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**The international protection of minors
against sexual exploitation**

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Introduction

We are witnesses, on a daily basis, to proclamations imbued with sentimentality towards childhood; a wonderful result of our age, which painstakingly managed to break the curtain of silence on a phenomenon, sexual abuse, not always approached throughout history as a crime.

Its ever changing classification is a clear indicator of the degree of collective sensitivity towards the reality of children: at first ignored, then tolerated and, finally, safeguarded.

The child, from an object available to the pater familias becomes entitled to rights, to be protected not only at the national level, but also and foremost through the provision of international instruments, granting sufficient standards of prevention, protection and prosecution in every fibre of the society.

The moving aim to combat such heinous acts has been transferred from an argument about decency, public morality or good costume, affecting the one abusing a minor, to the physio-psychological integrity and the sexual inviolability of the evolving individual, who should not and must not be compelled to confront such a delicate dimension.

Moreover, there is no kind of consent that can be considered as a discriminatory criterion, as a free expression of will can only come as part of a relationship of equality, free from mechanisms of psychological subjection.

With technological innovation, the methods of solicitation are also changing, offering candies now constitutes a legacy of the past, approaches through the internet are nowadays much safer and effective. Behind the computer screen hides an indefinite audience of abusive subjects, ready to give life to a sad repertoire that is repeated whenever they manage to steal the confidence of the victims.

The elaboration of international justice bodies on the notions of human rights and international crimes, as well as the activities of international tribunals, especially in

the past twenty years, certainly have contributed to devote attention to all crimes involving the weaker sections of the society, among which must be counted minors.

The most important news, in the legal drafting process inaugurated from the beginning of the last century, has been moving the attention of the legislator from a regulatory framework almost completely polarized around the offender, to aspects related to the interests and requirements of protection of the child.

Nowadays, to focus a paper on the various instruments involved in the protection of minors, considering for each one the differences and the efficiency, implies a discussion of a topic that has not yet reached a point of arrival, although some often believe the opposite.

There has been a lot of discussing and acting about the various possible mechanisms at international and domestic level that should be taken to grant to every child a chance to live a serene childhood, free from disturbance and abuse.

However, the level of protection that has been reached today cannot (and should not) be considered as the culmination of a process that is still far from over. This need is highlighted by the fact that there are still abysmal differences and completely different destinies of life depending on the place of birth of the child.

This thesis aims to be an analysis of the various instruments that until now have been created to limit possible situations of hardship suffered by children, the usefulness of each of them and possible solutions to the gaps that are still present.

In line with this aim, a critical assessment necessarily requires a treatment carried out on a wide range of actions to obtain, through the comparative analysis of multiple systems from an international and internal perspective, an overview and understanding of which are the solutions that have obtained the best results.

This work, moving from an international to an internal point of view and then returning to a European perspective as a point of closure, first gives an overall perspective of who is the subject of the thesis.

As just mentioned, the relevant legal framework has been evolving throughout the years, facing a constant modification especially since the Convention on the Rights of the Child, and is therefore necessary to try to delineate who is considered a child and what the implications concerning age limitations might be.

It seemed only proper, then, to dedicate the entire chapter to the definition of the different phenomena object of this dissertation paper, starting from the general circumstance of child exploitation and then analysing the subspecies of paedophilia and pedo-pornography.

However, defining the crimes and discussing the relevant doctrine, would be void and useless for the aim of this paper, when not related to what has been done in terms of the relevant legal framework as well as international cooperation.

Throughout the second chapter, the focal point is the examination of what has been defined, up to date, as the most comprehensive and innovative instrument in the European and, some argue, international scenery.

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse opened for signature in Lanzarote on 25 October 2007, is the first instrument to expressively define and discuss the different forms of sexual exploitation and sexual abuse, exploring and regulating them in relation to the previous framework but mostly “updating” those legislative efforts, transposing and adapting them to an ever changing society and to new conducts which were previously wrongfully not considered as crimes.

The chapter is structured in a way that aims to mirror the Convention, listing and analysing preventive, criminal and protecting measure, and culminating in one of the

most, if not the most in the opinion of the writer, innovative aspects of the document: the open invitation to the adoption of international cooperation measures by the Member States. As it will be seen, and as already briefly mentioned, cooperation in the judiciary field, especially with regards to such a sensitive topic, is fundamental if the community wants to achieve a more effective and efficient protection of minors. Lanzarote specifically dedicates norms to this end, laying down general principles and measures that should be adopted by the ratifying states in order to pursue the bigger picture of a protection on a larger scale.

To this end, it seemed appropriate to compare what has been brought upon by the Convention with the law adopted by the Italian legislator in order to introduce the Lanzarote provisions within the national system.

Chapter 3 therefore focuses on Law 1 October 2012, No.172. After an overview of the previous regulatory instruments formulated by the national legislative body and a brief mention to what has been a complex transposing mechanism, in order to properly and fully receive the dictates of the Convention, the chapter analyses the new crimes as well as processual innovations.

In particular, it seemed proper to point the attention towards one of the most sensible subjects of the Convention, namely the newly provided procedures for the hearing of the child victim and the value to attribute to the testimony.

This aspect of the Convention, as transposed in the Italian law, was particularly worth examining as it exemplifies the will of the European legislator to create a system in which the attention is not solely on the criminalisation of specific conducts and on their prevention, but mostly on the prevention of “secondary victimisation”, with the indication of specific procedures to be followed for an effective protection of the child even during the process and the investigations.

Finally, with the aim of concluding this dissertation as it was a full circle, the last chapter is dedicated to what has been done in order to achieve a more efficient harmonization in the field of criminal law and what should be done in order to configure a system in which the victim is effectively protected and the crimes are prosecuted homogeneously.

As mentioned above, one of the main problems with the prosecution of sexual crimes against children is that there is no guarantee yet of a uniform definition of the acts in question and therefore an effective protection of children in different countries, as what is considered as a crime in one country might not in another.

What emerges from chapter four is that the European Union has put a lot of efforts into the creation of a common area of justice even for what concerns criminal law, especially after Directive 29/2012 and the previous Treaty of Lisbon, but have these efforts achieved an effective result?

Chapter 1

The protection of minors and the relevant legal framework

a) General aspects and definitions

i) *Definition of minor in the International and European legislations*

When approaching the subject of children's sexual exploitation, it is necessary to preliminarily typify the subject to whom this legal status belongs. The concept of childhood, as well as that of age of consent, varies greatly depending on the geographical area of reference and on the cultural background. The problem with a non-unified legal approach to the definition of minor is that it gives criminals the possibility to take advantage of an eventual lack of norms in a specific area, getting away with conducts that are considered crimes in other countries.

As a general reference, a child is *every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*.¹

This definition is used as the common legal parameter for the denotation of a child both under the International and European legislations.²

The *United Nations Declaration on the Rights of the Child* of 1959³, while not providing a legal definition of the subject, clarifies and broadens the content of the *Geneva Declaration of the Rights of the Child*⁴: the children is described as a

¹ See *United Nation Convention on the Rights of the Child*, Art.1, adopted and opened for signature with Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

² See AA.VV. *Handbook on European law relating to the rights of the child*, European Union Agency for Fundamental Rights and Council of Europe, 2015, p.17.

³ See *United Nation Declaration of the Rights of the Child*, Proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959.

⁴ On 23 February 1923, the International Save the Children Union adopted the first version of the Declaration of the Rights of the Child during its fourth general assembly. The draft was later ratified during the fifth general assembly, on 28 February 1924, and was then sent to the League of Nations. On 26 September 1924, the League adopted the declaration and titled it the Geneva Declaration.

developing human being, considered in his or her physical dimension as well as social and psychological (Principles II and IV).⁵

The *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of parental responsibility and measures for the protection of children*, provides a very broad definition. In its Art. 2 it simply states that the principles contained in the document are valid for all the subjects, from their birth until they reach the age of 18; therefore, with the ratification, the States accept to distinguish between a child and someone whom has reached legal age using the standard of having reached 18 years old.⁶

It should be added that in all international conventions to term "minor" the expression "child" or "baby" is preferred. The reasoning behind is that it “underline, with too much emphasis, the situation of ‘minority’ of the boy and, therefore, of his/hers dependence on others; it presupposes a hierarchical relationship between an adult in the fullness of his majority and, therefore, omnipotent, and a minor, precisely because of its minority, lacking capacity and value; because it postulates a one-pointedness in the provision of viable answers to needs of the people, while in an adult-minor relationship the exchange is fruitful in both directions”.⁷

As for a legal definition of child under EU law, there is not, at present, one formal characterisation of the subject. In fact, the concept may vary depending on the regulatory context: as the *Handbook on European law relating to the rights of the child* points out⁸, there are laws referring to children as “direct descendants who are under the

⁵ See *supra*

⁶ See *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, Concluded 19 October 1996 and entered into force 1 January 2002.

⁷ See Moro A.C., *Il bambino è un cittadino*, Mursia, Milano, 1991

⁸ See *Handbook on European law (...)*, *supra*.

age of 21 or are dependent”⁹, as well as ones differentiating between “*young people*” (persons under the age of 18), “*adolescents*” (any young person between 15 and 18 years old) and “*children*” (persons under the age of 15).¹⁰

The Council of Europe Convention on Cybercrime defines in its Art. 9(3) a child as any person under 18 years old.¹¹ Again, however, the document grants the ratifying states the right to make reservations concerning the age limit, with the possibility of lowering the age under which a subject must be considered a child to 16 years. Switzerland, for instance, decided to lower the threshold for the crime of child pornography to 16 years.¹²

Another instrument adopted in the EU framework, contributing to the difficult task of circumscribing who is to be considered a child, is *Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography*, replacing Council Framework Decision 2004/68/JHA.¹³ It once again sets the bar to 18 years, allowing the Member States to decide at the national level what the age of engagement of a minor in consensual sexual activities should be.¹⁴

The Lanzarote Convention takes a step further by specifying that a child should be considered any person under 18 years old, and by not providing for any possibility of reservation to be made by Member States.¹⁵ Nevertheless, there are articles in the Convention specifying a different age threshold: Art.18(1b)(2) and Art.23, when

⁹ See *Directive 2004/38/EC* of the European Parliament and of the Council of 29 April 2004 on the *Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, Art. 2 (2) (c).

¹⁰ See *Directive 94/33/EC* of 20 August 1994 on the *Protection of young people at work*, OJ 1994 L 216, Art. 3.

¹¹ See Art.9, *Convention on Cybercrime ETS No.185*, opened for signature in Budapest on 23 November 2001, “*For the purpose of paragraph 2 above, the term “minor” shall include all persons under 18 years of age. A Party may, however, require a lower age-limit, which shall be not less than 16 years*”.

¹² All the reservations made by the ratifying states may be found on https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/declarations?p_auth=YL8g4gf8

¹³ See *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*.

¹⁴ *Ibid.*, Art.20

¹⁵ See *Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse*, CETS No.201, Treaty opened for signature in Lanzarote on 25 October 2007.

referring to the *solicitation* of a child, provide that the legal age for engaging in sexual activities should be defined by national provisions.¹⁶

Nevertheless, there have been criticisms toward the general adoption of 18 as the legal age. For instance, it has been argued that there are multiple countries where children engage in sexual intercourse before reaching the legal age, and it would be therefore more appropriate to distinguish between the age needed for sexual intercourse to be legally allowed and the age under which a sexual relation with a child should be considered a crime.

Moreover, as Jenkins has pointed out, generalising the legal protection for all subjects under 18 years old, means putting a 5 years old on the same level as a 17 years old.¹⁷ As the author remarks, trying to impose the same restrictions to all of those who have not reached the legal age might generate incoherence instead of more protection. Gillespie, although not completely agreeing with Jenkins, also acknowledges how teenage sexuality should not be categorised so vaguely.¹⁸ He, in fact, points out that maturity should not be presumed just basing on the age of the subject, as it is an extremely subjective characteristic.

On the other hand, if we want to take a look at the Italian normative provisions on the matter, Art.2 of the Civil Code, as amended by Law 8 March 1975, n. 39: "The age of majority is fixed at the age of eighteen years of age. With the major age, the subject acquires the ability to perform all acts for which it is not established a different age."

¹⁶ See *supra* Art.18, 23 and *Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, point 46.

¹⁷ See Gillespie A., *Legal definitions of child pornography*, *Journal of Sexual Aggression*, 16:1, 19-31, 2010, p.22.

¹⁸ *Ibid.*

It is appropriate, however, to clarify that the domestic law anticipates certain rights and duties before the age of eighteen and this exemption shall have effect for both Italian and foreign minors.

In fact, even with the achievement of lower age the ability to engage in certain actions, productive of legal effects, persists with the simple evaluation of the maturity acquired before the age of eighteen. By way of example, consider the ability to recognize the natural child (Art.250 c.c.) or the exercise of rights arising from intellectual property, which are obtained from the age of sixteen, or, again, the rights arising from the performance of work which minors can access under Law 17 October 1967, n. 977 (Art. 3 states, in fact, that the minimum age for admission to employment, even in the case of apprentices, is fixed at fifteen years of age).

In addition, it is expected that at twelve the child should be heard during the adoptability procedure and at fourteen the children is legally indictable. The hearing of the child and the obligation to take account of his views are also prescribed by various EU regulations, such as implementation of the measures concerning custody and visiting rights.

We can therefore subsume, from the disposition's phrasing, that anyone who has not reached eighteen years of age yet should be considered a minor, while when reaching such threshold, the subject leaves the minority and acquires full capacity to act, with the loss of the right to enjoy the regulatory system and the protections set up for minors.

ii) *Concept of sexual abuse*

Initially, the term *abuse* pertained to the physical beating of a child, but it progressively expanded to the point it now includes an adult behaviour, gravely

jeopardizing the personal growth of a child and that has as its objective the exploitation of the child for personal gratification or profit.

On a purely psychological level, it could be said that any sexual desire towards children, coming from an adult, is a pathology that could eventually lead to an abuse. Nevertheless, when such an inclination does not lead to concrete actions or does not express itself in forms apt to be directly perceived by the victim, it is not considered appropriate to talk about abuse.

Far from presenting a comprehensive notion, literature, in order to operationally define the phenomenon, relies on several variables: the age gap between abuser and victim, the component of threat, the desirability of the experience. Paedophilia, incest and sexual exploitation fully fall in this context.

The degree of specificity of the definition depends on the proposed categorisations, more or less extensive depending on whether they refers to clinic or judicial point of views. The inclusion of exhibitionism, obscene proposals and assaults committed between peers is still debated.

Even for what concerns the nature of the proceedings, it appears clear from the studies that there still is a wide range of meanings: the tendency of the past records the choice of encompassing various actions within the meaning of abuse, including sexual intercourse, masturbation, exposure of the genitals and watching pornographic movies. In the beginning, the distinction would be between forms of "abuse with contact" and "abuse without contact"; later on, more restrictive definitions were preferred, the abuse requiring a sexual act necessarily involving physical contact.¹⁹

¹⁹ Precisely, according to the U.S. based *Centres for Disease Control*, sexual violence may be partitioned in four subcategories: complete sexual act, taking place without the full consent of the victim, or involving someone unable to pay a real consensus; attempt to have a sexual relationship with an unwilling victim; sexual contact without penetration, including touching, directly or through the clothes, of genital organs or other body parts of the victim in order to obtain sexual excitement; sexual abuse not involving direct contact between abuser and victim, alluding to acts of voyeurism, exhibitionism, or exposure of a minor to pornographic material or sexually explicit dialogues.

In recent years, the option fell to a less rigorous one, considering "sexual abuse of a minor, any approach or action of a sexual nature involving a child and/or causing him discomfort or psychological suffering".

One of the first official definitions given of sexual abuse was that offered during the 5th International Congress on Child Abuse and Neglect, held in Montreal in 1984. For the first time it was clarified in an official document, that the child is a subject with his own personality and dignity, and should be protected as such.

As a general reference, while the definition of physical abuse might not always be clear – having to take into account economic and personal factors – the general definition of the acts constituting child sexual abuse usually does not encounter too many contrasts.

In the early 90's, the prominent doctrine was defining child sexual abuse as a crime requiring two elements: a sexual act with a child and the commission of the act through an "abuse", which could result in a coercive behaviour or a consistent age gap between the victim and the perpetrator.²⁰

Following this line of thoughts, Felzen Johnson broadly refers to it as "any activity with a child before the age of legal consent that is for the sexual gratification of an adult or a substantially older child".²¹

The transition to the sphere of sexual abuse still implies a power asymmetry in the relationship between the abuser and the child, the latter one being considered an almost powerless human being compared to the perpetrator; however, as the term itself suggests, the discipline of the crime is far more detailed and specific.²²

It is necessary to point out how there is not, in the juridical literature and normative provisions, a consistent definition of sexual abuse; the doctrine usually refers to

²⁰ See Finkelhor D., *Current Information on the Scope and Nature of Child Sexual Abuse*, in *The Future of Children*, Summer/Fall 1994, p.32.

²¹ See Felzen Johnson C., *Child Sexual Abuse*, in *The Lancet*, Volume 364, No. 9432, 31 July 2004, p.462.

²² See AA. VV., *Infanzia e abuso sessuale*, edited by T. Bandini and B. Gualco, Giuffrè, Milano, 2000.

different variables: the age gap between the abuser and the victim, whether there was a threat or not, the desirability of the act. Episodes of paedophilia, incest and sexual exploitation all fall within the broad category of sexual abuse.

This said, a general approach is usually better, as it avoids the description of the single actions, enabling the inclusion by legislators of veiled displays of interest and seduction from an adult towards a minor. In fact, the victim, who is not capable of codifying such behaviours, might perceive actions without violence, ambiguous hints, and prolonged stares as expressions of care and affection. The consequences are clear: it is necessary to eliminate the pre-requisite of violence as an essential character of the crime, as most of the sexual abuses occur without an “objective” violence, when the abuser has already formed such a strong psychological bond with the victim, he/she will be able to control the child.

In the European framework, we can find a proper juridical definition of sexual abuse in the recent Lanzarote Convention; the Convention provides a list of “*intentional behaviours*” constituting sexual abuse, which should be considered as crimes and should be consequently punished as such by national authorities.

Namely, Art.18 punishes the engagement in sexual activities with a child considered as such by national provisions, the use of coercion, force or threats, as well as the abuse of a position of trust or authority to engage in the aforementioned activities and, finally, the abuse of the vulnerable position in which a child could be due to mental or physical incapability.²³

Therefore, while the document expressively lists the single conducts, the reconstruction of the behaviours constituting an offence is to be made according to the norms on sexual liberty or the intangibility of children’s sexuality.

iii) *Paedophilia and Pedopornography*

²³ See *Lanzarote Convention*, Art.18, *supra*

Generally, the criminal conducts regarding sexual crimes against children are ascribed to the phenomena known as paedophilia. An unequivocal definition of the occurrence, given the scientific knowledge acquired up to date, is not possible, as it could lead to an improper juridical configuration of the crime.

The term paedophilia, as a word originating from ancient Greek, literally translates to “*love of children*”. However, the contemporary meaning denotes the desire for sexual activity with young children.

A paedophile is defined in dictionaries as “*someone who is interested in children*”²⁴, independently from any consideration of homosexual aspects.

Jurisprudence, on the other hand, identifies paedophilia as the conduct of those carrying out sexual activities with someone who has not reached the legal age yet, including – apart from physical activities – acts suitable to or aimed at putting a child at risk through sexual excitement and satisfaction.²⁵

It often happens that the concepts of sexual abuse and paedophilia are considered as overlapping, but it is fundamental to keep those two things separated.

As we have just analysed, sexual abuse denotes the action of causing harm to a child through sexual behaviours, while paedophilia is a mere sexual attraction for minors. Paedophilia is therefore a behavioural trait, a tendency towards the establishment of a relationship with a child. As a result, not all people labelled as paedophiles commit sexual abuses as well as someone who sexually abuses a child should not automatically be considered a paedophile.

It is for instance necessary to keep this in mind: the different perceptions of the nature and the consequences of a paedophilic relationship are greatly influenced by the historical and cultural context within which such relationship develops. While paedophilia as a phenomenology has different causes (biological, genetic, psychosocial,

²⁴ See, for example, definitions given by the Cambridge-Oxford Dictionary or the Merriam-Webster.

²⁵ In this sense, Cass. Pen. 15 November 1996, Coro, CED, 207298

etc.), as a cause, it mostly has socio-cultural references.

We can therefore conclude, for now, that paedophilia has always existed as a cultural phenomenon, but it was not always perceived and framed as a social issue to be legally regulated.

For what, instead, concerns child pornography, the Optional Protocol to the CRC defines it 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, the dominant characteristic of which is depiction for a sexual purpose*”.²⁶

The crime might take different forms, in the last years including electronic material and the use of the internet as a mean to create and distribute it, taking advantage of the new available technologies to morph real images or create “virtual child pornography”.

The development of advanced softwares has, in fact, allowed perpetrators to create pornographic images depicting a child that does not actually exist or to superimpose a child’s face on an explicit image.²⁷

As Gillespie notes in his work²⁸, the problem with fictitious material is that it is not always possible to show that harm is directly caused to the child.

Moreover, should the State be capable of demonstrating that such link exists, it could be questioned if the problem arises when the material is created or when the material is used: the author points out how, in the latter case, the more efficient response would not be to include it in the concept of child pornography, but to create specific offenses.²⁹

Once again, it is difficult to provide a general, internationally recognized, definition of child pornography, as different States acknowledge different conceptions

²⁶ See *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, General Assembly Resolution A/RES/54/263 of 25 May 2000, Art. 2(c).

²⁷ See Klain E., Davies H., Hicks M., “*Child Pornography: The Criminal – Justice-System Report*”, American Bar Association Center on Children and the Law for the National Center for Missing & Exploited Children, March 2001.

²⁸ See Gillespie A., *Legal definitions of child pornography*, in *Journal of Sexual Aggression*, 16:1, 19-31, DOI: 10.1080/13552600903262097, 2010, p.26.

²⁹ *Ibid.*

of the issue due to social, cultural and moral factors. Nevertheless, both state actors and political organizations have pointed out how the adoption of a harmonized definition of child pornography would greatly improve investigative procedure, as well as facilitate international cooperation in the fight against production and distribution of pornographic material.

