

## THE CRIME OF CHILD PORNOGRAPHY

There can be doubt whatsoever that internet provides the ideal medium for distributing child pornography.

Consumers of this type of image no longer have to go out of their way to seek specific photographs of children, with a concomitant risk of discovery. Access to internet allows them, with minimum effort to access from the comfort of their home, workplace or even from publicly available computers, the worldwide production of this type of material. In addition, if they are determined and persistent in their search they will be able to find websites, chat rooms and forums where other individuals who share their interest will be prepared to exchange material they have found at no cost whatsoever. In short, the concepts of “trafficker” and “consumer” become blurred and interchangeable to the extent that consumers in fact have become the main disseminators of pornography online.

In this field internet poses a number of different problems. Firstly, it is evident that the centres of production of child pornography are inexorably moving towards places where such conduct is not expressly classified (at times they are framed within broader categories with symbolic penalties), and where only persons much younger than 18 years are protected, or where prosecution of such crimes is ineffective.

A lack of standardised laws, and of international collaboration can pose special difficulties in prosecuting those who produce this material, and often attempts at defending the children subjected to these practices are hampered. The action of the courts in our field is restricted, barring exceptional cases, to conduct concerning dissemination of material already produced or to being in possession of pornography. This fact indubitably conditions the activities of the law and the courts.

The problem is aggravated in cases in which pornographic material concerns victims who are incapacitated. The failure to prosecute production networks, in many cases makes it impossible to know whether or not images of these persons have been used in creating the material. Furthermore, although there are many laws which consider child pornography to be a crime, they fail to include the incapacitated, which means that these persons, who are particularly vulnerable, are at the mercy of organisations dedicated to this type of misconduct.

Therefore, it is clear that there is a need to unify penal systems and to increase international collaboration in order to increase the effectiveness of Criminal Law.

1.- International regulations which exceed the scope of the European Community

The most important regulation in this area is indisputably the Convention of the Rights of the Child in 1989, which, in article 34 requires countries to take the necessary national and international measures needed to prevent “the exploitative use of children in pornographic performances and materials”.

Secondly the Treaty of New York of 25 May 2000 on the exploitation of children (BOE – official state gazette – of 31 January 2002) should also be considered. Article 3 of the Treaty Protocol establishes that each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal

law Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography .

Thirdly, another text of considerable importance is the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime implemented in New York on 15 November 2000 (BOE of 11 December 2003). This regulation establishes that a child as object of protection shall mean any person under 18 years of age (article 3.d).

A concrete definition of the concept of “child pornography” is provided in the Council of Europe Convention on Cybercrime (Budapest 23-11-2001) intended as a universal regulation.

This convention has all the requirements for providing a reference for international cooperation within the scope of computer delinquency, both in the precision with which the various types of criminal conduct are described, and the procedural norms designed to make international prosecution of such crimes effective. Nevertheless, despite its undeniable technical expertise and quality, remarkably few countries have ratified the convention to date, despite its entry into force on 1 July 2004.

The Cybercrime convention addresses child pornography in article 9. When defining this concept it firstly establishes that the term "minor" shall include all persons under 18 years of age”. A state may, however, require a lower age-limit, which shall be not less than 16 years.

This regulation on child pornography considers that the term “child pornography” shall include pornographic material that visually depicts:

- a.- a minor engaged in sexually explicit conduct;
- b.- a person appearing to be a minor engaged in sexually explicit conduct;
- c.- realistic images representing a minor engaged in sexually explicit conduct

Each Party may reserve the right not to apply, in whole or in part, subparagraphs b. and c that is, cases of virtual pornography or pseudo pornography.

This regulation also establishes a catalogue of punishable conduct as follows:

- a.- producing child pornography for the purpose of its distribution through a computer system;
- b.- offering or making available child pornography through a computer system;
- c.- distributing or transmitting child pornography through a computer system;
- d.- procuring child pornography through a computer system for oneself or for another person;

e.- possessing child pornography in a computer system or on a computer-data storage medium

With respect to sections d and e (that is, downloading pornography from internet or merely possessing this type of image), the Convention admits that the parties may reserve the right not to apply this.

## 2.- European Community Regulations

An important piece of legislation in this area is Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (Official European Union Journal of 20 January 2004). Its purpose is to standardise legislation by determining what may be defined as criminal conduct. It defines a child as anyone below the age of 18 years. Child pornography is defined as pornographic material that visually depicts or represents a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child, or a real person appearing to be a child involved or engaged in such conduct, or realistic images of a non-existent child involved or engaged in such conduct. It then refers to pseudo pornography and virtual pornography.

The following conduct is considered to be punishable:

- 1.- production of child pornography;
- 2.- distribution, dissemination or transmission of child pornography;
- 3.- supplying or making available child pornography;
- 4.- acquisition and possession of child pornography.

Finally it establishes that each Member State is obliged to take the necessary measures to ensure that instigation of one of the aforementioned offences and any attempt to commit the prohibited conduct is punishable

The regulation includes “effective, proportionate and dissuasive sanctions” establishing minimum penalties for each type of conduct.

Article 5 provides a list of aggravating circumstances, without prejudice to others established in national legislation when:

- 1.- the victim is a child below the age of sexual consent under national law
- 2.- the offender has deliberately or by recklessness endangered the life of the child
- 3.- the offences involve serious violence or caused serious harm to the child,
- 4- the offences are committed within the framework of a criminal organisation within the meaning of Joint Action 98/733/JHA, irrespective of the level of the penalty referred to in that Joint Action.

Each Member State shall take the necessary measures to ensure that a natural person, who has been convicted of one of the offences referred to may be prevented from exercising professional activities related to the supervision of children.

In order to ensure that the offence does not go unpunished due to a conflict of authority the decision introduces attribution criteria.