

## HUMAN TRAFFICKING IN CYBERSPACE

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**ABSTRACT:** *Once with the spread and use of computers and Internet on a larger scale, trafficking in persons has conquered a new space: cyberspace. The recruitment of victims through the Internet, the use of e-mails for the moral coercion of the victim and ultimately, the exploitation of victims with the purpose of obtaining widespread Internet pornography constitute human trafficking in cyberspace. This area of crime deployment raises many questions like: who will be criminally liable, which is the applicable law, which is the end point of the crime?*

**KEYWORDS:** *computer crime, human trafficking, cyberspace, computer fraud*

**JEL CLASSIFICATION:** *K 00, K 14*

The computer society, based on knowledge, exercises a profound impact on the economic, social, political system and last but not least on the legal system. In less than a generation, the information revolution and the introduction of computers into every aspect of the society has changed the entire world. But as any change in the social life creates new premises for the commission of illegal acts, in the same way the use of the computer system on an increasingly large-scale created the possibility of committing new crimes, generally known as “computer crimes”. Once with the introduction of the terms bit, byte, computer-based information system, the notion of *computer crimes* was introduced in the language in order to refer to illegal acts committed through informatics.

Thus, gambling and betting, online sales of goods off the market, computer fraud, identity theft, forgery, denied access to secret database, spreading of computer viruses, pornography and correspondence violation are just some of the crimes committed by computerized system. Therefore, new legal provisions were necessary in order to define these acts as crimes and to attract criminal liability for those who had committed those acts.

Legally, in the 90s, not a single text of law or decision of the court mentioned the Internet. It was seen by many as a kind of a juridical “Far West”, a field where anything was possible. However, there were already plenty of legal problems. All the legal areas were

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involved by the facts like spreading materials via Internet without the author's permission, damage caused by divulging certain secrets, unfair competition, insult and libel, etc.

In time and once with the widening spread of internet usage and acquiring of specialized knowledge by a larger number of people in the computer field, the sphere of infringements has increased, thus appearing the so-called computer crimes, namely the materializing direct or indirect, physical or logical, deliberate or non-deliberate actions, aiming at changing one or more positions (confidentiality, integrity, accessibility) of an informational system or subsystem. On the one hand, the accessibility and the widespread penetration of the information and communication technologies allow one type of crime that would not exist without the computer systems and on the other hand they offer greater opportunities for committing certain traditional crimes<sup>1</sup>.

Computer crimes are criminal acts that in order to be executed, discovered and repressed, require knowledge of computer technology. We must draw a distinction between 'possible' computer crimes and related offenses in the narrow sense. The possible computer crimes (or computer crime in the broad sense) are therefore likely to be committed, and without recourse to computer technologies. For example, insults via the Internet. Computer crimes in a narrow sense are those that involve computer systems or satellite, either as a material object, either as protected property<sup>2</sup>. Thus, the improper access to a computer system, the computer fraud, the spread of computer viruses are examples of crimes which could not exist in a world without computers.<sup>3</sup>

Among computer crimes, we could also speak about human trafficking. To what extent could the Internet and the computers contribute to the putting into execution of such crime? Can we actually talk about "human trafficking in cyberspace?"

In accordance with Article 3 of the Protocol regarding Prevention, Suppressing and Punishing Trafficking in Persons, especially women and children (2000)<sup>4</sup>, additional to the UN Convention against Transnational Organized Crime, "trafficking in persons means the act of recruiting, transferring, lodging or taking over of persons by threat or by use of force or other forms of coercion, abduction, fraud, deceit, abuse of authority in a situation of vulnerability or by offering or receiving payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.

Exploitation shall include, at a minimum level, the exploitation of prostitution or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the organ removal."

Regarding the material element, of course, we cannot speak about transportation, transfer, lodging or taking over persons through the Internet. But regarding the first form of the material element of the crime, namely *recruitment*, we can say that this could be achieved by using the internet.