Moreover, as Gillespie once again points out, the problem at the basis of the definition of child pornography is the eventual clash with the principle of freedom of speech and expression: the interference can be justified when an actual harm to the child can be proved, as it is functional to the protection of a superior interest; if, however, the nexus can't be shown, it becomes more difficult for the law to prevail.³⁰

The doctrine regarding this particular aspect is very controversial. While Gillespie's view seems to prefer a restriction of freedom of expression in favour of a more extensively criminalization of the above-mentioned conducts, there are authors that see the same criminalisation as an intrusion in what has been defined by authors as "*purely private speech*".³¹

Byrne Hessick, debating this issue, claims that only those images created with an actual abuse happening should be considered child pornography: the line of thought of the author is that if a sexual contact is necessary for the crimes of sexual exploitation and abuse to occur, then it is only rational that only images produced with the occurrence of an abuse are considered as child pornography.³²

b) Legal regime before the Lanzarote Convention

iv) *Previous regulatory framework*

³⁰ *Ibid.*

³¹ See Byrne Hessick C., *The Limits of Child Pornography*, in *Indiana Law Journal*, 2014, Volume 89, Booklet 4, p.1441

³² *Ibid.*

a. The international progression

The first international instrument directly dedicated to the legal protection of children was signed at The Hague on 12 June 1902; it exemplified the new tendency to consider children's rights as an independent body of law and not as a part of a bigger framework. Nevertheless, it was only after the end of the First World War and of the subsequent major violations of law against children and teenagers, that the international community took a further step in the field of children's rights.

The 'newly born' League of Nations (LON), having received suggestions in this direction by various non-governmental organizations as the Red Cross or Save the Children, ratified the Geneva 'Declaration of the rights of the child' in 1924.³³

The Declaration was nothing more than a mere moral obligation, but its revolutionary importance lays in the fact that it was the first international instrument to explicitly recognize certain rights exclusively to children; those rights were to be recognized at any given time, disregarding any other consideration.

When the General Assembly of the League of Nations approved the Geneva Declaration, the signatories promised to incorporate the principles of the document into their national laws, even though they were not legally bound to do so.

Nonetheless, the Geneva Declaration remains the first international Human Rights document in history to specifically address children's rights.

Following the path of this renewed understanding of children's rights, the adoption of the United Nations' Declaration of the Rights of the Child in 1959 completed and modified the previous Geneva Declaration of 1924.

The United Nations (UN) was founded after World War II. It took over the Geneva Declaration in 1946. However, after the adoption of the Universal Declaration of Human Rights in 1948, the advancement of rights revealed the shortcomings of the

³³ See *supra* note 4

Geneva Declaration, which therefore needed an expansion. The UN consequently chose to draft a second Declaration of the Rights of the Child, which again addressed the notion that “*mankind owes to the Child the best that it has to give*”³⁴.

On 20 November 1959, the Declaration of the Rights of the Child was adopted unanimously by all 78 Member States of the United Nations General Assembly in Resolution 1386 (XIV).

The declaration provides for the protection of the child ‘*against all forms of neglect, cruelty and exploitation*’³⁵, for the first time in an international instrument. The 1959 Declaration was used as a platform for all the following international instruments, which slowly started to enucleate and specify the forms and violations of children’s rights.

The instrument, which has, for the first time, dealt in a complete manner with the rights of the child, is the United Nations Convention on the Rights of the Child³⁶. The Convention, signed in New York in 1989, is the first legal instrument to explicitly condemn all forms of sexual exploitation, abuse, abduction, embezzlement, sale, and trade in which might be involved children, or any other form of inhuman and degrading treatment.

The Convention entered into force on September 2 1990, after the 21st state registered the ratification with the United Nations’ General Secretariat, and has ever since become a standing point in the field; it is, in fact, the only treaty applied worldwide, which is specifically devoted to the subject.

Starting from the Preamble, the Convention presents traits of continuity with most of the international instruments laid down for the safeguard of human rights, in

³⁴ See Declaration of the Rights of the Child, 1959

<http://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf>

³⁵ Ibid., Principle 9

³⁶ See *Convention on the Rights of the Child*, 1989

<http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

particular children's rights, and even more with the fundamental international sources devoted to the protection of these rights. This underlines the definitive overrunning of the concept of children rights as a branch of family law and the subsequent acknowledgment of rights specifically provided for in the interest of the children, to which they are entitled on their own.

Moreover, for the first time in an international document, which has been adopted by almost every country in the globe, it is explicitly provided that any form of abuse, including sexual abuse, perpetrated against children, should be persecuted.

To this extent, we should in particular consider Article 19 and 34 of the Convention.

The latter explicitly includes, among the behaviours that must be persecuted, the induction or compulsion to participate in any act of sexual nature, the exploitation of underage prostitution, and in particular the use of children for the production of pornographic shows and material³⁷.

On the other hand, Article 19, paragraph 1, requires that all the ratifying states adopt any suitable measure, be it of legislative or administrative nature, to protect the child against any given form of violence, physical or mental damage, abuse, mistreatment and exploitation. The Article clarifies that children should be protected by the national legislation from “[...] *all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse [...]*”³⁸.

The Committee on the Rights of the Child has issued a general comment on the mentioned Article³⁹, recognizing the need to strengthen and expand protective measures,

³⁷ Ibid., Article 34

³⁸ Ibid., article 19, par.1

³⁹ See *General Comment 13 (2011) on the Rights of the Child to Freedom from all Forms of Violence* http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf

and thus providing the States with a guide for a complete understanding of their obligations under the Convention⁴⁰.

The Comment supports the provision under which all forms of violence against children should be strictly prohibited and safeguarded by appropriate legislative measures implemented by the states⁴¹. It also provides that, for the purpose of the comment, the term “violence” should mean “*all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse*”⁴², going as far as specifying that “*translations of the Convention into other languages do not necessarily include exact equivalents of the English term “violence”*”⁴³.

However, the term “*violence*” in the Comment overlaps with the concept of “*prohibited action against children*” as stated in Art.19 of the Convention, and the absence of additional clarification of terminology may bring negative results in the fight against child pornography.

Notwithstanding the problems, moved by the impact of the Convention, the United Nation Commission on Human Rights, with Resolution no. 1990/68, decided to “*appoint [...] a Special Rapporteur to consider matters relating to the sale of children, child prostitution and child pornography, including the problem of the adoption of children for commercial purposes*”⁴⁴. The Rapporteur had the duty to analyse the impact of the convention concerning these practices.

⁴⁰ Ibid., Ch. II, par. 11

⁴¹ Ibid., Ch. IV, par.31

⁴² Ibid., Ch.1, par.5

⁴³ Ibid.

⁴⁴ <http://www.ohchr.org/Documents/Issues/Children/SR/E-CN4-RES-1990-68.pdf>

The investigation's results were alarming: the report⁴⁵ given by Rapporteur Vitit Muntarbhorn showed how the measures adopted on a national level were in fact not truly effective when compared to the ongoing technological progress.

The need to offer better methods of legal protection was consequently even bigger and it pushed international organisms towards the adoption of better provisions, which could pick up the precedent work and enforce it in a better way.

This was then the principal aim of the First World Congress against the Commercial Sexual Exploitation of Children, which took place in Stockholm between August 27 and August 31, 1996; the Congress was promoted by the United Nations and saw the support and participation of 122 delegates from different countries, together with inter-governmental organizations and NGOs.

The Congress' Final Declaration, adopted once the preparatory papers were completed, might as well be considered as "the mother of the charters in the fight against sexual exploitation of children"⁴⁶, explicitly recognizing the violation of children's rights as a violation of fundamental human rights.

The Document highlights the existing international commitments and calls for action in all sectors of society; in doing this, it focuses on the one hand on coordination and cooperation, and, on the other hand, on the participation of children⁴⁷.

As for the first point, the Document stresses the need for urgent action, such as the strengthening of comprehensive integrated strategies, the development of implementation and monitoring mechanisms, as well as the promotion of better cooperation between member states and international and regional organizations, and

⁴⁵ See <http://www2.ohchr.org/english/issues/children/rapporteur/docs/E.CN.4.RES.1991.53.E.pdf>

⁴⁶ See Helfer M., "*Sulla repressione della prostituzione e pornografia minorile*", Cedam, Padova, 2007, p.6

⁴⁷ See AA.VV. "*The role of international cooperation in tackling sexual violence against children*", Istituto degli Innocenti, Firenze, 2012

finally the assurance of the allocation of adequate resources⁴⁸. In order to do this, the Declaration provides for the ratification of an ‘Agenda for action against the sexual and commercial exploitation of children’.

Concerning instead the participation of children, for the first time, it was provided that children should be allowed to express their views and should be included in the development of the programs concerning them⁴⁹.

Finally, the Declaration deals specifically, for the first time, with the exclusion of the relevance of any possible justificatory cause for conducts leading to the abuse and the exploitation of children; it goes as far as recognizing the necessity of paying more attention and allocating more sources to finance and endorse regulatory acts in order to fight this phenomenon.

Taking the lead from the Stockholm Convention, further improvements for the protection of minors were the result of the International Conference "Combating Child Pornography on the Internet", conducted in Vienna between September 30 and October 1, 1999.

The need for a new international instrument appeared from the reports of the Special Rapporteur, which underlined the new problematic challenges caused by the technological progresses and the diffusion of the internet.

The ratifying states endorsed a zero tolerance program, regardless of the specific national jurisdiction, providing for the possibility of punishing their own citizens even if the crime had been perpetrated in other parts of the world, specifically in those countries where the possibilities for impunity are higher⁵⁰.

Moreover, the Vienna Conference explicitly lists the behaviours, which constitute child pornography, not limiting them to the phase of production or transfer of

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ E.g. ‘UK’s *Sexual Offences (Conspiracy and Incitement) Act 1996*’

the pedo-pornographic material but also including the distribution, exportation, importation, transmission, possession and publication of this material in order to avoid any type of remonstrance coming from subscribing states.

The Vienna experience was furtherly discussed during the 2nd World Congress against Commercial Sexual Exploitation of Children, held in Yokohama, Japan, in December 2001.

With more than 3.000 delegates, including representatives of 132 governments and international organizations⁵¹, the Congress ended with the drafting of a document that reaffirmed “[...] *the protection and promotion of the interests and rights of the child to be protected from all forms of sexual exploitation [...]*”⁵².

The Yokohama Congress also paid attention to the new dimension of child exploitation and pornography caused by the technological progress, with a recall to the Council of Europe Convention on Cybercrime (Budapest 2001) and through Art.5, which provides that it is the duty of the ratifying states to “*take adequate measures to address negative aspects of new technologies, in particular child pornography on the Internet, while recognizing the potential of new technologies for the protection of children from commercial sexual exploitation, through dissemination and exchange of information and networking among partners*”⁵³. We are therefore witnessing, not only the issue of legal protection against a twisted and criminal use of the Internet, but also about an active participation of private site managers, along with public authorities, in order to monitor the use of the web and the sharing of information for the protection of victims.

Notwithstanding the many positive outcomes, the Yokohama Congress also had negative aspects, which were once again highlighted by the UN’s Special Rapporteur. In the 2002 Report the rapporteur pointed out the scarce progresses made since the First

⁵¹ <http://www.unicef.org/events/yokohama>

⁵² See Yokohama Global Commitment 2001, 2nd Follow Up

⁵³ <http://www.unicef.org/events/yokohama/outcome.html>

World Congress, in fact emphasizing how less than half of the ratifying states had activated counter-actions to the phenomenon, and how those who had, did not devote adequate sources to their development.

In order to have an overall picture of the importance of these instruments, we should also mention the Third World Congress on Sexual Exploitation of Children and Adolescents, organized by the Government of Brazil, UNICEF and ECPAT in November 2008. The aim was to focus on the progress achieved but also on the ongoing problems, as well as renewing the commitment of the States regarding the Call for Action in the prevention and prohibition of sexual exploitation⁵⁴, even in forms that are different from the commercial one.

Another important international step, in the field of children's rights, is the Special Session of the UN General Assembly on Children (UNGASS), during which the participating states committed themselves to several goals to improve the situation of children⁵⁵. This was the first session specifically devoted to children, and it was the first time children were included as delegates.

The Special Session's outcome document, *'A World Fit for Children'*⁵⁶, offers an interesting overview of the preparatory works and of the many issues to be addressed; the subsequent adopted declaration, instead, includes various points of action. Particularly interesting is the one regarding the protection "*of children from harm and exploitation*", which states "*children must be protected against any acts of violence, abuse, exploitation and discrimination*"⁵⁷.

⁵⁴ See AA.VV. *"The role of international cooperation in tackling sexual violence against children"*, Istituto degli Innocenti, Firenze, 2012

⁵⁵ Ibid.

⁵⁶ http://www.unicef.org/sowc06/pdfs/pub_build_wffc_en.pdf

⁵⁷ <http://www.unicef.org/specialsession/documentation/documents/A-S27-19-Rev1E-annex.pdf>

The Declaration was followed by a Report on Follow-Up⁵⁸, about a year later. The Report underlines how the need for attention caused by international crises and wars has not helped in the fight of challenges such as child illness and malnutrition, illiteracy and abuse; yet it also recognizes the concrete actions taken by the States in order to put into effects the commitments, or to integrate them into already existing national legislation.

The Report, however, acknowledges how the progress has been uneven, since only the 43 percent of Middle-Eastern and North African countries have taken the necessary steps, compared to the 87 percent achieved by countries in Central and Eastern Europe⁵⁹.

The definitive step ahead towards the creation of a global system of protection against sexual crimes committed against children was taken with the ratification of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography in 2002. The Protocol is now a binding document as well as a 'guide' for States, which can adapt their legislation on child pornography accordingly.

The Protocol strengthens the commitment taken by the States of adopting all the necessary measures to protect children from any kind of sexual abuse or exploitation and it specifies the forbidden, punishable behaviours as well as the international coordination methods.

Concerning the first point, the Protocol pushes for the adoption of more strict national provisions; Art.2 precisely describes which behaviours are to be considered as selling of children as well as prostitution and child pornography, in order to fulfil that

⁵⁸ http://www.unicef.org/specialsession/docs_new/documents/SSC-anniversary-report.pdf

⁵⁹ *Ibid.*

minimum standard of punishment, which could not be achieved earlier due to states' reservations.⁶⁰

In the field of international cooperation, on the other hand, the Protocol demands a more strict collaboration between states and their judiciary and public offices, with the provision of the maximum level of assistance possible over jurisdictional and extradition procedures⁶¹.

b. Steps taken by Europe

Next to international instruments, the initiatives elaborated in the context of European institutions acquire exceptional significance. The integration process at the European level was not simple, but the need for uniformity in the punishing of the more serious crimes has justified the adoption of important dispositions.

We can mention Resolution (77) 27 adopted by the Committee of Ministers on 28 September 1977, at the 275th meeting of the Ministers' Deputies, which deals with the compensation of victims of serious crimes; or Recommendation no. R (85) 4

⁶⁰See *Optional Protocol to the Convention on the Rights of the Child [...]*
Article 2

For the purposes of the present Protocol:

(a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;

(b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;

(c) Child pornography means 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.

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>

⁶¹ *Ibid.*,

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 3, paragraph 1, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of the present article in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>

adopted by the Committee of Ministers on 26 March 1985, at the 382nd meeting of the Ministers' Deputies, about victims of acts of violence in the family.

However, all of these instruments are lacking of incisiveness and should be considered more like statements of intent. In fact, even in the European legal framework, which should have demonstrated a better legal cohesion and thus an easier application of the communitarian provisions at a national level, putting these provisions in the form of resolutions, and referring to the good will of the states for their application, has diminished the incisiveness of the contents.

Indeed, according to EU law, recommendations are nothing but instruments that include a mere exhortation to the Member States, non-mandatory in any way, to keep a certain behaviour; it is therefore comprehensible how, in this case, the community legislator decision goes against the need to cohesion and effectiveness in such a delicate subject.

After all, a constant reticence to any structural change of the domestic criminal law by almost all Member States of the European Union is very well known, even in those States that are not entirely alien to hypothesis of harmonization of their criminal code with different realities.⁶²

The European Social Charter⁶³, elaborated by the Council of Europe in 1961 and revised in 1996, is the first act in which the serious problem of crimes against children is addressed. It represents the first attempt of confronting the issue on a communitarian level.

In particular, we should mention Art.7, where the right of children and teenagers to a special protection against moral and physical dangers is recognized, and Art.17, which on the other hand provides for the right of children to an appropriate protection in the social, legal and economic fields.

⁶² Take, as an example, the harmonization of the respective criminal law codes by Sweden, Norway and Denmark.

⁶³ More information of the Charter may be found at <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035>

The active participation of European institutions to world Congresses and Conventions, as it happened for the 1989 Convention and the Stockholm Convention in 1996, justifies the enforcement of protective instruments for children. The European Parliament, in this first phase, took the responsibility of elevating the standards of protection with Resolution A4-0393/96 of November 11, 1997. The Resolution deals with the provision of measures to protect minors in the European Union. Particularly in art.11 it condemns “[...] *child pornography, whether or not it is created by recording live scenes or by means of special effects*”⁶⁴, moreover providing in art.12 that the Member States should “[...] *include provisions in their laws to condemn the production and holding of pornographic material involving children*”⁶⁵.

We should moreover mention Recommendation Rec (2001) 16 of the Committee of Ministers on the protection of children against sexual exploitation⁶⁶, which calls for the criminalisation of child prostitution, pornography and the trafficking of children for sexual purposes. The Recommendation asks States to approve special measures for child victims during proceedings and ensure that their rights are protected for the entire duration of those proceedings. It also points out that judicial authorities should give priority to cases involving one of those felonies as well as calling for the establishment of extra-territorial jurisdiction, without the requirement for dual criminality.

Another important step forward was represented by the ratification of the Council of Europe Convention on Cybercrime (Budapest, November 2001), which is relevant not only for its content, but also because it has been ratified both by the Member States of the Council, and by United States, Canada, Republic of South Africa and Japan. This helped the Convention achieve an international nature rather than a European one. The Convention currently represents the only international treaty that

⁶⁴ For the Complete text see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:51996IP0393>

⁶⁵ See *supra*

⁶⁶ <https://wcd.coe.int/ViewDoc.jsp?id=234247>

deals with protection of freedom, security and, generally, human rights online; it aims at protecting children when they are depicted as “*engaged in sexually explicit conduct*”⁶⁷.

Yet, this is not the core of the Convention, since the actual innovation brought by it is connected with the specific attention given to the criminal conducts carried out with the use of new technologies and through the web, like the act of *grooming* and that of sharing, detaining and selling of pedo-pornographic material; both real and technologically simulated images are considered.

Furthermore, the Explanatory Report⁶⁸ specifies that three types of material should be considered illegal: depiction of sexual abuse of a real child; pornographic image of a minor appearing to be a child (*apparent pornography*); images which do not involve a real child and which are consequently entirely computer generated (*virtual pornography*)⁶⁹. However, other forms of representations, such as written and audio documents, are not considered.

While analysing the Convention, we should focus on art.9, titled “*Offences related to child pornography*”⁷⁰, in which a specific definition of the behaviours integrating the crime of child pornography is given. The article has the purpose of strengthening protective measures for children and advising member states on how to modernize their criminal law by adding provisions that suggest the use of computer systems for disseminating illegal content⁷¹. According to the Report, most of the signatories have already criminalized “*the traditional production and physical*

⁶⁷ See *Council of Europe Convention on Cybercrime*, art.9, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_conv_budapest_/7_conv_budapest_en.pdf

⁶⁸ *Convention on Cybercrime Explanatory Report* (ETS No.185) <http://www.worldlii.org/int/other/COETSER/2001/8.html>

⁶⁹ *Ibid.*, point 101

⁷⁰ http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_conv_budapest_/7_conv_budapest_en.pdf

⁷¹ *Convention on Cybercrime Explanatory Report*, point 91-93

distribution of child pornography”⁷², but should further implement prosecution of cybercrimes in accordance with the Convention.

The distribution of child pornography is also forbidden under article 9; the article additionally outlaws the act of “*offering*” the pornographic material, which is defined in the Explanatory Report as the use of pornographic websites or as the simple fact of providing the materials through the online networks.

In article 9, however, it is specified that the term “minor” refers to a child under the age of 18 years old and that the ratifying states are entitled to the possibility of asking a lower age bar, as long as it is not inferior to 16 years old.

In particular this provision can be included in those wished for provisions “[...] *addressing the divergence of legal approaches in the Member States and contributing to the development of efficient judicial and law enforcement cooperation against sexual exploitation of children and child pornography*”, as provided by Council framework Decision 2004/68/JHA of 22 December 2003⁷³.

More specifically, this last Decision⁷⁴ obliges member states to criminalise offences related to sexual exploitation; it also provides for the submission to criminal charges for the perpetrators, as well as for those who “*instigate, aid, abet or attempt to commit*” the crimes, whether or not these offences entail the use of a computer system⁷⁵.

Directive 2011/92/EU of the European Parliament and the Council, repealed Framework Decision 2004/68/JHA. It incorporates the provisions of the Lanzarote Convention, recognizing it as the highest international standard in the field, and it contains various norms granting it added value: the introduction of new offences into

⁷² Ibid., point 93

⁷³ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004F0068>

⁷⁴ Council Framework Decision on combating the sexual exploitation of children and child pornography (2004/68/JHA)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:013:0044:0048:EN:PDF>

⁷⁵ See AA.VV. “Handbook for parliamentarians. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)”

criminal law, a better level of harmonization for criminal penalties, the obligation for member states to provide for juridical measures in order to prevent offenders from exercising activities in contact with children, and the improvement of protection for the victims and their familiars⁷⁶.

Concluding this brief list of European provisions in the field, we should mention two more instruments.

As for the first one, the Council of Europe Convention on Action against Trafficking in Human Beings (2005, CETS. No.197)⁷⁷ defines Human Trafficking in Article 4 and asks states to establish it as a criminal offence. The Convention particularly focuses its attention on children under the age of 18, considering their recruitment, transportation, transfer, harbouring or receipt as human trafficking, even where there is no use of coercion, force or abuse of authority to obtain the consent.

Finally, the Third Summit of Heads of States and Government, which took place in Warsaw in 2005.

At the end of this meeting, the States' representatives elaborated an action plan, which was then attached to the Warsaw Declaration; this action plan outlines the Council's principal tasks for the upcoming years, and it specifically addresses the issue of protecting children as one of the primary objectives for the European institutions.

In particular, it elaborates a plan with strong programmatic contents, aiming to effectively promote the rights of the child and fulfil, in a more efficient way, the obligations set out by the United Nation's Convention on the Rights of the Child.

⁷⁶ See AA.VV. *“Handbook for parliamentarians. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)”*

⁷⁷

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008371d>

Moreover, the Declaration sets out the intention to implement policies for the protections of children through the activities of the Council of Europe, specifically aiming at the eradication of forms of violence against them.

To this extent, the Declaration was used as the platform from where to launch a three-year program of action, addressing the various dimensions of violence against a child, from the social to the legal aspects, while also elaborating measures to stop the phenomenon of sexual exploitation.⁷⁸

This agenda for action will be expressively recalled by the Explanatory Report of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse in its paragraph 24.

