even if live-streaming of child existed, it was not yet a matter of general public knowledge and cases were very rare. That explains why the provisions of the Lanzarote Convention only cover the viewing without downloading of pre-recorded child abuse material, not of live-streamed material.

Nevertheless, the convention gives State Parties the right to issue reservations not to apply Article 20(1)(f) in whole or in part, and many countries have chosen to exercise this right. As such, Bulgaria, Hungary, Luxembourg and Russia have reserved their right not to apply Article 20(1)(f) in its entirety, while Belgium, France and Germany reserved the right not to criminalize the aiding and abetting and attempt to knowingly obtain access to child pornography via ICT. Giving state parties the possibility of reserving the right not to apply certain parts of a convention prevents the harmonization of legislations on the matter, thus restricting to a certain extent the scope of the convention itself, which is to harmonize legislation, in this case, in order to more effectively combat the sexual exploitation and sexual abuse of children. Such reservations result in inconsistencies among legislations, which are an obstacle to cooperation among countries on cross-border crimes. In the context of online child sexual abuse and exploitation, and particularly the viewing of child sexual abuse material online, and the live-streaming of child sexual abuse, the problem is more acute precisely because of the cross-border nature of these crimes. It is even more serious when countries which are among the ones having the highest request rates for viewing online child sexual abuse material and live-streaming of child sexual abuse chose to opt out of criminalizing such activities.

Similarly, Article 21 of the Lanzarote Convention calls upon States to take all necessary measures to criminalize offences concerning the participation of children in pornographic performances, including recruiting or coercing children for such purposes, profiting or exploiting children for such purposes and knowingly attending pornographic performances which involve children. The aim of this provision is to criminalize both the supply and the demand of pornographic performances involving children, leading to the prosecution of the organizers and recruiters of children for such purposes as well as the consumers, namely those watching such performances.

The use of the term 'knowingly' attending, reassures that this provision is not intended to apply to persons who inadvertently access such performances without having had the possibility of any prior knowledge of what they are going to witness, and who on realizing what is involved

immediately leave or turn off. The intention of this provision is rather to criminalize persons seeking to attend or watch child abuse material online, or to attend such a performance on sight, being aware of what it involves and clearly intend to participate in the crime.

The Convention itself is very vague as to its intended scope and whether it only covers the offline environment or also includes online pornographic performances. However, this question is answered in the Explanatory Report. The Explanatory Report does not exclude the possibility of a broad interpretation of Article 21 of the Convention as to cover online pornographic performances. Nevertheless, it does *not oblige* States to adopt that interpretation either, leaving it to each State to determine whether they will regulate child pornographic performances on the online environment or not.⁷⁷³ When referring to online pornographic performances, the report expressly mentions the use of webcams as a tool for the production of such performances. Webcams are the only tool currently used for such activities, but, given the rapid speed of technological development, the potential for new technological tools replacing and outperforming webcams, and then being exploited by offenders to produce pornographic performances involving children, and for other similar crimes, should be borne in mind when the provision is interpreted and implemented in national law, and while developing new national legislations in this regard.

While this provision provides the basis for criminalizing the phenomenon of live-streaming of child sexual abuse on the Internet, the fact that it is not the Convention text itself but only the Explanatory Report which mentions the online environment, and the fact that interpretation is a matter left to the discretion of the Parties, does not promote the harmonization of national law on the matter. Moreover, in this case the drafters of the Convention did not choose to mention the online environment in the text of the Convention and then set out a right to issue a reservation to it. Rather, they decided *not* to mention the online environment at all in the Convention, but limited themselves to referring to it only in the Explanatory Report, which states that the Parties may adopt a broader definition without falling outside the scope of the Convention. This is a much less effective approach in terms of harmonization, awareness raising and combating the live-streaming crime than the other option of including a right of reservation in the text of the law.

The Lanzarote Convention adopts an even more worrying approach to offences involving the participation of children in pornographic performances in the second paragraph of Article 21,

⁷⁷³ Explanatory Report, Para. 148.

which gives States the right to limit the application of paragraph 1(c) (“knowingly attending pornographic performances involving children”) to cases where the children have been recruited or coerced in accordance with paragraph 1(a) or (b). In other words, States may choose not to criminalize the knowingly attending of pornographic performances involving children in cases when the child involved in such performances has not been recruited, and no coercion or force has been used to make the child get involved in such performances, as well as when the organizer does not derive any commercial profit from such pornographic performances, therefore, when there is a lack of a commercial exploitation element. That said, states may choose not to criminalize the “knowingly attending of pornographic performances involving children” when it is claimed that the child is participating willingly in those performances, without the use of force or coercion, and attendance is free. The text of this paragraph raises two major issues: first, the drafters forget to take account of the fact that children cannot legally consent to participating in such pornographic performances, and that even if it might seem that consent has been expressed by the child, that should and must be disregarded, since children lack the legal right to consent to activities which are harmful to their physical and moral being. Thus, even though it cannot be demonstrated that steps have been taken to recruit, coerce or force, this does not mean that the child is not a victim. And secondly, the right to issue a reservation gives the impression that the authors of the Convention only attach importance to cases of commercial pornographic performances involving children, while similar activities with no commercial element in them, done only for the sexual gratification of the organizers and the consumers, get disregarded.

Also the EU has paid significant attention to the fight against online sexual abuse and sexual exploitation of children. Through the Council Recommendation 98/560/EC on Protection of Minors and Human Dignity⁷⁷⁴ and then the Recommendation 2006/952/EC,⁷⁷⁵ the EU advocates for national self-regulatory mechanisms for the protection of minors in the broadcasting and Internet environments and calls for multi-stakeholder cooperation on the matter, both within national borders and across borders. A more specific piece of legislation on this matter is the 2010 Council Decision to combat child pornography on the Internet.⁷⁷⁶ This

⁷⁷⁴ Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity.

⁷⁷⁵ Recommendation 2006/952/EC of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry.

⁷⁷⁶ Council Decision of 29 May 2000 to combat child pornography on the Internet (2000/375/JHA).

Decision, which is binding on the Member States, requires Member States to take the necessary measures to increase the reporting of suspicious child pornography material on the Internet, to further develop both their human and technological resources to combat online sexual abuse and sexual exploitation of children and also to increase international cooperation on the matter as far as possible.

Possibly one of the most important provisions of this Council Decision is Article 4 which requires Member States to be on constant guard against new technological developments and their misuse so as to continuously update the legislation, in particular criminal laws and criminal procedural laws in order to keep pace with technology and be able to efficiently fight online sexual abuse and sexual exploitation of children. Given the binding nature of this decision, it is a very important legal basis for EU Member States to enact new legislation when it is lacking, and excluding the possibility that they might rely on loopholes in their legislation to justify failure to tackle cases of online sexual abuse and sexual exploitation of children.

However, the most important legal instrument in the fight of sexual abuse and sexual exploitation of children is Directive 2011/93/EU on Combating Sexual Abuse, Sexual Exploitation and Child Pornography which replaced the previously existing Framework Decision 2004/68/JHA. While this Directive is very similar to the CoE Lanzarote Convention, it provides a more robust legal framework introducing many new concepts. One of the most important novelties is the exclusion of the right for Member States to issue reservations to its provisions, which leads to greater harmonization of national legislations among EU Member States, a crucial element in the battle against sexual abuse and sexual exploitation of children.

Despite the fact that both UN and CoE conventions refer to “pornographic performances involving children” as a criminal activity, neither of them provides a definition of what the term includes, leaving it to states to develop their own national definitions. The EU Directive is the first regional instrument introducing a definition of this term. As such, the term ‘pornographic performances’ in the Directive refers to live exhibitions of a child engaged in real or simulated sexually explicit conduct or of the sexual organs of a child for sexual purposes, including by means of ICT, when the exhibition is aimed at an audience.⁷⁷⁷ Apart from this definition, the regulation of the offences concerning pornographic performances is very similar to the regulation provided by the Lanzarote Convention.

⁷⁷⁷ Directive 2011/93/EU Article 2(e).

In the Explanatory Memorandum to the EU Directive the European Commission is explained that the provision relating to “knowingly obtaining access to pornographic performances” is aimed at criminalizing the viewing of child abuse images via the ICT without downloading or storing them on the computer,⁷⁷⁸ thus leaving cases of live video-streaming outside the scope of the Directive. However, subsequently, in a resolution on the implementation of the Directive adopted in December 2017, the European Parliament expressed its concern that Member States have only partially transposed the provision of the Directive, stressing in particular measures against the increased threat of live-streaming of child abuse.⁷⁷⁹ Nevertheless, instead of calling upon Member States to adopt legislation which would make it possible to investigate, identify and punish perpetrators of such a heinous crime, and locate and protect its victims, the European Parliament focuses mainly on the technical methods for detecting and blocking access to live-streamed content. Merely blocking access to such content, does not solve the core issue, which is the identification of abused victims and their protection, the identification of facilitators and perpetrators of this crime and the imposition of adequate penalties. If the legislation in place for tackling live-streaming is non-existent or weak, criminals will always find new ways of abusing with the technology and use it for committing this crime. Thus, tackling the crime from one perspective alone is not sufficient. What is needed is a multi-directional approach, including legislation, technological detection and prevention mechanisms, investigation, the punishment of abusers and the protection of victims.

II. Live-Streaming of Child Abuse in Selected National Legal Systems

Even though Italian courts have tried to criminalize live-streaming by interpreting prostitution laws broadly so as to call it a type of online prostitution, this only applies to cases where the victim - either alone or with other victims - performs sexual acts on the basis of direct communication online with a client who is viewing the performance for his sexual gratification. A necessary element for it to be considered as prostitution is the direct communication between the victim and the client. But that does not include cases when somebody else is sexually abusing, or in the case of adult prostitution, engaging in sexual acts with the victim, and there is direct communication between the client and the hands-on abuser. In other words, this

⁷⁷⁸ Explanatory Memorandum of the European Commission’s proposal for the Directive 2011/93/EU.

⁷⁷⁹ European Parliament resolution of 14 December 2017 on the implementation of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (2015/2129(INI)). Para. 10.

interpretation of the law from Italian courts does not include situations involving a hands-on abuser, but only cases where the real time interaction occurs directly between the client and the victim. The difference between this type of crime and the offense of pornographic performances or shows, according to the Italian judges, is the live interaction between the victim and the client in the case of online prostitution, and thus the fact that the client can direct the performance of the victim in real time. Whereas in pornographic performances, the client is only a viewer, watching passively.

Italy falls short of criminalizing the simple viewing or knowingly obtaining access to child pornography, therefore failing to comply with the Directive 2011/93/EU that requires Member States to criminalize such acts.

Also the UK have certain legal provisions which could be amended so as to include the criminalization of the live-streaming of child sexual abuse. The offence of paying for sexual services of a child would be a good start for prosecuting the viewers of the live-stream. But, as demonstrated in the third chapter, a constitutive element of this offence is the physical contact between the ‘client’ and the child victim. This crime cannot be committed remotely. As it has been demonstrated in the third chapter, for tackling the demand side of the live-streaming of child abuse, the judges in the UK refer to the offence of causing or inciting a child to engage in sexual activities. In the lack of proper legislation to criminalize the viewing of the live-stream, the judges criminalize cases when the viewer records the live-stream under the making of indecent photographs of a child provision.

The provisions tackling the supply side of the sexual exploitation of children in England and Wales are broad enough to be used for prosecuting the facilitators of live-streaming of sexual abuse of children: causing or inciting a child to be sexually exploited in any part of the world, intentionally controlling a person under 18 for the purpose of sexually exploiting that person in any part of the world and intentionally arranging and facilitating the sexual exploitation of a child in any part of the world.⁷⁸⁰

No reference is made to ‘pornographic performances’ in the UK legal instruments. It is assumed however that these illegal activities can be criminalized using the aforementioned provisions of the Sexual Offences Act 2003 on the sexual exploitation of children. However, there are contrasting arguments, and no clear position on the criminalization of viewing without downloading of children pornography in the UK.

⁷⁸⁰ Sexual Offences Act 2003. Sections 48-50

In both legal systems and their case law, there are initiatives toward criminalizing the live-streaming of child abuse to the extent that it can be allowed through a broad interpretation of the existing legal provisions. While these initiatives are impressive and sometimes quite innovative, the status quo of the legal provisions hinders the full criminalization of the live-streaming, as there are certain constitutive elements of the crime that are not covered by any existing legislation. This leads to only a partial criminalization of the live-streaming of children abuse, leaving some aspects of the phenomenon still unaddressed.

B. A NEED FOR NEW LEGISLATION V. THE SUFFICIENCY OF EXISTING INSTRUMENTS

As stated in the previous sections, while it cannot be said that the crime of live-streaming of sexual abuse of children has been completely ignored by international and national legislators, not enough action has yet been taken. There are still major inconsistencies both among national legislations and among jurisdictional disputes due to the global nature of the crime. Moreover, the case law on the matter varies from one country to the other and is largely inconsistent. These inconsistencies and the legal loopholes in the protection of children from the phenomenon of live-streaming of child abuse are in breach of the provisions of the UNCRC to which the majority of the states are Parties. Article 19 of the CRC requires states to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of violence. Despite this obligation under the main international legal document on child protection, many States Parties to the convention still display legal gaps and lack the necessary measures to protect children from online sexual abuse and sexual exploitation, thus being in breach of the convention.⁷⁸¹ An explanation for this might be the lack of an enforcement mechanism to ensure compliance with the convention and the non-existence of a complaints-mechanism for cases of failure to comply with the UNCRC.⁷⁸² There is clearly a need for more effective regulatory mechanisms, and much more collaboration to achieve the harmonization of legislative, procedural, technological and other measures necessary to improve the response towards the issue. Lastly, but not less important, there is a need to raise

⁷⁸¹ Carr, J. and Hilton, Z. (2011) Combating child abuse images on the Internet: international perspectives. In Internet child abuse: current research and policy. Davidson, J. and Gottschalk, P. (eds.) pg. 56. 52-78. Routledge.

⁷⁸² Ibid.

awareness on the matter among the public and the tech community, and in particular to make conscious of their ISPs in protecting children from the live-streaming of child abuse.

I. The Sufficiency of Existing Instruments

The suggestion that new laws are the answer to the problem of live-streaming may be criticized on the grounds that drafting and implementing new legislation is a lengthy and time-consuming process, whereas the technological and ICT environments are constantly and rapidly evolving. The effectiveness of new legislation is questioned on the grounds that while new laws are being drafted to deal with the current situation, technology moves on and offenders are able to exploit other ways of committing online live-streaming abuse. Thus, by the time the new law has been finally approved, it is likely already to be outdated and irrelevant.

In the light of the constantly evolving nature of cyberspace, providing opportunities for innovative methods and tools for committing online crimes, many would argue that it is better to continue to apply existing legislation and interpret it broadly enough to cover all the new forms of ICT crime which may appear. Some of the lawyers and investigators of online crime I interviewed for this study argued that existing legislation provides a sufficient legal basis for states to investigate and prosecute the crimes in question, including the live-streaming of child abuse, providing the wording of the laws is wide enough. even though there is no specific legislation on the live-streaming of online child abuse, some legal professionals dispute that new laws are the answer.

The CRC, which is the most universally ratified legal instrument on the matter, obliges all states to protect children from any kind of violence. The OPSC, the Lanzarote Convention and the EU Directive establish even more detailed obligations on states, based on clearer definitions. Many of the joint police-cooperation initiatives which exist have resulted in successful international investigations. However, when discussing the adequacy of existing legislation, it must first be pointed out that that legislation mainly addresses commercial online sexual exploitation of children, such as trade in child abuse material, but ignores non-commercial online child sexual exploitation, such as peer-to-peer sharing of child abuse material. Law enforcement focus largely on the commercial manifestations of the crime, while the non-commercial side is expanding unnoticed and undetected partly because of the investigative challenges for enforcement agencies, but also because of the lack of legislation fit for purpose.

Secondly, as mentioned above, despite the existence of international legislation, there is a persistent problem of implementation by state parties. Even though most countries are parties to the relevant international treaties, such as the CRC and the Lanzarote Convention, many of them still have not adopted substantive criminal law provisions sufficient to meet even the minimum requirements for child protection. Clearly this leaves open many avenues for child sexual abuse and exploitation. Criminals already take advantage of the legal gaps in national legislation to sexually abuse children.⁷⁸³ For instance, criminals from countries with strict legislation on child protection against online sexual abuse, seek out countries known to lack such legislation or with weak enforcement mechanisms to sexually abuse and exploit children. The widespread phenomenon of live-streaming of child abuse is a classic example of this: it has grown precisely because of the loopholes in national legislation allowing customers from Europe, the USA and Australia to locate poor families in Asian countries such as the Philippines and persuade them to sell their children online for live-streamed sessions of sexual abuse.⁷⁸⁴

Thus, there is an urgent need to close the gaps and remove the disparities in national legislation. In order to meet the requirement to protect children from violence and sexual abuse which is set out in international and European legal instruments, new laws are needed to fill the lacunae in current legislation and keep pace with the technological developments exploited by global criminals.