<sup>1</sup> See VasIU, I., VasIU, L. "Frauda informatică", in Penal Law Review, Year XII, no. 1, January-March, „The Romanian Association of Penal Sciences”, Bucharest, 2005, p. 43

<sup>2</sup> See Mario Luberto - "I reati informatici contro il diritto alla privacy. La tutela fornita dal D.L.G. N. 196 del 2003 e dal codice Penale", in Giurisprudenza di Merito, no. 3/2008, March, Milano, p. 898, 899

<sup>3</sup> See "Comercio elettronico e servizi delle società dell'informazione", diretta da Vincenzo Francescheli și Emilio Tosi, Chapter 9-Le responsabilità penali, de Giovanni Buonomo, Giuffrè Publishing house, Milano 2003, p. 324

<sup>4</sup> UNIFEM and UN Project on Human Trafficking in the Mekong Sub-region, Trafficking in Persons, A Gender and Rights Perspective Briefing Kit, Sheet 2, 2002 [http://unifem-eseasia.org/resources/others/traff kit.pdf](http://unifem-eseasia.org/resources/others/traff%20kit.pdf)

*Recruitment* consists in taking over the potential victims by their enticing to traffickers through different methods, the most common being the success stories of the persons who were helped to go abroad and returned with large sums of money after a relatively short period of time.<sup>5</sup>

The used methods and recruitment techniques are different depending on the degree of vulnerability of the victim, on the age, the level of training, the material position (mostly poor), lack of life experience, naivety.

The principal means of recruitment consist in:

- The promise of a respectable and well paid job in the Western countries, made directly by the dealer, or through relatives or friends of the victim who trust the dealer. The victim enjoys a promise for a modeling career, services in bars and clubs, nanny or cleaning positions.

- Ads in newspapers regarding offers for jobs abroad, particularly attractive in terms of high wages that can be obtained, compared with the minimum training required to the future employees.

- Dating agency ads<sup>6</sup>

Very often these ads regarding jobs or dating are found on different sites. In most cases, traffickers are choosing sites specifically designed for such ads, where they post their own ad, along with others that truly provide jobs, the traffickers offering more advantageous conditions than the others, luring in this way the victims.

*The means used* by the traffickers to carry out acts of trafficking are enumerated in Article 12 paragraph 1 of Law no. 678/2001, and consist of: threat, violence or other forms of coercion, by abduction, fraud or deception, abuse of authority or taking advantage of the persons' inability to defend themselves or to express their will, or by offering, the giving or receiving payments or benefits to achieve the consent of the person who has authority over another person.

To constrain means to force somebody, or compel a person to do a certain thing that willingly that person would not do or forcing somebody to have a certain behavior or conduct. The constraint may be physical or psychological (moral) and the actions that make this possible are actions of threat or violence<sup>7</sup>. In cyberspace, only the moral coercion can be achieved, the victims being threatened by different mails, instant messages (messenger, chat), or even posts on different forums.

Moral coercion involves threatening the victim with causing a harm pointing directly to it, to the spouse or a close relative, harm can be straighten only by accepting the trafficker's requirements. Causing harm may be for example publishing on various websites movies or photos with the person who does not want to make them public.

The problem that arose in theory and in practice was whether the one responsible for the messages posted on the Internet is only the author or the person in charge with the server. The conclusion reached is that if the administrator of the system can not predict and verify the content of the messages sent by subscribers, but is limited to ensure optimal functioning of the service and its correct use, than he is not liable for the content of

<sup>5</sup> See Florea Pasca – Fenomenul infracțional de trafic de ființe umane, Pro Universitaria Publishing house, Bucharest, 2010, p. 101, 102.

<sup>6</sup> Idem

<sup>7</sup> Ibidem, p. 106

messages. But in case of the moderator of the discussion group, whose task is to monitor messages and to authorize their publication, we can speak of a contest of people to commit the crime<sup>8</sup>. For example, in United Kingdom, The Criminal Justice and the Public Order Act provide the fact that the transmitter of an obscene material is not the only party who risks a sentence: the organization that provides facilities necessary to the Internet access – a computer center or an employee – may be held responsible. If they are conscious that the system they are responsible for is used to distribute obscene materials and do not undertake anything to prevent this action they could be brought to justice<sup>9</sup>.