Using the Warsaw declaration as a starting point, the Council of Europe elaborated the program “*Building a Europe for and with Children*”, through which the Council would take the responsibility of registering the progresses achieved by previous action plans, as well as taking into account the instances brought before it by the society and national governments. The Council provided for this strategy in order to achieve various objectives, as the elimination of any form of violence against children, the assurance of children’s fundamental rights and the promotion of children’s participation in the educative processes specifically destined to them⁷⁹.

⁷⁸ “*We are determined to effectively promote the rights of the child and to fully comply with the obligations of the United Nations’ Convention on the Rights of the Child. A child rights perspective will be implemented throughout the activities of the Council of Europe and effective coordination of child-related activities must be ensured within the Organisation.*

We will take specific action to eradicate all forms of violence against children. We therefore decide to launch a three-year programme of action to address social, legal, health and educational dimensions of the various forms of violence against children. We shall also elaborate measures to stop sexual exploitation of children, including legal instruments if appropriate, and involve civil society in this process. Coordination with the United Nations in this field is essential, particularly in connection with follow-up to the optional protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography”.

http://www.coe.int/t/dcr/summit/20050517_plan_action_en.asp

⁷⁹ http://www.coe.int/t/dg3/children/BriefDescription/Default_en.asp

v) International co-operation and good practices: some examples

As far as international efforts go, all the Conventions, Protocols and Directives discussed in the previous chapter are a blatant sign of how this increasing necessity is also felt by legislators on an international level. Just to briefly introduce the extent of the efforts undertaken, Art. 10 of the Optional Protocol to the Convention on the Rights of Children thoroughly covers all the subjects for which international cooperation should be strengthened, stressing how those crimes are acquiring more and more a cross border dimension.⁸⁰

Moreover, the Cybercrime Convention's major purpose was that of enhancing and supporting such cooperation as well as to make the existing procedure to combat cybercrime uniform, when pornography is involved.⁸¹

Another clear example of how international cooperation could effectively be of help is provided by the worldwide conferences organized in the past 15 years. Not only is their objective relevant for the purpose of fighting sexual exploitation of children, but also because the final documents adopted at the end of each Conference, which present a statement of intents and a plan of action addressed to several different international subjects.⁸²

We have already thoroughly discussed the three World Conferences, however we should just briefly stress how, once again, they called for increased cooperation practices as well as suggesting strategies and measures to be taken at the national level. In particular, the Rio de Janeiro Conference, which was the last one and took place from 25th to 28th November 2008, assessed the progresses made in the prior 10 years and, through a comparison of results achieved internationally, was able to draw an overview of what had been learned and what should be improved.⁸³

We should now examine a number of worthy initiatives in the fight against sexual exploitation of children, which were the result of collaboration between public and private organizations and should be useful when tracing the evolution of the international cooperation framework.

⁸⁰ See *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, adopted on 25th May 2000 with Resolution A/RES/54/263

⁸¹ See *Convention on Cybercrime*, opened for signature on 23rd November 2001, CETS No.185

⁸² See AA. VV., *The role of international cooperation in tackling sexual violence against children, Background Paper for the International Conference in Rome*

⁸³ Ibid.

One of the first initiatives in this direction dates back to 1998, with the elaboration by ECPAT (End Child Prostitution, Pornography and Trafficking) of the Code of Conduct for the Protection of Children from Sexual Exploitation in Tourism.⁸⁴

The organization elaborated the project in cooperation with few of the major Scandinavian tourist companies, and with the support of the Tourism World Organization, the Swiss State Secretariat for Economic Affairs, and the Japanese Committee for UNICEF.⁸⁵

The Code, adopted today by more than 240 tourism companies in over 40 countries⁸⁶, aims to fight against sexual tourism by achieving six objectives:

- establishing common policies in the field of child exploitation;
- instructing people working in the travel industry;
- introducing contractual provisions, inside holiday packages, which contain an express statement of repudiation of child sex practices;
- informing travellers about the extent of the phenomenon;
- collect annual data and statistics.⁸⁷

A more recent practice is represented by the TACRO project for UNICEF. It combats abuse practices in Latin America, one of the global realities where the phenomenon is more widespread, to the point it has taken quite alarming proportions: it is estimated that in Latin America, every year, 2 million children are exploited for sexual purposes, while 1.2 million of children are trafficked around the world.

However, we should point out how there is no data on the true extent of the problem in Central America, due to a severe lack of quantitative information on the phenomenon. Moreover, several ILO studies show how, in Central America and especially in Santo Domingo, the social tolerance of the phenomenon is still alarmingly high.

The first phase of the program (TACRO I), launched in 2003, was primarily devoted to raising awareness among institutions in Central and South America about the problem of child abuse and trafficking. The goal was to induce the institutions to include the issue in the national and regional political agendas, and from there to initiate

⁸⁴ See *The Code*, www.thecode.org

⁸⁵ See A.A. V.V., “*The role of international cooperation in tackling sexual violence against children*”, *Background Paper for the International Conference in Rome*, p.28 and following

⁸⁶ A complete list of the partners and countries can be found at www.thecode.org/join

⁸⁷ See A.A. V.V., *supra*

and support legislative reform processes, create national and regional inter-institutional networks to tackle the issue, and finally spur coverage of the topic in the mass media.⁸⁸

The second phase (TACRO II), concerning the period 2008-2010, had the overall objective of contributing to the implementation of the action plans of the Stockholm (1996), Yokohama (2001) and Rio de Janeiro (2008) Conferences. It moreover aimed at promoting regional training, exchange of experience and communication on the topic of sexual exploitation and child trafficking in the territory, strengthening institutional capacities, at regional, national and local levels, in the prevention of the phenomenon, protecting victims of abuse, trafficking, sexual exploitation, pornography and sex tourism and finally developing research programs.⁸⁹

The TACRO II program was definitely one of the more effective initiatives not only in terms of police and judiciary cooperation at the supranational level, but it also achieved important results on the side of the domestic law of each Member State involved. In fact, the participants began a slow but steady process in order to adapt their legislation to the standards imposed by the International Acts (first of all the Lanzarote Convention).

Just to list some of the more significant examples, we can mention the adoption of a new code of Criminal Procedure⁹⁰, more respectful of the needs of the victims and of child witnesses, in the republic of El Salvador, and the approval, in Guatemala, of a new legislation against sexual violence⁹¹, with which it was established under the office of the Vice-Presidency of the Republic, the Secretariat against Violence, Sexual Exploitation and Trafficking in Persons (SVET).

Another initiative, in which the role of the Italian government was preponderant, is the "Programme of Action against Trafficking in Minors from Nigeria to Italy for the purpose of sexual exploitation".

The program, launched in 2008, is a prime example of trilateral cooperation as it sees, preventive action together with police and judicial cooperation between the Italian state (or rather the regions most affected by the phenomenon of trafficking and prostitution of girls from the Guinea area), the Nigerian federal government and international

⁸⁸ See AA. VV., *The role of international cooperation in tackling sexual violence against children, Background Paper for the International Conference in Rome*

⁸⁹ Ibid.

⁹⁰ *Código Procesal Penal*, Decreto n°. 733, de 22 de octubre de 2008

⁹¹ *Ley contra la violencia sexual, explotación y trata de personas*, decreto n. 9-2009, Congreso de la República de Guatemala

institutions, in particular the United Nations Office on Drugs and Crime (United Nations Office on Drugs and Crime - UNODC).⁹²

The Action Plan starts from the sad realization, confirmed in the most recent statistics, of the sharp increase, especially in the last ten years, in the trafficking of young Nigerian women and children, in particular from the rural areas of the federal state of Edo, for the scope of sexual exploitation.⁹³

The distinctive character of trafficking and sexual exploitation of young people from Nigeria is the fact that Nigerian criminal organizations are capable of coordinating all the steps of the shameful trade of human beings from the recruitment (or often by kidnapping) of victims to the illegal entry of the girls in Italy and their introduction of the same in the world of prostitution. More recently, using computer technology for the purpose of child pornography has become one of the distinctive elements of Nigerian criminal groups.

A situation as such is usually followed by the finding of inadequacy of government initiatives, limited to national borders, because of the transnational dimension of trafficking and of the ability of criminal groups to take advantage of the weaknesses and the limits of the applicable regulations.

Greater and stronger international cooperation was therefore necessary to carry out coordinated actions aimed at decisively and effectively counteract this phenomenon.⁹⁴

The 2008 program, subsequently supplemented until 2010 by the United Nations Institute for Research on Interregional Crime and Justice (UNICRI), with the involvement of numerous international partners, conceives a multidisciplinary and multi-sectorial approach. The program is on the one hand directed to combat the phenomena of trafficking in human beings and the other activities of criminal organizations on both sides of the Mediterranean; for the other to prevent the exploitation of young Nigerian women through a series of social and economic programs. The latter are aimed at improving their social conditions, making these women gain greater awareness of the role that they can exercise in society, thereby distancing them from the threats and blandishments of recruiters, and, at the same time, promoting the reintegration of the victims of exploitation, including through medical and financial assistance.

⁹² See AA. VV., *The role of international cooperation in tackling sexual violence against children, Background Paper for the International Conference in Rome*

⁹³ See Okojie C.E. E., Prina F., *"Trafficking of Nigerian girls to Italy"*, UNICRI, United Nations Interregional Crime and Justice Research Institute, Torino, 2004

⁹⁴ See AA. VV., *supra*

The project's results have been encouraging.

From the point of view of education aiming at subtracting the potential victims from their torturers, it is promising to look at the number of campaigns that have been launched by non-governmental organizations, gathered under the Edo State NGO Coalition Against Trafficking in Persons (ENCATIP)⁹⁵, which reached about 2,700 minors in rural areas.⁹⁶

Moreover, there has been a significant growth in the trading and sharing of information between Nigerian and Italian police and judicial authorities, with the aim of narrowing the mesh of protection of victims, especially minors.

Finally, not of secondary importance was the signing of a Memorandum of Understanding between the National Anti-Mafia Prosecutor and the National Agency for the Prohibition of Trafficking in Persons (NAPTIP). The organ not only increased cooperation between the two countries and reinforced the fight against phenomena of exploitation of children and young women, but also associated, for the first time in an international document, Nigerian criminals' organizations with mafia phenomenon, with important consequences in the application of the special criminal regime reserved to it.

⁹⁵ https://www.unodc.org/ngo/showSingleDetailed.do?req_org_uid=8139

⁹⁶ See A.A. V.V., *"The role of international cooperation in tackling sexual violence against children, Background Paper for the International Conference in Rome"*

Chapter 2

The Lanzarote Convention

i) The Convention

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse opened for signature in Lanzarote on 25 October 2007 and entered into force on 10 July 2010. Since then, the Convention has been signed by 47 Member States and ratified by 41.⁹⁷ Overall, the Lanzarote instrument has been well accepted by the Member States, which, some sooner than other, have put into force what has been defined as the “*most comprehensive international legal instrument*”, not only in terms of the subject covered by it, but also in consideration of the favour with which was welcomed by the Community.⁹⁸

The Lanzarote Convention, considered the most “*advanced and comprehensive instrument at international level*”⁹⁹, is the first treaty that defines and criminalises the conducts which have to be regarded as forms of sexual abuse against children; it also contains provisions in order to guarantee protection for children against sexual exploitation as well as dealing with legal proceedings against the alleged perpetrators. The Convention takes the relevant UN and Council of Europe standards and it extends them to cover all possible forms of sexual offences against minors.

The document is in line with most of the precedent international instruments, but has the manifest aim of contributing “[...] *to the common goal of protecting children against sexual exploitation and sexual abuse, whoever the perpetrator may be, and of*

⁹⁷Namely, Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Republic of Moldova, Monaco, Montenegro, the Netherlands, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, “The former Yugoslav Republic of Macedonia”, Turkey and Ukraine. See *Information document prepared by the Secretariat of the Lanzarote Committee*, up-dated on 26 May 2016, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680654d96>

⁹⁸Ibid.

⁹⁹ See AA.VV. “*Handbook for parliamentarians. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*”

providing assistance to victims”¹⁰⁰, through the realisation of a more effective cooperation between member states and with the further purpose of obtaining concrete cohesion.

As a matter of fact, the previous instruments’ effectiveness had just reached the point of indicating the punishable conducts and their circumstances, without providing for concrete instruments of protections. The Convention consequently has the primary goal of identifying newer and more effective norms to combat the phenomenon, in addition to the reinforcement of minors’ protection; it does not stop at prescribing an exclusively punitive action, but it provides for the activation of common legislative and regulatory criteria.

Those provisions should be binding for all the ratifying states: signing the treaty and consequently ratifying it, these have agreed to the harmonisation of their criminal legal system and the alteration of their national legislation, where in contrast with the Convention’s principles. This is one of the strongest innovations brought by the document: through the requirement of the adjustment of the national legislations to the common principles set by it, the Convention alters the national criminal provisions in a substantial way.

Moreover, harmonizing the legislations of the single ratifying states could strongly help a more effective prosecution of the crimes.¹⁰¹

Interesting, to this extent, is to note how the drafters decided to use the verb *shall* when addressing the signatory states, indicating a mandatory provision in which both the moral and legal aspect are equally important.

Proceeding to an in depth analysis of the contents, as Art.1 states, the purposes of the Convention are three:

- Prevent and combat sexual exploitation and sexual abuse of children;
- Protect the rights of child victims of sexual exploitation and sexual abuse;
- Promote appropriate policies and national and international cooperation against the phenomenon¹⁰².

¹⁰⁰ Lanzarote Convention, Preamble

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046e1e1>

¹⁰¹ See Bitensky Susan H., *Introductory Note to Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse*, 49 Int’l Legal Materials 1663, 2010

¹⁰² Ibid., Chapter 1, Art.1

The article represents a sort of programmatic manifesto of the entire document, summarizing in just three points the implied purposes of any international and European instrument in this field.

This norm should be read in accordance with Article 2 of the Convention, which prohibits discrimination in the implementation of the provisions by the parties. The question of discrimination is one of the most debated problematics in European and international law; in particular, the principle expressed by Article 2, and its list of grounds, are identical to those provided for in Article 14 of the European Convention on Human Rights (1950)¹⁰³.

Namely, this latter article has been the object of various sentences of the European Court of Human Rights, which defined a behaviour as discriminatory if “*it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised*”¹⁰⁴.

Even though Article 2 was the object of few derogatory instances during the preparatory works – directed to the integration of the principle of non-discrimination even for health and sexual orientation - it is still relevant to note its perfect compliance with Article 14 of the European Convention on Human Rights.

Article 3 closes the first chapter of the Document, providing for three useful definitions, which circumscribe and individuate the unlawful behaviour, defining the limit between a punishable conduct and a legitimate one¹⁰⁵. Examining the single definitions, the term “*child*” evokes the definitions given by the Convention on the Rights of the Child and the Convention against Trafficking in Human Beings¹⁰⁶. It refers to any person under the age of 18; yet, some articles of the Convention specify a

¹⁰³ Lanzarote Convention, Art.2, Non-discrimination principle: “*The implementation of the provisions of this Convention by the Parties, in particular the enjoyment of measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status*”.

European Convention on Human Rights, Art.14, Prohibition of Discrimination: “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”.

¹⁰⁴ See European Court of Human Rights, case “*Abdulaziz, Cabales and Balkandali v. The United Kingdom*”, 15/1983/71/107-109, 24 April 1985

[http://hudoc.echr.coe.int/eng#{"dmdocnumber":\["695293"\],"itemid":\["001-57416"\]}](http://hudoc.echr.coe.int/eng#{)

¹⁰⁵ See Lanzarote Convention, Art.3

“*For the purposes of this Convention: a. “child” shall mean any person under the age of 18 years; b. “sexual exploitation and sexual abuse of children” shall include the behaviour as referred to in Articles 18 to 23 of this Convention c. “victim” shall mean any child subject to sexual exploitation or sexual abuse*”.

¹⁰⁶ See Art. 4(1) of the Convention Against Trafficking in Human Beings

different age. Specifically, in relation with sexual activities, the age of consent may vary through Europe.

Moreover, with the clarification of the concept of “*sexual exploitation and sexual abuse of children*”, the text has the aim of covering possibilities of abuse within the victim’s family, his/hers social surroundings, or the acts committed for commercial purposes¹⁰⁷; having in mind the specific purpose of criminalising all the possible sexual offences against children.

Finally, the last term – “*victim*” – relates to any child who has been subjected to one or more of the offences listed in the document.

A closer examination of the Convention suggests that the thorough characterisation of behaviours constituting offenses is one, if not the principal, of its most innovating features; earlier instruments did not lack of explanatory provisions, but the Lanzarote Convention inserts them in a new perspective. Indeed, the text circumscribes the behaviours in the perspective of the creation of a standard of criminalisation between Member States, for example a process of harmonization of national legislations. This in order to achieve two objectives.

On the one hand, it hopes to prevent the potential phenomenon of migration in countries where the laws are more permissive, and on the other hand to “*promote the exchange of useful common data and experience*”¹⁰⁸.

a) Preventive Measures

Chapter II of the Convention is dedicated to *Preventive Measures*. The dispositions aim at producing preventive measures which should be implemented at national level, such as provisions for raising awareness among professionals and the public, organizing courses for people who work in contact with children and making children more aware through courses offered in schools¹⁰⁹.

Regarding people who habitually work in close contact with children, the Convention¹¹⁰ requires the Parties to adopt the measures necessary to ensure that the

¹⁰⁷ See AA.VV., “*Handbook for Parliamentarians. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*”

¹⁰⁸ See *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Explanatory Report*, par.112

¹⁰⁹ See AA.VV. “*Handbook for Parliamentarians*” (*supra*)

¹¹⁰ See Art.5, Lanzarote Convention

1. Each Party shall take the necessary legislative or other measures to encourage awareness of the protection and rights of children among persons who have regular contacts with children in the education, health, social protection, judicial and law-enforcement sectors and in areas relating to sport, culture and leisure activities. 2. Each Party shall take the necessary legislative or other measures to ensure that the

personnel has a sufficient knowledge of children's rights and is informed about matters relating to the sexual exploitation and abuse, their consequences and how to recognize possible signals given by the victims. To this extent, the Explanatory Report¹¹¹ points out how the text does not include any specific obligation for the Parties to train those subjects, implying that the national provisions could require a definite training as well as simply providing them with sufficient information.

The examined Article also invites parties to introduce stricter controls for the recruitment of personnel, in order to ensure that candidates have not been convicted of one of the acts criminalised; the Report specifies that the controls might even be applied to voluntary activities, but denotes how the addition of the expression "*in conformity with its internal law*" allows the States to implement the provision in accordance with internal provisions¹¹².

The Chapter focuses as well on the education of children.

As for the first point, Article 6 suggests that minors should be furnished with information on sexuality issues and the risk of sexual exploitation with the help of parents, since these are the closest and most trusted people. Since parents might be reluctant to confront their children with these issues, the Convention also suggests that Parties should ensure that children receive proper information, during the education cycle, on the risk of sexual exploitation, sexual abuse and the means to protect themselves.

As for the "counterpart" of the offence, the document establishes that subjects at risk of committing the crimes should have access to intervention programmes. According to the opinion provided in the "*Handbook for Parliamentarians*", the option is considered to have a preventive purpose and is designed for persons who are not being investigated, prosecuted or serving a sentence¹¹³.

The participation of the private sector is also very important in this process. The advent of new technologies and the spread of the use of internet has increased the importance of involving Internet providers and mobile telephone operators; there is an increasing number of agencies specialised in fighting internet crimes and these agencies should

persons referred to in paragraph 1 have an adequate knowledge of sexual exploitation and sexual abuse of children, of the means to identify them and of the possibility mentioned in Article 12, paragraph 1. 3. Each Party shall take the necessary legislative or other measures, in conformity with its internal law, to ensure that the conditions to accede to those professions whose exercise implies regular contacts with children ensure that the candidates to these professions have not been convicted of acts of sexual exploitation or sexual abuse of children.

¹¹¹ See Explanatory Report, par. 56

¹¹² Ibid., par.57

¹¹³ See AA.VV., "*Handbook for Parliamentarians*", pg.31

have a more direct contact with Internet users in order to inform them of the threats to children.

The “*tourism and travel industry*” is specifically mentioned by Article 9¹¹⁴, in order to target the growing phenomenon of sex tourism. According to the *Handbook for Parliamentarians*, the agencies should inform travellers about the risks that being processed for sexual crimes committed in a different country would entail, by the distribution of “*brochures, audio-visual messages and statements on airline companies’ websites*”¹¹⁵.

A constructive example of good practices in this field is the “*Code of Conduct to Protect Children from Sexual Exploitation in Travel and Tourism*”¹¹⁶, drawn by ECPAT International¹¹⁷ in 1998, in collaboration with the World Tourism Organization. The mission of the Code is to furnish the tourism industry with the tools to combat sexual exploitation of children, providing it with a set of criteria that are up for adoption; these criteria include the training of the personnel and the education of the travellers through pamphlets offered in the companies’ premises.

b) Criminal law measures

In Chapter VI, the Convention deals with the criminalisation of the conducts, defining in detail the single crimes. This Chapter is of fundamental importance because it allowed the realization of a higher level of harmonization and therefore a better way of acting against the crimes¹¹⁸. In fact, the harmonization of definitions and consequently of the national legislations, constitutes a serious obstacle for perpetrators, who will not be able to take advantage of a more lenient legal system; moreover, the provision of a given set of definitions, as we have already established, makes the research and the comparative studies in the field easier. Finally, international cooperation will be further acquired through the provision of a uniform legislation.

Article 18 of the Convention deals with the crime of *sexual abuse*. The provision states that there are two types of conducts constituting sexual abuse¹¹⁹.

¹¹⁴ See Lanzarote Convention, Art.9(2)

¹¹⁵ See *supra*

¹¹⁶ http://www.unicef.org/lac/code_of_conduct.pdf

¹¹⁷ End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes

¹¹⁸ See AA.VV., *Handbook for Parliamentarians*

¹¹⁹ See Lanzarote Convention, Art.18

“Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised: a. engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities; b. engaging in sexual activities with a child where: – use is made of coercion, force or threats; or – abuse is made of a

The first one, under letter a), generally punishes sexual acts with a child who “*has not reached the legal age for sexual activities*”, explicitly referring to the national law of each State for the concrete determination of age boundaries, which integrate the crime. Under this article, the mentioned sexual relations involve children who have not reached the legal age for such acts, and are, a fortiori, illegal.