Nevertheless, the adoption of new legislation must be accompanied by effective implementation and interpretation if it is to produce the desired outcome. Legislation may be perfectly drafted, but its effectiveness is highly dependent on the way judges apply and interpret it in the courts. From the analysis of various live-streaming cases heard by courts in Italy, the UK and some other countries considered in this study, it is clear that in a situation where there is no specific legislation clearly establishing live-streaming as a stand-alone offence, judges interpret and apply existing legislation differently when dealing with cases of live-streaming of child abuse.

⁷⁸³ Carr, J. and Hilton, Z. (2011) Combating child abuse images on the Internet: international perspectives. In Internet child abuse: current research and policy. Davidson, J. and Gottschalk, P. (eds.) 52-78. Routledge.

⁷⁸⁴ See a case of a criminal from Australia paying for live-streaming of child abuse from the Philippines: <http://www.abc.net.au/news/2016-09-07/predators-using-internet-to-direct-live-online-sex-abuse/7819150> (last accessed 2 July 2, 2018).

Although national legislations criminalizing offences involving the online sexual abuse and exploitation of children tends to be fairly similar in terms and are based on the international and regional legal framework, interpretation by the courts tends to vary. For instance, while in Italy the phenomenon of live-streaming is interpreted as a form of online child prostitution, in Sweden it has resulted in charges of rape, whereas in UK it is treated as sexual assault. These differences are noticeable not only from country to country but also within the same country. For instance, not all Italian judges agree that the laws on prostitution apply to the online world, and not all Swedish judges agree that the offence of rape can be committed remotely, without there being any actual physical contact between the abuser and the victim. These disparities in the interpretation of the law are problematic in that they are an obstacle to a unified response to live-streaming. The lack of a unified response and the trend towards widely diverging interpretations of the law makes the prosecution of cross-border cases very difficult. Even though the requirement of dual criminality is generally waived for offences of sexual abuse against children, other issues affecting cooperation in the investigation, prosecution and sentencing of these cases may potentially arise.

II. New Legislation

The main aim of this research study was first to analyze existing international, European and regional legislation and determine whether it provides the necessary legal basis for countries to fight the rapidly emerging trend of live-streaming of child abuse on the Internet. Secondly, the intention was to examine how the countries chosen for this research, - namely Italy and England and Wales, have transposed and implemented in their national legislation, the requirements set out in the international and European legal instruments which are binding on them. In this regard, since these countries have not adopted a specific provision regarding the offence of live-streaming of child abuse, attention was focused on the provisions regulating offences against child pornography, offences against child prostitution and offences against pornographic performances, in order to determine whether the definitions of these offences are wide enough to allow them to apply to the criminalization of live-streaming and the prosecution of offenders. In addition to the legislation in place, case law has also been briefly analyzed, in order to establish which provisions of national criminal laws have been applied by the courts to prosecute persons guilty and on what grounds and basis, in the absence of a specific legal definition of the offence.

When analyzing existing provisions in Italy and England and Wales, the aim was to identify the elements which existing offences of child pornography, child prostitution and pornographic performances have in common with the offence of live-streaming of child abuse on the Internet, and establish whether all the constitutive elements of these crimes match, or not, in order to be able to say whether new legislation is needed, or whether current legislation is sufficient to tackle the as yet nonexistent offence of live-streaming of child abuse.

Analysis of the three types of offence shows that there are crucial elements characterizing the offence of live-streaming which are not present in the other offences, and that there are constitutive elements of the existing offences which are not germane to the offence of live-streaming. The results of this analysis are set out in the tables which follow.

Child prostitution	Vs.	Live-streaming of child abuse
Victims tend to be older children or young adults exploited in cities or tourist areas	Victims	Victims are much younger children, some just two years old, who can be exploited anywhere with internet access.
<ul style="list-style-type: none"> -Customers are physically present at the place of abuse -There is physical contact between the customer and the victim. -The customer is the hands-on abuser of the child -Always have to pay for the 'service' 	Customers	<ul style="list-style-type: none"> -Customers tend to be foreigners who remain in their own country, purchasing abuse via the internet. -No physical contact between the customer and the victim -Customers can direct the live abuse by giving orders to the victim or to the hands-on abuser. -The customer and the hands-on abuser are different persons -The live-streaming may also be offered free of charge
Abusers are established owners or pimps whose only relationship with the victim is for exploitation.	Abusers (Facilitators)	<ul style="list-style-type: none"> -In 60% of cases the abuser is a parent, relative or family friend taking advantage of their relationship. -The facilitator is also the hands-on abuser

Table 5.1. Comparison between the offences of child prostitution and live-streaming of child abuse

Child pornography	Vs.	Live-streaming of child abuse
<ul style="list-style-type: none"> - Victims can be of any age; - Child pornography material can include images of children in engaging sexually explicit conduct, without any form of sexual abuse depicted; or images of children being sexually abused or engaged in sexual acts with other children, with adults or with animals. 	Victims	<ul style="list-style-type: none"> -Victims are much younger children, some just two years old, who can be exploited anywhere with internet access; -Live-streamed material can include children performing sexual acts alone; or children being sexually abused by an adult; or children performing sexual acts with other children, with an adult or with animals.
<ul style="list-style-type: none"> -Consumers are located anywhere in the world and they purchase child pornographic material online or offline -No physical contact between the consumer and the victim -Consumers can ask for specific images to be taken and send to them -Consumers see the material after the abuse has taken place and been photographed or recorded -The customer and the hands-on abuser are different persons -Child pornographic material can also be obtained free of charge -The customer must be in possession of the child abuse material 	Customers	<ul style="list-style-type: none"> -Customers tend to be foreigners who remain in their own country, purchasing abuse via the Internet. -No physical contact between the customer and the victim -Customers can direct the live abuse by giving orders to the victim or to the hands-on abuser while the abuse is happening -consumers view the abuse on real-time -The customer and the hands-on abuser are different persons -The live-streaming can also be offered free of charge -The material is viewed online without being stored or downloaded
<ul style="list-style-type: none"> -Abusers can be a parent, relative or family friend, an assumed boyfriend/girlfriend or an unknown person. 	Abusers (Facilitators)	<ul style="list-style-type: none"> -In 60% of cases the abuser is a parent, relative or family friend taking advantage of their relationship.

Table 5.2. Comparison between the offences of child pornography and live-streaming of child abuse

Pornographic performances involving children	Vs.	Live-streaming of child abuse
<ul style="list-style-type: none"> - Victims can be of any age; - pornographic performances can include a child performing sexual acts alone; or children being sexually abused by an adult; or children performing sexual acts with other children, with an adult or with animals. -victims perform in real-time in front of a group of people or in front of a webcam 	Victims	<ul style="list-style-type: none"> -Victims are much younger children, some just two years old, who can be exploited anywhere with internet access; -Live-streamed material can include children performing sexual acts alone; or children being sexually abused by an adult; or children performing sexual acts with other children, with an adult or with animals -the child abuse is transmitted live on the Internet for an online audience
<ul style="list-style-type: none"> -Consumers can be physically present at the place where the performance takes place or anywhere in the world viewing the abuse via the Internet -No physical contact between the consumer and the victim -Customers can direct the live abuse by giving orders to the victim or to the hands-on abuser while the abuse is happening -Consumers see or view the abuse on real-time -The customer and the hands-on abuser are different persons -pornographic performances are produced for commercial purposes 	Customers	<ul style="list-style-type: none"> -Customers tend to be foreigners who remain in their own country, purchasing abuse via the Internet. -No physical contact between the customer and the victim -Customers can direct the live abuse by giving orders to the victim or to the hands-on abuser while the abuse is happening -consumers view the abuse on real-time -The customer and the hands-on abuser are different persons -The live-streaming can also be offered free of charge
<ul style="list-style-type: none"> -abusers can be a parent, relative or family friend, an assumed boyfriend/girlfriend or an unknown person 	Abusers (Facilitators)	<ul style="list-style-type: none"> -In 60% of cases the abuser is a parent, relative or family friend taking advantage of their relationship.

Table 5.3. Comparison between the offences of pornographic performances involving children and live-streaming of child abuse

The results of these findings are supported by analysis of the case law on live-streaming of child abuse, where it is noticeable that judges, in the absence of adequate legislation enabling them to prosecute the perpetrators of this heinous crime, have tried to abandon the traditional interpretations of existing legal provisions of certain offences, such as offences of child prostitution or rape of a child or causing a child to engage in sexual activities, by applying a broad interpretation of the law, therefore going beyond the definition and scope of these offences, with the specific aim of prosecuting the offenders of the live-streaming of child abuse.

As pointed out above, some of the main international and European legal instruments provide a sufficient legal basis for states to adopt new legislation to deal with the phenomenon of live-streaming of child abuse. Nevertheless, analysis of Italian and English legislation shows that these states feel somehow reluctant in fully implementing existing treaties, either completely ignoring some obligations imposed by the international and European legal instruments or exercising their right to make reservations to certain provisions of the treaties. It is worth mentioning here the failure of Italy to comply with the Article 5(3) of the EU Directive, by lacking any kind of legislation regarding the criminalization of knowingly obtaining access to child pornography through the ICT. As a Member State of the EU, Italy is obliged to implement EU law into its national legislation. Since EU Directives have binding effect on its Member States, it can be concluded that Italy has in this case failed to fully implement the EU Directive, therefore has failed to comply with the EU law.

Article 27 of the Directive 2011/93/EU states that the deadline for transposition by Member States of the provisions of this Directive to their national legislation was December 2013. Currently, as of June 2018, Italy has still not transposed Article 5(3) of the EU Directive. The Commission, as the monitoring body responsible for making sure that Member States properly apply EU law and monitoring the level of transposition of the EU Directives into the national laws, has the power to launch a formal infringement procedure when a country fails to comply with its EU obligations and may even refer the case to the European Court of Justice.⁷⁸⁵ To date, the European Commission has not taken any steps to initiate infringement proceedings against Italy. It must be pointed out that the Commission itself missed the deadline of December 2015 by which it was supposed to have submitted a report to the European

⁷⁸⁵ Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012. Pg. 47–390. Art. 108 and Art. 259

Parliament and the Council assessing the extent to which the Member States have taken the necessary measures to comply with the Directive. In fact, the Commission only submitted the report one year after, in December 2016. Despite the delay, the report was very short and did not provide any details about the level of compliance of each Member State with the Directive.

Another example is the persistent reluctance of the UK to ratify the Lanzarote Convention. Having signed the convention since 2008, UK only finally decided to ratify it only 10 years later, in 20 June 2018. But although it has at last done in, making legislative alignment and further cooperation, in less than one year from now, after Brexit, the UK will no longer be obliged to comply with the EU law, and thus it will no longer be subject to the EU Directive requirement which prohibits Member States from issuing reservations about any of its provisions. Therefore, since the UK has not yet transposed the provision regarding pornographic performances, soon it will no longer be obliged to do so, taking into consideration that even though Lanzarote Convention has the same provision, it is subject to reservations. Thus, ratifying the Lanzarote Convention does not bring any changes in the UK in terms of the adoption of legislation on the sexual abuse and sexual exploitation of children.

In addition to the reluctance of individual countries to ratify or implement the provisions of international treaties in their national legislation, it is important to point out as well that international and European treaties themselves remain to some extent inconsistent to a certain extent and contain loopholes which may be exploited by offenders who seek, pay for or view live-streaming of child abuse on the Internet. The absence of clear legal provisions means that victims are not given the right protection and offenders escape the law or are prosecuted for other similar but not identical offences rather than for the specific criminal actions they have actually committed.

The inconsistencies are even more striking in national legislations. It is worth mentioning here the differences in substantive law regarding the notion of 'child', the age of consent for engaging in sexual activities, the definition of sexual abuse and the definition of what constitutes production and possession of pornographic material. The inconsistencies make cooperation by law enforcement agencies in cross-border investigations and prosecutions more complicated particularly with regard to the transfer of information and access to electronic evidence, unless they rely heavily on Europol and Interpol for the coordination of their activities. These obstacles to rapid investigations, led the European Commission to adopt a proposal in April 2018 for a new Regulation and Directive providing for simplified procedures

for easier and faster access by the police and judicial authorities to electronic evidence in cross-border investigations.⁷⁸⁶

Technology is a two-edge sword: when properly used it is a tool for facilitating the investigation process and identifying connections and links between perpetrators of online sexual abuse and sexual exploitation of children. On the other side, identifying the perpetrators and facilitators of these crimes, especially in the case of live-streaming of child abuse, where the material is not stored on the computer and may take place on the darknet, requires special techniques which may breach fundamental human rights. An example of this would be the use of hacking or surveillance methods which could breach privacy rights, or the simulation of production of child abuse material, or undercover investigations involving knowingly attending a live-streaming session of child abuse with the view to identifying the victim and the perpetrators. Such techniques raise many questions relating to the balancing of rights.

Rescuing victims must be a priority, but if there is no legal basis on which to investigate and prosecute the offenders, then the measures are half measures only, and the crime will continue unabated. Tackling demand should be the starting point, not the often-un-addressed end point. If there is no demand, there is no supply. As long as the demand persists, there will always be a supply, no matter what measures are taken to find and rescue the victims.

States are and should be held responsible for protecting their citizens from any kind of existing and new crimes by enacting legislation and adopting effective investigation and prosecution methods. The obligation on countries to punish serious crimes effectively flows also from article 3 of the European Convention of Human Rights which prohibits torture or inhuman or degrading treatment. This is an absolute right which creates a positive obligation on states to enact adequate and effective substantive and procedural criminal laws to protect their citizens from any kind of serious crime. As interpreted by the European Court of Human Rights (ECHR), this provision not only applies to torture and inhuman or ill-treatment by public officials but also if those crimes are committed by private individuals. As such, in *MC v Bulgaria* case, the court declared that “states have a positive obligation inherent in articles 3 and 8 of the Convention to enact criminal-law provisions, effectively punishing rape and to

⁷⁸⁶ See European Commission, E-evidence – cross-border access to electronic evidence: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/e-evidence-cross-border-access-electronic-evidence_en.

apply them in practice through effective investigation and prosecution.”⁷⁸⁷ Clearly, the ECHR considered rape to be a crime comparable to torture or inhuman or degrading treatment, within the meaning of Article 3 of the Convention. Similarly, given the gravity of the crime of live-streaming of child abuse, which, in addition to rape itself, involves the transmission of acts of rape live over the Internet for others to view in real time, one may conclude that live-streaming should also be treated as a kind of torture and inhuman and degrading treatment as a form of torture and inhuman and degrading treatment perpetrated by private individuals. States should be held responsible under Article 3 of the European Convention on Human Rights for enacting effective criminal-law provisions to punish live-streaming and for applying those provisions effectively in practice on the basis of sound investigative methods in order to achieve successful prosecutions. There are many examples – in addition to the *MC v Bulgaria* ruling – of states being held responsible for the violation of human rights on the grounds of omitting or failing to provide sufficient protection of their most vulnerable citizens namely children, in the particular context of child pornography and sexual abuse.⁷⁸⁸ Thus a new instrument to deal with the phenomenon of live-streaming of child abuse which would address all aspects of the crime would be an appropriate measure to adopt. Such legislation would have to take account of all the factors fostering the global phenomenon of live-streaming, such as poverty, technology, social norms and many other factors. Therefore, an effective legal instrument would be one based on intersectionality, and thus on close international cooperation, and on multi-stakeholder and cross-sectoral cooperation both at national levels and across-borders. Such legislation should abandon the use of terms such as ‘pornographic performances’ or ‘pornographic shows’ to refer to the live-streaming of child abuse since such terms conjure the idea of artistic performance, giving a sense of legitimacy and normality to the phenomenon. The legal term used to refer to live-streaming of child abuse should reflect the real gravity of the crime, and not make the crime seem more innocuous. Many international and national organizations, institutions and even countries do not use the term ‘pornography’ anymore when referring to sexual images of children. The UK has even stopped using the term ‘child prostitution’ in its legislation. The same approach should be taken with regard to the term ‘pornographic performances’.

⁷⁸⁷ *MC v Bulgaria*: ECtHR 4 Dec 2003, Para. 153.

⁷⁸⁸ See: *X and Y v Netherlands* [Judgment] [ECtHR] no. 8978/80, 26 March 1985; *Söderman v Sweden* [Judgment] [ECtHR] no. 5786/08, 12 November 2013.

Another potential solution would be the effective functioning of reporting⁷⁸⁹ and monitoring mechanisms to guarantee implementation of relevant international and European legal instruments. Given that many countries still fail to implement in their national laws the provisions of international and European legislation of which they are signatories, effective reporting mechanisms are needed to make states more conscious of their liability for the human rights infringement of failing to protect their citizens. Italy is an example of a country which has failed to enact legislation criminalizing the knowingly obtaining access to child pornography through the ICT because of its failure to adopt adequate legislation criminalizing the viewing of child abuse images on the Internet Italy should be liable under both the EU Directive and the Lanzarote Convention for failing to protect children from that crime. But so far, Italy has not been reported for failing to comply with its positive obligations under international and European legislation on this matter.