But sometimes the roles are reversed, meaning that the victim is the one addressing to the trafficker. We think here of organ trafficking, which pretty often, the future donor decides to search online buyers through real estate fields that have more visitors, by subscribing under false names and using phones specially purchased. “Volunteers”, most often aged between 20-40 years, require large sums of money, offering in change organs that are not indispensable for life (kidneys). The victim’s consent as we know, however, is not a cause that could exonerate from liability the trafficker. In this case, however, and the victim also commits a crime, that one provided by the Law no. 95/2006 regarding the healthcare reform<sup>10</sup>.

Among the means of people exploitation the ones that can be achieved in cyberspace are the pornographic representations aiming to produce and spread pornographic materials and to perform other activities as such, that violate human rights or fundamental freedoms of the person.

By forcing the victim to engage in pornographic representations there are implicitly violated the legal provisions of Law no. 196/2003 regarding preventing and fighting pornography<sup>11</sup> and the Optional Protocol of the Convention regarding the Rights of the Child, child prostitution and child pornography<sup>12</sup> signed by Romania on 26 September 2001.

Given the great extent of this phenomenon on the Internet, the legislature decided the express incrimination of child pornography committed by network means, namely “production aiming distribution, offering or making available, distribution or transmission, obtaining for oneself or for another pornographic material involving minors or possession, without right, of child pornographic material.”

The Convention regarding cyber crime defines in Article 9 “child pornography” as “including pornographic material (obscene, against moral values) that visually depicts a minor engaged in an explicit sexual act, realistic images representing a minor engaged in a sexual activity.” In the same text, by minor we understand “any person under the age of 18, or according to the national legislation, a person not older than 16 years.”

In 2007, a study shows that in Romania a female victim was kidnapped by traffickers with the purpose of pornographic exploitation on the Internet<sup>13</sup>. Regarding the trafficking

<sup>8</sup> See Vincenzo Franceschelli, Emilio Tosi – op.cit., p. 322

<sup>9</sup> See Ioana Vasii, *Criminalitatea informatică*, Nemira Publishing house 1998, Bucharest, p. 132

<sup>10</sup> Published in the Official Journal of Romania, First Part, no. 372/2006

<sup>11</sup> Official Journal no. 342 of 20 May 2003

<sup>12</sup> Official Journal no. 601 of 25 September 2001

<sup>13</sup> See Florea Pasca, op.cit., p. 143

in children, the study shows that in 2007, the main way of exploitation of children was sexual (75%), out of which six children were victims of exploitation for child pornographic reasons, two cases being exploitation with the aid of the internet.

The small number of victims regarding the human trafficking crime exploited for this purpose compared to the number of victims used for other purposes does not reduce its importance. This is because the amount of money derived from internet pornography is much larger than the amount of money a dealer can get using the victim for other purposes. Still, the number of people that can watch those images is very high, as it takes fractions of a second for the image to be transmitted abroad, even on other continents.

In these cases the traffickers are also criminally liable for these acts when it comes to the series of crimes. Regarding the ones that view the sites, the jurisprudence holds that the mere “visiting” of a site containing such images without downloading them, does not constitute a crime<sup>14</sup>.

*The Continuous nature of the crime*

One can make a distinction regarding the criminal acts taking into account the technical characteristics of the used means. Thus, in case of transmission by electronic mail or online chat, the message is sent instantaneously, but situation stands in a different way in case of the infringements committed through Internet sites or by forums on Usenet. Here we find a permanent retransmission of data without the victim’s possibility to prevent it. The site is visible anywhere in the world connected to the network at any time. Hence we draw the conclusion that the illegality committed by these methods (websites, internet) is as a continuous infringement, a place where data are constantly available<sup>15</sup>.

The crime in its continuous form is characterized by the fact that continuity is associated with the possibility of ending the harm and the prejudice caused is always higher every moment. In the case of trafficking in persons where the Internet is used as a means of recruitment, threat or exploitation methods, the conditions are achieved.