The following letter b), criminalises conducts that are qualified, other than by the minor age of the child, also by the use of coercion, force or threat, or by the abuse of a qualified position of trust, authority or influence on the minor, or finally by the abuse of a particular situation of vulnerability of the victim. In this case, it may happen to confront children who have reached the legal age for sexual activities but are still considered minors (under the age of 18), and therefore the issue of a potential consent of the victim might arise.

However, in the case of abuse of children who are in a situation of particular vulnerability, any eventual consent to sexual activities loses its validity because of their “*situation of dependence*”; according to the Explanatory Report, the term refers not only to a situation where the child might suffer from drug or alcohol addiction problems, but also to situations of physical, psychological, emotional dependence, or even if the child has “*no other real and acceptable option than to submit to the abuse*”¹²⁰.

While determining the constitutive elements of the crime, the signatories have taken into account the evolution of the European Court of Human Rights’ and the other Institutions’ jurisprudence.

A precedent of particular relevance is the sentence “*M.C. v Bulgaria*”¹²¹, in which the Strasbourg Court has outlined the elements necessary for the crime of sexual abuse of minors.

Through a comparative exam of the existing national legislations in this field¹²², and referring to noteworthy precedents in the International Criminal Tribunal for the former Yugoslavia¹²³, the Court pointed out that a physical resistance by the victim is no longer necessary for the crime to persist. In fact, “*in common-law countries, in Europe and elsewhere, reference to physical force has been removed from the legislation and/or case-law [...]*” and significantly pointed out that, for the relevant case

recognised position of trust, authority or influence over the child, including within the family; or – abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.”

¹²⁰ See Explanatory Report, par.126

¹²¹ See *M.C. v Bulgaria*, (39272/98) [2003] ECHR 646, (4 December 2003)

¹²² See *M.C. v Bulgaria*, “II. Relevant Domestic Law and Practice”, par.72 ss

¹²³ See, in particular, *Prosecutor v Anto Furundzija*; but also *Prosecutor v Kunarac, Kovac and Vukovic*

law, it is the lack of consent, and not force, that should be regarded as the constituent element of the crime¹²⁴.

The Court thus recognizes that violence and coercion are not necessary elements for the existence of sexually based crimes, but it suggests that the national legislators should adopt a less rigid approach

In fact, it notes how the prosecution of non-consensual sexual acts is often linked to the interpretation of terms such as “*violence*”, “*coercion*”, “*duress*”, “*threat*” and others¹²⁵, while the Court “*is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim*”¹²⁶.

Those considerations were fully acknowledged by the Lanzarote Committee while drafting Article 18, when considering sexual acts with a minor as a conduct autonomously punishable. This was not to detach the act of sexual violence from the subjective element of the author of the crime, but to expand children’s protection to the point of demanding a higher grade of attention from an adult whom has a relationship with somebody who is a minor or appears to be one.

Article 19 of the Convention deals with *child prostitution* and it enucleates three alternative conducts for the mentioned felony: the recruitment of the children, his or hers exploitation, and the fruition of prostitution (“*recourse to child prostitution*” as in the original text).¹²⁷

The definition of child prostitution elaborated in the second comma of the Article (“*[...] the fact of using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless if this*

¹²⁴ See *M.C. v Bulgaria*, par.157-159

¹²⁵ *Ibid.*, par.161 “*Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms (“coercion”, “violence”, “duress”, “threat”, “ruse”, “surprise” or others) and through a context-sensitive assessment of the evidence*”.

¹²⁶ *Ibid.*, par.166

¹²⁷ See Lanzarote Convention, Art.19

“*1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised: a. recruiting a child into prostitution or causing a child to participate in prostitution; b. coercing a child into prostitution or profiting from or otherwise exploiting a child for such purposes; c. having recourse to child prostitution*”.

*payment, promise or consideration is made to the child or to a third person*¹²⁸), is in line with most of the international and national provisions, but it stands out for a more precise indication of the relevant conducts.

Unarguably, if we compare the terminology used in the norm with national provisions, we notice how, not only it is provided that even a mere promise of payment is sufficient for the crime to subsist, but moreover how there is no specific indication of the need of a subjective element, a generic fraud being sufficient.

As for the single conducts, there is no clear definition of what “*coercion*” is, but the Explanatory Report includes the use of inducement or pressure to drive the children into prostitution, as well as taking advantage of the child’s vulnerable psychological state¹²⁹.

Letter c) of the first comma of Article 19 constitutes the true innovation of this provision, explicitly criminalising the act of recurring to child prostitution. The national laws regarding this specific conduct were various: some States, like Italy¹³⁰, already punished even the “consumer”, others, like Spain¹³¹, excluded it. The strong position taken by the Committee is a clear expression of the environment and the spirit in which the Convention was elaborated, where the punishment of those who engage in a relationship of a sexual nature with a child appeared to be the only way to contrast this growing phenomenon.

The combined provisions of Article 20 and Article 21 represent the most relevant element of development, compared to the previous framework. These two norms offer an overall legislative framework for the crime of child pornography, while in earlier documents the protection was left to the provision of the single States.

Article 20, titled “*offences concerning child pornography*”, incriminates the behaviours listed in the first comma, “*when committed without right*”¹³²; we should focus on this expression, which could easily be misinterpreted.

¹²⁸ Ibid., comma 2

¹²⁹ See Explanatory Report, par.131, “*The recruiters make use of inducements and pressures to push children into prostitution, taking advantage of their psychological and emotional distress.*”

¹³⁰ See art. 600-bis c.p. (before the changes made by L.172/2012): “[...] *chiunque compie atti sessuali con un minore di età compresa tra i quattordici e i diciotto anni, in cambio di corrispettivo in denaro o altra utilità, anche solo promessi [...]*”.

¹³¹ See *Código Penal*, artículo 187, comma 1, “*El que induzca, promueva, favorezca o facilite la prostitución de una persona menor de edad o incapaz, será castigado [...]*”.

¹³² See Lanzarote Convention, Art.20

“*1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised: a. producing child pornography; b. offering or making available child pornography; c. distributing or transmitting child pornography; d. procuring child pornography for oneself or for another person; e. possessing child pornography; f.*”

As the Explanatory Report illustrates, there are only two cases for which production or possession of children pornography is not legally punishable.¹³³

The first one is obvious and subsists when the police holds the material for investigation or for the processual inquiry, whereas the second provision is more problematic, allowing its detention and production for “*artistic, medical, scientific or similar merit*”¹³⁴.

Since the Report does not give an exemplification of what material should fall within these categories, it is necessary to refer to some sentences, in order to gain a better understanding of this problematic controversy.

First, mention should be made of the “*Osborn v. Ohio*” case.¹³⁵

The Supreme Court of the United States, in 1990, stated the incompatibility between possession of pornographic material depicting children and the principle of freedom of expression, protected by the First Amendment to the Constitution.

The question has raised interpretative issues in Britain as well, where most of the cases in front of the courts concern the existence of a legitimate reason for the possession of child pornography on the ground of academic research.

In the “*Atkins v. Director of Public Prosecutions*”¹³⁶ case, Professor Atkins justified his possession of sexual images depicting minors invoking for his defence a legitimate interest in the name of academic research¹³⁷.

According to the Tribunal of last instance, the *High Court (Queen’s Bench Division)*, the question of what should integrate the hypothesis of “legitimate interest” should be considered as a “*pure question of fact*”, which would concern the existence of a “*unhealthy interests in possession of indecent photographs in the pretence of undertaking research, or by contrast a genuine researcher with no alternative but to have this sort of unpleasant material in his possession*”.¹³⁸

knowingly obtaining access, through information and communication technologies, to child pornography”.

¹³³ See Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Explanatory Report, par. 141

¹³⁴ Ibid.

¹³⁵ See Supreme Court of the United States, “*Clyde Osborne v. State of Ohio*”, 495 U.S. 103, Argued December 5, 1989, Decided April 18, 1990

<https://supreme.justia.com/cases/federal/us/495/103/>

¹³⁶ See “*Atkins v. Director Of Public Prosecutions v. Goodland v. Director Of Public Prosecutions* [2000] *Ewch Admin* 302 (8th March, 2000) <http://www.bailii.org/ew/cases/EWHC/Admin/2000/302.html>

¹³⁷ See Akdeniz Y., “*Internet Child Pornography And The Law: National And International Responses*”, Ashgate Publishing Limited, Aldershot, Hampshire (UK), 2008

¹³⁸ See “*Atkins v. Director of Public Prosecutions*”

<http://www.bailii.org/ew/cases/EWHC/Admin/2000/302.html>

In this specific case, even if judges were not completely ready to trace a clear line between what constitutes and what does not constitute a “legitimate interest”, both the *Magistrate’s Court* (first instance) and the *High Court* excluded that the convicted subject was leading an *“honest and straightforward research into child pornography”*.¹³⁹

Moving to the specification of the single criminal conducts, letter a) through c)¹⁴⁰ (production, offer and distribution) are not particularly problematic nor innovating, while letter f) (intentional access), on the other hand, is interesting because it punishes those subjects who may access websites depicting pornographic images or videos of children, even when the files are not downloaded and the subjects *“cannot therefore be caught under the offence of procuring or possession in some jurisdictions”*.¹⁴¹

The adverb *“knowingly”*, in this case, rules out any involuntary or casual access and any access due to aggressions to the computer system, wilful misconduct and culpable responsibility being excluded for the case and requiring specific fraud.

The second comma of Article 20, recalling the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography¹⁴², offers a very broad definition of child pornography, labelling it as *“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”*.¹⁴³

Such an open definition, however, raises few interpretative obstacles. One major question for example regards the use of the term *“simulated”*, interpreted by the Italian legislator in connection with virtual images (images realized with techniques fully or partially non related to real situations, but appearing to be real due to their quality¹⁴⁴).

¹³⁹ Ibid.

¹⁴⁰ See Lanzarote Convention, Art.20

“1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised: a. producing child pornography; b. offering or making available child pornography; c. distributing or transmitting child pornography; d. procuring child pornography for oneself or for another person; e. possessing child pornography; f. knowingly obtaining access, through information and communication technologies, to child pornography”.

¹⁴¹ See Explanatory Report, Par. 140

¹⁴² See *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, Article 2, letter c *“Child pornography means 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”*.

¹⁴³ See Lanzarote Convention, Article 20(2)

¹⁴⁴ See Article 600 *quater.1, comma 2, Codice Penale*: *“immagini realizzate con tecniche di elaborazione grafica non associate in tutto o in parte a situazioni reali, la cui qualità di rappresentazione fa apparire come vere situazioni non reali”*.

To this extent, part of the Italian doctrine¹⁴⁵ has argued that it would be hard to consider a victim as “damaged” by virtual pornography, since there might be no real or identifiable victim, and that thus, the article should be seen as a way of punishing despicable moral conducts, which however are unable to realize a true danger for the victim.

Consistently with the national provisions, Article 20 (3) of the Lanzarote Convention, makes it possible for the ratifying States to exclude the crime of producing and possessing pornographic material depicting children, only if this constitutes an hypothesis of representation of a non-existing minor¹⁴⁶, or in the case of images produced and possessed by underage children with their express consent and for their personal use only¹⁴⁷.

Article 21 constitutes the natural extension of Article 20, regarding the crime of “*Offences concerning the participation of a child in pornographic performances*”¹⁴⁸.

The Article has its “ancestors” in two fundamental international instruments, Article 34(c) of the United Nation’s Convention on the Rights of the Child¹⁴⁹ and Article 2(b) of Framework Decision 2004/68/JHA¹⁵⁰. The Lanzarote Committee confirmed the concepts affirmed by the two preceding documents, leaving the concrete determination of the crime to the national legislators.

It is interesting to note how the Article condemns those who organize the show, participate in it and who *knowingly* assist, though in this last case States may exclude incrimination when ratifying. In particular the term “*knowingly*”, according to the Explanatory Report, was added to underline the intentional nature of the offence: in order to be considered a felon, the person “*must not only intend to attend a pornographic performance but must also know that the pornographic performance will involve children*”¹⁵¹.

¹⁴⁵ See Cadoppi A., “*Commentario delle norme contro la violenza sessuale e contro la pedofilia*”, Cedam, Padova, 2006

¹⁴⁶ See Art.20(3) “[...] consisting exclusively of simulated representations or realistic images of a non-existent child”

¹⁴⁷ Ibid. “[...] involving children who have reached the age set in application of Article 18, paragraph 2, where these images are produced and possessed by them with their consent and solely for their own private use”.

¹⁴⁸ See Lanzarote Convention, Article 21

¹⁴⁹ See Convention on the Rights of the Child (1989), Article 34(c), “(c) *The exploitative use of children in pornographic performances and materials*”.

¹⁵⁰ See Council of Europe Framework Decision 2004/68/JHA, “(b) *recruiting a child into prostitution or into participating in pornographic performances*”.

¹⁵¹ See Explanatory Report, Par. 149

Moving on with the analysis of the Convention, Article 23, titled “*solicitation of children for sexual purposes*”¹⁵², introduces and criminalises, for the first time, a completely new hypothesis of crime: *grooming*.

The activity of soliciting a child through the Internet is not a new habit, since it has grown evenly with the technological progress. The common law system already provided for a rough regulation and definition of it¹⁵³. The Lanzarote text answers the pressing need for a consistent regulation for this crime, recognizing solicitation of a child as the premise of crimes such as children prostitution and pornography, as well as sexual abuse and exploitation.

It therefore dictates for the ratifying States to sanction “*the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set in application of Article 18, paragraph 2, for the purpose of committing any of the offences established in accordance with Article 18, paragraph 1.a, or Article 20, paragraph 1.a, against him or her, where this proposal has been followed by material acts leading to such a meeting*”¹⁵⁴.

As the Explanatory Report points out, the signatory States felt that the mere provision of criminalizing the act of solicitation was insufficient, and thus decided to add the last part of the Article, which requires that the “*proposal*” must be followed by “*material acts*” leading to the meeting with the child¹⁵⁵ (for example the fact of concretely going to the meeting place). The Lanzarote Committee¹⁵⁶ Opinion on Article 23 of the Lanzarote Convention¹⁵⁷ goes beyond this vision and offers many interesting points of view on the Article and its many facets.

The Explanatory Note sets out how the fact of “*simply chatting*” with the child is not sufficient for the action to be considered a crime, and clearly points out how the

¹⁵² See Lanzarote Convention, Article 23

¹⁵³ See the *Criminal Code of Canada*, section 172.1, “*luring a child*”, makes it an offence to communicate with a child through the Internet for sexual purposes; also *United States Criminal Code*, Title 18, Part I, Chapter 117, § 2422, “*coercion and enticement*”, provides that luring a child into sexual activity through the mail is a federal crime; finally the *United Kingdom Sexual Offences Act 2003*, section 15, regards the fact of arranging a meeting, for oneself or someone else, with the intent of committing a sexual abuse, as a crime

¹⁵⁴ See *supra*

¹⁵⁵ See Explanatory Report, Par.157

¹⁵⁶ For a deeper understanding of the Lanzarote Committee mechanism and body, see *infra*

¹⁵⁷ See Lanzarote Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (T-ES), *Opinion on Article 23 of the Lanzarote Convention and its explanatory note, Solicitation of children for sexual purposes through information and communication technologies (Grooming)*
<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046ebc8>

act of *grooming*, is facilitated by the increasing use of technological devices and mobile phone applications.

When communicating online, through “screen-to-screen” chat conversations or with the use of a webcam¹⁵⁸, the adult, even if not physically present, can cause the child to “*witness, watch or take part in the production of child pornography*”¹⁵⁹; the material will easily circulate online, becoming increasingly difficult to permanently eliminate the harmful material.

This particular interpretation of Article 23 is of great relevance, since the Committee expressively states how it is in fact not necessary for the adult to meet the child for the hypothesis of sexual abuse to exist. In fact, it is the opinion of the Committee that it is possible for sexual offences to be committed exclusively online, nevertheless causing harm to the minor. Yet, since the Committee does not have the means to change the text of the Convention and thus this remains a mere interpretation of the text of Lanzarote, the Explanatory Note points out how the criminalisation of such conducts may be achieved through the application of other provisions of the Convention¹⁶⁰.

Finally, the Committee, in its Opinion, opens possibilities for States wishing to extend the criminalisation of grooming to the cases where the sexual abuse is not the consequence of meeting in person. The monitoring body thus offers few suggestions for the parties¹⁶¹, among which the fact that States should set up collaborative mechanisms with specialised NGOs, discouraging at the same time private initiatives, namely where single persons or the media track down and expose sexual offenders, which seem to become a growing habit in the present society.

c) Protective measures

The Convention also establishes procedural obligations for the parties, in order to ensure the protection of the child throughout the proceedings, including informing children and families of the progress of the proceeding, of the possible release of the person who allegedly committed the crime, ensuring the protection of the victims and their relatives from intimidation or from any direct contact with the prosecuted and

¹⁵⁸ Ibid., point 9-10

¹⁵⁹ Ibid.

¹⁶⁰ Namely, Art.20 (“*producing, offering or making available, distributing or transmitting, procuring and possessing child pornography, knowingly obtaining access to child pornography*”) if the contact has the aim of obtaining sexually explicit photos, Art.21 (“*participation of a child in pornographic performances*”) and finally Art.22 (“*corruption of children*”)

¹⁶¹ See *supra*, points 18-24

finally to initiate proceeding even without the filing of a complaint or even if the victim withdraws the complaint¹⁶².

Of fundamental importance, to this extent, is Article 35, which clarifies the proper means of the interviews with the child. The provision has the scope of safeguarding children's interests and avoiding the endurance of any additional emotional stress or trauma caused by a potential questioning.

The acquisition of cognitive contributions from victims or witnesses of such crimes has, in general, two profiles presenting undoubted problematics, relating to rules to be observed for the interviewing, on the one hand, and to the evaluation criteria of the relevant statements on the other.

The close connection between these aspects implies the incidence of the interpellation technique and of the context of acquisition of the results of the testimony, similarly to the production of different consequences depending on the adopted methods of enforcement.¹⁶³

In such a scenario, which appears extremely delicate when thinking about the vulnerabilities typically congenital of the developmental age, the most accentuated critical issues are found when the child has been subject to sex crime violences.

In these hypotheses, in addition to the ordinary factors of emotional stress that mark the child's deposition during the process, the so-called "secondary victimization" phenomenon is perceived the most, as the subject is forced to revive during the testimony that state of fear, frustration and shame felt at the time of the crime's commitment.¹⁶⁴

In order to achieve this aim, the Article sets a series of outlines, to which the national system will have to conform.

First, it is required that the audition takes places "*without unjustified delay*"¹⁶⁵, after the fact is recounted to the police and in "*premises designed or adapted for this purpose*".¹⁶⁶ Moreover, relevant is letter c), which establishes that "professionals trained for this purpose",¹⁶⁷ should conduct the interview: the provision is clearly linked to the aforementioned Article 5 (Recruitment, training and awareness raising of persons

¹⁶² See AA.VV., *Handbook for Parliamentarians, The Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse*, p. 73-74

¹⁶³ See Romeo A., *Abusi sessuali sui minori e dinamiche di acquisizione probatoria*, in Dir. pen. e processo, 2008, n. 9

¹⁶⁴ See AA.VV., *Trattato dei nuovi danni*, vol. III, *Uccisione del congiunto. Responsabilità familiare. Affido, Adozione*, edited by P. Cendon, CEDAM, Padova, 2011

¹⁶⁵ See Lanzarote Convention, Article 35 (1.a)

¹⁶⁶ Ibid., point b)

¹⁶⁷ Ibid., point c)

working in contact with children), showing how the Lanzarote committee has recognized the constant necessity of training professionals capable of interacting with children victims of abuse.

As the *Handbook for Parliamentarians* points out¹⁶⁸, it is not necessary for the judicial organs to seek trained personnel outside of its premises, since the people involved in this type of proceedings should “*be able to receive training in children’s rights and in the area of sexual exploitation and sexual abuse of children*”.¹⁶⁹

Letter d) of the article confirms this notion, providing that the same person should conduct all the interviews, acting as a mediator between the children and the judiciary organs.¹⁷⁰

We can also briefly mention the remaining letters, according to which the number of interviews should be as limited as possible (letter e), and that the victim should have the possibility to have his or her parents, legal guardian or person of choice while being questioned.

Again, we can note how the recurring purpose of the Convention is to protect the child in the most complete way and to eradicate the prejudicial effects of violence.

d) International cooperation and Art.38

As a closure to our analysis, we should mention Article 38, “*General principles and measures for international co-operation*”¹⁷¹.

The importance of international cooperation in this field is mentioned by most of the international instruments. The UN Charter refers to it in Articles 55 and 56¹⁷², the Millennium Declaration and the Special Session on Children reaffirming the same principles¹⁷³; moreover, international cooperation in fighting sexual crimes committed against children finds a thorough dissertation in the Convention on Child Rights and in the Optional Protocol on Child Rights on the sale of children, child prostitution and use of children in pornography. According to the Convention, international cooperation

¹⁶⁸ See *supra*, p.75

¹⁶⁹Ibid.

¹⁷⁰ Lanzarote Convention, Art.35, point d)

¹⁷¹ Lanzarote Convention, Chapter IX, Article 38

¹⁷² See *Charter of the United Nations*, Chapter IX “*International Economic and Social Cooperation*”, in particular Article 55, “*With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples [...]*”; Article 56, “*All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55*”.

¹⁷³ See, respectively, *United Nations Millennium Declaration (A/55/L.2)*, Chapter VI, Par.26 and *United Nations General Assembly Special Session on Children*

should conform to four basic principles¹⁷⁴: non-discrimination (Art.2), the “*best interest of the child*” (Art.3), the right to life, survival and development (Art. 6), finally the right to express an opinion and to have the opinion considered (Art.12).

The Lanzarote Convention harks back to these postulates and sets out an outline of rules that should govern international cooperation.

Article 38 realizes a system of cooperation on three levels, pointing out the necessity for international collaboration for “*a. preventing and combating sexual exploitation and sexual abuse of children; b. protecting and providing assistance to victims; c. investigations or proceedings concerning the offences established in accordance with this Convention*”¹⁷⁵, through the application of national and international provisions.