The absence of proper monitoring mechanisms and penalties for failure to comply with international and European legislation undermines harmonization even where countries are part of the same international and European treaties. For instance, according to the 8th report of the International Center for Missing and Exploited Children - a globally operating NGO focusing on the eradication of child sexual abuse both online and offline - as of 2016, 35 countries out of 196 still did not have any kind of legislation addressing child pornography, 50 countries did not criminalize even the possession of child sexual abuse images and 26 countries did not criminalize the sexual abuse and sexual exploitation of children through the ICT,⁷⁹⁰ even though those countries are parties to the CRC and other relevant international and European treaties. Yet no measures have been taken against these countries for failing to comply with the basic fundamental rights enshrined in the international treaties which they have signed.

While following the approach of interpreting the legal provisions broadly enough as to cover the new phenomenon of live-streaming of child abuse might be the most comfortable solution, one of the main principles of criminal law, the principle of legality (*nullum crimen, nulla poena sine lege*), prevents such an approach. Based on this principle no one may be convicted or punished for an act or omission that did not constitute a criminal offence under national or international law in existence at the time it was committed. The purpose of this principle is to

⁷⁸⁹ Markovich, E. (2017) Two Clicks Away: An analysis of the offence of viewing child sexual abuse material on the Internet. Lund University. Master Thesis. Pg. 65.

⁷⁹⁰ International Centre for Missing and Exploited Children (2016) Child Pornography: Model Legislation and Global Review. 8th Edition. ICMEC.

ensure that legislation is specific and predictable in order for people to reasonably foresee the legal consequences of their actions.⁷⁹¹ Associated with this principle is the principle of specificity/certainty (*nullum crimen sine lege certa*), which requires that the definition of the proscribed act be sufficiently precise.⁷⁹² The principle of specificity is directly related to the other principle, that of the prohibition of analogy, which required the definition to be strictly proscribed by law, in order for the act to be considered a crime. Therefore, a judge cannot apply a provision beyond its wording or extend a precedent through the creation of a new unwritten crime.⁷⁹³

Criminalizing live-streaming is required also as a response to technological developments, particularly private browsing sessions, streaming facilities and encryption.⁷⁹⁴ These technologies allow individuals to access live-streaming without leaving sufficient evidence to be prosecuted for current offences. There is no need to possess child abuse material anymore in order to view it. And technology has gone so far as to make possible the viewing of “fresh” child abuse material in real time -while the abuse is happening - instead of viewing material that already exists on the Internet. This possibility of viewing a crime happening in real time, gives the viewer the opportunity to take an active role in the sexual abuse, by communicating with the hand-on abuser and giving instructions on what kind of abuse to perform. And these activities hardly leave any traces on the devices of the offenders.⁷⁹⁵

Having a more specific criminal offense tackling the live-streaming of child abuse would lead to more effective regulatory strategies, addressed toward this specific type of offence, with a potential to increase the number of identifications of child victims. An arguable point is that those who seek to view live-streaming online might then want to physically abuse children

⁷⁹¹ Gallant, K. S. (2008) *The Principle of Legality in International and Comparative Criminal Law*. Cambridge University Press.

⁷⁹² See: *Kokkinakis v Greece*. [Judgment] [ECHR] 25 May 1993. Para. 52.

⁷⁹³ Max Planck Institute for Comparative Public Law and International Law (2010) *Max Planck Encyclopedia of Public International Law*. Heidelberg and Oxford University Press.

⁷⁹⁴ Horsman, G. (2018) *Combatting those who intentionally access images depicting child sexual abuse on the Internet: A call for a new offence in England and Wales*. *Computer Law & Security Review*. 34. 111-124.

⁷⁹⁵ *Ibid.*

themselves,⁷⁹⁶ and maybe to even produce live-streamed material themselves. While there is no evidence to this argument yet,⁷⁹⁷ such a possibility should not be neglected.

Technological developments change fundamentally the shape of an offence.⁷⁹⁸ When technology makes possible to view fresh child abuse material in real time, it is possible that soon we will witness a shift from possession and viewing of already existing child sexual abuse, to viewing live-streamed material without leaving any trace on the devices, thus with offenders of such acts being more protected. A specific provision on live-streaming of child abuse would serve as a deterring effect to those involved or planning to get involved in this kind of criminal activity.

Criminological research has shown that if the certainty of being apprehended for a crime is high, fewer people would get involved in illegal behavior.⁷⁹⁹ In order for deterrence to be impactful, offenders must be aware of sanction risks and consequences before committing the crime.⁸⁰⁰ In the case of the live-streaming of child abuse, the lack of a clear specific legal provision criminalizing the phenomenon increases the believe in potential offenders that they can escape the law and will not be apprehended for their actions. If potential offenders, both the demanders and the suppliers, would believe that punishment for committing the offence of live-streaming of child abuse is more certain, they would be less likely to engage in such an illegal behaviour. Having a clear stand-alone offence on the phenomenon of live-streaming would increase the probability of apprehension, resulting in a more robust deterrence effect, thus probably reducing the live-streaming of child abuse crime rate.

⁷⁹⁶ Babchishin KM, Hanson RK, VanZuyleen H. (2015) Online child pornography offenders are different: a meta-analysis of the characteristics of online and offline sex offenders against children. *Arch Sex Behav*; Vol. 44(1). Pg. 45–66.

⁷⁹⁷ Seto MC, Hanson RK, Babchishin KM. (2010) Contact sexual offending by men with online sexual offenses. *Sexual Abuse*. 23(1), 124–145.

⁷⁹⁸ Combatting those who intentionally access images depicting child sexual abuse on the Internet: A call for a new offence in England and Wales. *Computer Law & Security Review*. 34. 111-124.

⁷⁹⁹ von Hirsch, A., Bottoms, A., Burney, E. and Wikstrom, P-O. (1999) *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*. Oxford: Hart Publishing; Nagin, D. and Pogarsky, G. (2001) Integrating celerity, impulsivity, and extralegal sanction threats into a model of general deterrence: theory and evidence. *Criminology*. Vol. 39(4); Wright, V. (2010) *Deterrence in Criminal Justice: Evaluating certainty vs. Severity of Punishment*. The Sentencing Project. Washington, D.C.

⁸⁰⁰ Wright, V. (2010) *Deterrence in Criminal Justice: Evaluating certainty vs. Severity of Punishment*. The Sentencing Project. Washington, D.C.

III. The Constituent Elements of the Criminal Conduct of Live-Streaming of Child Abuse

As it results from this research study, live-streaming of child abuse is not fully covered by existing frameworks. Despite the possibility of using existing legislation to criminalize the phenomenon, certain forms of the phenomenon remain unpunished. This section draws an assessment of the elements of this criminal conduct which were identified during this research as constitutive elements of the live-streaming of child abuse which distinguish it from other offences related to the sexual abuse and sexual exploitation of children.

1. *The Object of the Crime*

The object of a crime is the essential element of a criminal offence without which the criminal offence does not exist. In criminal law the social relations protected by criminal legislation, which are affected by the criminal act, constitute the object of the crime. Hence, the object of a criminal offence is the set of human rights and freedoms, that are protected by the criminal legislation of a country. In the case of the crime of live-streaming of child abuse, the object can be said to be the judicial relations established by the law in order to protect the physical and psychological integrity of the child, the health and the dignity of the child from the criminal actions included in the live-streaming of child abuse.

2. *Objective Elements of the Criminal Liability*

The objective elements of the crime are those external elements that constitute the characteristics of the criminal conduct and differentiate one specific type of crime from another,⁸⁰¹ serving to determine the legal classification by differentiating between different types of similar offences. The absence of these elements means that the act is not a crime. Thus, the *actus reus* is an essential aspect of the unlawful conduct outlawed in criminal legislation. The objective elements of the crime are: the criminal conduct in the form of an act or an omission to act, the causal connection, the consequences, the method, the time and the place and environment in which the criminal act is committed.

a. The Conduct

The conduct, known also as the external element of a crime, is understood to mean the act or the omission to act of a person that is expressed in the outside world, which, when proved beyond a reasonable doubt and combined with the *mens rea* (guilty mind) give rise to criminal

⁸⁰¹ McAlhane, C and Wortley, N. (2016) Criminal Law: The Fundamentals. Fourth Edition. Thomson Reuters. Sweet and Maxwell. Pg. 12-13.

liability. In the case of live-streaming of child abuse, the crime is one of commission, rather than omission. The *actus reus* of the offence of live-streaming of child abuse consists of two stages: the initial act and the live-streaming. The initial act is a conversation/communication between the viewer (the demander) and the facilitator (the supplier), in the case of the involvement of a facilitator, or a communication between the viewer and the child - similar to the first stage of the grooming offence.⁸⁰² This stage is the same for both parties to the offence. The second part of the *actus reus* is the live-streaming of the sexual abuse of the child which involves three simultaneous actions:

1. the sexual abuse of the child, either by the facilitator, by a third person or by the child themselves;
2. the transmission of that abuse on real-time over the Internet;
3. the viewing or knowingly obtaining access to the stream.

The first two acts are part of the *actus reus* of the supplier of the live-stream, whereas the third act is done by the demander(s). In cases when the viewer actively participates in the abuse by giving instructions to the child victim or to the hands-on abuser on the type of abuse to be committed, the *actus reus* includes another simultaneous action: the remote communication on real-time, while the sexual abuse and its live-streaming is happening. Again, this is part of the *actus reus* of the demander.

b. Causation

Establishing causality means establishing that the actions of the author of the crime have given rise to its effects. In this case, the commission of one of the actions listed above, or of a combination thereof, gives rise to the consequences of the crime of live-streaming. The direct consequences of the crime of live-streaming of child abuse are the sexual abuse and sexual exploitation of the child, and the real-time transmission of such abuse with the help of ICT to an audience, in other words abuse of a two-fold nature. These consequences are directly linked with the requests of the viewer of the live-stream. Had he not sought, requested or accepted to view on real-time the abuse of the child, the abuse would not have happened. This might be an explanation behind the decisions of the courts in Sweden and Belgium assessed in the third chapter of this research, for sentencing the viewers of the live-streaming of the sexual abuse

⁸⁰² For a detailed analysis of the constitutive elements of the grooming offence refer to: Gillespie, A. A. (2004) Tackling Grooming. *The Police Journal: Theory, Practice and Principles*. Vol. 77(3). 239–255.

with rape despite the lack of physical contact: because they directed the abuse. They are the principle and sole cause behind the consequences: the harm of the child.

c. The Method of Committing the Crime

The method whereby a criminal act is committed is of significant importance in determining the category of criminal offence and the degree of danger which it represents. Sometimes the method of committing a crime can be a specific characteristic of the crime in question. The method of committing a crime is related to the tools used.

In the case of the live-streaming of child sexual abuse the main tool to commit the crime is the Internet, and more specifically, the technology that enables live-streaming, via Internet platforms or equivalent applications, of acts of child sexual abuse. The act of live-streaming is a very specific element which distinguishes this offence from other similar offences. The fact that the crime of hands-on sexual abuse of the child is streamed live on the Internet is not simply an added component of the criminal offence of sexually abusing a child offline. In the case of live-streaming, in addition to the crime of actual sexual abuse, there is the further crime of live-streaming of that act. This further act is not proscribed under the provisions on hands-on sexual abuse of a child, not even as an aggravating circumstance.

To charge the perpetrators of such a crime on the grounds of sexual abuse alone is tantamount to prosecuting them only for part of the crime. The live-streaming of the abuse is no less important than the hands-on abuse. The consequences of live-streaming the abuse are much more far-reaching, as the abuse will be viewed in real-time by other perpetrators in different parts of the world, which ultimately makes live-streaming common practice, and gives rise to a commercial demand for child abuse, turning it into a business. The psychological effects on the child are more serious as well. In certain cases, the live-streaming allows remote viewers to ask for certain acts to be performed by the child or on the child by an adult, thus adding a new dimension to the crime: namely, giving perpetrators located far away from the victim the possibility of actively participating in the sexual abuse of the child through the Internet. This additional element increases the level of physical and psychological harm caused to the victim. Being sexually abused by one individual is not and cannot be the same as being sexually abused by someone who is being directed by various other persons who are watching the abuse. In the latter case, the sexual violence is much more severe since the victim is exposed simultaneously to the vile fantasies of more than one child sex abuser. The level of harm can be compared with that of group rape, where each abuser contributes - with his particular fantasies - to the harm

caused. Despite the fact that the performer of the rape in the case of live-streaming of a real rape of a child is a single individual, that person is following the directions of several individuals, each watching and directing the rape in real time as if they were directly involved. Only live-streaming can make this possible. But so far, existing legislation does not criminalize the **viewing and directing** of the live sexual abuse of a child.

d. Location and Time

An offence is circumscribed by its location and the time at which it occurs. Time and location are important elements for determining the jurisdiction and the territorial competences of the court. In the case of live-streaming of child abuse, the offence is committed in two environments simultaneously. On the one hand the child abuse occurs in a specific geographical location, and on the other hand, the crime is transmitted in real-time via the Internet, in an online environment to which individuals from anywhere in the world, having internet access can view it. These parallel environments add a new cross-border dimension to the crime of child sexual abuse and raise jurisdictional issues which have a major impact on the investigation, prosecution, and sentencing of the perpetrators. The availability of live-streaming facilities via the Internet, means that the hands-on abuser of the child victim is located in the same country as the victim, but the person who requests and pays for the abuse may be located in a different country. Payment may occur before or after the abuse has taken place, while viewing occurs in real time with live broadcasting.

In accordance with the principle of specificity, which requires the definition of the proscribed act be sufficiently precise,⁸⁰³ the online environment and the real-time streaming should be recognized as the characteristic elements of the crime of live-streaming of child sexual abuse so as to legally distinguish this offence from other related offences.

A second triangle developed by Barnardo's explains the relation between the location of the perpetrator and the location of the child-victim of sexual abuse, showing that it is not necessary for the victim and the perpetrator to be located in the same place for the crime to be considered as committed. This is an exact reflection of the crime of live-streaming in which the perpetrator and the victim are always located in different places and no physical contact occurs between them. It is the facilitator (the supplier) of the live-streaming of the abuse who is in the same location with the child victim.

⁸⁰³ Refer to section *F.III.* of the first Chapter.

3. *The Subject of the Criminal Offence*

The subject of an offence is essential to crime: he/she is the person who commits the crime and bears the criminal liability for that crime. A person may be deemed criminally responsible for a crime if he/she is conscious of what he/she is doing and has the ability to control his/her own actions, and understand the causal nexus between his/her acts and the consequences of those acts. Hence, the perpetrator of a criminal offence is someone who has reached the legal age of criminal liability as determined by the criminal law, and meets the criminal intent requirement (*mens rea*) - having a blameworthy state of mind.⁸⁰⁴

A criminal offence involves an active subject and a passive subject. The active subject of the crime of live-streaming of child abuse – as in other sexual abuse and sexual exploitation offences - is the author of the crime, in this case the person who views and sometimes directs the streamed sexual abuse by demanding certain acts to be performed by the child or the adult sexually abusing the child. In some cases, the offence of live-streaming of child sexual abuse involves also a second offender: the facilitator of the crime, who might at the same time also be the hands-on abuser of the child. Both the viewer and the facilitator are active subjects of the criminal conduct of live-streaming of child abuse. While the passive subject of the crime of live-streaming of child abuse is the child-victim. According to international legislation on the protection of children from sexual abuse and sexual exploitation both online and offline, which was assessed in the second chapter, a child is any person below the age of 18.

4. *The Subjective Elements of Criminal Liability*

The subjective elements of the crime, which are related to the internal state of mind of the perpetrator with regard to the criminal act and its consequences, determine the criminal liability of the person.⁸⁰⁵ This includes the fault (*mens rea*) or criminal intent, the purpose for committing the crime and the reasons behind it. These elements help to construct a picture of the state of mind of the author of the crime at the time of committing the crime, and thus to determine the type of the criminal offence, the degree of intention and recklessness – level of foresight of the natural consequences - and threat posed by the perpetrator, and to decide on the type and severity of the sentence.

⁸⁰⁴ Card, R. and Molloy, J. (2016) Card, Cross & Jones Criminal Law. 22nd edn. Oxford University Press.

⁸⁰⁵ Weigend, T. (2014) Subjective Elements of Criminal Liability. The Oxford Handbook of Criminal Law.

a. Fault

Most offences require that the perpetrator commit the *actus reus* of the offence having an appropriate state of mind.⁸⁰⁶ This mental element of the offence is known as the *mens rea* or the “fault element”.⁸⁰⁷ The degree of fault of a defendant is analyzed based on the intention, recklessness and to a lesser extent negligence.⁸⁰⁸ Intention is considered as the most serious form of *mens rea* because it means the defendant *deliberately* chooses to act in such a way as to bring about a certain consequence.⁸⁰⁹ A person who acts with intention is considered to be more culpable and presumably gets a higher sentence than someone who merely foresees the consequence (recklessness or *dolus eventualis*) or act carelessly (negligence).⁸¹⁰ Nevertheless, these terms do not exist in isolation.

