# THE CRIME OF CHILD CYBER-PORNOGRAPHY IN THE ARGENTINE CRIMINAL CODE

## INTRODUCTION

The growing and rapid advancements in terms of technology, especially with Internet and the accelerated development of telecommunications, raise serious questions in the Criminal Law.

First, there are new transnational crimes, as in the case of illegitimate access to computers to get sensitive information or in that of the introduction of programs that attack the integrity of computerised systems. Secondly, there are new ways of committing already existing crimes, like cyberstalking in relation to harassment. Thirdly, there are problems of jurisdiction that focus on the question of which is the competent State to pursue, judge and punish the criminal conduct in transnational cases. In the fourth and last place, there are problems related to the guarantees and the rights of the citizens in a rule of law, especially those related to the right to privacy, the right to self-determination and, specifically in terms of Criminal Law, to the principles of legality, liability and proportionality.

In turn, all these problems are encompassed by a largest problem: the international standardization of crimes to avoid impunity. As Marcelo Riquert asserts: *"national borders constitute an evident obstacle for detention, investigation, persecution and punishment of the authors of the crimes perpetrated using new information and communication technologies, insofar Internet is configured as a non-border's space"*.[1]

Transnational crimes cannot be solved anymore with bilateral agreements. It is necessary to find strategies of regulatory harmonization through multilateral agreements. Harmonization *"is to be achieved above all based on communitarian guidelines that command the creation of new national laws with shared standards that ensure the necessary equality for the functioning of the communities. It is not an imposition of a cultural or axiological unity between different countries, but something more unpretentious: an attempt to create uniform conditions in the interior market"*.[2]

In that order of things, the Budapest Convention on Cybercrime of 2001, whose entry into force dates to 2004, is an enormous improvement at an international level. The Convention, a European Union undertaking, was signed by many other countries that do not belong to that community: United States, Japan, Argentina, Costa Rica, Mexico, Chile, among others.

---

[1] Marcelo Riquert (coord.), *Ciberdelitos*, Buenos Aires, Hammurabi, p. 23.
[2] *Ibid*., p. 29.

In 2008 Argentina, with the Law 26.388, modified the Penal Code in order to adapt its national law to the Budapest Convention, which was adopted many years later.

In this exposition I will focus on the child cyberpornography crime. I will first go through the regulation of this penal type in the Budapest Convention, to then go in depth to the recent argentine regulation.

## THE REGULATION OF THE BUDAPEST CONVENTION

The Budapest Convention regulates in Chapter II, "Measures to be taken at the national level", under the Title 3, "Content-related offences", the article 9: "Offences related to child pornography".

The first paragraph establishes the conducts that must be defined as crimes in each State Party:

> 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.

Then, the second and third paragraphs provide the definitions: the second defines "child pornography" and the third defines "minor". Lastly, the fourth paragraph regulates which points each State Party may reserve the right not to apply.

Something that generates conflict in this article is the broad definition of "child pornography". This broad definition was taken from the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of the year 2000.

This definition includes not only "a minor engaged in sexually explicit conduct" (a), but also "a person appearing to be a minor engaged in sexually explicit conduct" (b) and "realistic images representing a minor engaged in sexually explicit conduct" (c).

The paragraphs b and c regulate the cases in which there is no real participation of a minor and the cases of simulated images. The States Parties may reserve the right not to apply to these paragraphs. The inclusion of simulations within the normative element could violate constitutional principles, such as the right to the freedom of speech (in the case of artistic representations, for example), or could well end up in an actor-based criminal law that would hold pederasts responsible just because they are pederasts and not because they

committed a forbidden conduct. Argentina precisely opted to exclude the mere simulations of its criminal law.

## ARGENTINE'S REGULATION OF THE CHILD PORNOGRAPHY CRIME – LAW 26.388

Argentine Criminal Code does not have a chapter exclusively dedicated to informatic crimes. The Law 26.388 was amended to include the informatic modalities to already existing crimes. That is, it doesn't consider that there are informatic crimes as autonomous crimes, but modalities of execution of different crimes that attack different legal assets.