As for the protection of victims¹⁷⁶, the article resembles the content of the Council of Europe Framework Decision 2001/220/JHA¹⁷⁷, giving the victims of an offence in a Member State other than the one of residence, the right to make a complaint in their State of residence, if they were unable to do so in the State where the offence took place or, in serious cases, if they did not wish to do so.¹⁷⁸

Letter c), instead, should be read, as the Explanatory Report¹⁷⁹ states, keeping in mind both multilateral agreements¹⁸⁰ and all the international instruments adopted by the European Community: the European Convention on Extradition (ETS 24), the European Convention on Mutual Assistance in Criminal Matters (ETS 30), their Additional Protocols (ETS 86, 98, 99 and 182), and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141). Finally, for States members of the European Union, mention should be made of Council of Europe Framework Decision 2002/584/JHA, dealing with the European arrest warrants and the surrender procedures.¹⁸¹

¹⁷⁴ See AA.VV., “*The Role of International Cooperation in Tackling Sexual Violence Against Children. Background Paper for the International Conference in Rome*”, November 29-30 2012, Istituto degli Innocenti, Firenze, p.9

¹⁷⁵ See *supra*

¹⁷⁶ *Ibid.*, comma 2

¹⁷⁷ See *Council of Europe Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings* (2001/220/JHA)

¹⁷⁸ See AA.VV. “*The Role of International Cooperation in Tackling Sexual Violence Against Children. Background Paper for the International Conference in Rome*”, November 29-30 2012, Istituto degli Innocenti, Firenze, p.10

¹⁷⁹ See Explanatory Report, par. 254

¹⁸⁰ See, for example, the system of uniform criminal legislation in the Scandinavian Countries, or the reciprocal application of legislation followed by Ireland and the United Kingdom

¹⁸¹ See *Council of Europe Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* (2002/584/JHA)

Finally, the Convention may serve as the legal basis for mutual international assistance in the context of criminal law, not in a derogatory position with reference to the previous body of law, but serving as a “supplement”. This particularly in the perspective of cooperation with third states in criminal matters or extradition, when a Member State of the Convention has not concluded a treaty regarding these matters with the third State.¹⁸²

v) *Monitoring mechanisms: an overview of the Convention’s 1st implementation report*

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse opened for signature by the member states, non-member states that had participated to the elaboration process and by the European Union; it opened for accession by other non-member states as well.

The text of the Convention arranges the creation of a monitoring system, as provided for under Article 39 of the instrument. The monitoring system set up essentially consist of a Committee of the Parties, which controls that States effectively implement the Convention and evaluates the progress made by the national legislation on the protection of children, basing its judgment on questionnaires filed by the competent authorities.¹⁸³

The Committee also has a mandate to facilitate the gathering, analysis and exchange of information, experience and good practices between Member States, in order to help creating a better preventive and punitive system.¹⁸⁴

The Committee started his work a year after the entry into force of the Treaty¹⁸⁵ and has since held 13 meetings.

As the Explanatory Report points out¹⁸⁶, the negotiators considered appropriate delaying the monitoring activity for a one-year period in order to have a sufficient

¹⁸² See Art.38, comma 3

¹⁸³ Both the *General Overview Questionnaire*, the *Thematic Questionnaire* and the National Authorities’ responses can be found online at <http://www.coe.int/en/web/children/monitoring>

¹⁸⁴ See Art.41

¹⁸⁵ The first meeting of the Lanzarote Committee took place exactly one year after the Convention entered into force (1 July 2010), in September 2011. The Committee set up its rules of procedures and its agenda. See “*Committee of the Parties to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (T-ES). First Implementation Report*”

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804701a0>

¹⁸⁶ See *Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, par.265

number of ratifying states, applying the Convention “*under satisfactory conditions*”¹⁸⁷, to compare.

Pursuant to Article 39(3) of the Convention, the Committee of the Parties adopted its Rules of Procedures during the second meeting, held in Strasbourg on 29-30 March 2012. The Document is articulated in four parts, the first one to establish the rules regarding the composition and functioning of the body, a second one dealing with the monitoring system established by Article 41, the third being on the exchange of information and good practices and a final one about the entry into force of the rules.

As for the functions of the body, the Committee should pursue the dictate of Article 41¹⁸⁸, therefore monitoring the implementation of the Convention by national authority, furnishing aid and solving interpretative problems when needed, as well as promoting good practices and the exchange of information on legal or technological developments.

Part II of the Document focuses on the first of the two main objectives: the establishment of a monitoring system for the implementation of the Lanzarote Convention. To this extent, *Rule 22*¹⁸⁹ clarifies that the Committee should carry out its duty applying the principle of “*the best interest of the child*” and in the respect of the existing international instruments.¹⁹⁰

The body decided it would be best to start the monitoring of the Convention by scrutinising the existing national legislation as well as the measures and the institutional framework set up at national, regional and local level. To achieve this, as mentioned earlier, it provided national authorities with two set of questionnaires: a first, general

¹⁸⁷ Ibid.

¹⁸⁸ See Lanzarote Convention, Chapter X, Article 41:

1. The Committee of the Parties shall monitor the implementation of this Convention. The rules of procedure of the Committee of the Parties shall determine the procedure for evaluating the implementation of this Convention. 2. The Committee of the Parties shall facilitate the collection, analysis and exchange of information, experience and good practice between States to improve their capacity to prevent and combat sexual exploitation and sexual abuse of children. 3. The Committee of the Parties shall also, where appropriate: a. facilitate the effective use and implementation of this Convention, including the identification of any problems and the effects of any declaration or reservation made under this Convention; b. express an opinion on any question concerning the application of this Convention and facilitate the exchange of information on significant legal, policy or technological developments.

¹⁸⁹ See Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Committee of the Parties Rules of Procedure, Part 2, Rule 22

¹⁹⁰ Ibid.

one¹⁹¹, to achieve information on the overall state of national provisions on the subject, followed by a thematic questionnaire.¹⁹²

Rule 24 deals with the setting up of the latter mechanism, establishing that it should be based on a “*procedure divided by rounds*”, where each round should concern a specific theme decided by the Committee.¹⁹³

During its first meeting (20-21 September 2011), the body decided that the first round would focus on the “*sexual abuse of children in the circle of trust*”, since the data already possessed by the Committee showed how most of the abuses committed in the Member States were perpetrated “*within the family framework, by persons close to the child or by those in the child’s social environment*”.¹⁹⁴

The Committee decided to focus on this specific subject, moved by the consideration that all the preceding international instruments had their main aim set to the protection of children against commercial sexual exploitation. The Body thus felt the need to stress how, often, children are victims of sexual violence also within the family framework.¹⁹⁵

This first round concerned the 26 State Parties which had ratified the Convention at the time and which had the duty to answer to both questionnaires by 31 January 2014. Moreover, the Committee decided it would adopt two implementation reports at the end of the first thematic round: the first, concerning the effective enforcement of the applicable legislation as well as judicial procedures, was adopted by the Committee on 4 December 2015; the second, regarding the effects of the measures and procedures adopted for preventing sexual abuse of children in the circle of trust and the protection of children, will be adopted by the beginning of 2017.¹⁹⁶

As mentioned earlier, the 1st Implementation Report was adopted on December 4, 2015. It assesses the criminal law framework and judicial procedures, specifically

¹⁹¹ See *General Overview Questionnaire on the Implementation of the Lanzarote Convention* <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804703b3>

¹⁹² See *Questionnaire for the 1st thematic monitoring round: “SEXUAL ABUSE OF CHILDREN IN THE CIRCLE OF TRUST”* <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804703b4>

¹⁹³ See *supra*, Rule 24

¹⁹⁴ See *Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (T-ES), 1st activity report of the Lanzarote Committee*, p.3

¹⁹⁵ See *Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (T-ES), 1st implementation report, Protection of Children against Sexual Abuse in the Circle of Trust*, p.6

¹⁹⁶ For a complete timetable of the Committee’s work, see *Appendix IV* of the *1st Activity Report of the Lanzarote Committee*

looking at the process of criminalisation of sexual abuse of children in the circle of trust, the collection of data, the progresses made with reference to child friendly procedures and the implementation of the principles regarding corporate liability in this field.

As for the modality of the mechanism, according to the Activity Report¹⁹⁷ all parties should be monitored at the same time, in order to avoid country-specific evaluation; the objective is to “*create a momentum around a specific aspect of the monitoring theme in all States Parties at the same time, which in turn fosters exchange of good practices and detection of inadequacies or difficulties*”.¹⁹⁸

Concentrating on the specific issues analysed by the Document, the Committee¹⁹⁹, with regard to the sexual abuse of children, found that most of the Parties criminalise sexual acts committed within specific contexts and relations, few of them generally criminalise act committed with the abuse of a “position, status or relationship”, while just one²⁰⁰ of the Parties uses for the definition of the crime the exact wording given by the Lanzarote Convention.²⁰¹

Moreover, the Committee found that most of the parties still have not adopted data collection mechanisms, the data being collected in the broader context of all types of child abuse and neglect.²⁰² To this extent, the Committee had underlined how the setting up of such structure is urgent, since an exhaustive and internationally comparable study in this field would be of great help for the designation of more effective tackling policies.

Finally, as for child friendly proceeding, the Committee observed how Parties should pay more attention to the implementation of measures acting in the best interest of the child and comprehensively prevent, act and rehabilitate the victims.

The report in-depth analysis²⁰³ highlights various promising practices enacted by the Parties in different fields, which have proven effective in the minimisation of children’s traumas. The Committee, in its final recommendations, directs three invitations to the

¹⁹⁷ See *supra*, p. 3

¹⁹⁸ *Ibid.*

¹⁹⁹ See *Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (T-ES)*, 1st implementation report, *Protection of Children against Sexual Abuse in the Circle of Trust*, p. 3

²⁰⁰ Namely Spain, which has introduced in *Article 182* of its renewed *Spanish Criminal Code* the wording “*Whoever, by deceit or abuse of a recognised position of trust, authority or influence on the victim, engages in acts of sexual nature with a person over the age of sixteen¹⁴ and under the age of eighteen, shall be punished [...]*”

²⁰¹ See Lanzarote Convention, Ch.VI, Art.18, “*abuse is made of a recognised position of trust, authority or influence over the child, including within the family*”

²⁰² See *supra*, 1st Implementation Report

²⁰³ *Ibid.*

States: establishing or reinforcing the approach of the judiciary bodies involved in this kind of proceedings, exchanging good practices to provide the children with the best possible assistance and finally setting measures and procedures apt to guarantee the safeguarding the already traumatized children.

Focusing again on the structure provided by the Rules of Procedure, Part III of the Document establishes that the Committee should serve as an Observatory for the protection of children against the crimes in discussion.

The Committee has the mandate to facilitate the collection of data, exchange of information, experiences and good practices between States. The Committee may therefore organize capacity-building activities on specific issues, such as study visits, conferences or hearings on specific challenges raised by the implementation of the Convention.

To this extent, we may recall two important conferences: the *Conference on the role of international co-operation in tackling sexual violence against children (Rome, Italy, 29-30 November 2012)*²⁰⁴ and the *Conference on preventing sexual abuse of children (Madrid, Spain, 10- 11 December 2013)*.²⁰⁵

The International Conference of Rome, jointly organized by the Council of Europe and Italian authorities, discussed the implementation of the Lanzarote Convention, concentrating in particular on the measures of International Cooperation as set out in Article 38 of the Convention. The Conference served as a forum to exchange good practices and debate about projects and programmes adopted on the European, Mediterranean and African level, as well as the regional ones.

Moreover, the Conference saw the creation of three working groups, which concentrated their efforts respectively on *International Agreements, Communication Strategies* and *Development Programmes*.²⁰⁶

On the other hand, the Conference organised in Madrid on 10-11 December 2013, represented the occasion for an in-depth analysis of the preventive measures on the sexual abuse of children, as provided by Chapter II of the Lanzarote Convention.

²⁰⁴ See

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680471136>

²⁰⁵ See

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680471174>

²⁰⁶ See *Consultation with experts on the Role of International Cooperation in tackling Sexual Violence against Children, The International Rome Conference promoting the Council of Europe Convention on the Protection of Children against Sexual exploitation and Sexual Abuse*, p.13-17

The Convention's Program²⁰⁷ lists as the aims of the Convention the possibility of discussing the various problems and the possible solutions found by the single Member States, the recognition and promotion of different national and regional policies and finally the promotion of good practices implemented by Spain.

vi) *Council of Europe initiatives for the protection of children against sexual exploitation and sexual abuse*

In order to properly conclude this overview of the Lanzarote framework, it is necessary to mention both the Council of Europe *One in Five* Campaign and the Council of Europe *Strategy for the Rights of the Child 2012-2015*.

On 29 and 30 November 2010 in Rome at the "Michele di Ripa" former detention centre for minors, the Council of Europe launched the *One in Five* campaign to stop sexual violence against children.

The evocative campaign's name is due to the fact that about one in five children falls victim to sexual offences, about 75-80% of which are perpetrated by subjects covering a position of trust in the life of the victim.

The campaign recognizes the great importance and innovative power of the Lanzarote Convention and thus has as its principal aim the further promotion and implementation of the Convention.²⁰⁸ The relationship with the Lanzarote instrument is clear when considering the instruments and the means used to by the campaign, namely the training of all the subjects whom may interact with the victim and the fact of raising awareness among parents and relatives, in a framework that seeks the prevention and repression of this growing phenomenon.

The Council's activity essentially revolves around the consideration of the importance of educating children and those surrounding them, through the elaboration of simple rules, among which of fundamental value is the *Underwear Rule*.²⁰⁹

²⁰⁷ See *supra*

²⁰⁸ See *One in Five: A Council of Europe Campaign to Stop Sexual Violence against Children, Campaign Guidelines*, "[...] promote the signature, ratification and implementation of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention)",

http://www.coe.int/t/DG3/children/1in5/News/CampaignGuidelines_en.pdf

²⁰⁹ The *Underwear Rule* comprises five important aspects:

1. *Your body is your own*
 2. *Good touch – Bad touch*
 3. *Good secrets – Bad secrets*
 4. *Prevention and protection are the responsibility of an adult*
 5. *Other helpful hints to accompany The Underwear Rule*
- http://www.underwearrule.org/howto_en.asp

The Rule has a mainly preventive character, raising awareness on what should be considered as sexual abuse of children, but is also of great help for children, approaching them to the subject in a way that is suitable for their young age.

Moreover, the express recall to the Lanzarote Convention makes it clear that the Council's instrument pursues the aim of assuming the role of "natural successor" of the innovative instrument.

As for the Council of Europe Strategy for the Rights of the Child²¹⁰, it proposes a way of action for the Council, taking into account the progresses achieved by the first two cycles²¹¹ of the programme "*Building a Europe for and with children*". These two cycles reached a number of achievements, among which the development of new working methods and ways of training Council of Europe staff, the identification of the need of new standards and guidelines²¹² and increased international cooperation through the introduction of joint programs of action.

In 2011, the Committee of Ministers acknowledged the proposed objectives and procedures for the elaboration of a new strategy, which has been refined and completed in collaboration with various European institutions and international organizations. The Strategy was adopted on 15 February 2012; it stretches out in four strategic objectives:

1. promoting child-friendly services and systems;
2. eliminating all forms of violence against children;
3. guaranteeing the rights of children in vulnerable situations;
4. promoting child participation.

Since the adoption of the Strategy, the Council has made concrete progress for the achievement of the four objectives.

As mentioned by the *Final Report to the Conference on the implementation of the Council of Europe Strategy for the Rights of the Child 2012-2015*²¹³, some of the steps taken include the work of the Lanzarote Committee, the publication of the "*Guide for professionals working in alternative care*" and, finally, the *Council of Europe Convention on preventing and combating violence against women and domestic*

²¹⁰See *Council of Europe Strategy for the Rights of the Child (2012-2015)*, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045d224>

²¹¹ 2006-2009 and 2009-2011 respectively

²¹² Including, in particular, the Lanzarote Convention

²¹³ See *Growing with children's rights, A Conference on the implementation of the Council of Europe Strategy for the Rights of the Child 2012-2015, Final Report* <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045d225>

violence entered into force on 1 August 2014, specifically addressing certain forms of violence against girls.

The Dubrovnik Conference “*Growing with Children’s Rights*”²¹⁴, held in 2014 in the Croatian city, took note of the progress made in the implementation of the Monaco Strategy. The Conference served as a useful forum for confrontation between national and local governments, NGOs and representatives of the civil society, identifying challenges and problems to be addressed in the upcoming strategic cycle.

The Conference dealt with seven major issues²¹⁵, all concerning methods through which promote children’s rights. It acknowledged how, while the international and European legal standards are comprehensive and well-articulated, national legislations still have to work on the transposition of international provision into national system. It also recognized the unique nature of the Lanzarote Convention as well as the steady work conducted by the Lanzarote Committee, yet it recognizes how there is still a lot of work to do in order to fully protect children rights in the field of sexual exploitation and abuse of children.

Concluding, the Dubrovnik Conference once again stresses the importance of international cooperation in order to successfully implement children’s rights. The Report points out the need for a continuous growth in this field, with the need for cooperation at all levels of society and through all sectors working in close contact with children.²¹⁶

²¹⁴Ibid.

²¹⁵See *ibid.*, “*The main issues discussed during the conference were: a. Implementing children’s rights through law and policy b. Creating child-friendly health and social services c. Ensuring child-friendly justice systems and providing viable alternatives to detention d. Tackling sexual violence and gender-based violence against children e. Alternative care and reaching children in vulnerable situations f. Making child participation a reality g. Strengthening international cooperation and partnerships to increase impact*”, p.2

²¹⁶ Ibid.

Chapter 3

Ratification and implementation of the Lanzarote Convention: the Italian Law no. 172/2012

i) *Preceding body of laws*

The approval of Law No. 172/2012 is ideally placed at the end of a legislative reform process, started in Italy in the early 90s.

The attention and efforts of the Italian legislator, aimed at building a legal system capable of addressing the problem of child sexual abuse, emerged as the outcome of numerous debates and proposals, worthy of being relevant for the subject at hand only in the last two decades. A law-making process in which the laws were frantically chased, almost groped, to recover from centuries of silence.²¹⁷

The consequence is a national legislation in which weigh in, for the protection and safeguard of the child, different laws and provisions.

The provisions of the Rocco Code concerning sexual offenses, while representing a major step forward compared to the previously applicable regulatory instruments, reflected, in fact, the cultural and social context in which the code itself was conceived (the penal code would place the crimes of rape and indecent assault in the chapters on crimes against public morals and family order).

Law No.66 of 15 February 1996, “*Norms against sexual violence*”, represents the first significant reform of the penal code concerning sexual offenses.²¹⁸

²¹⁷ See AA.VV., “*I reati sessuali, i reati di sfruttamento dei minori e di riduzione in schiavitù per fini sessuali*”, edited by F. Coppi, Giappichelli, Torino, 2007

Coppi draws the attention on how the criminal code, early in the years, tended to muddle crime with sin, especially with regards to sexuality. Following this line of thought, any behaviour not aligned with catholic dictates or morality would be prosecuted, even in the lack of a factual harmfulness of the act.

²¹⁸ In Gazz. Uff., February 20, 1996, n. 42.

The instrument reserved particular consideration to minors, in light of their specific condition: individuals identified by a global immaturity and inexperience (an obstacle to the rendering of a free and informed consent), against which the effects of abuse are extremely amplified, because they undermine irreversibly the harmonious and balanced growth path of the subject.

The new legislation essentially affected two fundamental aspects, namely that of a more precise identification of the interest protected by the provision and of the reformulation of the type of offences.

As for the first aspect, the law transferred the norms dedicated to sexual violence from their previous location in Title IX (crimes against public morality and decency) to Title XII of the Code (offenses against the person), stressing how "*(...) the person in all its individuality should be considered as the focal point of the protection and not as a mere instrument of protection of other superior interests like public morality and decency*".²¹⁹

The alteration should not be seen as a simple linguistic variation, since the news brings with it the considerable implication of a change of mentality, accepted and adopted by the new law: the interest affected is not a generic sexual morality that sees the community as the main recipient, but rather the sphere of freedom of the individual, affected by the indicted behaviours.²²⁰

The person stands out in all its individuality, appearing as the main object of protection and not as a mere tool for achieving other ends. The community is affected only indirectly, as through the protection of the individual the safeguard of the other subsidiaries is still reached. The crimes of sexual violence offend the personal freedom, intended as the freedom of self-determination to perform a sexual act, and not as the moral freedom the victim, or his/hers decency and sexual honour.²²¹

On the other hand, the Law had the effect of eliminating the difficult and evanescent distinction between rape and indecent assault, formulating the unitary notion of sexual violence in art. 609-bis. The choice replaced the crime of rape, acts of violent and carnal lust committed with abuse of the capacity of public official, with the unique case of "sexual violence": the recipients are all those people (adults or children) that

²¹⁹ See Canestrari S. et al., "*Diritto penale. Lineamenti di Parte Speciale*", Ed. Monduzzi, Bologna, 2009, pp. 537-538

²²⁰ Agreeing on this Garofoli R. – Alpa G., "*Manuale di diritto penale. Parte speciale*", vol. II, V Ed., Neldiritto, Roma, 2013 and Mazzacuva N., "*Delitti contro la persona: le altre ipotesi di tutela*", in AA.VV., *Diritto penale. Lineamenti di parte speciale*, V Ed., Monduzzi, Bologna, 2009

²²¹ Ibid

with violence or threats or by abuse of authority are obliged to make or suffer "sexual acts". Therefore, the distinction between sexual intercourse and indecent assault unwinds: the hypothesis of sexual assault persists even with incomplete sexual acts (such as excitement or harassment) committed with violence, aggression, threat or by claiming authority. The physical contact between victim and aggressor becomes possible but not necessary.²²²

Law 66/1996, as already pointed out, devoted specific attention to the child victim, including in particular, as a specific aggravating factor in the crime of sexual assault, the age of the person enduring the crime, and even criminalizing, in Art.609-quarter c.p., sexual acts with a person under 14, even when consent was given. In this way, the legislator seemed to be protecting the child, even from his own judgment and choices, given his/her not completely developed intellectual maturity, which suggests his/her self-determination is not yet fully developed.

The same ratio, the protection of the freedom of the child and the peaceful development of his sexual sphere, may also be found in the new wording of Art. 609-quinquies c.p., where the corruption of a minor, as the fact of who "(...) engages in sexual activity in the presence of a person under fourteen years in order to make her watch", is punished.²²³

The conduct is considered a criminal offense only if it is accomplished with the express purpose of forcing the child to witness such acts (it is an offense requiring specific intent). To this extent, it is irrelevant whether the action is accomplished, even in the presence of the child, for different purposes.²²⁴

Nevertheless, the age of the minor should be such that the acts should concretely trouble him/her, as indeed holds the most recent case law, which states that the offense is deemed to exist only in cases where the child has the opportunity to perceive the sexual act in its real essence.²²⁵

A major step forward in the direction of a more comprehensive protection for the child came with the approval of Law No.269 of 3 August 1998, known as "The law on paedophilia", the first instrument of its kind ever introduced in the history of the Italian Republic.