Lawyers distinguish between two meanings of ‘intention’: direct intention (*dolus directus*) and oblique intention or indirect intention (*dolus indirectus*). The ‘direct intention’ which is considered to be the primary meaning of ‘intention’ means that one intends a consequence if it is one’s aim or purpose to achieve it.⁸¹¹ Whereas the ‘oblique intention’ is when the actual outcome was not the defendant’s aim or purpose but was foreseen by him as an inevitable and certain consequence of his direct intent.⁸¹² For example, if A throws a bomb on a B’s house in order to kill B, knowing that this would inevitably result in the death of B’s family as well because they were inside the house at that moment, then A indirectly intended to kill B’s family. In common law this phenomenon is considered as oblique intent, whereas in civil law as indirect intent.

In the case of live-streaming of child abuse, the crime is deliberate: the offender is fully aware of the consequences of the crime and wants to bring them about. The offenders, both the person who requests and/or pays for the live-streaming of child abuse, and the person who supplies and participates in acts of live-streaming of child abuse, are fully aware that it constitutes a crime, – despite legal and cultural differences regarding the age of consent – and can foresee and are aware of the consequences of their acts. They nevertheless deliberately decide to commit the crime. The aim and object of the perpetrators in this case is to bring about the

⁸⁰⁶ Mcalhone, C and Wortley, N. (2016) Criminal Law: The Fundamentals. Fourth Edition. Thomson Reuters. Sweet and Maxwell. Pg. 52.

⁸⁰⁷ Ibid.

⁸⁰⁸ Ibid. Pg. 54

⁸⁰⁹ Ibid.

⁸¹⁰ Ibid.

⁸¹¹ Ibid. Pg. 55

⁸¹² Ibid. Pg. 56

unlawful consequence: the sexual abuse of the child. In the phenomenon of live-streaming of child sexual abuse referred to in this study, there are at least two offenders involved: the viewer and the one who physically abuses the child. Based on the above-mentioned classification of the intent to commit a crime, the viewer in this case, both the one paying for the view and the one viewing the live-stream for free, act with deliberate intent to view the live-stream of a child being sexually abused by another person, knowing and wanting to bring about the consequence: the sexual abuse of the child by the other person. Whereas the deliberate intention of the hands-on abuser is the sexual abuse of the child (penetrative or non-penetrative) and the transmission of those acts live on the internet. The motive behind these acts is irrelevant for determining the intent.⁸¹³

b. The Purpose of the Crime

As analyzed throughout this study, the purpose of live-streaming of child abuse may be either commercial or non-commercial. The purpose of the non-commercial live-streaming of child abuse is similar to that of the criminal offence of sexual abuse of children, namely the sexual gratification of adults who are sexually attracted to children. In addition to self-gratification, the reason behind giving other perpetrators the possibility of viewing the abuse in real-time, may also be in order to gain status and esteem among peers in a particular online paedophile group, or in exchange for access to restricted child abuse content online.⁸¹⁴

The underlying reason for the commercial live-streaming of child abuse is entirely different from that of non-commercial live-streaming. In this case, as the name suggests, the purpose is purely commercial gain, and the child abusers are not paedophiles, nor do they have any sexual interest in children. Their main reason for abusing children is to earn money to relieve their own poverty. Online perpetrators take advantage of this by offering to pay for the live-streaming of child abuse. These specific circumstances should be taken into account when the offenders are prosecuted. Individuals who use children for live-streaming sexual abuse for commercial purposes, without having any sexual interest in the child, should not be treated in the same way as the non-commercial producers of such live-streaming, that is to say those who sexually abuse children and live-stream the abuse either for sexual gratification or in order to gain credit among paedophile groups. While there is no justification whatsoever for the sexual abuse and sexual exploitation of children, poverty should be taken into account as a relevant factor. The fact that child sex offenders knowingly take advantage of the economic situation

⁸¹³ Ibid.

⁸¹⁴ Terre des Hommes (2014).

when offering to pay to view children being sexually abused, should be considered by the courts to be an aggravating factor. This could potentially have a deterrent effect preventing potential offenders from seeking to pay poor families in developing countries to live-stream abuse sessions.

5. *Viewing as a Criminal Offence*

The viewing of live-streamed material is a problematic issue, which is not entirely covered by current legislation on child pornography and child sexual abuse offences. Generally, the provisions on these offences clearly state that a person must be in possession of child sexual abuse material to be liable for prosecution.⁸¹⁵ There is no legislation explicitly criminalizing the viewing of such material live on the Internet without downloading it. The situation is less problematic in the case of static images because the images accessed are saved in the computer cache,⁸¹⁶ thus evidence can be found. Whether and to what extent the images thus stored are considered to be in the possession of the person who owns the computer, or not, is a matter of national legislation.

The issue remains problematic in the case of non-static images/moving video material that is streamed live via the Internet and is erased from the Internet afterwards. The viewer does not record the live-streamed footage on the computer, and since the material is erased at once from the Internet after the live-streaming is finished, it cannot be recorded in the cache either. If nothing is saved on the computer, no evidence of viewing remains on the computer, and there is no possession offence⁸¹⁷. It might be possible that screenshots of the stream got captured during the buffering of the video, but if those frames did not get stored in the perpetrator's computer, but somewhere in the servers of the service providers, finding that evidence is hardly possible, leaving therefore the crime unpunished.

6. *The Attempt to Commit the Crime of Live-Streaming of Child Abuse*

A possible charge of attempt to commit a crime is an interesting aspect of the live-streaming of child abuse. The specificities of the online environment raise questions which may compromise the charge of actual abuse. What is the position if, after an agreement as to the price, the connection fails? The probability is that this would be considered as an attempt to commit a crime, rather than actual commission.

⁸¹⁵ See Chapter 2.

⁸¹⁶ Gillespie, A. A. (2011a) *Child Pornography: Law and Policy*. Routledge. Pg. 173.

⁸¹⁷ *Ibid.*

In order to clearly set out the dividing line between attempt, crime and no crime at all, it is necessary to determine where the crime begins. Does it start at the point when the parties through an online communication agree on a price in exchange for a live show or live sexual abuse of the child? Does it start when both parties go online and the supplier switches on the webcam? Or does it start when the actual sexual abuse or sexual performance starts?

The first stage of the live-streaming of similar to the first stage of the grooming offence: the communication. But they differ in that in the communication for grooming, the communication is always between the groomer and the child-victim⁸¹⁸ - there is no facilitator – and the communication is more direct in its scope. If evidence of such a communication can be found, it should be enough to prove that the person has embarked on a course of conduct designed to result in the commission of the live-streaming of child abuse. This would make undercover investigation much easier, and similar to the grooming offence, it would create a preventative rather than a reactive offence. Such an approach, would eliminate the necessity of proving that the live-streaming has occurred, eliminating therefore all the evidence gathering obstacles associated with the disappearing live-stream.

Issues might arise in cases of proactive undercover police investigations, where ‘the client’ agrees to pay for the live-streaming of child sexual abuse, without knowing that he is communicating with an undercover police officer instead of a facilitator of live-streaming of child abuse. These cases should be considered as attempt to commit a crime, therefore holding the ‘client’ liable despite there not being any real potential victim. Such an approach would be possible in England and Wales based on the Criminal Attempts Act 1981, the provisions of which proscribe the liability for attempting to commit an offence “even though the facts are such that the commission of the offence is impossible”.⁸¹⁹

All these questions need to be resolved in the specific legal definition of the offence of live-streaming of child abuse. A clear definition would prevent confusion and make the process of prosecution and punishment of the perpetrators easier.

7. Possible Scenarios of Live-Streaming of Child Sexual Abuse

In the light of all the elements and aspects analyzed in this study, the phenomenon of live-streaming of child sexual abuse referred to in this research could be defined as follows:

⁸¹⁸ See: Gillespie, A. A. (2004) Tackling Grooming. *The Police Journal: Theory, Practice and Principles*. Vol. 77(3). 239–255.

⁸¹⁹ Criminal Attempts Act 1981, Section 1(2).

Live-streaming of child sexual abuse is the real-time transmission over the Internet, in front of an online video transmitting device, of a child who, being incited, forced, coerced or threatened by the viewer or by a third person, is performing sexual activities alone or engaging in sexual activities with an adult or with another child, for an audience (one individual or a group) who:

(a) views the real-time transmission of the sexual abuse

(b) gives real-time directions, via the Internet, to the child or the facilitator on the desired type of performances they want to see

in exchange for financial or any other remuneration or for pure sexual gratification.

The live-streaming of child abuse involves:

- Paying for or requesting to view live-streaming of child sexual abuse
- Knowingly obtaining access, through ICTs, to live-streaming of child abuse
- Actively participating/Directing the live-streamed sexual abuse through the ICT
- Offering, arranging or facilitating the live-streaming of child sexual abuse
- Causing, recruiting, coercing or forcing a child to participate in live-streaming of child abuse
- Engaging in sexual activities with a child with the intention of live-streaming those sexual activities for commercial or non-commercial purposes

The act is considered to be unlawful even if the live-streaming of sexual activity appears to be consensual. The live-streaming of child abuse does not always involve physical contact between the facilitator and the victim and never involves physical contact between the child-victim and the person viewing or paying for viewing the real-time abuse of the child online.

The sexual activities in the live-streaming of child abuse may include:

- (a) live performances of a sexual nature by the child alone
- (b) non-penetrative sexual activity of the child with an adult or with another child
- (c) penetrative sexual activity of the child with an adult or with another child
- (d) bestiality or sexual activity involving animals

The phenomenon of live-streaming of child sexual abuse can be divided into three main possible scenarios. In the first scenario, the viewer A, after grooming the child victim through online communication, forces, incited or convinces the child B to make a live pornographic

performance in front of the webcam while A gives instructions on real-time on the sexual acts to be performed. Examples of this scenario are the Uppsala case and the Brussels case accessed in the third chapter, where both courts sentenced the perpetrator for rape of a child. Cases of live-streaming of child abuse falling under this scenario are non-commercial in nature and the purpose of the A is his sexual gratification.

In the second scenario, the communication occurs between the viewer A and a third person C, who offers to exploit a child B into live-streaming of child abuse. After agreeing on the price, C forces B to perform sexual acts in front of the webcam, based on the real-time requests of A. C does not appear on the stream. These commercial cases were considered by the Italian judges as online prostitution.⁸²⁰

The last scenario is similar to the second one, with the distinction that in these cases C appears in the live-stream sexually abusing or raping the child, satisfying the real-time requests of A. These cases can be commercial or non-commercial in nature.

In all the three scenarios, more than one viewer, more than one child and more than one facilitator can be involved.

C. OTHER ASPECTS

The law is the primary and most powerful weapon in the fight against the live-streaming of child abuse. This is because of the global nature of this internet-enabled crime which crosses national borders and is very difficult to investigate because of the anonymity of internet technology which makes it possible inter alia to view live-streamed abuse content without actually downloading it. However, legislation in itself is not enough to combat this kind of crime. There is a need for more cooperation by ISPs and law enforcement agencies to improve information (electronic evidence) sharing, for extensive research in order to understand the abuse phenomenon, discover its weak points in the system of transmitting and concealing live-streaming, and find ways to tackle it, and for increased awareness in society.

I. Enforcement Techniques

While drafting and passing legislation are the first steps, the question remains as to whether countries which have adopted a comprehensive substantive criminal law framework are

⁸²⁰ Refer to the section on the Italian case law in the Third Chapter of this study.

enforcing that legislation effectively. In order to make the legislation really useful, it must be effectively implemented. And for effectiveness to be properly assessed there must be a monitoring system applied by unbiased, well-resourced and competent international bodies on the basis of international collaboration. Implementation of the law is not simply ensuring that each legal component is integrated. As is highlighted by the Lanzarote Convention and the EU Directive, comprehensive implementation requires both preventive and protective measures.⁸²¹ Preventive measures may include, but are not limited to national strategy plans, online protection frameworks, public awareness campaigns, training programs, education programs, research and data collect, etc. Protective measures may include victim care services, rehabilitation services for perpetrators, monitoring and reporting mechanisms, improved investigative tools and processes.

Multi-stakeholder cooperation is another important element in ensuring effective implementation of legislation. Collaboration between different stakeholders and sectors helps to maximize resources, avoid duplication and effort and facilitate the exchange of information and faster identification of perpetrators and victims.⁸²²

The adoption of specific and clear substantive criminal law provisions has a strong effect in increasing the certainty of being apprehended for committing a crime, but this should be accompanied with high rates of effective prosecution. Such an evidence-based approach of laws being actually enforced would further increase the certainty of punishment,⁸²³ by increasing the likelihood that criminal behavior of live-streaming of child abuse would be detected. Subsequently, an increased certainty of being punished for this criminal activity, would have an even more robust deterrence effect on potential offenders of live-streaming of child abuse. In order to increase the number of offenders being punished for the offence of live-streaming of child abuse, very specific investigation techniques must be developed and employed, otherwise the detection of cases of live-streaming and the identification of victims and abusers will be scarcely possible. Two of the most effective investigation methods of this type of crime are the use of covert human intelligence sources, and - the most recently

⁸²¹ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Chapters II and IV

⁸²² International Centre for Missing and Exploited Children (2016) Child Pornography: Model Legislation and Global Review. 8th Edition. ICMEC. Pg. 17.

⁸²³ Wright, V. (2010) Deterrence in Criminal Justice: Evaluating certainty vs. Severity of Punishment. The Sentencing Project. Washington, D.C. Pg. 9.

introduced method - the use of special technological means of investigation which would substitute undercover police with artificial intelligence.

1. *Undercover Investigation Pursuant to the England and Wales Legislation*

Covert police activities in England and Wales are governed by the Regulation of Investigatory Powers Act 2000.⁸²⁴ Pursuant to this Act, the grant of the authorization to use of covert human intelligence sources must be approved by a relevant judicial authority.⁸²⁵ Accordingly, the use of covert human intelligence sources is allowed, among others things, for the purpose of preventing or detecting crime,⁸²⁶ and thus includes the proactive covert investigation of child sexual abuse and sexual exploitation offenses.

While undercover police are not allowed to act as *agent provocateurs*,⁸²⁷ as in the case of Italy, or to use entrapment to encourage or lure someone into committing a crime that they otherwise wouldn't,⁸²⁸ they are allowed to pose as children on social networking sites and enter into conversations with potential child abusers. During the conversations undercover agents must be very careful not to cross the boundaries of legality by doing more than giving the suspect an opportunity to break the law.⁸²⁹ The role of undercover investigators and the informers⁸³⁰ used by them must be minor. They cannot incite or procure the commission of a crime but only participate in an offence that has already been planned.⁸³¹ If they do not respect this rule and incite a person to commit a crime he/she would not otherwise have committed, they risk of being prosecuted for acting as *agent provocateurs*.⁸³²

The Sexual Offences Act 2003 amended the Protection of Children Act 1978 by introducing the possibility of “making of an indecent photograph or pseudo-photograph of a child” for undercover investigation purposes. Such a procedure is considered to be exceptional and only allowed for the purposes of preventing, detecting, or investigating the crime, or for the purposes

⁸²⁴ Regulation of Investigatory Powers Act 2000, Sections 26, 28 (8), 29 and 32.

⁸²⁵ Ibid. Section 32A.

⁸²⁶ Ibid. Section 29(3)(b).

⁸²⁷ Crown Prosecution Service. Vigilantes on the internet - cases involving child sexual abuse. Legal guidance. 03 August 2017. Available at: <https://www.cps.gov.uk/legal-guidance/vigilantes-internet-cases-involving-child-sexual-abuse>.

⁸²⁸ See: R v Loosely [2001] UKHL 53. Entrapment was considered by the court as compromising the integrity of the judicial system.

⁸²⁹ Ibid.

⁸³⁰ The Regulation of Investigatory Powers Act 2000, Section 26(8) allows the covert police to task or engage certain persons into covert activities, known as Covert Human Intelligence Source (informers).

⁸³¹ Martellozzo, E. (2013) Online Child Sexual Abuse: Grooming, Policing and Child Protection in a Multi-Media World. Routledge. London. Pg. 114.

⁸³² Ibid.

of criminal proceedings.⁸³³ According to Section 46(1)(1)(b) and (c), such an exceptional covert activity is permitted to members of the Security Service and members of the Government Communications Headquarters⁸³⁴, who prove that making of such indecent photographs or pseudo-photographs of children was necessary for them to exercise any of their professional functions. Section 46(1)(1)(a) provides for a wide range use of this type of exceptional measure by stating that a person can be declared not guilty of the offence of making the indecent photograph or pseudo-photograph of a child if he proves that it was necessary for him to do so for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings, in any part of the world.⁸³⁵ The provision is expressed in vague terms, accompanied by a very short explanatory note stating that this clause creates a limited defense to the offence of making an indecent photograph or pseudo-photograph of a child which applies “*where a person “making” such a photograph or pseudo-photograph can prove that it was necessary for him to do so for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings. The defense **also** applies to a member of the Security Service or GCHQ (Government Communications Headquarters) who can prove that it was necessary for them to “make” the photograph or pseudo-photograph for the exercise of the functions of the Security Service or GCHQ.*”⁸³⁶ Neither the text of the provision, nor the explanatory note define the “person” referred to in section 46(1)(1)(a) leaving space for interpretation that such a term can include also a non-state actor, that is, any member of the public. The use of the word ‘also’ in the explanatory note, when referring to the use of this exceptional power by members of the Security Services and the Government Communications Headquarters cited in paragraphs (b) and (c) of the same provision, proves that paragraph (a) is not taken in conjunction with paragraphs (b) and (c), but rather stands alone and refers to other persons not covered by paragraphs (b) and (c). The loophole resulting from this provision makes it possible for any person guilty of the crime of making indecent photographs or pseudo-photographs of children to avail themselves the protection afforded by paragraph (a) of this provision.