The importance of the crime classification as a continuous crime is found in the prescription enforcement. The Criminal Code sets out regarding the crimes that the prescription runs from that day and for the continuing crimes that day it ended. This means that for the crimes regarding the data on the internet, prescription flows only from the moment the data are taken off the Internet. In this regard, the French court pronounced itself in a case settled by the Correctionelle Tribunal of Paris on December 6, 2000, which stated that the prescription will not run as long as the data is still available online<sup>16</sup>.

In another aspect, the continuous nature of the crime enables the participation of a third party to the crime already initiated. In such cases, we are not dealing with two separate crimes committed by two different people at different times, but a contest of people in the same continuous crime. Let’s think in this respect to the responsibility of the host-providers to take note of the unlawful nature of the data posted on their servers and do not remove them thus giving their consent to the access of these data by any person<sup>17</sup>.

<sup>14</sup> See Decision of 5 January 2005 of the Court of Cassation, in Vincent Fauchoux, Pierre Deprez – “Le droit de l’internet - lois, contrats et usages” Litec Publishing house, Paris, 2008, p. 216

<sup>15</sup> See Francesco Buffà „Profili penali del commercio elettronico”, Giuffrè Publishing house, 2006, p. 279

<sup>16</sup> Ibidem, p. 282

<sup>17</sup> Ibidem, p. 283

*Determining the applicable law*

Regarding these crimes it's been raised an issue – the place of the committed crime, which attracts the applicable law and judicial competence. By its nature, the Internet is a supranational instrument where users sometimes become administrators of the information without even being aware of it. Therefore, it is necessary to return to the previous principles of territoriality principle, which is difficult to be applied in these cases<sup>18</sup>.

It is considered that the principle of universality is the most acceptable, which although at first glance may seem utopian, it applies in different sectors. Thus we could recall the human rights (UN Convention), the international corruption (New York Convention), organized crime and human trafficking (Palermo Convention). On the other hand, criminal law can govern only where it has power to impose: only in the fields where the sovereign power whose expression is the criminal law, allows this, while the state has no interest to punish acts committed outside its territory<sup>19</sup>.

Therefore, we consider it necessary on an international level the existence of cooperation between states much closer in terms of fighting this phenomenon, and also it is necessary the enforcement of certain common rules to punish acts of human trafficking, taking into account this new form of expression, in cyberspace.

In conclusion, we can say that the technological innovations have simplified our lives allowing us to accede rapidly to information and to communicate remotely in real time, a fact that once was unimaginable but in the same time they might constitute a real danger because the legal system fails to deal with these phenomena with the same rapidity by which they develop. The information revolution has caught unprepared the states in what concerns the system of law. Preoccupying now for all the modern societies is not only how to efficiently use and develop computer technology continuously, but also to establish the legal framework where to develop interactions in this area. In addition to the emergence of new crimes specifically to the computer environment, it was created a new framework for the display of traditional crimes such as human trafficking. The recruitment of victims through the Internet, using e-mails for the moral coercion of the victim and eventually, exploitation of victims aiming to achieve widespread Internet pornography are the ways in which such a crime takes place in cyberspace. It is necessary the establishment of certain legal provisions to expressly regulate who exactly will be held responsible for the spreading of such material (only the one who has published the data on the site and the site administrator or other persons), when exactly the human trafficking crime concludes and the term of prescription starts running out (which in our view cannot run out as long as information is still visible and accessible on the site), and where is the place where the crime is committed (the place where the victim finds itself, the place where the information was posted, the place used by the perpetrator to send threatening messages).

<sup>18</sup> Fabrizio Lisi, Gaetano Murano, Agostino Nuzzolo, "I reati informatici - la disciplina penale nella società dell'informazione. Profili procedurali", Maggioli Publishing house, San Marino, 2004, p.90

<sup>19</sup> Francesco Antolisei – Manuale di diritto penale - parte generale, Giuffrè Publishing house, Milano, 1985, p. 101

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