²²² In this sense Romano B., *Profili penalistici dell'abuso sessuale sui minori*, in Dir. fam., 1998, n. 3, pt. 2

²²³ See Cass. Pen., Sez. III, 16 novembre 2005

²²⁴ See Flora G., Tonini P., "Nozioni di diritto penale", Giuffrè, Milano, 1997, pag.354

²²⁵ In this sense, Cass. Pen., Sez. III, 27 febbraio 1970, in Giur. It., 1971, II, 323

The continuity with the path opened by Law 15 February 1996 n. 66 emerges clearly, integrating and completing the spectrum of protection, towards the healthy physio-psychic development of the children.²²⁶

The innovative scope of the reform can be measured on the specificity of its object: the sexuality of children, whose integrity must be safeguarded from multiple forms of aggression.

While in 1996 the attention of the legislator focused on mainly episodic and lecherous conducts, perpetrated by one or more subjects, two years later the choice is that of repressing phenomena characterized by greater complexity, with an evolution also in terms of protagonists. The active subjects are not perceived anymore as individuals, but as criminal organizations operating regardless of national boundaries and for which the child sexuality becomes, like illegal substances and arms, an attractive source of profit.²²⁷

The frame of the legislative instrument reflects an acquired awareness: differently from the past, the erotic needs and fantasies are often no longer the key to the reason behind the abuses, replaced by the desire to make economic profits. The background becomes that of an entrepreneurial activity in which come together the perverse demands of consumers and the profit of those responsible for the crimes.

The law is in line with the discussions and elaborations on the subject at the international level: with it the Italian State showed that it had accepted the contents of both the Declaration of the Rights of the Child of 1989 - which had been part of the Italian legal sources since its reception by Law 176/91 - and the Final Declaration of the Stockholm Conference in 1996.

The main innovations brought to the legislation were the prosecution of the conduct of induction, aiding and exploitation of child prostitution, even when the aim is to realise pornographic exhibitions or to produce pornographic material, distribution or dissemination (also electronically) of such material or information aimed at the solicitation or exploitation of children, as well as child prostitution for sexual tourism.²²⁸

²²⁶ See Fiandaca G. – Musco E., *Diritto penale. Parte speciale*, vol. II, tomo I, *I delitti contro la persona*, IV ed., Zanichelli, Bologna, 2013

²²⁷ Romano B., *Repressione della pedofilia e tutela del minore sessualmente sfruttato nella legge 269 del 1998*, in *Dir. fam.*, 1998, n.4

²²⁸ See Bianchi D., “*Un quadro degli interventi contro violenza e abuso*”, in Istituto degli Innocenti, “*Cittadini in crescita*”, year 3, n. 1, Firenze, 2002, p. 51

The basic characters of the 1998 law can be enclosed in five directions: the strengthening of the criminal justice system through the introduction in the code of new offenses (child prostitution, child pornography, possession of child pornography and tourism initiatives aimed at exploiting child prostitution); the equipment of more effective police investigation tools (the law expanded the range of offenses for which the arrest *in flagrante delicto* is mandatory and are eligible interceptions, in addition to foresee the so-called protected hearing).

It moreover conferred to the police new ways through which contrast these crimes (simulated purchase of pornographic material, opening of “phishing websites”, delay of the execution of arrest and seizure, “infiltration” of agents in organized trips for sex tourism); it aimed at protecting children from physical and psychological damages related to the endured offenses (ban on the publication of the victim’s generalities and duty of performance of diagnostic tests on the author of crime in order to prevent the occurrence of sexually transmitted diseases on the victim).

Finally, it attributed important coordination tasks to the Prime Minister and the Minister of the Interior (also stimulating international cooperation and ensuring the establishment of new specialized investigative units).

In any case, the most interesting aspect of this legislation lies, perhaps, in the strong moral connotation, given the legislator’s intentions to “*protect children from all forms of exploitation and sexual violence to safeguard their physical, psychological, spiritual, moral and social development*” (therefore individuating as a protected legal right, “*the physical and psychological integrity and freedom of the child*”).²²⁹

The aim seems to be to protect minors from conducts that would give birth to “new forms of slavery”, as the own section of the law recounts, and as it is explicitly suggested by the structure of the provisions, positioned immediately after Art.600 c.p. (precisely devoted to “Reducing or holding in slavery or servitude”).²³⁰

The recent Law No. 154, of April 5, 2001 – entitled “Measures against violence in family relations”, seems to be pursuing the same purpose.

The law has set as its main objective the guarantee of a more extensive protection, with respect to the one already provided by the existing legislation, of the victims of abuse in the family, among which minors.

²²⁹ See Canestrari S. et al., “*Diritto penale. Lineamenti di Parte Speciale*”, Monduzzi Ed., Bologna, 2009, p. 549

²³⁰ Ibid.

The provisions contained in the legislation in question are essentially articulated into the major changes brought forth on the civil code as well as on the civil and criminal procedure's codes, with the introduction, respectively, of three groups of provisions intended to bring effective substance to the hypothesis of protection already provided for in the criminal and civil regulations.

Moreover, with Law No.228 of 11 August 2003, "Measures against trafficking in persons", the legislator intended to further strengthen the panorama of tools at disposal for the complex goal of an overall protection of children.²³¹

Despite the efforts made in 1998, with the provision of a massive recourse to criminal sanctions in relation to child prostitution and paedophilia, the sexual exploitation of children did not hint at diminishing.²³² Increasingly, children bought or seized in countries of origin (especially Eastern Europe and South-East Asia) were forcibly used for prostitution or sexual exploitation purposes.

The intersection of a multiplicity of levels such as immigration, prostitution, domestic criminal law, crimes against humanity and international cooperation had to wait long for a rational regulatory response, worthy of a holistic vision.

The work of propulsion caused by the European and supranational bodies proved to be particularly effective in preparing a more decisive instrument for combating trafficking in human beings.²³³

For the creation of an area of freedom, security and justice within Europe, it was essential to proceed to the elimination of such serious violation of human rights: an objective to be pursued through both Cooperation between Member States, and the harmonization of the national laws in the light of a typically cross-border phenomenon.

Under the impetus for the birth and consolidation of a common criminal system, Law 228/2003, brings innovations on several fronts: the reformulation of certain offenses under the Criminal Code in order to adapt them to the features of new forms of slavery; the extension of the responsibility arising from these crimes to legal entities in whose interest or advantage they are committed (Art. 25-quinquies of Legislative Decree. n. 231/2001); the provision of measures supplying the victims with instruments to support and reintegrate them into the society.²³⁴

²³¹ In Gazz. Uff. 23 agosto 2003, n. 195

²³² See Pennisi A., *La giustizia penale minorile: formazione, devianza, diritto e processo*, Giuffrè, II ed., Milano, 2012

²³³ Ibid.

²³⁴ Pennisi, *supra*

The most recent legislative intervention, implemented by Law No.38 of 15 February 2006, places itself as the completion of a process started with the 1998 law. The political-criminal strategies undertaken by the Council of Europe in 2001, with the Convention on Cybercrime, and the European Union, with Framework Decision 2004/68 / JHA, required a further reformist intervention, suitable to tighten up the previous legislation. In 2006, the discipline of the crimes against new forms of slavery endured numerous changes at the hands of the mentioned Law, titled "Provisions for the fight against sexual exploitation of children and child pornography, including via Internet".²³⁵

The most modern communication tools, outcome of an ongoing technological evolution, are originating new channels of expression that paedophiles have not failed to turn in their favour. The studies for the prevention and repression of these new forms of sexual abuse of minors have increasingly become more and more frequent: with Resolution of 11 April 2000, the European Parliament had already asked to the Commission to formulate legislative proposals and, in particular, a framework decision for the delineation of common criminal circumstances for the Member States.²³⁶

The matter found, up to the l. n. 38/2006, its discipline in the combination of the laws n. 66/1996 and n. 269/1998, which made significant changes to the penal code. Operationally, however, the framework proved insufficient in providing immediate and adequate answers, facing deficiencies not easily filled even in lights of the efforts carried out by the postal police.

The innovations introduced by the new legislation are many, but among the most important we should mention: increased penalties and ancillary measures (for example, the possibility for a plea bargain is excluded for offences related to the sexual exploitation and abuse of children); attempt to draw a more inclusive definition of the phenomenon (the term "exploitation" was substituted by the term "use" of a child, extending the offences to situations that go beyond pure economic exploitation); identification and protection of victims, in view of the fact that a very low percentage of children is identified and supported among those abused and subject of pornographic representations; adoption of a series of preventive measures, aimed both at potential abusers, who often tend to be habitual offenders, and at minors, whom, using their own

²³⁵ In Gazz. Uff. 15 Febraury 2006, No.38

²³⁶ See Eramo F., *Lotta contro lo sfruttamento sessuale dei bambini e la pedopornografia anche a mezzo Internet. Ombre e luci*, in Fam. dir., 2007, n. 1

computers, are often subject to the risk of exposure to child abuse images and the danger of solicitation.

The regulatory instrument also established two new bodies: the National Centre for combating child pornography on the Internet (already active for both Postal and Communications Police), and the Observatory for the fight against paedophilia and child pornography.

However, the instrument does not set out, for coordination purposes, the relations between the aforementioned observatory and other institutional bodies operating in the sector.

The purposes referred to in the Preamble have been pursued through the expansion of the range of application of the provisions devoted to the subject of sexual offenses against children, further characterising them with a pre-emption of the legal protection stronger than the one conferred to the protection of the legal interest. This orientation raised criticism among the doctrine, which had already reprehended the excessive polarization of incriminating norms on authorial characteristics as well as those regarding the protected legal interest.²³⁷

Other aspects of the new legislation did not go free from criticism as well. Leaving aside the problematics related to the preparation of the second paragraph of Art. 600-bis c.p., we should look at what is perhaps the most controversial provision of the new legislation, which is Art. 600-quarter (1) c.p..

The norm, indexed "Virtual pornography", states that the provisions of the preceding Articles shall apply *"even when the pornographic material represents virtual images created by using images of minors under eighteen or parts of them"*, meaning with virtual images those *"created with graphic techniques not associated in whole or in part to real situations, the quality of which makes virtual situations look real"*.²³⁸

In this case, it is necessary to ask oneself what the protected legal interest is, in fact, and in this way, clarify the criminal policy motivations supporting such a provision. Indeed, it seems very difficult to recognize, with regards to the norm in question, the same ratio of those that precede it, if only for the mere fact that here the profile of the damage caused to the children seems to shift in a dimension that seems to cause little to no damage the sexual freedom of the child.

²³⁷ Canestrari S. et al., *"Diritto penale. Lineamenti di Parte Speciale"*, Monduzzi Ed., Bologna, 2009, p. 550

²³⁸ For a thorough examination see Lorusso S., Manna A. (edited by), *"L'abuso sessuale sui minori: prassi giudiziarie e novità normative introdotte dalla legge 38/2006 sulla pedopornografia"*, Giuffrè Ed., Milano, 2007

Even when considering the psychosexual development of the child as thoroughly protected, the result is the same: if the images are virtual, if there is not a reference to real situations, in practical terms it is the lifestyle, surely morally abject, which is condemned, indicting what essentially looks like an assembled product.²³⁹

On the other hand, according to different doctrinal orientations, the provision in question, not taking into account hypothesis, which are totally devoid of offensiveness, could be seen as a completion of a possible lack of protection with regard to acts committed through the extrapolation and de-contextualization of images of recognizable or otherwise identifiable children.

ii) Preparatory work

Law 172/2012 has undergone a long and complex legislative process, which required a triple intervention of the Chamber and the Senate and that, in addition to involving numerous Parliamentary Committees called to express opinions about the content of the measure in its various phases, saw the participation of different actors in informal hearings.²⁴⁰

First, some officials of the Ministry of Interior were questioned about IT investigations for the prevention and suppression of crimes against children; moreover, some prosecutors and the national anti-mafia prosecutor were involved to determine which public prosecutor's office, district or metropolitan, was better equipped for the investigation. Finally, representatives of the Associations Telefono Azzurro and Telefono Arcobaleno also took part in such hearings, in order to provide an even more comprehensive scenario.²⁴¹

The preparatory works set off with the presentation of the government draft legislation C. 2326 to the Committees of Justice and Foreign Affairs of the Chamber of Deputies, on March 23, 2009.

Already from the examination phase in front of the Commission in a reporting capacity, the broad bipartisan convergence on the underlying purposes of the bill clearly emerged.

²³⁹ See Lorusso S., Manna A., *supra*, and Manna A., Resta F., “*I delitti in tema di pedopornografia alla luce della legge 38/2006. Una tutela virtuale?*” in *Diritto dell’Internet*, 2006, booklet 3

²⁴⁰ In Gazz. Uff. 8 October 2012, n. 235

²⁴¹ <http://leg16.camera.it/561?appro=517&Legge+172%2F2012++Ratifica+della+Convenzione+di+Lanza+rote>

In fact, the document was referred to as *"the first international instrument with which the sexual abuse of children become criminal offenses, including those that take place at home or within the family, with the use of force, coercion or threats"* by the rapporteur of Commission III, On. Matteo Mecacci (PD) as well as *"(...) the first international instrument with which it is expected that sexual abuse against children are considered criminal offenses"* by the rapporteur for the II Commission, On. Angela Napoli (PDL).²⁴²

Despite, however, the broad agreement of the political forces on the draft, the parliamentary proceedings were characterized by their slowness and very high complexity, which led to the approval of the text of the Law only at the end of 2012.

In January 2010, the examination of the Chamber committees was concluded, and the bill was voted on and approved on January 19; it was then sent to the Senate as number S.1969.

On January 20 the cross examination in Commissions 2nd and 3rd began. In this first phase the Chamber of Deputies and the Senate had different positions, especially with regard to amendments to the penal code, as is clearly evident from the bill transmitted, with amendments, to the Chamber with the number A.C. 2326-B.

Once an agreement on the new code's provisions was found, with specific attention drawn on the configuration of the new offense of "incitement to practices of pedophilia and child pornography", the Chambers continued to disagree on other aspects of the draft, especially on the jurisdiction for investigating crimes of sexual exploitation of minors and on the length of the accessory punishment when convicted for crimes committed against children.

In particular, Article 4, paragraph 1, lett. u), number 3, adding a third paragraph to Art. 609-*nonies* c.p., provides for the application of personal security measures against convicted sex offenders, after the execution of the sentence and for a duration of five years. These measures are laid out regardless of an investigation about the social dangerousness of the offender and operate for a fixed, predetermined duration of five years.

The Senate, recalling that the Constitutional Court had repeatedly intervened in the matter, declaring the unconstitutionality of provisions providing for socially dangerous

²⁴² Camera Dei Deputati, 16 July 2009, N. 203. XVI Legislature. *Bollettino delle Giunte e delle Commissioni Parlamentari. Commissioni Riunite (II e III)*. Text updated to 22 September 2009, p. 8-10 http://leg16.camera.it/dati/leg16/lavori/bollet/frsmcdin_wai.asp?AD=1&percboll=/dati/leg16/lavori/bollet/200907/0716/html/0203/%7Cpagpro=INT8n2%7Ccall=off%7Ccommis=0203

presumptions²⁴³, and considering the intervention of the Gozzini Law (Law no. 663 of 1986, Art. 311), which, among other things, had repealed Art. 204 c.p. about the assessment of dangerousness and alleged social dangerousness, establishing moreover that all the personal security measures should be ordered upon verification that the person who committed the act is socially dangerous, had raised profiles of constitutional incompatibility of the norm regarding the new Art. 609-nonies c.p..

However, after the approval, on July 5, 2012, during the third reading, of the further amended bill, the Senate confined itself to the implementation of the changes brought by the other Parliamentary branch and, on September 19, 2012, it finally approved the bill, with 262 voters, of which 262 in favor, 0 against and 0 abstentions.²⁴⁴

The text of the law, entitled Law of 1 October 2012, n. 172, "*Ratification and implementation of the Council of Europe Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse, made in Lanzarote October 25, 2007, as well as norms for the adaptation of the national legislation*", was published in the Official Gazette of the Italian Republic n. 235 of 8 October 2012, and entered into force on October 23 of that year.

iii) The subject of the law: an overview

The direction followed by the Council of Europe with the Lanzarote Convention, was in the sense of strengthening the protection of minors against new ways of aggression to their sexuality, which are incessantly increasing with the complicity of computerized communication techniques.

Some of the recommended measures relate to substantive criminal law, urging signatory States to the criminalization of different hypothesis of involvement of children in sexual activities, in addition to those already provided for.

The legal framework established by Law No.269/1998, on which Law No.38/2006 was grafted, was consequently amended with the ratification of the Lanzarote Convention, which took place with Law No.172/2012. This law affected multiple sections of the criminal code, within the context of the crimes against the person and the family.

Once again, the reception of a European instrument offered the occasion for an exiguous reform of the Code: introduction of new forms of crime, often characterized by an

²⁴³ Consider the Constitutional Court rulings 1/1971; 139/1982; 249/1983 and 1102/1988.

²⁴⁴ See Senate Act No. 1969, Session 769 of September 19,2012

http://www.senato.it/leg/16/BGT/Schede/Ddliter/votazioni/796_7.htm

anticipation of the criminal liability even to conducts prodromal to the realization of the offenses referred to in Art.600, and following, c.p .; reformulation and / or integration of to existing ones, tightening up the sanctioning treatment; revision of the rules of aggravating circumstances and accessory penalties; preparation of new security measures.²⁴⁵

The substantial intervention at the core of the new Law is, therefore, pursued in order to adapt the national system to the aims of the Lanzarote Convention.

This appears clearly from the heading of the Law and, in particular, from Art. 2 of the same text, laying down the execution order, which proclaims that "the Convention should be executed exhaustively (...)".

The national legislator, as already shown, in order to adapt the domestic law to the demands from the European Union and the international bodies, had enacted a number of interventions affecting to different extents the domestic criminal justice system, without however reaching a full review and harmonization of the matter of sexual crimes against minors.

Nevertheless, as pointed out by some authors, the intercessions enacted in the previous fifteen years were not completely lacking some systematic vocation, therefore allowing the reduction of the extent of the changes needed for further adaptations imposed by the implementation of Convention, as many of the provisions contained in it (and in particular Articles 18 to 29) were to a large extent already present in the criminal code.²⁴⁶

Wanting to advance an overall judgment on Law n. 172, one can argue that, on the one hand, it made it possible to fill existing gaps in the protection system, to correct the system's flaws and resolve interpretative questions raised by the pre-existing regulations. On the other hand, it does not fail to reproduce the recurring criticalities in the previous various regulatory interventions: blurring of criminal law's core principles, basing on which the expansion and the anticipation of the sanction is allowed within certain limits; tendency to censor morally reprehensible conducts, in relation to which is difficult to glimpse an offensive or dangerous dimension related to concrete legal interests; insufficient legislative classification of the conducts, producing a generic and vague discipline and leaving behind a sense of incompleteness.

These findings are shared by Gemelli, who argues that despite the intention, preordained to the valorization of the victim and observant of the problematics arising

²⁴⁵ See Pisa P., *Una nuova stagione di "miniriforme"*, in *Dir. pen. e processo*, 2012, n.12

²⁴⁶Cfr. Rel. N. III/10/2012, Roma 19 ottobre 2012

from the offense, the interventions of the legislator do not appear satisfying as lead to the premissions of the minor's needs, "favoring the culture of the suspect and / or defendant's guarantees".²⁴⁷

iv) The crimes of sexual assault and exploitation against minors after the ratification of the Convention

Given the above, it seems appropriate to review the changes introduced by the Convention in relation to crimes against the sexual freedom of the child.

First, the 2012 novel has taken steps to reformulate the offense of child prostitution provided and punished by Art. 600-bis c.p..

In his pre-reform version, the mentioned incriminating disposition was characterized by the outline of two distinct situations: that referred to in the first comma punished the conduct of induction, aiding, abetting and exploitation of prostitution of underage subjects. The second comma was instead aimed at sanctioning "*(...) any person engaging in sexual activities with a child between the ages of fourteen and eighteen, in exchange for money or other economic benefits*".

The 2012 document affects both aspects of the norm, albeit with varying intensity.

Beginning with the amended first comma, it normalizes five additional active behaviours: recruiting underage children for prostitution, managing, organizing and controlling the criminal activity, and, finally, the conducts of those who otherwise profit from prostitution. These actions are added to the other three (inducing, aiding and exploiting) already present in the old formulation, the importance of which is confirmed by their automatic inclusion in the 2012 legislative instrument.

Nevertheless, it should be emphasized how the five new conducts are not truly innovative, as they could easily be included into one of the activities concerning the induction, exploitation or aiding and abetting of a child, as evidenced by the jurisprudential development.²⁴⁸ This also in light of the reconstruction of the latter made by the doctrine, according to which induction means "*any form of psychological influence directed to convince or to determine a minor to practice prostitution*", aiding

²⁴⁷ See Gemelli M., *Gli abusi sessuali sui minori dopo Lanzarote e le nuove opzioni difensive*, in Giust. pen. , n. 4, pt. 3

²⁴⁸ See Tovani S. Trinci A. (edited by), "*I delitti contro la libertà sessuale. Aggiornato al d.lgs. 4 marzo 2014, n. 39*", Giappichelli, Torino, 2014

and abetting is "any personal interposition or otherwise, any activity to procure in any way favourable conditions for the exercise of prostitution" , and, finally, exploitation as "the fact of gaining any usefulness, not necessarily economic, from the sexual activity of those prostituting".²⁴⁹

Moreover, the conduct of recruiting for the purpose of prostitution of underage victims was already defined as an offense from a source other than the Criminal Code, namely Art.3, paragraph 1, no. 4 of Act No.75, 20 February 1958 (the so-called Merlin Law)²⁵⁰. Therefore, the true aspect of novelty of the new Art. 600-bis, paragraph 1 of the code, lies in the greater severity of the expected custodial sentence, in the case that the conduct referred to is perpetrated against children.

Nevertheless, the breakthrough of the new provision should not go unmentioned, especially in view of the autonomy given to the concept of recruitment compared to that of induction, as elaborated by the most recent case law, according to which for the configurability of the first conduct, it is sufficient that the action is committed only for the purpose of placing the victim in the availability of the subject wanting to benefit from the activity of prostitution, not being required, in particular and unlike induction, to carry out activities of persuasion or conviction of the victim in order to determine him or her to prostitution.²⁵¹

A different argumentation should instead be carried out for the conduct of managing, organizing, controlling and profiting from another's prostitution, as, in this case, it should be assumed that they constitute further specification of the conducts of aiding and exploiting, especially considering the very wide semantic reconstruction of the two terms of made both by the law and the jurisprudence.

Further specification of such conducts, which in any case were not even imposed by the text of the Lanzarote Convention, would therefore seem to be attributable to the intent of the national legislator to prevent any gaps in the incriminating dispositions, in order to create a more severe regulatory environment for the treatment of the criminal offenses under consideration.