The flows of this provision were addressed in more detail by the Crown Prosecution Service in a Memorandum of Understanding with the Association of Chief Police Officers (ACPO). In this Memorandum of Understanding it is made clear that the exceptional powers provided by

⁸³³ Sexual Offences Act 2003, Section 46.

⁸³⁴ The Government Communications Headquarters is an intelligence and security organization of the United Kingdom. See: <https://www.gchq.gov.uk/>.

⁸³⁵ Sexual Offences Act 2003, Section 46(1)(1)(a).

⁸³⁶ Explanatory Notes to the Sexual Offences Act 2003.

section 46(1)(1)(a) were intended to protect people whose aim is to report the production and distribution of child abuse images and who in so doing might have to make a copy of such images as evidence to the authorities.⁸³⁷ This protection was especially intended towards people whose legitimate duties expose them to potentially illegal material, such as persons professionally involved in the management, operation or use of electronic communications networks and services and whose duties include the reporting of potentially illegal material.⁸³⁸ Such persons should be guaranteed protection, so that fear of prosecution does not stop them from reporting potential crimes they come across in the course of their professional activities. In addition to those whose professional duties may include reporting potentially illegal material, other persons as well may engage in making indecent photographs or pseudo-photographs of children for crime prevention or detection purposes. This may include parents, who intercept a suspicious online communication of their child and then respond as if they are the child, vigilant groups conducting targeted operations or researchers for research purposes. The Crown Prosecution Services has recognized this undercover activity as ‘Internet Vigilantism’.⁸³⁹ While acknowledging that such online vigilante activity - which is not illegal in the UK - may be well-intended, the CPS expresses its concern that vigilantism may disrupt legitimate undercover activities carried out by law enforcement agencies and the risk that vigilantes may break the law by committing offences for the purposes of detecting potential offenders.⁸⁴⁰ The CPS therefore makes it clear that vigilantes cannot avail of the protection granted by Section 46 of Sexual Offences Act if in the course of their vigilance they have in their possession, make or distribute indecent images of children.⁸⁴¹ The Memorandum of Understanding states that “*Vigilantism is not merely unnecessary, it is unhelpful: anyone taking it upon themselves to seek out or investigate this kind of material where there is no legitimate duty to do so will be liable to prosecution*”⁸⁴²

Recent field research shows that one of the main challenges of undercover investigators in UK is the non-availability of images of children for use in their online covert accounts in order to

⁸³⁷ Memorandum of Understanding between Crown Prosecution Service (CPS) and the Association of Chief Police Officers (ACPO) concerning Section 46 Sexual Offences Act 2003. Available at: <https://www.cps.gov.uk/publication/memorandum-understanding-between-crown-prosecution-service-cps-and-association-chief>.

⁸³⁸ Ibid.

⁸³⁹ Crown Prosecution Service. Vigilantes on the internet - cases involving child sexual abuse. Legal guidance. 03 August 2017. Available at: <https://www.cps.gov.uk/legal-guidance/vigilantes-internet-cases-involving-child-sexual-abuse>.

⁸⁴⁰ Ibid.

⁸⁴¹ Ibid.

⁸⁴² Memorandum of Understanding between Crown Prosecution Service (CPS) and the Association of Chief Police Officers (ACPO) concerning Section 46 Sexual Offences Act 2003.

appear more credible to potential child predators seeking children on social networking sites.⁸⁴³ Another challenge is the question of availability of technological tools for proper undercover investigation. Police officers cannot answer phone calls because of the lack of voice camouflage devices, and obviously, they cannot answer video calls.⁸⁴⁴ This makes it impossible for undercover investigations to progress in cases where the offender is very cautious, wants to speak to the victim, or see a picture of the victim, or see the victim via webcam before starting a ‘relationship’ with the victim, or agreeing to pay for a live-streaming session of child abuse because they want to be sure they are speaking to a child and not to an undercover police officer. Claiming not to have a webcam on or attached to the computer is no longer a convincing argument now that webcams are so easily available. The sex offender’s suspicions may be aroused if the potential child-victim cannot be seen on a webcam.

Evidence suggests that undercover police do not usually initiate conversations themselves: they enter social networking sites with a fake username, make their profile appear as online, and wait to be contacted by the other users of the platform.⁸⁴⁵ As case law shows, evidence gained from undercover investigations is admissible in court,⁸⁴⁶ and the fact that the victim does not exist, does not nullify the crime of the offender who has sought out children on the internet for sexual abuse purposes.⁸⁴⁷ While in these circumstances the crime might be considered as an attempt or inchoate offence rather than a fully completed offence, on the grounds that the person on the other side of the computer is an adult (undercover police posing as a child), from the abuser’s perspective the offence(s) can be considered as completed and committed since the abuser does not know and has no reason to believe that there was no child behind the screen.⁸⁴⁸

2. *Undercover Investigation Pursuant to the Italian Legislation*

The Italian Law n. 269 of 1998 on the fight against child prostitution, child pornography and child sex tourism, prescribes the use of undercover investigation for activities related to the fight of child pornography. An ‘agente provocatore’, the Italian term for undercover investigator, meaning ‘provoking agent’, may be allowed, upon prior judicial authorization, to

⁸⁴³ Martellozzo, E. (2013) *Online Child Sexual Abuse: Grooming, Policing and Child Protection in a Multi-Media World*. Routledge. London. Pg. 137.

⁸⁴⁴ Ibid.

⁸⁴⁵ Ibid.; The Guardian. How Police Investigators are Catching Paedophiles Online. L. Tickle. 22 August 2012. Available at: <https://www.theguardian.com/social-care-network/2012/aug/22/police-investigators-catching-paedophiles-online>.

⁸⁴⁶ Brown. [2010] EWCA Crim 1203.

⁸⁴⁷ Criminal Attempts Act 1981, Section 1(2).

⁸⁴⁸ Rook QC, His Honour Judge Peter and Ward CBE, Robert (2010) *Rook and Ward on Sexual Offences Law and Practice*. 4th edition. Sweet and Maxwell. London Pg. 164.

simulate the acquisition of pornographic material or engage in other intermediary activities or even in child sex tourism activities for the purpose of obtaining proof in relation to the offences covered by art. 609 bis para 1, 600 ter para 1,2,3 and 600 quinquies of the Italian Penal Code,⁸⁴⁹ namely offences of sexual violence against children, child pornography and child sex tourism. The law n. 269 of 1998 has entrusted such covert investigation activities to the ‘Polizia Postale e delle Telecomunicazioni’⁸⁵⁰ in the form of exclusive investigative competences.

The undercover investigative activities listed in article 14 of Law n. 269 are exceptional measures going beyond the ordinary investigation techniques, such as interception of telephone or online communications allowed by the Italian legislation for the investigation of other types of serious offences. It is for this reason that the Italian Supreme Court of Cassation has made it clear that these undercover investigation powers can in no way be used analogically offences other than those explicitly listed in article 14 of law n.269.⁸⁵¹ The Supreme Court of Cassation was concerned to stress the prevention of analogy for cases of undercover investigation despite analogy being *per se* prohibited under Italian criminal law. Thus, the Court has excluded any possibility of further or wider interpretation, making it clear that the use of the exceptional undercover investigation set out in art.14 for other offences outside the express scope of this provision, would be against the law. This strict application of the rules applying to undercover investigation techniques was brought up again by the Supreme Court of Cassation in a later judgement in 2004. Here the Court stated that the activities of an ‘agente provocatore’ are *per se* illegal activities but have nevertheless been authorized and made legit within exclusively strict limits for the purpose of acquiring evidence about certain criminal offences.⁸⁵² This strict interpretation is the consequence of the sensitivity of the use of such undercover investigation techniques, which exceptionality derogate from fundamental principles, but which are justified by the particular gravity of the crimes involved. Nevertheless, in reality knowing and deciding where to draw the line between what may be a lawful and justifiable measure in a covert investigation and what exceeds legality is not as straightforward as it might seem in theory, and where the line is drawn will vary from case to case.⁸⁵³ The evidence acquired in the course

⁸⁴⁹ Law n. 269, 3 August 1998 Norme Contro lo Sfruttamento della Prostituzione, Della Pornografia, del Turismo Sessuale in Danno di Minori, Quali Nuove Forme di Riduzione in Schiavitù. Art. 14 (1)

⁸⁵⁰ The Office of Postal and Telecommunications Police.

⁸⁵¹ Corte di Cassazione, Sezione Penale III, Judgement 8 May-21 October 2003, 904 (39706/2003); Fiammella, B. (2006) Commento alle Recenti Modifiche della Legge 269/98. In Strano, M. (2006) Abusi sui Minori. Nuovo Studio Tecna.

⁸⁵² Corte di Cassazione, Sezione Penale III, Judgement n. 37074/04.

⁸⁵³ Fiammella, B. and Brucciafreddo, L. (2009) Pedofilia e Sfruttamento Sessuale dei Minori: Dalla Prostituzione Minorile alla Pedopornografia On-Line. Experta Edizioni. Forli. Pg. 91.

of covert investigation without prior authorization, or which exceed the limits of the authorization, is inadmissible in court.⁸⁵⁴

With regard to the of undercover investigation for offences of child sexual abuse and sexual exploitation online, the limited knowledge which law enforcement agencies may have about the ICTs, and in particular about chat line and Internet networks has resulted in many discrepancies leading to improper sentences which had to be changed in later case law.⁸⁵⁵ Such instances may arise in particular when similar offences have a very specific distinction not that easy to detect, such as those offences prescribed by the third and fourth paragraphs of art. 600-ter. The only distinction between these offences is the target of the offer to supply child abuse material: the third paragraph covers cases when the offer is made towards an undetermined number of persons, while the fourth paragraph applies to cases when the offer is towards a specific number of persons.⁸⁵⁶ In chat lines such a difference is verifiable depending on where the conversation about supply take place: in a public or private (one by one communication) chat room. Unfamiliarity with the existence of public and private chat rooms causes errors in categorizing the offence.

Pursuant to the second paragraph of Art. 14 of the above mentioned law, in cases when the aforementioned offences occur through information and telecommunication systems or by using public telecommunication networks, in addition to the actions listed in the first paragraph, the undercover investigation may also include the creation and activation of websites that are presented as explicitly offering child abuse material, the so-called ‘honeypots’,⁸⁵⁷ in order to attract and trap child abuse criminals. In these cases, investigators must be careful to differentiate and identify users who access the site intentionally rather than by accident. Moreover, the undercover investigators are even allowed to participate in activities of simulated exchange and acquisition of child abuse material⁸⁵⁸ through the creation or management of areas of communication and file sharing such as chat rooms and peer-to-peer network services, to the extent necessary to make themselves more credible and identify child sexual abuse rings. Research shows that undercover investigators usually adopt the technique

⁸⁵⁴ Ibid.

⁸⁵⁵ Ibid.

⁸⁵⁶ Sorgato, A. (2005) Pornographia Minorile su Internet e Indagini di Polizia Giudiziaria. Ventiquattro Avvocato, il Sole 24 Ore. N. 6. Pg. 83.

⁸⁵⁷ Fiamella, B. and Brucciafreddo, L. (2009) Pedofilia e Sfruttamento Sessuale dei Minori: Dalla Prostituzione Minorile alla Pedopornographia On-Line. Experta edizioni. Forli. Pg. 95.

⁸⁵⁸ Legge n. 269, 3 Agosto 1998, Article 14(2).

of creating a fake profile of a child or an adult seeking child abuse material, going online and waiting to be contacted by potential adult offenders.⁸⁵⁹ The undercover investigator has to prove the intent of the user by explicitly declaring themselves to be a minor or a person seeking child abuse material and registering the conversation as evidence.⁸⁶⁰ In 2016, the head of investigative department of the Postal and Telecommunications Police declared that the undercover police were witnessing an evolution in the quality of child abuse material, with live-streaming being an emerging trend.⁸⁶¹

The third paragraph of Art. 14 empowers the judicial authority to order the delay of the arrest of an offender or of the seizure of materials in cases where this is necessary for the acquisition of important evidence or for the identification and prosecution of other offenders of the crime (such as in cases of child pornography rings, or when there is a reasonable suspicion that accomplices exist).

The Italian Law n.38 of 2006 introduced the creation of the ‘Centro Nazionale per il Contrasto alla Pedopornografia sulla Rete Internet’ (the National Center for the Fight against Child Pornography on the Internet), hereafter ‘the Centre’ in an amendment to Art. 14 of the law no. 269 of 1998.⁸⁶² This Center was set up as a section within the Ministry of the Interior Affairs with the duty of collecting all the reports on websites that spread information about the sexual exploitation of children through the ICTs, together with information on the names of the site managers and the beneficiaries of the payments made to those sites in a continuously updated database. The information in this database, which contains a “black list” of all Uniform Resource Locators (URLs) of websites resulting to have child abuse content, is periodically sent to all ISPs operating within the national territory in order for them to prevent access to such sites through filtering systems.⁸⁶³ This way, users trying to access such websites from the Italian territory, will receive a ‘STOP’ screen warning them of the illegal nature of the website,

⁸⁵⁹ Paselli, A. (2015) Pedopornographia Online, Metodologie di Contrasto e Analisi Forense. In Maioli, C. (2015) Questioni di Informatica Forense. Aracne Editrice. 64-88. Pg. 77.

⁸⁶⁰ Ibid.

⁸⁶¹ La Stampa. I Nuovi Fronti della Guerra alla Pedopornographia. C. Frediani. 31 July 2016. <http://www.lastampa.it/2016/07/31/italia/i-nuovi-fronti-della-guerra-alla-pedopornografia-ZP40Eh2Mv8KtBJtR44u5bK/pagina.html>.

⁸⁶² Law 6 February 2006, n. 38 "Disposizioni in Materia di Lotta Contro lo Sfruttamento Sessuale dei Bambini e la Pedopornografia Anche a Mezzo Internet" Art. 19(1).

⁸⁶³ Paselli, A. (2015) Pedopornographia Online, Metodologie di Contrasto E Analisi Forense. In Maioli, C. (2015) Questioni di Informatica Forense. Aracne Editrice. 64-88. Pg. 76.

instead of the homepage. The Centre is also the contact point and information point for foreign law enforcement agencies investigating cases of online child sexual abuse.

The creation of a centralized database not only serves as a primary information resource for law enforcement agencies, but also helps to prevent the risk of several undercover investigators from different departments working simultaneously on the same case and unknowingly intercepting each other.⁸⁶⁴ Therefore, the creation of the Centre to manage a centralized database increases cooperation and coordination of activities between the various law enforcement agencies and departments within the country, resulting in more efficient investigations as well.

3. *The Use of Modern Technology for Investigative Purposes*

Currently, there is no legislation in place explicitly regulating the use of modern technology and/or Artificial Intelligence (AI) in criminal investigations. Nevertheless, researchers claim that the absence of legislation on the use of software or technologies comparable to AI does not *per se* exclude their use for investigative purposes.⁸⁶⁵ The use of highly sophisticated technology may be deemed possible providing that its application does not cross the legal boundaries of general investigative principles,⁸⁶⁶ specifically the infringement of human rights such as privacy rights and the right to fair trial as it regards the extent of the use of entrapment of the suspects through the technology. Therefore, in order to comply with human rights principles, the use of AI and other modern technology for investigation purposes should be lawful, proportionate and necessary in a democratic society.

a. The Sweetie Project

One of the best-known examples of the way AI technology can be used in undercover operations is Sweetie. Sweetie is an avatar resembling a Filipino girl (a virtual child), created by researchers working for the Dutch organization Terre des Hommes for the purposes of tracking down online child sex abusers in a manner similar to undercover investigations.⁸⁶⁷ While the first version of Sweetie allowed an undercover researcher to use the avatar profile when manually entering into conversations with offenders online, Sweetie 2.0 version is able

⁸⁶⁴ Fiamella, B. and Brucciafreddo, L. (2009) *Pedofilia e Sfruttamento Sessuale dei Minori: Dalla Prostituzione Minorile alla Pedopornographia On-Line*. Experta Edizioni. Forli. Pg. 96.

⁸⁶⁵ Schermer, B.W., Georgieva, I., Van der Hof, S. and Koops, B.J. (2016) *Legal Aspects of Sweetie 2.0*. Leiden/Tilburg: Center for Law and Digital Technologies (eLaw) / Tilburg Institute for Law Technology and Society (TILT). Pg. 48.