The crime of child pornography is regulated in the article 128 of the Criminal Code, in the Title "Crimes against sexual integrity". Such article says:

> Whoever produces, supports, offers, trades, publishes, facilitates, discloses or distributes, by any means, any representation of a minor of 18, dedicated to explicit or implicit sexual activities or any representation of its genital area for predominantly sexual purposes, as well as whoever organizes live shows of explicit sexual representations in which those minors participate, will be punished with imprisonment from 6 months to 4 years.
> Whoever has in its power representations of the descriptions in the first paragraph with unequivocal purposes of distribution or commercialization will be punished with imprisonment from 4 months to 2 years.
> Whoever facilitates the access to pornographic show or supplies pornographic material to children under 14 will be punished with imprisonment from 1 month to 3 years.

The article 128 is directed to protect the legal asset of "integrity". In words of Fabián Luis Riquert, that means that *"the legal asset that is being safeguarded is the normal psychic and sexual development of those who are not of age and therefore haven't reached enough maturity, and to avoid that someone recurs to them to be involved in those exhibitions without calculating the damage that they can suffer because of that".*[3] It's a modern innovation that replaces the prior version that sought to protect the "honesty" of the minors, a concept that has a strong moralist semantic charge. Here what is sought is the protection of the dignity of the minor.

In the first paragraph, the regulation lists an extensive quantity of verbs. This legislative technique has the purpose of reaching all the production and commercialization chain of child pornography. Like this, there is no distinction between the different links of the chain, since all of them would have the same penalty. As a result, some problems related to the internationalization of this kind of crimes can be resolved: if any of the

[3] *Ibid.*

actions mentioned in the norm is accomplished in Argentina, the local jurisdiction becomes available to judge the author.

In the second paragraph, a particular action is individualized: the possession with unequivocal purposes of distribution. The simple possession without those purposes is not classified as a crime, maybe because it is an intrusion in reserved spheres of individual freedom. This was recently modified; it will be explained it *infra*.

In the third paragraph, the facilitation of access to the minor to see pornographic shows or the supply of that kind of material is regulated.

Regarding the active subject, any person can accomplish the forbidden action. The regulation does not contemplate aggravating factors related to the quality of the author, for example if he's the father of the minor. Regarding the passive subject, he must be under 18 in relation to the first two paragraphs, and under 14 in relation to the last one.

In all the three paragraphs, it is an intentional crime. It is relevant that the negligence is not regulated, whereby the cases in which the author has make a mistake regarding the age of the minor would go unpunished.

### THE RECENT MODIFICATION BY THE LAW 17.436

The Law 27.436, sanctioned in March 2018, introduced some modifications to the regulation.

First, it modifies the scale of punishment. Like this, regarding the first paragraph, it raises the minimum, though it reduces the maximum. Secondly, it adds the simple possession as a crime, that before was unpunished. Thirdly, it establishes an aggravating factor when the victim is under 13. It is evident that this recent modification of the regulation seeks to maximize the State intervention (in the cases of simple possession) and at the same time to raise the penalties provided to this crime, in the scale of punishment as well as in the aggravating factors.

### CONCLUSION

One of the most complex aspects of cyber criminality is the difficulty to determine exactly who are the authors of the crimes, that is, the difficulty to attribute responsibility in the cyberspace. The cross of multiple borders that the images or the files accomplish complicates the possibility to delimit with certainty the origin of the chain. That's why the legislative technique used sought to punish all agents involved in the chain of production,

commercialization and distribution. This seeks to avoid the *lacuna* in law that would result into impunity.

However, this must not be done at the expense of the constitutional rights and guarantees of the citizens. As Gonzalo Quintero Olivares affirms, *"The tension, then, between the intention of control (no matter what its raison d'être is) and the citizen's rights to the full exercise of their rights and liberties, is in the scene of the cyberspace. None of them can have legitimacy for everything they wish, and for that reason a balance is necessary. In that balance is where the criminal law will be placed.*"[4]

The enlargement of punishment can result in a violation of some basic principles of a rule of law. For example, to punish the simple possession could be understood as a violation of the article 19 of the National Constitution that regulates the so-called "principle of reserve": the right to intimacy and privacy as long as it doesn't violate the rights of others. Another example is the scale of punishment contemplated in the first paragraph of the article 128 of the Criminal Law: the fact that all the links in the chain of criminal activity receive the same amount of punishment violates the principle of proportionality that prescribes that each person has to receive a punishment proportional to his or her actions.

The crime of child cyberpornography faces us, just like many other cyber-crimes, to the difficult balance (always sought but few times reached) between the punitive power of the State and the no-violation of the citizen's civil rights.

[4] *Ibid.*, p. 175.