²⁴⁹ See Canestrari S. et al., "Diritto penale. Lineamenti di Parte Speciale", Monduzzi Editore, Bologna, 2009

²⁵⁰ In this sense, Cass. Pen., sez. VI, 5 November 2008, n. 43872, Tolescu, rv 241215 and AA.VV. "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 norme di adeguamento dell'ordinamento interno'", in Penale Contemporaneo, Rel. n. III/10/2012

²⁵¹ See Cass. Pen., sez. III, 4 December 2007, n. 11835, Fuccaro and AA.VV. "Novità legislative [...]", *supra*

However, the multiplication of the active behaviours achieved with the 2012 reform will leave without solution a problem that had already arisen with the original version of the provision.

Already with the old version of Article 600-bis, which also listed all the typified conducts in one paragraph, there had been a conflict of interpretation about the possibility or not of the concomitant realization of multiple conducts within those provided in the norm, and, if so, about the possibility to configure it as a concurrence of multiple crimes or as one offense.²⁵²

A separate issue is that of the coordination between the new Art. 600-bis, paragraph 1, c.p. and Art. 4 of Law n. 75 of 1958, as the conducts are worded very differently in the two sources.

In particular, causing a person to enter the territory of another State - or any place other than his habitual residence – in order to practice prostitution, gives rise to an active conduct that, while having nothing to do with the prostitution activities of the victim and while preceding the material beginning of the act is nonetheless causally connected with it. However, the conduct continues to not be included in the concept referred to in paragraph 1 of the new Art. 600-bis c.p..²⁵³

The second paragraph of art. 600-bis provides instead a separate criminal hypothesis, in that it penalizes the activities of those who use the services of underage prostitute.

The renewed version of the provision in question does not present any major structural change from the old text, except for the introduction of the reference to even just the promise of compensation in lieu of payment, required by the old formulation for the consummation of the crime.

It's a particularly timely change since, apart from being expressly provided by the text of the Lanzarote Convention, it realizes the effect of an anticipation of the protection of the victim to a time (the promise of payment) already suitable for the integration of the criminal conduct. It thus release the crime from the necessity of a material dation of money or other benefits (which becomes only eventual), moreover avoiding that the failure in paying the price, eases the perpetrating subject's position, something that seemed possible with the old formulation.

²⁵² In this sense Cass. Pen., sez III, 15 April 2010, n. 21335 and Cass. Pen., sez III, 28 October 2010, n. 43414

²⁵³ See Russo C., “*L’abuso sui minori dopo Lanzarote. L. 1 ottobre 2012, n. 172*”, Il penalista, Giuffrè Editore, Varese, 2012

Another clarification contained in the new text, the expunction of the "economic" nature of the promised payment, recalls instead considerations, which had already surfaced during the drafting of bill No.269 of 1998 (which in fact did not require the economic nature of the compensation for the configuration of the case of child prostitution), but were instead set aside for the fear of overly broad interpretations, evidently deemed incompatible with the motivations of the Convention.²⁵⁴

Returning to the structure of the crime, the revised text entails, with the sole requirement of the promise of payment as a constituent element, a remarkable anticipation of the protection threshold.

If, in fact, in the pre-reform version, the full integration of the two moments of the offense of fruition of prostitution (both the sexual act and the payment of the compensation) was necessary for the integration of the crime; the new law envisages two objective elements, the fulfilment of the sexual act and the promise of payment, the second of which always precedes the first logically, and as a result the offense can only be said to be consumed with the completion of the sexual act.²⁵⁵

The legislator did not deem it necessary to further advance the protection threshold, in particular up to the agreement with the underage person to have, in exchange for payment, a sexual relationship that then does not concretely happen.

It can be however discussed whether the *pactum sceleris* is punishable by way of attempt. A significant obstacle to this reconstruction is Art. 115, paragraph 1, c.p., according to which the agreement to commit a crime that is not then followed by its commission, is not a crime; but, according to preliminary reports of the doctrine, "*it should be assumed that the pactum sceleris between an underage prostitute and the user constitutes a crime. The minor and the user are in fact the subjects of a necessary improper multi-person crime, one of which is the offender and the other is the victim, and in which the objectivity of the offense lies in the agreement between the two parties. Article. 115 c.p. disciplines instead the agreement between the two authors of a multi-person eventual offense, where the agreement does not enter into the structure of the offense and is in fact entirely foreign to it*".²⁵⁶

²⁵⁴ See AA.VV. "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 norme di adeguamento dell'ordinamento interno'", in Penale Contemporaneo, Rel. n. III/10/2012

²⁵⁵ See Russo C., *supra*

²⁵⁶ Ibid.

Different considerations might be made for the much more significant possibility where there is a request to a minor to perform a sexual act in exchange for payment. The relevance of the provision criminalising such conduct should be considered in coordination with the provisions of Art. 56 c.p., with particular reference to the research of the conduct's eligibility requirements and to its non-ambiguity. In this specific case, both are subsisting: regarding the eligibility, the conduct of the active subject is fully enclosed in the request of a sexual performance to a minor, since the events that follow (i.e. acceptance of the proposal and the consummation of the sexual act) do not fall within his/her full availability, not being required any further act for the active subject.²⁵⁷

Consequently, even the conduct substantiating in the request of a paid sexual performance with a minor will be punishable as an attempt. All this, of course, is just the tip of the overall tightening of the sanctioning treatment for child prostitution. Further confirmation of this trend can also be found in the preparation of a new series of aggravating circumstances with special effect, namely: to have committed the act with violence or threats (paragraph 3); having committed the crime by taking advantage of the situation of need (paragraph 4); having committed the crime to the detriment of the lesser of sixteen (paragraph 5); finally, committing the act through the administration of alcohol, narcotics, or other substances prejudicial to the health of the child (paragraph 7).

Moreover, those circumstances are assisted by the express prohibition of balance with various mitigating circumstances other than the lower age of the author of the crime or participation of little relevance to the crime.

In line with the tightening requirements for the processing of crimes committed against children, is also the new special aggravating circumstance for committing the crime to the detriment of minors under the age of sixteen that, while not appearing in the wording of Art. 600-bis c.p. was implemented without substantial changes but with higher edictal limit in the new Art. 602-ter, paragraph 5, c.p.

Of course, this provision is intended to be reserved for persons under sixteen who have however already reached the age of fourteen years; below this threshold, the crime of child prostitution is not configurable, the case falling, as supported by the legitimacy jurisprudence, within the more serious crime of sexual violence against children as under Art. 609-quater c.p., considering the consent given by the fourteen year old to a

²⁵⁷ See Russo, *supra*

paid sexual intercourse *iuris et de iure* flawed due to the incomplete mental and physical maturity of the child.²⁵⁸

Finally, for what concerns the special mitigating circumstance, which included the reduction of the sentence by one-third to two-thirds for the situation where the user of the sexual performance of a minor was also less than eighteen years, it does not appear in the revised text and should therefore be deemed repealed.

Clearly, the legislator having conferred to the fact the same degree of deplorability independently of whether it was committed by a minor or an adult and thus not justifying the favourable treatment reserved for the category in the past.²⁵⁹

In this hypothesis, therefore, it the common effect mitigating circumstance, provided for in Art.98 c.p., will be applicable, with the reduction of up to a third if the offense is an offense committed by a minor subject.

The 2012 legal instrument also intervened to amend Art. 600-ter c.p., concerning child pornography offenses.

The non-reformed provision in question actually included four distinct criminal offenses, having in common the necessary use of the presence of a child for child pornography: that is, in order, the creation of pornographic shows or production of child pornography (paragraph 1), its marketing (paragraph 2), its distribution, dissemination and publication (paragraph 3), its offer or sale even free of charge (paragraph 4).

The intervention of the legislator focuses primarily on paragraph 1, which, while reintroducing the crime of use of minors for the purpose of realizing pornographic shows or producing material of the same nature (No. 1) and that of induction or recruitment of minors to participate in those performances (No. 2), added a further element, namely the concept of "pornographic performance".

After all, to avoid such a vacuum, with regard to the concept of exhibition referred to in the pre-reform version of Article 600-ter, paragraph 1, the doctrine had come to the development of a concept of exhibition intended to encompass all kinds of representation as long as it was live and in public, the abstract possibility of people participating being sufficient, not detecting whether concretely there was only one spectator.²⁶⁰

However, this reconstruction must now confront the presence of two terms, show and exhibition, which would result in referring the opinion above to the notion of

²⁵⁸ See Cass. Pen., sez. III, 9 luglio 2010, n. 26216

²⁵⁹ See Rel. N. III/10/2012, Roma 19 ottobre 2012

²⁶⁰ See S. Canestrari et al., "*Diritto penale. Lineamenti di Parte Speciale*", Monduzzi Ed., Bologna, 2009

show only, remaining the exhibition reserved to a fruition of pornographic material dedicated to a specific person, for example to the subject watching such material at home.

Nevertheless, this is a minor problem. The reformed provision should be correctly read in the sense that these are rule applying to those who attend the show live and publicly (as indeed would seem to indicate the term used by the legislator, "attend", which implies the physical presence of the subject); still, the "private" viewer of child pornographic representations will still be prosecuted by way of detention of pornographic material ex Art. 600-quarter c.p., this rule having the same negative value of the first as well as the same punishment (imprisonment up to three years), in indirect confirmation that the two standards work each as a completion of the other.²⁶¹

The conduct of the person who had simply attended a pornographic performance in which a minor took part, however, was not punishable under the previous system, not being able to include the concept either in Art. 600-quater c.p. (only aimed at penalizing the detention of pedo-pornografic material) or in the catalogue of conducts envisaged by the old wording of Art. 600-ter.

It was a gap that, in addition to being reported²⁶², seemed unjustifiable in a system that, overcoming all objections, expressly provided for the punishment even of the user of child pornography (Art. 600 c.p.), a mirror image of what happened in the case of child prostitution (Art. 600-bis, paragraph 2 c.p.). Moreover, the need to move in that direction was now also set by the Lanzarote Convention.²⁶³

The system is completed by the express provision, referred to in paragraph 6 of the new Art. 600-ter, of the punishment for those who attend such shows and performances, unless the fact constitutes a more serious offense. At this point, the question is whether a concurrence between the different cases listed in the provision of Article. 600-ter is possible. The affirmative answer would be admissible in the case of a diversification between the conducts within their textual fragmentation; moreover, in this case, such a conclusion is preferred as the constant doctrine is brought to recognize

²⁶¹ Russo C., "L'abuso sui minori dopo Lanzarote. L. 1 ottobre 2012, n. 172", Il penalista, Giuffrè Editore, Varese, 2012

²⁶² See Rel. N. III/10/2012, Roma 19 October 2012

²⁶³ Art. 21 of the Convention "1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

a. recruiting a child into participating in pornographic performances or causing a child to participate in such performances;

b. coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes;

c. knowingly attending pornographic performances involving the participation of children"

to Art. 600-ter c.p., even in his old formulation, the nature of a rule including several conducts and not as merely aggravating in comparison to a general pattern.²⁶⁴

Continuing with the analysis, another innovation in the formulation of the norm is the introduction of two additional conducts: recruiting a child for pornographic performances and otherwise taking advantage of its participation in such shows. The specification of such conducts, not essential as they could still be included in the broader notion of realization of pornographic shows, is a clear sign of the legislator's will to better circumscribe all criminal cases in this sensitive area.

According to part of the doctrine, the interpretation of the term "otherwise" proves unwieldy, as it formally would seem to indicate the necessity for the conducts of recruitment and induction to nevertheless lead to a profit for their author *NOTA*. On the other hand, *"(...)no evidence suggests that the legislator's intention was actually to create a link of that kind between the various types of conduct described in the arrangement in question, so that it seems preferable to conclude that the adverb has been improperly used to say that the recipient of criminalization is the one who still makes a profit from shows where the child participates, while to respond for the crimes of induction or recruitment is not necessary to have any profits"*.²⁶⁵

The core novelty of the provision in question lays, however, entirely in the introduction, in paragraph 7, of a first definition of child pornography: *"For the purposes referred to in this article, child pornography shall mean any representation, by whatever means, of a child under eighteen years involved in explicit sexual activities, real or simulated, or any representation of the sexual organs of a child under eighteen years for sexual purposes"*.

The identification of the concept of child pornography, far from appearing as just a textual data, is intended to represent the hub of all the indictments that refer to it. Until the approval of Law no. 172 of 2012, an express definition of the concept of child pornography was missing altogether and the attempts of that doctrine, which tended to draw it to the concept of "obscene", appeared unsatisfactory.²⁶⁶

²⁶⁴In this sense, Canestrari S. et al., *"Diritto penale. Lineamenti di Parte Speciale"* and Russo C., *"L'abuso sui minori dopo Lanzarote. L. 1 ottobre 2012, n. 172"*

²⁶⁵Rel. N. III/10/2012, Roma 19 October 2012

²⁶⁶For a thorough examination of the notion of obscene, see Fiandaca G., *"Problematica dell'osceno e tutela del buon costume"*, Cedam, Padova, 1984

In fact, according to some, the concept of child pornography defined a narrower sphere, placing itself in a relation of genus to species with the concept of obscene, while, according to others, the two concepts were deemed as entirely heterogeneous.²⁶⁷

During the preparatory works for Law 38/2006, two different notions, drawn from international documents, were envisaged: the first, used by the Special Rapporteur of the Commission on Human Rights on child trafficking and prostitution and child pornography, made reference to *"any visual or auditory representation of a minor aimed at the sexual gratification of the user"*, whereas the second, adopted by the Council of Europe in 1989, referred to *"any audio or visual material using children in a sexual context"*.²⁶⁸

Such notions were not however implemented by the legislator, judging the definitions above as lacking specificity and in general considering with disfavour the engagement in such activities given the technical difficulty of developing an abstract notion of child pornography that was not related to a series of concrete behaviours.²⁶⁹

It was then up to the doctrine to first attempt to circumscribe the definition of the term under review, based on objective criteria and respecting its mandatory, to the involvement of the child in the consummation of sexual acts, according to some even as a spectator. Only in such cases the sexuality of the child would be put directly into play so as to indicate the existence of a real risk to his mental and physical development, and thus ruling out the importance of the mere representation of nudity.²⁷⁰

On the other hand, at the same time, even the case-law carried out his interpretative work, first stating that *"(...) the offense of child pornography can be configured only when the material portrays or visually represents a child under eighteen years involved or engaged in sexually explicit conduct, which may also simply be the lascivious exhibition of the genitals or pubic region"*.²⁷¹ In providing this interpretation, the Court had recurred to the provisions of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, in which child pornography is defined as *"any representation, by whatever means, of a child engaged in explicit sexual activities, real or simulated, or*

²⁶⁷ See Cadoppi A., Veneziani P., *"Commento all'art. 600-ter"*, in *Commentario delle norme contro la violenza sessuale*, edited by Cadoppi A., Cedam, 2006 and Pistorelli L., *"600-ter, Pornografia minorile"*, in *Codice Penale commentato*, edited by Dolcini E, Marinucci G., Ipsoa, Milano, 2006

²⁶⁸ Bianchi M., Delsignore S. (a cura di) *"I delitti di pedo pornografia fra tutela della moralità pubblica e sviluppo psico-fisico dei minori"*, Cedam, Padova, 2009

²⁶⁹ Rel. N. III/10/2012, Roma 19 ottobre 2012

²⁷⁰ See Bianchi M., Delsignore S., *supra*

²⁷¹ See Cass. Pen., sez. III, 4 March 2010, n. 10981

any representation of the sexual organs for primarily sexual purposes" and the European Council Directive no. 2004/68 / JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, according to which the connotation of "child" concerns a person below the age of eighteen, while "child pornography" alludes to material that visually depicts or represents "a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or pubic area"; "A real person appearing to be a child involved or engaged in the conduct"; "Realistic images of a non-existent child involved or engaged in the conduct" (Art. 1).

Therefore, the case law encompasses in the concept of child pornography also the simple exhibition of sexual organs, provided that it is lascivious, and immediately after, with a sudden change of opinion, requiring that "(...) *for the configurability of the offense, the presence of photographs depicting images of children sexually equivocal poses is necessary*" and also that "(...) *the pornographic exploitation of children does not require, for the purposes of the configurability of the crime in art. 600-ter, paragraph 3, c.p., the commission of sexual acts, active or passive, at the expenses of the victim or perpetrated by the latter*".²⁷²

Law 172/2012 therefore finally ended the jurisprudential conflicts, outlining a precise definition of child pornography. The instrument essentially borrows the concept from Art. 20 of the Lanzarote Convention, extending it even to conducts simulating a sexual activity or to the mere display and representation of the sexual organs and replacing the adjective, of dubious value, "lascivious", with "sexual", thus stemming the expansive potential of the definition through a parameter linking the assessment of the pornographic nature of the object to the context of the representation.²⁷³

Moreover, as stated by recent case law "Not including the development represented by the inclusion, for the first time, in the national law of the concept of child pornography, there is, obviously to put a stop to the rampant phenomenon, an undisputed stricter "rigor", tempered by the reference to "sexual purposes", as the sole representation of the sexual organs is required and no longer the lascivious exhibition of them"²⁷⁴

Law 172/2012 also intervened on Art. 609-quater c.p., dedicated to sexual acts with a minor.

²⁷² See Cass. Pen., sez. III, 7 June 2010, n. 21392

²⁷³ Rel. N. III/10/2012, Roma 19 ottobre 2012

²⁷⁴ Cass. Pen., sez. III, 06 febbraio 2013, n. 5874

It should be immediately clear that, in this case, it was mostly a change in the text and in style, which scarcely affected the general statute of the offense, without altering the original structure.

The elements of the crime remain, in fact, unchanged: same typical conduct, which is the performance of sexual acts that do not have the character of sexual violence; the cause of non-punishment provided in the third paragraph, namely whether the consensual sexual act is committed by a minor with another minor who has attained the age of thirteen, provided that the age difference between the two is not more than three years; finally, the special mitigating circumstance for the fact of lesser gravity of paragraph four, as well as the aggravating circumstance of special effect of the fifth paragraph, for the performance of sexual acts with minors under the age of ten.

Therefore, apart from strictly procedural adjustments, or those that only touch up the statute of limitations and some statutory limits, the only major change seems to have been the one affecting paragraph 2 of art. 609-quater, with the addition to the catalogue of authors of the crime, also "*(...) the parent (of the child), the cohabiting and guardian, or other person who has been entrusted with the care, upbringing, education, supervision or custody of the minor, or with whom it has a relationship of cohabitation*".²⁷⁵

This is a specification that aims at coordinating the text of paragraph 2 of the provision, concerning sexual acts performed with a child between 16 and 18 years, with that of paragraph 1, which instead is dedicated to the different hypothesis of sexual acts with a minor less than 16 years.

From this point of view, the intervention on the provision in question can be summarized in the necessity to reconcile the first two paragraphs, designing the crime provided for in Art. 609-quater c.p. as a proper offense even in the hypothesis of the second paragraph, wiping out what could be seen as an inconsistency of the text prior to the reform.²⁷⁶

Nevertheless, the new legal instrument did not remedy to all the controversies, and the definitional work of the jurisprudence was indeed necessary. The latter, however, caused interpretative contrasts on two issues arising from the application of Article. 609-quater c.p., namely the relevance or not of the child consent to sexual

²⁷⁵ Russo C., "*L'abuso sui minori dopo Lanzarote. L. 1 ottobre 2012, n. 172*", Il penalista, Giuffrè Editore, Varese, 2012

²⁷⁶ Ibid.

intercourse, and the relationship between the crime in question and child prostitution, in the event that the sexual act was in any way paid.

In the first case, the Supreme Court first recognized that *"(...)in relation to sexual offenses, the mitigating factor of fraudulent concurrence of the injured party is incompatible with the crime of sexual acts with a minor, as the eventual consent of victim does not represent a cause or contributory cause of the event"*, then pointed out that *"(...)the mitigating circumstance of lesser gravity in the offense of sexual acts with a minor occurs if the acts do not imply a significant impairment of the psycho-physical integrity of the victim, not detecting, for the purpose of an attenuating circumstance, the eventual consent of the same(...)"*, and finally reversing its earlier decision ruling that *"(...) the consent of the child to sexual intercourse, even if unsuited to exclude the configurability of the crime of sexual violence, can be assessed by the court in order to recognize the mitigating circumstance of the lesser gravity"*.²⁷⁷

As for the other problematic profile, the configurability or less of the more serious crime of child prostitution in the presence of a payment, the jurisprudence of legitimacy's positions primarily focus around two rulings: the first clarifying that *"(...) the crime of child prostitution (...), leading to a merely apparent concurrence of incriminating norms, absorbs the crime of sexual acts with a minor exercising prostitution"*; while the second that *"(...) the crime of child prostitution (...) concurs with that of sexual acts with a minor both for the different legal objectivity and for the diversity of the constituent elements"*.²⁷⁸

One of the most significant changes of L. 172/2012 undoubtedly consisted in the introduction, with the new art. 602-quater c.p. (which should be read in connection with the reformulated Art. 609-sexies c.p.), of a provision devoted to the ignorance of the age of the victim.

Once again, a comparison with the previous system, characterized by numerous and decided position taken by the Court, which had contributed to the creation of a rather confused system, is deemed necessary in light of the present homogeneity.

Article. 609-sexies, introduced by L. 66/1996, by repealing and replacing the old Art. 539 c.p. (which already established the principle of objective imputation of the victim's age), maintained that, in the cases provided for in Art. 609-bis, 609-ter, 609-quater, 609-

²⁷⁷ See, respectively, Cass. Pen., sez. III, 9 January 2009, n. 347; Cass. Pen., sez. III, 24 March 2010, n. 11252; Cass. Pen., sez. III, 14 June 2011, n. 29618

²⁷⁸ See Cass. Pen., sez. III, 18 May 2010, n. 18315 and Cass. Pen., sez. III, 18 January 2011, n. 1860

quinquies and 609-octies, if the acts had been committed against a minor of fourteen *"the offender could not invoke, in their excuse, ignorance of the victim's age"*.

The picture, however, was deeply affected by the actions of the Constitutional Court, culminating in the landmark ruling of July 24, 2007, n. 322.

With the sentence, the Court radically changed its previous stance on the basis of the consolidation of a different interpretation of the principle of individual criminal responsibility.