⁸⁶⁶ *Ibid.*

⁸⁶⁷ See: Terre des Hommes Website. Sweetie: The face of webcam child sex tourism: <https://www.terredeshommes.nl/en/sweetie-face-webcam-child-sex-tourism>.

to interact with child sex abusers online without the involvement of a human being. Despite the fact that the use of such a technology may raise questions relating to individual online privacy and entrapment, its use can be justified for detecting perpetrators of live-streaming of child abuse for the following reasons: the ease of accessing live-streaming of child abuse; the slim chances of identifying suspected offenders of this crime by using general investigative techniques; the fact that the best way of combating this crime is catching the suspects in the act by luring them via undercover interaction; and the significant scale of the problem which calls for a more rapid response than that provided by undercover human agents. Given these facts, researchers argue vigorously that the use of Sweetie 2.0 may be necessary in a democratic society, in accordance with the ECtHR case-law on the need to proactively defend vulnerable groups by means of effective and deterrent criminal procedures.⁸⁶⁸

b. The Spotlight Software

Another modern technological tool is Spotlight, launched by the US-based NGO, Thorn,⁸⁶⁹ in cooperation with Digital Reasoning company,⁸⁷⁰ with the specific scope of assisting law enforcement to rapidly identify child-victims of online sexual exploitation. Spotlight leverages machine learning algorithms by processing publicly available online data and insight from officers in the field in order to more rapidly identify victims and perpetrators of online child sexual abuse material with a specific focus on child sex trafficking victims who are advertised and sold online.⁸⁷¹ Because of the high volume and variation of online data and its inconsistency, plus the fake profiling of the victims advertised, it takes law enforcement a long time to trawl through the information and identify victims. The Spotlight tool utilizes advanced cognitive computing-based analytics to organize the chaotic data on online commercial sex market and provide rapid information to the law enforcement agencies to support their investigations and identify child sex trafficking victims.⁸⁷² This software is able to learn from online data by understanding and processing human language from many sources, and uses that knowledge to fight online sexual exploitation and trafficking of children.⁸⁷³ Moreover, the Spotlight technology can also learn from the insights provided by investigators from real-world investigations and make smarter selections the more often it is used.⁸⁷⁴ Statistics show that

⁸⁶⁸Schermer, B.W., Georgieva, I., Van der Hof, S. and Koops, B.J. (2016) Legal Aspects of Sweetie 2.0. Leiden/Tilburg: TILT. Pg. 54-55. KU v Finland, Application no. 2872/02. Para. 46.

⁸⁶⁹ See Thorn Website: <https://www.wearethorn.org/>.

⁸⁷⁰ Digital Reasoning Website: <https://digitalreasoning.com/>.

⁸⁷¹ See: <https://www.wearethorn.org/blog/spotlight-tool-wins-data-impact-award/>.

⁸⁷² Ibid.

⁸⁷³ See: <https://www.wearethorn.org/blog/fighting-child-exploitation-through-intelligent-technology/>.

⁸⁷⁴ See: <https://www.wearethorn.org/blog/applying-machine-learning-to-fight-child-exploitation/>.

when law enforcement agencies use Spotlight the time taken to carry out an investigation is reduced by 60%.⁸⁷⁵ Spotlight is currently only used in US and Canada where it has become the leading tool for child sex trafficking investigations,⁸⁷⁶ and has enhanced the collaboration between different law enforcement agencies in tackling the borderless crime of online child sexual exploitation. The use of such technology would undoubtedly have a very positive impact in Europe on the rates of online child sex victim identification. It would also be interesting to examine whether the use of such technology would be feasible in EU countries given the new EU data protection laws.

c. The Photo DNA Technology

The Photo DNA is a technology developed by Microsoft in 2009 in order to identify and remove online child abuse images. Photo DNA eliminates the hurdle of manually searching for illegal images among the millions of images uploaded every day and removes the need to watch the same images over and over again by automating the process. This technology was designed to tackle the well-known problem of the circulation on the Internet of the same images of sexually abused children over and over again, sometimes even over a number of years. Photo DNA uses a “hash” matching technology in order to be able to identify not only identical photos of sexual abuse of child but also altered versions of those photos which have been modified in order to escape detection.⁸⁷⁷ Hash technology converts the images into a greyscale format, creates a grid, and assigns a numerical value to each tiny square of the grid.⁸⁷⁸ The assigned numerical values form the “hash” of the image, otherwise known as the Photo DNA signature of that image.⁸⁷⁹

Companies and organizations such as Facebook and Twitter are already using Photo DNA technology to detect illegal content on their platforms.⁸⁸⁰ Microsoft has also launched the Photo DNA Cloud Service which makes the Photo DNA technology freely accessible to all companies and organizations which could not otherwise afford the technology. The program was designed in such a way as to protect users’ privacy by not looking at or scanning the images as such, but only matching the numerical hashes with a database of known illegal images

⁸⁷⁵ Thorn Website “Spotlight Helps Law Enforcement Identify Victims of Sex Trafficking Faster” Available at: <https://www.wearethorn.org/blog/spotlight-helps-identify-sex-trafficking-victims-faster/>.

⁸⁷⁶ See: <https://www.wearethorn.org/spotlight/>.

⁸⁷⁷ See Microsoft Website: Microsoft’s PhotoDNA: Protecting children and businesses in the cloud. (15 July 2015) Available at <https://news.microsoft.com/features/microsofts-photodna-protecting-children-and-businesses-in-the-cloud/>.

⁸⁷⁸ Ibid.

⁸⁷⁹ Microsoft Photo DNA. Available at: <https://www.microsoft.com/en-us/photodna> (Last accessed 15 October 2018).

⁸⁸⁰ Ibid.

created by the National Center for Missing and Exploited Children (NCMEC) based on reports of illegal images from electronic service providers.⁸⁸¹ Companies using this technology can detect child abuse images uploaded by the users of their platforms, report them to law enforcement agencies and remove the content from their platforms. Companies can share their hashes with other companies by using the Industry Hash Sharing Platform, created jointly by Thorn, Facebook and Google,⁸⁸² and thus collaborate to reduce duplication of effort and optimize results in identification of illegal content online.

In 2017, Internet Watch Foundation, started leveraging PhotoDNA to identify videos of child abuse material. This led Microsoft to further develop their PhotoDNA technology so that it can detect also video material besides still images – the Photo DNA for Video. The PhotoDNA for Video uses the same technology as PhotoDNA to break down a video into key frames (screenshots) and then creates hashes of those frames.⁸⁸³ The technology is even able to detect child abuse material that has been edited or embedded into a longer video footage that might appear harmless.⁸⁸⁴

d. Facial Analytics Soft Biometric Technology

Soft biometrics are biometric signals that transmit distinctive information about an individual whose identity is unknown.⁸⁸⁵ Biometric signals, on the other hand, are the digital personification of the specific physical or behavioural traits that are used for identity recognition.⁸⁸⁶ All the biometric signals of a person form a person-specific template, which is stored in a biometric system like a database.⁸⁸⁷ Therefore, a biometric system is a kind of database with identity templates. The system can be used to compare new identity templates with the stored templates for the identification of verification of the identity of the new template. Face-based soft biometric systems use person-specific templates containing attributes of the face, such as physical features, and medical and behavioral markers to automatically identify persons, to determine their gender and to estimate their age.⁸⁸⁸ An emerging form of soft biometric technology is facial analytics, which leaves aside the identity recognition

⁸⁸¹ Microsoft Website: Microsoft's PhotoDNA: Protecting children and businesses in the cloud.

⁸⁸² See: <https://www.wearethorn.org/reporting-child-sexual-abuse-content-shared-hash/>.

⁸⁸³ Langston, J. (12 Sep. 2018) How PhotoDNA for Video is being used to fight online child exploitation. Microsoft – Cybersecurity. Available at: <https://news.microsoft.com/on-the-issues/2018/09/12/how-photodna-for-video-is-being-used-to-fight-online-child-exploitation/> (Last accessed 15 October 2018).

⁸⁸⁴ Ibid.

⁸⁸⁵ Ricanek, K. Jr. and Boehnen, C. (2012) Facial Analytics: From Big Data to Law Enforcement. IEEE Computer Vol. 45. No. 9. 95-97.

⁸⁸⁶ Ibid.

⁸⁸⁷ Ibid.

⁸⁸⁸ Ibid.

component and instead generates metadata about persons based on their face features, such as face shape, age and sex.⁸⁸⁹ The use of this technology can help both companies and law enforcement agencies to efficiently process the huge volumes of video and image data which are uploaded into the Internet every day in order to identify child sexual abuse material without breaching the privacy of any of the persons depicted.

One of the facial analytics soft biometric technologies developed specifically for use by law enforcement agencies to identify child abuse material is Artemis. Artemis is a digital forensics tool that developed jointly by researchers from the Oak Ridge National Laboratory and the University of North Carolina Wilmington with Knoxville, Tennessee Police Department.⁸⁹⁰ Artemis software is able to perform a scan of a computer for child abuse content located on it in just a few minutes, producing a list of possible child abuse content which is then examined by law enforcement officers.⁸⁹¹ This software does not replace human completely, but it saves a lot of time by identifying potential illegal content quickly and narrowing the number of images or videos that law enforcement officers need to view. Artemis software uses the hash matching technology of Microsoft's Photo DNA technology, to compare images in a metadata stage, without breaching any privacy rights. Artemis software can also be used to detect virtual child abuse material, such as cartoons, manga or other drawings.⁸⁹²

e. Google's New Content Safety API Toolkit

All the above-mentioned software tools function by matching the new images with the hashes of the images already in a database of pre-identified online images of child abuse. These technological tools are not able to identify new or current child abuse content, which has to be identified manually by police officers responsible for content review. While hash technology is of huge significance for the identification of child sexual abuse material online, and saves a great amount of time during investigations, content reviewers still have to examine vast quantities of newly uploaded images, which is very time consuming.

In September 2018, Google introduced a new cutting-edge artificial intelligence (AI) tool that promises to resolve this problem in a major way. Google's new Content Safety API toolkit is able to sort through many images and flag the ones most likely depicting child abuse content which than can be reviewed by service providers, NGOs, technology companies and LEA.⁸⁹³

⁸⁸⁹ Ibid.

⁸⁹⁰ See: Oak Ridge National Laboratory: <https://www.ornl.gov/news/jaguar-pounces-child-predators>.

⁸⁹¹ Ibid.

⁸⁹² Ricanek, K. Jr. and Boehnen, C. (2012) Facial analytics: From Big Data to Law Enforcement. IEEE Computer. Vol. 45. No. 9. 95-97.

⁸⁹³ Google in Europe – Safety and Security: Using AI to help organizations detect and report child sexual abuse material online. 3 September 2018. Available at: <https://www.blog.google/around-the-globe/google->

The specificity of Google's new toolkit, is that it does not rely on hashes of known child abuse material, it is rather able to identify quickly new content that has not been previously confirmed to be child abuse material.⁸⁹⁴ The ability to quickly identify new child abuse material, speeds up the identification process and increases the chances of identifying children who are still being abused and protect them from further abuse. Furthermore, such a tool means human experts working on reviewing child abuse content online will be less exposed to such content since the tool will do the first review process and notify the reviewers only for the images less likely to be child abuse material. While currently only able to detect online published material, Google's new content safety API toolkit seems to be a promising start towards future technological developments which would make possible the detection of live-streams and identify the depicted children in real time.

Each of the above-mentioned technologies constitute a step forward towards bridging the gap between the Internet industry, governments, academia, law enforcement bodies and also between the disciplines of law, technology and science in order to overcome the operational and legal shortcomings which hinder the fight against online child sexual abuse and sexual exploitation. Nevertheless, a lot of work remains to be done. The existing technologies are not perfect and are not able to track and detect absolutely every kinds of online child abuse material. Future research must focus on designing new technologies and/or enhancing existing technologies in order to improve the capacities of law enforcement agencies to detect live-streams of child abuse by analyzing the content of live video streamed material more efficiently and in real time, while ensuring that the content analyses and the information sharing does not infringe the right to privacy both during. Content analyses must happen in real-time when the video footage is being streamed, but the software must also be used to create a hash code or digital fingerprint of the video which should be saved in the database for detection purposes should the video/live-stream be recorded and later uploaded onto the Internet.

II. ISP Responsibility Regarding Data Retention and Data Preservation

According to the International Centre for Missing and Exploited Children (ICMEC), Internet Service Providers are in a position to manage online content and receive reports from users about illegal activities online, and are thus ideal partners for law enforcement agencies

[europe/using-ai-help-organizations-detect-and-report-child-sexual-abuse-material-online/](#) (Last accessed 15 October 2018).

⁸⁹⁴ Ibid.

regarding suspected child abuse content online.⁸⁹⁵ As practice shows, the collaboration between law enforcement agencies and ISPs is already crucial to the prevention and investigation of these crimes.⁸⁹⁶ ISPs can assist in preventing and investigating cybercrimes in general, and online child sexual abuse and sexual exploitation in particular, by blocking access to sites containing child abuse material and by assisting law enforcement by providing further information about suspicious users.

1. The Production Order

Obviously, such cooperation cannot purely be a matter of self-regulation as ISPs are not always willing to cooperate, claiming that they are not responsible for content monitoring or that they have to respect the data protection rights of their users. In order to ensure their collaboration in investigations regarding serious online crimes, legislation has been enacted to hold ISPs accountable particularly regarding data retention and data preservation for investigation purposes. The second paragraph of Art. 18 of the Budapest Convention thus calls upon State Parties to adopt legislation that would permit national law enforcement authorities, to issue production orders and require service providers in their territory to submit subscriber information in their possession or control. By ‘subscriber information’ the authors of the Budapest Convention are referring to ‘any information relating to subscribers of its services, be it computer data or other form of data, held by a service provider, other than traffic or content data’.⁸⁹⁷ Such information includes the type of communication services used by the subscriber, the technical provisions during that communication, the period of service, subscriber’s personal data such as, identity, address, phone number, payment information, and any other information regarding any installation of equipment of communication.⁸⁹⁸

While disclosing subscriber information may be considered as conflicting with subscribers’ data protection and privacy rights, such information is crucial for tracking the activities of persons suspected of having committed serious crimes or for identifying those responsible for such suspicious activity. The Cybercrime Convention Committee, acknowledges that production orders interfere with users’ right to privacy and data protection, but, somewhat weakly, justifies the disclosure of subscriber information, on the grounds that such an interference is less intrusive than obtaining traffic or content data.⁸⁹⁹ While the justification for

⁸⁹⁵ ICMEC (2016) Child Pornography: Model Legislation & Global Review. International Centre for Missing and Exploited Children.

⁸⁹⁶ Global Alliance Against Child Sexual Abuse Online (2016) 2015 Report. US Department of Justice.

⁸⁹⁷ Explanatory Report to the Cybercrime Convention para 177.

⁸⁹⁸ Cybercrime Convention Committee (T-CY) (2017) T-CY Guidance Note #10 Production Orders for Subscriber Information (Article 18 of the Budapest Convention). 1 March 2017. Strasbourg, Pg. 5.

⁸⁹⁹ Ibid.

interfering with individual rights should not be based on a comparison between different degrees of interference, a balancing of the rights involved is necessary. Any interference with the right to privacy and data protection must be necessary and proportionate to the need to guarantee security and public safety.

Production orders adopted pursuant to Art.18 have domestic power, meaning that a production order can be issued only against service providers offering their services in the territory of the Party issuing the order. Article 18 para. b however, is silent on the location of the service provider. According to that paragraph, the only requirement is that the service provider should be offering its services in the territory of the issuing country but there is no indication as to whether the service provider must also be physically or legally present in the Party's territory. This leaves room for a broad application of the provision, allowing law enforcement agencies to issue production orders also to service providers located in other states, if those providers are supplying their services in the issuing state, even though they might not be legally bound by the laws of that country, due to their physical presence in another territory.

As explained above, a production order may be issued to obtain subscriber data in the possession or control of a service provider. Thereby, the location of that data is not relevant for establishing the jurisdiction for the purposes of the production order. In other words, a service provider located in one jurisdiction, may have the data stored in another jurisdiction. This factor is irrelevant for the establishment of the jurisdiction, which is determined based on the location where the service provider offers its services. According to the Cybercrime Convention Committee, the requirement that services must be being offered in the territory of a Party is met even in cases when the services are provided via a country code top-level domain name referring to another jurisdiction.⁹⁰⁰ In other words, an Art. 18 production order can be issued also for data stored abroad, if the services in question are being offered in the territory of the issuing country.⁹⁰¹

The Budapest Convention does not place any specific restrictions on production orders with regard to compliance with human rights standards. The only reference to those standards is to be found at Art. 15, which states that such procedures and powers should be subject to conditions and safeguards provided for in the domestic laws of the Parties for the adequate protection of human rights and liberties and applicable international human rights instruments

⁹⁰⁰ Ibid. Pg. 8.

⁹⁰¹ de Hert, P., Parlar, C. and Sajfert, J. (2018) 'The Cybercrime Convention Committee's 2017 Guidance Note on Production Orders: Unilateralist Transborder Access to Electronic Evidence Promoted via Soft Law'. Computer Law & Security Review. Pg. 3.

and should be based on the principle of proportionality. This brief but widely-formulated provision shows that the Budapest Convention relies heavily on the domestic laws of its State Parties, on the assumption that all State Parties have adequate human rights safeguards in place. Ideally this would be the case, but the reality is that there are huge discrepancies in the national legal frameworks and practices of the State Parties to the Convention and harmonization is illusory.

Production orders may only be issued for individual cases related to specific investigations. They may be issued only in specific criminal investigations or proceedings, usually in one of two particular situations: when the subscriber is known and the subscriber information needed is related to services and other technical means used by that subscriber; or when the technical address is known and the subscriber information is needed to identify the person concerned.⁹⁰²

2. Cross-border Access to Computer Data

While production orders have strictly domestic powers, cross-border access to computer data for the purposes of investigation of serious crimes is regulated by Mutual Legal Assistance (MLA) laws and procedures. Such procedures are complex and very lengthy, which given the volatile nature of electronic evidence, may cause delays and inefficiencies in cybercrime investigations. Pursuant to Article 32 of the Budapest Convention, trans-border access to stored computer data directly from physical or legal persons (ISPs included) is possible if the laws of the Party where the data is stored allow ISPs to disclose computer data to another Party and if the ISP consents to disclosing the data (voluntary basis). Thus, this provision sets out two conditions the disclosure of computer data to the law enforcement authorities of a foreign country: domestic laws in place must allow the cross-border disclosure of such data and, once this condition is met, ISPs must voluntarily consent to disclose the data – in other words, they cannot be forced to do so. As in all other respects, there is no harmonization regarding the regulation of cross-border data disclosure between the Parties to the Convention.

From answers to a questionnaire from the Bureau of T-CY in 2013-2014,⁹⁰³ it is apparent that Italian legislation neither permits its national law enforcement authorities to contact natural or legal persons in foreign jurisdictions directly to obtain data, nor does it authorize foreign law enforcement authorities to contact natural or legal persons (ISPs) present on Italian territory directly to obtain disclosure of subscriber information. This means that Italian law enforcement

⁹⁰² Cybercrime Convention Committee (T-CY) (2017) T-CY Guidance Note #10 Production Orders for Subscriber Information (Article 18 of the Budapest Convention). 1 March 2017. Strasbourg. Pg. 12.

⁹⁰³ Cybercrime Convention Committee (T-CY) (2014) T-CY Assessment Report: The Mutual Legal Assistance Provisions of the Budapest Convention on Cybercrime. Strasbourg. Pg. 117.

authorities cannot obtain information directly from ISPs and law enforcement authorities from other states cannot obtain information directly from ISPs subject to Italian jurisdiction.

On the other hand, the UK is more open to cross-border cooperation and allows direct cooperation between national law enforcement authorities and natural and legal persons located in foreign jurisdictions and also permits the direct cooperation between foreign law enforcement authorities and such entities present in the UK, making such cooperation entirely dependent upon the will of the owner of the requested data.⁹⁰⁴ The new UK Data Protection Act 2018⁹⁰⁵ regulates in detail the conditions under which a data controller may transfer personal data to a relevant law enforcement authority in a third country. One of the four main matters regulated in this Act is the law enforcement data processing, provided for in Part 3 of the Act. Pursuant to Section 73 of this legal act, the controller may transfer personal data to a relevant authority in a third country if three conditions are met: the transfer should be necessary for any of the law enforcement purposes; the transfer is based on an adequacy decision or on there being appropriate safeguards for the protection of personal data, or is based on special circumstances; and the recipient must be a relevant authority in a third country. The Data Protection Act 2018, refers to the EU GDPR definition of data controller.⁹⁰⁶ While there is no clear definition or ruling on whether ISPs are data controllers or data processors pursuant to the new EU GDPR, if - depending on the situation, (which type of data is processed, how it is processed in a particular situation, who decides on the processing) - ISPs were to be considered as data controllers, then they would fall under the scope of section 73 of the UK Data Protection Act 2018 and could be allowed to transfer personal data to a law enforcement authority in a third country if the three conditions apply. Section 76 of the 2018 Act further clarifies what “special circumstances” refers to, by providing an exhaustive list of such situations which includes the protection of the vital interests of the data subject or another person, and in individual cases, for any of the law enforcement purposes.⁹⁰⁷ This would mean that a controller can transfer personal data to a third party law enforcement agency when that is necessary for the protection of the child from live-streaming of child abuse and for the investigation of cases of cross-border live-streaming of child abuse.

Consequently, Italy and the UK have followed completely opposite approaches to direct cooperation between law enforcement authorities and ISPs for the disclosure of subscriber

⁹⁰⁴ Cybercrime Convention Committee (T-CY) (2014) The Mutual Legal Assistance Provisions of the Budapest Convention on Cybercrime. T-CY Assessment Report. Strasbourg. Pg. 120.

⁹⁰⁵ See: UK Data Protection Act 2018, Part 3, Chapter 5.

⁹⁰⁶ Ibid.

⁹⁰⁷ Ibid. Section 76(1)(a) and (d).

information in cross-border cases. The report shows that numerous countries have similar approaches with either Italy or the UK.⁹⁰⁸ However, a number of countries have not adopted any approach at all, or no clear approach to the issue of cross-border access to subscriber data.⁹⁰⁹ This once again shows how difficult it is to achieve harmonization, even when states are parties to the same convention.

a. The Proposed Second Additional Protocol to the Cybercrime Convention

After a discussion period of five years (2012-2017) the Cybercrime Convention Committee's Cloud Evidence Group concluded that, given the persistent discrepancies in national legislation on trans-border access to data, an additional protocol to the Cybercrime Convention should be adopted. That protocol would extend the scope of Article 32 of the Budapest Convention in order to facilitate direct cooperation between law enforcement agencies and service providers located in other jurisdictions.⁹¹⁰ This Additional Protocol would allow for more effective mutual legal assistance in criminal matters, including with regard to disclosure of subscriber data in cases outside the scope of Article 18 and in cases where service providers refuse comply with domestic production orders.⁹¹¹ The new provisions would give the production order an international dimension. T-CY goes even further by suggesting the establishment of joint investigation teams, not only between parties to the Convention, but also with states not party to the Convention.⁹¹²

In order to resolve the problem of the delays resulting from traditional Mutual Legal Assistance (MLA) procedures, the proposed Protocol shortens the deadlines for response to productions orders to only 10 days, and in emergency cases which would include requests related to risks to life and other similar circumstances, the information would have to be supplied within just 6 hours.⁹¹³

In an effort to further harmonize the mutual legal assistance among states, the proposed Addition Protocol calls upon state parties to recognise data received from service providers

⁹⁰⁸ Cybercrime Convention Committee (T-CY) (2014) The mutual Legal Assistance Provisions of the Budapest Convention on Cybercrime. T-CY assessment report. Strasbourg

⁹⁰⁹ Ibid.

⁹¹⁰ Cybercrime Convention Committee (T-CY) (2016) Criminal Justice Access to Electronic Evidence in the Cloud: Recommendations for Consideration by the T-CY. Final Report of the T-CY Cloud Evidence Group. Strasbourg. Pg. 49 para. 106-107.

⁹¹¹ Ibid. Para. 111 and 114.

⁹¹² Ibid. Para. 126.

⁹¹³ Ibid. Para. 134.

pursuant to Article 18 as admissible evidence in criminal proceedings,⁹¹⁴ and possibly also to allow trans-border access to data without consent, providing lawful procedures are followed.⁹¹⁵ In order for cross-border data disclosures to be effectively used for investigation purposes, legislation must be adopted obliging service providers to store and retain data for a certain period of time. If no data is stored, the trans-border cooperation procedures on cross-border data disclosure are worthless. Legislation regarding the obligation of service providers to store data vary from country to country, further hindering cooperation on cross-border access to electronic data.

b. Developments in EU Law on Data Retention, the Proposal for a New E-Evidence Directive and the Proposal for a Regulation on Production and Preservation Orders

Directive 2006/24/EC⁹¹⁶ (the EU Data Retention Directive) required telecommunication service providers to retain user data for a period of 6 to 24 months in order to allow law enforcement agencies to access that data for investigation purposes. But, in 2014, in the Digital Rights Ireland Case, the Court of Justice of the European Union (CJEU) declared the Directive invalid, holding that the indiscriminate retention of personal data violated Articles 7, 8 and 52(1) of the EU Charter.⁹¹⁷ This judgement was followed by the Tele2/Watson judgement in which the CJEU ruled that only targeted data retention needed for combating serious crime is permissible and that access to such data by law enforcement agencies must be subject to prior judicial authorization.⁹¹⁸

Despite this strict ruling from the CJEU, rapid ICT developments and the extensive global growth of cybercrime led to further changes in the regulation of data retention and access by law enforcement authorities to electronic evidence for investigation purposes. In May 2017 the Directive on the European Investigation Order (EIO), which was adopted since 2014, finally entered into force.⁹¹⁹ The EIO is based on the principle of mutual recognition of judicial

⁹¹⁴ Ibid. para. 138

⁹¹⁵ Ibid. para. 144

⁹¹⁶ Directive 2006/24/EC on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive 2002/58, OJ, L 105/54, 13.4.2006.

⁹¹⁷ Digital Rights Ireland Ltd (C-293/12) ECLI:EU:C:2014:238. For further details on the development of data retention after this judgement refer to: Boehm, F. and Cole, M.D. (2014) Data Retention after the Judgement of the Court of Justice of the European Union. Study for the Greens/EFA Group in the European Parliament. Münster/Luxembourg.

⁹¹⁸ Watson (C-698/15) ECLI:EU:C:2016:970;

⁹¹⁹ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 Regarding the European Investigation Order in Criminal Matters.

decisions for the purpose of obtaining evidence for use in criminal proceedings, which means that every EU Member State is obliged to recognize and carry out the request for evidence from another Member State, as if the request had been issued by its own national authorities.⁹²⁰ In particular, the EIO provides for measures to preserve evidence and for covert investigations and interception of telecommunications. But, by the time it actually entered into force, the provisions of the EIO on access by law enforcement authorities to electronic evidence were already outdated.

In 2016, the Commission acknowledged that MLA procedures for access to electronic evidence were felt to be too problematic and time-consuming,⁹²¹ and that for this reason law enforcement authorities tended to prefer informal channels of direct contact and cooperation with foreign service providers to obtain e-evidence.⁹²² After studying the problem on the basis of impact assessments and public consultations for a period of two years, in April 2018 the Commission proposed new rules on access to e-evidence by law enforcement authorities in the form of a Regulation⁹²³ and a Directive⁹²⁴. These new rules would create a European Preservation Order and a European Production Order, allowing the judicial authorities of a Member State to directly order a service provider located in another Member State to preserve or produce specific electronic evidence. Similar to the provisions of the proposed Additional Protocol to the CoE Cybercrime Convention, the service provider will be obliged to respond to these requests within 10 days, and in urgent cases within just 6 hours. Currently, the deadline for responding to such requests is 120 days under the EIO and 10 months under MLA procedures. These new rules will include strict safeguards for the protection of personal data which must be consistent with the General Data Protection Regulation (GDPR)⁹²⁵ and the Data Protection

⁹²⁰ See: European Commission. As of Today the "European Investigation Order" will help Authorities to Fight Crime and Terrorism. Press Release. Brussels, 22 May 2017. Available at: http://europa.eu/rapid/press-release_IP-17-1388_en.htm.

⁹²¹ Council of European Union. (2016) Non-paper: Progress Report following the Conclusions of the Council of the European Union on Improving Criminal Justice in Cyberspace. 15072/1/16 REV 1. 7 December 2016. Brussels. Pg. 4.

⁹²² Ligeti, K. and Robinson, G. (2018) Transnational Enforcement of Production Order for Electronic Evidence: Beyond Mutual Recognition? In Kert, R. and Lehner, A. (eds.) *Vielfalt des Strafrechts im internationalen Kontext – Festschrift für Frank Höpfel zum 65. Geburtstag* (2018). Pg. 626.

⁹²³ Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for Electronic Evidence in Criminal Matters COM/2018/225 final - 2018/0108 (COD)

⁹²⁴ Proposal for a Directive of the European Parliament and of the Council Laying Down Harmonized Rules on The Appointment of Legal Representatives for the Purpose of Gathering Evidence in Criminal Proceedings COM/2018/226 final - 2018/0107 (COD).

⁹²⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard To The Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation).

Directive for Police and Criminal Justice Authorities (LED)⁹²⁶. The GDPR regulates the processing of data by service providers, while the LED regulates the exchange of information between police and judicial authorities. The new Directive requires both service providers and law enforcement authorities to operate in compliance with both the GDPR and the LED, which means that they will have to implement strict data protection safeguards guaranteeing compliance with human rights standards. Under the proposed Directive, service providers will be required to designate a legal representative who will deal with the receipt and compliance with these orders. representative responsible for dealing with reception and execution of these orders. These changes are expected to enhance cooperation between law enforcement authorities and ISPs and harmonize the relevant procedures throughout the Union, improving legal certainty and clarity.⁹²⁷ It is worth noting that the new CoE proposal for an Additional Protocol to the Cybercrime Convention overlaps with the new EU proposals, resulting in duplication of legislation when considering that EU Member States are also State Parties of the CoE. These almost parallel initiatives might lead to potential conflicts on the different levels of applicability of these pieces of legislation, rather than having the opposite effect, namely the harmonization of legal frameworks.⁹²⁸

Based on the definition provided in Article 2 of the proposed EU Directive, service providers falling within the scope of the Directive would include providers of electronic communications services, providers of information society services, including social networks, online marketplaces and other hosting service providers, and providers of names and numbering services for the internet. Social networks, cloud services, digital marketplaces, domain name registrars and registries, privacy and proxy service providers, and regional internet registries for internet protocol (IP) addresses fall within the scope of this Directive as well.⁹²⁹

The European Production Order proposal differentiates between four types of data: subscriber data, access data, transactional data and content data,⁹³⁰ the regulation of which is treated

⁹²⁶ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and on the Free Movement of Such Data, and Repealing Council Framework Decision 2008/977/JHA.

⁹²⁷ European Commission. E-evidence - Cross-Border Access to Electronic Evidence: Improving Cross-Border Access to Electronic Evidence. Available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/e-evidence-cross-border-access-electronic-evidence_en.

⁹²⁸ Cole, M.D. and Quintel, T. (2018) Transborder Access to e-Evidence by Law Enforcement Agencies: A first Comparative View on the Commission's Proposal for a Regulation on a European Preservation/Production Order and Accompanying Directive. Privacy Discussion Forum 2018. Paris 25-26 June 2018. (Draft)

⁹²⁹ As defined in Article 2 of the proposed Directive.

⁹³⁰ Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for Electronic Evidence in Criminal Matters COM/2018/225 final - 2018/0108 (COD)Article 2(7), (8), (9) and (10).

differently based on the presumed level of intrusiveness for each data set. Thus, orders to produce subscriber data and access data may be issued for all types of criminal offences, whereas orders for the production of transactional data and content data can be issued only for criminal offences punishable by a maximum of at least three years.⁹³¹ Moreover, for the later types of data, a review by a court or an investigating judge is required. In the case of preservation orders no differentiation is made between different types of data.⁹³² The different standards regarding different types of data under this proposal are questionable, in the light of the CJEU's case law on the equal protection of all data.⁹³³ Nevertheless, even the CJEU falls short of guaranteeing absolute protection of all data since it has ruled that the question of disclosure should be decided on a case-by-case basis, thus hinting that disclosure (intrusiveness) may be permitted in respect of all types of data without any distinction. The question as to which degree and method of intrusion to e-evidence best complies with the data protection regime, and whether categorization of data sensitivity for such purposes makes a difference at all, remains open.

III. Awareness Raising

In the course of participation at a number of international conferences discussing the phenomenon of live-streaming of child abuse with many people, it was realized that the public is largely unaware of the existence of this problem. Initial reactions show that people confuse live-streaming with child pornography, and are completely unaware that there are situations in which children are sexually abused, with the abuse being transmitted in real time over the Internet, and watched live, and even directed by viewers watching remotely. This lack of awareness on the part of the public does not mean that this crime is very rare or non-existent. On the contrary, lack of awareness allows the crime to flourish undisclosed and hidden in the darkest corners of our society. Light must be shone on this very recent but very widespread phenomenon with the help not only of national, but also international advocacy and media campaigns.

Moreover, school teachers must also be trained to teach children how to recognize the risk of live-streaming exploitation and report it when they feel threatened or have actually been subjected to abuse. The public must be made aware and cooperate with their governments and

⁹³¹ Ibid. Article 5(4).

⁹³² Ibid. Art. 4(3).

⁹³³ Cole, M.D. and Quintel, T. (2018).

police authorities in order to help combat this crime. Given the extreme secrecy surrounding live-streaming, the difficulties in investigating it, and the lack of reporting by child-victims, whistleblowers are essential.

Even more importantly, the public must be made aware that live-streaming of child abuse online is not a virtual crime. It is not a harmless crime. Behind every screen, there is a real child suffering actual sexual abuse. The fact that there may be no physical contact between the viewer and the child, and that in some cases the child performs sexual activities alone without any physical contact with the facilitator or anyone else, does not make it a crime with no consequences. And cases where children are actually physically abused for the purpose of live-streaming to occur. These cases are present in more developed countries such as across Europe and US and do not happen for commercial reasons but merely for sexual gratification. These cases pose an even greater danger. Measures should be taken to raise awareness of the fact that this crime is as harmful as child prostitution, rape or any other crime involving sexual abuse of children. Even in cases where there is absolutely no physical contact, the harm caused to the child is enormous. The victims of child-abuse have low self-esteem and self-respect, and even if they are rescued their lives are never the same again.

CONCLUSIONS

In less than two decades, the Internet has become a powerful tool for connecting people all over the world, and is now the primary source of information and means of communication globally.⁹³⁴ This widespread, global technology is naturally being used by all age groups for various purposes, be it communication or information, but it is also misused by criminals. Research shows that approximately one third of all Internet users in the world are children below the age of 18,⁹³⁵ and that at any given moment, an estimated 750,000 sexual predators are online.⁹³⁶ This data clearly demonstrates the serious risk of children being exploited online. The scale of child sexual abuse and sexual exploitation has increased over the years and since the creation of Internet and its rapid expansion over the past years, the nature of child sexual abuse and sexual exploitation has changed dramatically. The Internet has opened up new pathways for exploitation of children, by transferring on-site, hands-on sexual abuse and sexual exploitation into the online world and easily giving it a global dimension. White, western, middle-aged men are no longer the typical offender.⁹³⁷ Now offenders may be local or foreign, young or old, and not all of them are pedophiles. The Internet makes it possible for child sexual offenders to remain virtually anonymous, concealing their true identities without difficulty, making it easier for them to locate and approach children to gratify their sexual needs and makes it more difficult for law enforcement to identify and locate them.⁹³⁸ The popularization of webcams and the rapid evolution of broadcasting that enable the streaming of live video footage has led to their exploitation by child sexual abusers. As a result, the live-streaming of

⁹³⁴ Gottschalk, P. (2011) Characteristics of the Internet and Child Abuse. Pg. 27. In: Davidson, J. and Gottschalk, P. eds. (2011) *Internet and Child Abuse: Current Research and Policy*. Routledge; There are approximately 3.9 billion Internet users worldwide. Internet World Stats, at <http://www.internetworldstats.com/stats.htm> (last accessed on 7 January 4, 2018).

⁹³⁵ Livingstone, S., Carr, J. and Byrne, J. (Nov. 2015) One in Three: Internet Governance and Children's Rights. Global Commission on Internet Governance, Paper Series No. 22-Nov. 2015. Pg. 7 at: https://www.cigionline.org/sites/default/files/no22_2.pdf (last accessed on 7 January 4, 2018).

⁹³⁶ Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography. Najat M'jid Maalla. UN Special Rapporteur 2009 A/HRC/12/23. Pg. 9 at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/146/27/PDF/G0914627.pdf?OpenElement> (last accessed on 7 January 4, 2018).

⁹³⁷ ECPAT International (2016) *Global Study Finds Sexual Exploitation of Children in Travel and Tourism is Increasing and Occurring in Every Part of the World*. Available at: http://www.ecpat.org/wp-content/uploads/legacy/20160508_ECPAT_Global_Study_Release_bey2.pdf

⁹³⁸ Taylor, J. (2011) Policing Social Networking Sites and Online Grooming. In Davidson, J. and Gottschalk, P. eds. (2011) *Internet and Child Abuse: Current Research and Policy*. Routledge. Pg. 131.

child sexual abuse, in front of a camera, for an audience which has usually paid to watch, has emerged dramatically quickly as an established reality.⁹³⁹

The harm and damage which is caused to a child as a result of involvement in online live-streaming of abuse is no less than that resulting from offline abuse, even if there is no physical contact with the sexual offender. It should also be borne in mind that there is a particular risk that the pay-per-view child abuse may lead to later hands-on-abuse of the same child. Governments must recognize the risks of live-streaming of child abuse and take measures to address it in the most effective way possible. The adoption and implementation of legislation which makes live-streaming of child abuse a separate and autonomous offence, and makes it possible to identify, locate, investigate and prosecute online perpetrators of live-streaming effectively, are crucial steps towards preventing this crime and creating a safer online environment for children.

This research reveals that:

- The Internet and high broadcasting rates have led to the development and swift increase in the live-streaming of child abuse by creating new abuse pathways and ensuring the online anonymity of offenders and the possibility of leaving no online traces.
- No child is immune and victims are not only located in poor countries.
- There are alarmingly low conviction rates for perpetrators of live-streaming of child abuse. This does not mean that the incidence of live-streaming of child abuse is very low or non-existent - it means that the majority of offenders of live-streaming escape justice.
- Enforcement and prosecution of offenders is hindered by the lack of an internationally recognized definition of what constitutes live-streaming of child abuse and by the lack of legislation expressly criminalizing this action. Thus, prosecutors have to try to prosecute offenders under the heading of other offences.
- Because of the nature of the Internet and cybercrimes, criminals prefer to operate with anonymity under the virtual cover that the cyberspace offers. It is a challenge for law enforcement authorities to identify them and make sure that they are held to account. Research shows that cases of live-streaming are only detected as part of other larger investigations into child pornography rings, or other types of child pornography-related crimes. There is no specifically targeted investigation of live-streaming because this crime is not reported. However, law enforcement agencies should not wait until a case

⁹³⁹ Europol (2015) IOCTA.

of live-streaming is discovered in the course of other investigations, because if they do, the true incidence of this crime will remain hidden and there will never be an appropriate response to it. In order for this to change, the current reactive response (removing the child from harm) must be replaced by a proactive approach (preventing the crime from happening in the first place).

As demonstrated throughout this study, there have been a considerable number of initiatives to address the problem of online sexual abuse and sexual exploitation of children, and even the more specific phenomenon of live-streaming of child sexual abuse at international, European and national levels as well. Generally, the EU plays an advisory role for its Member States as it regards criminal matters, leaving it to Member States to adopt measures at national level. However, the EU's approach towards the fight of online sexual abuse and sexual exploitation has been through legally binding instruments, rather than advisory with the development of two binding instruments, namely the Council Decision to combat child pornography on the Internet and the Directive 2011/93/EU on combating sexual abuse, sexual exploitation of children and child pornography replacing the Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography. The development of such instruments in combating online child sexual abuse and sexual exploitation of children at the EU level is significant. These EU instruments might not have a significant impact on the UK, whose legislation is very close to that of EU described in this study, and soon, - after the Brexit, UK will not be obliged under the EU framework anymore. But, these instruments will certainly have an impact on the framework of other EU Member States and the candidate countries under the EU enlargement plan.

Despite these developments, existing laws do not explicitly address the offence of live-streaming of child abuse, but only deal with specific aspects of it in general provisions applying to offences of child pornography, child prostitution, rape, etc. As has been shown in the examples addressed above in this study, judges and prosecutors, in the absence of explicit provisions criminalizing the live-streaming of child abuse, apply provisions relating to child pornography offences, child prostitution and even rape as a basis of convicting the viewers of the live-streaming. While this may be an appropriate approach, the particular methods of investigation of these offences should be born in mind, as should differences in training needs, the need for specialized units and other measures, and the particular impact of live-streaming on society. Thus, states may wish to consider adopting a different system of penalties based on the risks, dimension and consequences when offences such as rape, child pornography, and child sexual abuse are transmitted live on the Internet to an audience who may or may not have

paid to watch the abuse as it happens, and who even participate actively in the abuse by giving instructions to the hands-on abuser or to the child-victim on the abusive acts they want to see being performed.

International framework is not sufficient to fight the rapidly increasing levels of live-streaming of child abuse. Even though current legal instruments do aim, to varying degrees, to combat the sexual exploitation and sexual abuse of children via the Internet, there is no single legal instrument now in force which unilaterally tackles each and every form of Internet sexual exploitation and sexual abuse of children. Nevertheless, the existing instruments, especially the Lanzarote Convention and the EU Directive, can provide the basis for new legislation to combat this crime. These two instruments, together with the CoE Budapest Convention and the UN OPSC, provide a comprehensive blueprint for a new legal instrument to specifically address online child sexual abuse and sexual exploitation in all its various forms. When drafting such an instrument, it will be important to address these crimes not only from the perspective of criminal law but also on the basis of human rights laws and principles. Such an approach would ensure that the focus of this legal instrument would not be only on punishing the offenders but also on protecting the victims. This is particularly necessary when considering that the victims of these crimes are the most vulnerable members of our society, namely children, who need the highest level of protection, not only from the crime itself, but also from re-victimization in the course of criminal justice procedures. Those procedures should be designed in such a way as to accommodate the special developmental needs of children.

Like any other form of child sexual abuse, live-streaming of child abuse may affect any child or young person, regardless of gender, including children above the legal age of consent for engaging in sexual activities. Even if the sexual activity appears consensual, it may still constitute abuse. Live-streaming of child abuse can include both contact (penetrative and/or non-penetrative acts) and non-contact sexual activity. It is a cyber-dependent crime, thus only made possible by technology. It can involve force and/or enticement to make the child comply, and like any other form of child sexual abuse, it may, or may not, be accompanied by violence or threats of violence. It may be perpetrated by individuals or groups. Even women may be perpetrators of this kind of crime. The live-streaming of child sexual abuse may be a one-off occurrence or an activity repeated over time, and it can range from opportunistic to organized abuse. Among the factors fostering the abuse is the power imbalance in favour of those perpetrating the abuse or those paying for the abuse to happen. This power imbalance not only results from a difference in age. A range of other factors may be involved, including gender,

intellect, physical strength, status, and access to economic or other resources.⁹⁴⁰ Live-streaming of child abuse may be commercial or non-commercial in nature. When it occurs for commercial purposes, it involves some form of payment to the perpetrator or facilitator of the live-streaming.

Analysis of the history of development of legislation relating to child sexual abuse and exploitation, shows that initially child pornography, child prostitution and child sexual exploitation were subject to the general provisions on laws against sexual violence, pornography, prostitution, rape and sexual assault. In cases where the victims of these crimes were minors, that was considered to be an aggravating circumstance and the sentence imposed was correspondingly higher. But, later on, countries started acknowledging the difference in incidence and impact of these crimes when committed against minors, and amended their legislations by finally criminalizing sexual crimes against children in separate, stand-alone provisions, instead of dealing with them as aggravating circumstances under the general provisions.⁹⁴¹

Based on these historical events, by analogy, it may be assumed that, while live-streaming might initially be considered an aggravating factor in the crime of child pornography, rape or prostitution, its rapid growth, both in scale and methodology, will soon require its recognition as a separate offence in its own right. This would mean that the law will have to be modified within a reasonably short period of time, with all the substantive and procedural consequences thereof. The best, most trouble-free solution, therefore, would be to recognize live-streaming of child abuse as a stand-alone cybercrime offence within the group of online child sexual abuse offences, from the start.

The adoption of criminal law provisions is one important element of the response to the online live-streaming of child abuse. The Internet, and the ICTs in general, facilitate such offences and at the same time pose major challenges to law enforcement. Online live-streaming of child abuse is a transnational phenomenon. Comprehensive national legislation which keeps up with international standards is a prerequisite for effective cooperation by law enforcement authorities to protect children and investigate and prosecute offenders. This research shows that the provisions of the Lanzarote and Budapest Convention and the EU Directive can indeed

⁹⁴⁰ Beckett, H., Holmes, D. and Walker, J. (2017) *Child Sexual Exploitation Definition & Guide for Professionals: Extended Text*. University of Bedfordshire and The International Centre Researching Child Sexual Exploitation, Violence and Trafficking. Pg. 8

⁹⁴¹ Refer to Italian law of 1996 and 1998 and also UK legislation regarding the evolution of regulation of child prostitution, analyzed in Chapter 3

serve as benchmarks for substantive criminal law and usefully be used as templates by states wishing to adopt legislation which is in line with provisions of international law.

While International and European laws set high standards for the protection of children against sexual abuse, the national laws, and national justice and protection systems may fail to protect children adequately. Pursuant to Article 3 of the UN Convention on the Rights of the Child, the “best interest of the child” must be the central principle in all legal instruments protecting children’s rights, including legislation to combat child sexual abuse and exploitation and child abuse images. Therefore, the EU has an obligation to examine the impact of all relevant measures on children’s rights.

Problems that do not get measured, do not get solved. Live-streaming of child abuse is not measured. That does not mean that it doesn’t exist, but rather that it is not properly addressed, identified and responded against. Numbers are needed in order for a common action strategy to be formulated.

Live-streaming cannot be dealt with under the existing provisions relating to child prostitution because, according to that legislation, one of the constitutive elements of prostitution is physical contact with the victim. Either the provisions on prostitution must be amended in such a way that they can also be applied to online prostitution; or, live-streaming must be recognized as a unique separate offence with all its distinguishing elements. In both cases, one thing must be guaranteed: that the provisions criminalizing live-streaming are not formulated in terms of an option which countries can choose to adhere or to opt out, otherwise, there would be a lack of harmonization which would make tackling this global crime extremely problematic.

It must be recognized that live-streaming of child abuse is much more than a sexual act, since it involves the transmission of that act of sexual abuse over the Internet to an audience willing to pay to watch and, in cases of commercial live-streaming, it involves the manipulation of the child in accordance with the demands of the viewer(s).

The fact that child-victims and the crime scene are on the other side of the world from the viewer, who is able to perpetrate the abuse by means of ICT, should not be considered a mitigating factor. On the contrary, it should be considered an aggravation factor as it shows the ability of the perpetrator to identify and target victims anywhere in the world, demonstrating the offender’s persisting intent to commit the crime and the level of planning for committing the crime. There is no doubt that offenders who take advantage of the Internet facilities to procure live-streamed child abuse believe that they can far more easily escape detection by committing these offences online and paying for them with a credit card than if they had run

the risk of actually traveling to another country to commit the abuse. Such offenders, who exploit every opportunity to perpetrate the sexual abuse of vulnerable children for their own sexual gratification, must clearly be deterred. Punishment must be severe enough to stop potential offenders. The impoverished circumstances of the children involved make protection even more necessary. The victims need protection against the ever more sophisticated technological means employed by offenders to obtain sexual gratification. The nature and cruelty of these acts must be underlined by legislators, law enforcement authorities, or the courts. Moreover, the fact that the viewing occurs in real-time, and thus the viewer assists and, in some cases even directs, the live abuse of the child victim should not be ignored either. And, in cases when the child victims are located in poor underdeveloped countries, the reality of those victims, being more vulnerable than children in developed countries, should not be overlooked either, taking into consideration they have been deliberately targeted by the offenders because of their poverty.

Besides certain similarities with other established criminal offences, this type of crime has certain very specific aspects and constitutive elements which distinguish it and should lead to it being specifically defined as a crime in its own right in international and national criminal laws. Establishing a stand-alone offence of live-streaming of child sexual abuse is essential in order to raise awareness and recognition of this phenomenon and thus promote better and more appropriate specific action for prevention and investigation, thus enhancing the protection and safeguarding of children from the threat of this crime. Furthermore, establishing a specific stand-alone offence of the live-streaming of child sexual abuse would have a deterrent effect on both those seeking and those supplying the live-streaming of child sexual abuse. Based on criminological research the likelihood and certainty of punishment has a stronger deterrent impact than increasing the severity of punishment.⁹⁴² Therefore, if potential offenders, knew that penalties for committing the offence of live-streaming of child abuse are certain, they would probably be less likely to engage in such an illegal behaviour. Similarly, establishing a specific offence of live-streaming child abuse would highlight the need for the courts, law enforcement agencies, the general public and the technical community (Internet Service

⁹⁴² Wright, V. (2010) Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment. The Sentencing Project. Washington, D.C. pg. 2; von Hirsch, A., Bottoms, A., Burney, E. and Wikstrom, P-O. (1999) Criminal Deterrence and Sentence Severity: An Analysis of Recent Research. Oxford: Hart Publishing; Nagin, D. and Pogarsky, G. (2001) Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence. *Criminology*. 39(4)

Providers, IT experts, business companies offering video streaming services) to treat this crime more seriously and pay higher attention to it.

Finally, rescuing victims is a priority, but if the laws in force do not provide sufficient and clear legal basis for investigating and prosecuting offenders, the task is only partially completed and the phenomenon will never stop. Tackling the demand should be the starting point - not the – often unresolved - end point. If there is no demand, there is no supply. As long as there is demand, no matter what measures are taken to find and rescue the victims, there will always be a supply.

In a globalized interconnected technological age, it is vital to ensure that children's interests and rights are protected online in the same way they are in all other aspects of life. While using the existing legislation by interpreting it in a novel way so that it can be used to prosecute and punish offenders of live-streaming of child abuse might seem as a temporarily comfortable solution, live-streaming of child abuse does not seem to be a temporary problem. As the Europol annual threat assessment reports on internet organized crime reveal,⁹⁴³ live-streaming of child abuse is an established reality which is here to stay and it is expected to continue growing if not effectively and rapidly tackled.

⁹⁴³ Refer to Europol 2015-2018 IOCTA Annual Reports.

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