Based on the arguments already made by the Court itself, the Council succeeded in asserting that *"(...) the principle of individual criminal responsibility should be considered fulfilled only when the penal precept is formulated in terms granting the psychic connection between the agent and the 'significant or underlying core of the case', which encapsulates the unlawful status of the criminal conduct, thus justifying the rehabilitative goal of the punishment that follows"*.²⁷⁹

Notwithstanding the numerous Constitutional Court's rulings, there were still some problems concerning the applicability of the new interpretation of Article. 609-sexies c.p., not only to the crimes of paedophilia but also to those of child pornography. In fact, these latter remained excluded by Article. 609-sexies, as also confirmed by the case law, with the result that for them arose the need to impute the age of the victim by way of fraud, and that, therefore, the agent could only be punished if he knew (even by way of indirect intent) the age of the victim, determining a discrepancy, especially in the hypothesis of concurrence of sexual and pornography crimes committed against children.²⁸⁰

The legislator rectified this duality in 2012, substantially extending, albeit through two different norms (i.e. the new Art. 609-quater and new Art. 609-sexies) the constitutionally oriented interpretation of art. 609-sexies made by the Court in 2007 to the crimes of child pornography too.

Therefore, today, the agent will be punishable for both categories of offenses, unless his/her ignorance or error on the age of the victim was inevitable.

v) *Processual modifications*

a) *Competence issues*

²⁷⁹ For a clearer overview of the preceding jurisprudence of the Court see Corte Cost., ord. n. 22 of 27 March 1962; Corte Cost., sent. n. 20 of 17 February 1971; Corte Cost., sent. n. 364/1988 and Corte Cost., sent. n. 1085/1988

²⁸⁰ Cass. Pen., sez. III, sent. n. 46983 of 10 December 2009

The Law introduces, in the group of internal rules for the adaptation to the Lanzarote Convention, also some important changes to the Criminal Procedure Code. It is perhaps, as has been claimed, the less innovative and incisive part of the new legal instrument, as it is primarily directed to coordinating the procedural discipline rules with the provisions introduced by the novel within the penal code, by completing the list of criminal offenses to which refer certain norms.²⁸¹

This is, in fact, the case of Art.5, paragraph 1, letter a) of Law 172/2012 that, in amending Art.51 of the Criminal Procedure Code, only adds to the catalogue of offenses envisaged there some of the new criminal offenses introduced.

Moreover, following the amendment of paragraph 3-bis of Art. 51 c.p.p., the proceedings for the new crimes of criminal association for the commission of the crimes of child sexual exploitation and child pornography, pursuant to the new paragraph 7 of Art.416 c.p., are attributed to the office of the prosecutor within the district court of the Court of Appeal, where the seat of the competent judge is.

Symmetrically, the two new criminal offenses of incitement to practices of paedophilia or child pornography and enticement of minors are added to the catalogue provided under Art.51, paragraph 3-quinquies c.p.p, a provision which already counted, after the ratification of the Budapest Convention on Cybercrime 3 November 2001 (Law 18 March 2008, n. 48), in addition to crimes related to computer communications or telecommunications systems, the crimes of child pornography, possession of child pornography (also virtual), and tourism aimed at the exploitation of child prostitution. As a result, the functions of the prosecutor in proceedings for the crimes referred to above will be carried out by magistrates belonging to the district attorney's office, and not to the ordinary one, with the possibility, therefore, that, in accordance with Art.51, paragraph 3-ter c.p.p., if the district attorney so requests, the prosecutor of the Court of Appeal may, for justified reasons, decide that the functions of public prosecutor for the trial are exercised by a magistrate appointed by the Public Prosecutor within the competent court.

Therefore, the new text does not affect the previous system, which provided and provides for different treatment for the crimes of child pornography, assigned to the District Attorney, and those of paedophilia, which instead follow the ordinary rules on jurisdiction.

²⁸¹ See Russo *supra*

On the other hand, the choice of providing the district attorney's office with competence for the sole persecution of the new associative crime under Art.416, paragraph 7, c.p., instead confirming the choice of leaving to the ordinary courts the single crimes of paedophilia committed by the association, could be somehow reprehensible.

Nevertheless, it is a line already chosen by the legislator, as the example of criminal association provided for in the single text on drugs demonstrates.

b) Maximum duration of preliminary investigations

Art.5, paragraph 1, letter i) of the novel also influenced the provisions of Art.407, paragraph 2 c.p.p., concerning the maximum duration of the preliminary investigations.

The current operation is part of a system that had already been affected by several successive reforms over time, already providing, pursuant to Art.407, paragraph 2, letter a), n. 7-bis c.p.p., a maximum duration of two years for preliminary investigations related to the most serious crimes of sexual exploitation against children, including child prostitution (art. 600-bis c.p.), child pornography (Art. 600-ter c.p.), sexual violence (Art. 609-bis), group sexual assault (Art. 609-octies c.p.), sexual acts with a minor (Art. 609 c.p.), to which had been added, with the 2003 reform, the crimes of trafficking in human beings under Art.600 and following.

According to certain doctrine, stretching the terms for preliminary investigations applied only in respect of certain sexual crimes against children would clash with the general orientation of the legislature to provide for a single procedural regime for these crimes regardless of statutory limits for each case.²⁸²

It is interesting to note how, before the reform of 2012, the crime of child pornography included a maximum duration of the preliminary investigation of two years only in the case referred to in the first paragraph of Art. 600-ter c.p. (creation of pornographic material or induction of the child to participate in pornographic performances) but not in that of the second paragraph of the same article (trade of pornographic material) which, however, was considered as severe and was subject to the same penalty.

Nevertheless, the legislator laid down a remedy for this divergence with the new instrument, providing for both criminal cases the same regime.

²⁸² See Russo *supra*

Finally, it should be noted that direct consequence of the amendment to Art.407 c.p.p. is the reflection on the regime of the terms of custodial supervision measures arranged for the crimes committed against children, because of the explicit reference to Art.407, paragraph 2, letter a) contained in Art.303, paragraph 1, letter a) n. 3.²⁸³

c) *The problematic interpretations concerning depositions of underage victims*

Art.5, paragraph 1, letter c), d) and f) of L.172/2012, introduces a new institution that could be called assuming "assisted" information from the minor, which basically translates in the necessary presence of a psychology expert or child psychiatrist whenever there is the need to gather information from the minor during the investigations.

Among the reformed provisions, fundamental is Art.351, paragraph 1-ter c.p.p., dedicated to the activity of the judiciary police and to which the contemporary standards, laid down for the public prosecutor (Art. 362, paragraph 1-bis) and for the defence attorney during defensive investigations (Art. 391-bis, paragraph 5-bis), shall refer broadly.

Indeed, Art.351, paragraph 1-ter, prescribes the applicability of this particular form of assisted interview with the child, if it is to be used for one of the offenses related to child sexual exploitation, trafficking, sexual violence and solicitation of minors.

The legislator has thus shown to be implementing the directions given by the Community sources which, in Article 35, letter c, asked (although in reality it is a real obligation, thus surpassing the opinion of the Court who considered the expert assistance as purely optional), that hearings of children and adolescents were carried out by professionals trained for this purpose.²⁸⁴

²⁸³ See Art.303 of the Code of Criminal Procedure

²⁸⁴ See Cass. Pen., sez III, 4 novembre 2010, n. 248757 in accordance with Art.35 of the Convention:

Article 35 – Interviews with the child

1 Each Party shall take the necessary legislative or other measures to ensure that:

a.interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities;

b.interviews with the child take place, where necessary, in premises designed or adapted for this purpose;

c.interviews with the child are carried out by professionals trained for this purpose;

d. the same persons, if possible and where appropriate, conduct all interviews with the child; e the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings; f the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.

2 Each Party shall take the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by its internal law.

Nevertheless, there remain some critical profiles with regard to the transposition into national law of the conventional provision.

First, a compulsory configuration of the assistance, even in cases where the adolescent is almost an adult, could result as problematic: the purpose of the protected hearing is that of avoiding further psychological trauma to the child victim, as well as preventing a "secondary victimization". It is clear that, in line with the arguments of the Supreme Court (albeit dictated in the area of legal opinions), the same hearing is not required if the child does not present any signs of mental distress or further victimization risks in the case of an "ordinary" exam.²⁸⁵

A second problem concerns the hearing's procedure.

If in fact it was made clear from the new legal instrument that the presence of the expert is mandatory, but not to the extent of giving rise to any additional qualification as a procedural entity, entitled to collect elements of proof, even in the absence of the subject legitimized to such power; it has not been further clarified if the expert can be delegated entirely to the conduction of the hearing or whether he has instead only the function of assisting the prosecutor (or the judicial police officer or defender), with the task to provide assistance only if the hearing takes a critical turn for the child.²⁸⁶

The discipline of the content of the examination, conducted or assisted by the expert, is also unclear.

Some suggestions could be brought up with a careful examination of Art.498, paragraph 4, c.p.p., stating that *"the examination of minor witnesses is conducted by the president, on questions and objections raised by the parties. During the examination, the president may request the support of a family member of the child or an expert in child psychology"*.

3 When the age of the victim is uncertain and there are reasons to believe that the victim is a child, the measures established in paragraphs 1 and 2 shall be applied pending verification of his or her age.

²⁸⁵ See Cass Pen., sez. III, 7 luglio 2011, n. 38211: "(...) in tema di reati sessuali nei confronti di minori, il mancato espletamento della perizia in ordine alla capacità a testimoniare non rende per ciò stesso inattendibile la testimonianza della persona offesa, giacché un tale accertamento, seppure utile laddove si tratti di minori di età assai ridotta, non è tuttavia un presupposto indispensabile per la valutazione dell'attendibilità, ove non emergano elementi patologici che possano far dubitare della predetta capacità (Sez. 3, n. 38211 del 7/07/2011 Rv. 251381) e che in tema di valutazione della testimonianza del minore persona offesa del reato di violenza sessuale, non ricorre la necessità di indagine psicologica in relazione alle dichiarazioni di persona adolescente, la cui naturale maturazione è connessa all'età, ove si possa escludere la presenza di elementi, quali una particolare predisposizione all'elaborazione fantasiosa o alla suggestione, tali da rendere dubbio il narrato (Sez. 3, n. 44971 del 6/11/2007 Rv. 238279)"

²⁸⁶ See Recchione S., "Le dichiarazioni del minore dopo la ratifica della Convenzione di Lanzarote", in *Diritto Penale Contemporaneo* (www.penalecontemporaneo.it)

It is therefore clear that the court shall ask the questions, while the professional translates them into a language understandable to the child, even in order to avoid suggestibility of the same.²⁸⁷

The expert must therefore not only avoid any trauma to the child victim, but should also direct the examination towards the collection of useful elements for the ascertainment of facts in the case and thus avoiding to conduct his/her interview "in ways attributable to sessions of psycho-diagnostic assessment, instead directing the investigation towards a judicial assessment".²⁸⁸

Given the delicacy of the expert's role, it is necessary to set up specific rules for the conduct of the interview with the minor, as provided for in general terms by the guidelines drawn up by the psychology and criminology scholars and consecrated in the Charters of Noto of 1996 (updated in 2002 and in 2011), the SINPIA Guidelines (Italian Society of Child and Adolescent Neuropsychiatry of 15 February 2007) and the National Guidelines for listening to the child witness of 2010.²⁸⁹

These documents, however, are void of any legal effect and lack any binding force.

One possible solution, viable even during the stage of transposition into domestic law of the Lanzarote Convention, would have consisted in reproducing, in Art. 351, 362 and 391-bis c.p.p., with the necessary adaptations, the wording of Art.398, paragraph 5-bis, where it states that *"the judge, in the event that among the subjects interested in the assumption of further proof there are minors, (...) shall determine the place, time and particular circumstances for hearing the evidence, when the requirements for protection of people make it necessary or appropriate. To this end, the hearing can be held in a place other than the court, the judge using, where they exist, special facilities or, failing that, at the home of the person interested in the taking of evidence"*.²⁹⁰

In any case, at present, the concrete delimitation of the expert's powers within the assisted hearing must necessarily be left to the elaboration of jurisprudence.

²⁸⁷ See Camaldo L., "La testimonianza dei minori nel processo penale: nuove modalità di assunzione e criteri giurisprudenziali di valutazione", in *Indice Penale*, 2000

²⁸⁸ See Recchione *supra*

²⁸⁹ See, respectively, Carta di Noto – Linee Guida in <http://www.privacy.it/codeonpsicolforense.html>; SINPIA, *Linee Guida in tema di abuso di minori*, in <http://www.privacy.it/codeonpsicolforense.html>; and AA.VV., *L'ascolto del minore testimone, Linee Guida Nazionali*, Roma, 2010, in http://www.psicologiagiuridica.com/pub/docs/numero_1/annox%202011/Consensus_Testimonianza.pdf

²⁹⁰ See . Capitta A. M., "Legge di ratifica della Convenzione di Lanzarote: le modifiche al codice di procedura penale e alla legge sull'ordinamento penitenziario", in *Diritto Penale Contemporaneo* (www.penalecontemporaneo.it)

A word is worth spending instead on the procedural qualification of the expert: will this be classified as an auxiliary or as a technical consultant?

The Code provides for the auxiliary's figure with technical expertise for the judicial police only, whom, in accordance with Art.348, paragraph 4, c.p.p., may employ individuals with specific expertise when "*carrying out acts or transactions that require specific technical skills*".

The proper standard of reference for the expert's activities is rather Art.359 c.p.p., in relation to the consultancy required by the prosecution. The legal framework, in which the expert figure is framed, is such that it cannot be identified as a technical advisor.²⁹¹

However, this could give rise to a further problem: the supranational sources are decidedly inclined towards the need that the child shall always be heard by the same person throughout the process, but in our system that is not possible, especially if the nature of partisan consultant is recognized to the expert, ex Art.225 c.p.p., since in this case the figure cannot be appointed as an expert by the Court.

On the other hand, at least during the preliminary investigation, it will be necessary to resort to a single expert in the event that the child's statements are collected not only by the public prosecutor, but also from the suspect's lawyer during his defence investigations or, otherwise, the principle established under Art.35 of the Convention would completely be misapplied.²⁹²

A further problem arises from the frequent possibility that, for the same act, hang parallel to the main criminal trial, another case at the Juvenile Court, given that both require the hearing of the child.

Fractioning of court premises may in fact provoke the result that the child is subjected to multiple interviews, all at the expense of the principle of concentration of traumatic occasions for the young victim, in order to avoid as far as possible, cases of so-called secondary victimization.

The question to ask is whether, therefore, interviews with the child could be reduced with the preparation of joint examinations or at least with the appointment of the same expert for both the trial locations, according to an approach already pursued by the doctrine.

The Court of Cassation (sect. III, April 7, 2010, n. 24294) has, in fact, ruled out the incompatibility of a child psychologist, named by the prosecutor as a technical advisor

²⁹¹ Ibid.

²⁹² See the Article in question, note 68

in proceedings for sexual offenses, whom was already nominated by the Tribunal for Juveniles to follow the abused minor.²⁹³

To such a question, however, a negative answer would probably be preferable.

In fact, the concentration of the exams in the hands of the same expert definitely presents profiles of inappropriateness; even the preparation of joint exams is not without risks, given the diversity of the role of technical adviser in criminal and juvenile proceedings.²⁹⁴

Further demonstration of this, are the coordination cases expressly provided for in Art.609-decies c.p., where it obliges the Public Prosecutor, proceeding against sexual offenses against children, to inform the Juvenile Court.

This form of coordination is in fact very complicated, given the fact that the documents formed in the course of preliminary investigations are covered by the confidentiality of investigations. However, this rule is not applicable in case of proceeding in front of the Juvenile Court: the transmission to the latter of the acts of the first, therefore, would cause a preventive discovery of the investigations, definitely detrimental for the pursuit of the offender and for the young victim's privacy requirements.

It is therefore, in any case, an extremely difficult act of coordination.

Finally, a further problem arises in relation to the current guidelines for the assisted interview, caused by deviations of the standard of the Italian implementation from the European discipline.

Art.35 of the Convention (as well as other supranational sources)²⁹⁵ firmly promotes the use of videotaping in order to document the collection of the statements made by the child during the survey, in order to avert the need for a new examination, even foreseeing the possibility that the recordings themselves assume value of proof (this hypothesis, however, is certainly not applicable in our system if not within the limits set by Art.111 Constitution, which states that the formation of the proof can be carried out

²⁹³ See Recchione *supra*

²⁹⁴ Ibid.

²⁹⁵ Directive 2012/29 / EEC, Article 24 Right of the Children to enjoy protection in the course of criminal proceedings "1. If the victim is a minor, Member States, in addition to the measures referred to in Article 23, shall ensure that: a) in criminal investigations all of the child victim of crime hearings can be audio-visually recorded and such records can be used as evidence in criminal proceedings "; Directive 2011/36 / EU, art. 15, paragraph 4: "Member States shall take the necessary measures to ensure that in criminal investigations relating to offenses referred to in Articles 2 and 3, all of the child victim hearings, or the child witness, may be videotaped and that these videotaped interviews may be used as evidence in criminal proceedings, in accordance with the provisions of national law"

outside the contradictory only with "(...) consent of the defendant or because of ascertained objective impossibility or proven illicit conduct ".

Nevertheless, the 172/2012 law makes no mention of the use of such documentation tool, leaving the possibility to use them or not to the pure discretion of the parties.

vi) The renovated system of sanctions: general references

In line with the ideology behind the adjustments introduced, L.172/2012 also modified the sanctions applicable to the different crimes. The reform carried out resulted in a more complex system, consistent with international regulations, requiring the provision of more substantial measures.²⁹⁶

The innovations mainly concern ancillary measures and individual safety measures; the system appearing to be mainly held up by two purposes: harmonizing the measures already planned for the different offenses and correcting all the irrationalities of the old system.

Namely, the previous general framework was seen by many as not only characterized by an intrinsic lack of homogeneity, but was also judged as overly bland for child pornography crimes, for which was only provided the disqualification from positions in schools or other offices, fact that however, did not preclude further contact with minors, nor hindered the recurrence of such crimes.²⁹⁷

Beginning with the renewed Art.600-septies (ii) c.p., for offenses concerning child pornography, as well as those of trafficking and labour exploitation, provides the following accessory sanctions: loss of parental rights, if the offense is committed by a parent; loss of the entitlement to maintenance and the exclusion from the succession of the injured party; perpetual interdiction from protecting offices and assimilated positions; permanent or temporary exclusion from holding public offices; and, finally, the additional charge of perpetual interdiction from positions in schools or other facilities where contact with minors is possible and the closing of commercial activities devoted to the perpetration of such offences.

The system that emerged from the reform of 2012 has thus made a decisive rationalization of the entire heterogeneous previous subject.

²⁹⁶ Art.10 of Directive 2011/92/EU in fact requires the predisposition of "necessary measures to ensure that a natural person convicted of offenses under Artt. 3 to 7 may be temporarily or permanently prevented from exercising professional activities involving direct and regular contacts with children", already required in Art.5, co.3 of the Framework Decision 2004/68/JHA

²⁹⁷ See Russo C., "*L'abuso sui minori dopo Lanzarote. L. 1 ottobre 2012, n. 172*", Il penalista, Giuffrè Editore, Varese, 2012

However, there are still some problematic areas, some of which arose just after its amendment by the new law.

If we take, for example, the situation in which a parent commits a sexual crime against their own son but he has reached the age of 16 already, the issue is raised with reference to Art. 609-h that applies the additional punishment of loss of parental authority "when the qualification as a parent is a constitutive element or an aggravating circumstance of the offense".

The same principle was then reaffirmed by the Supreme Court in a 2008 ruling, stating that in the case of conviction for the crime of aggravated sexual assault against a minor daughter, the additional punishment of loss of parental authority should be ordered only when the quality of the parent of the victim is a constituent element or an aggravating factor of the crime.²⁹⁸

From this follows the inevitable consequence that, not being the age of the victim a constituent element of the crime, in the case of sexual assault on a child who has already reached the age of sixteen, the offender will not suffer the loss of parental authority.²⁹⁹

A similar argument may be carried forward in cases where a parent commits sexual acts with a consenting child who has reached the age of fourteen.

As known, the commission of sexual acts with a minor being punished equally, no matter who committed them, the qualification as a parent is not a constituent element or an aggravating circumstance of the crime under Art. 609-quater c.p. It is, on the other hand, a crime to commit sexual acts, with a child in between sixteen and fourteen years (and the parental qualification has here constitutive character). It then follows that the sanction of loss of parental authority would be applied to the parent who had a sexual relationship with the infra-sixteen son and not in the more serious cases in which the victim was less than fourteen years old.³⁰⁰

To avoid such an unacceptable result, the jurisprudence of the Supreme Court considered it necessary to clarify the situation, stating that "(...) the conduct of sexual acts with a minor by the parent or other qualified person nevertheless falls within the case of Art. 609-quater, n. 2 c.p., even when the victim is fourteen years of age, resulting in the applicability, even in such a case, of the additional punishment of loss of parental authority".³⁰¹

²⁹⁸ See Cass. Pen., sez. III, 16 settembre 2008, n. 35414

²⁹⁹ Russo *supra*

³⁰⁰ Ibid.

³⁰¹ See Cass. Pen., sez. III, 18 ottobre 2011, n. 37509

The same reasoning can be applied in the case of sexual violence committed by a parent, to the detriment of the son older than sixteen.

One final aspect, worth of being mentioned, is whether the loss of parental authority should arise only in respect of the child victim of sexual violence or if that penalty is also applicable to other siblings, not subject to such violence.

In the presence of a certain vagueness of the legislative data, which talks generally about parental responsibility, the Supreme Court addressed the situation for the first time.

The Court's intention was to extend as far as possible the applicability of the norm, specifying that the additional punishment should be provided with reference to all the children, and not only the ones victim of sexual abuse. The judges underlined how both the wording of the provision, not making any distinction to this extent, and the ratio behind the norm are intended to sanction the indignity of such an action by a parent. In other terms, if a parent has seriously failed in its moral duties to a son, he is unfit to exercise his parental rights also in relation to other children.³⁰²

For what concerns security measures instead, the systematic coherence that inspired the reform of the accessory penalties to the crimes of paedophilia and child pornography, placing order to a system that in many ways demonstrated to be cumbersome, failed to be applied to the parallel reordering of the personal security measures system, for which the intervention of the legislature was "less organic and the result of a not fully meditated picture".³⁰³

Moreover, the 2012 novel intervened in the absence of any foothold in criminal law: no special personal security measure was in fact laid down, before the 172/2012 law, neither in the criminal code, or on special laws, for sexual crimes against children, to which therefore could only apply the ordinary personal security measures under Art.215 and following c.p..

Art.4, paragraph 1, letter u) of the 2012 Law introduces then, in art. 609-h, paragraph 2 c.p., three new special security measures consisting in the imposition of, respectively restriction of movement and freedom of movement, the prohibition to get close to places frequented by children, the prohibition to have jobs implying regular contact with minors, and the obligation to keep the police informed about their residence and any eventual movement.

³⁰² See Cass. Pen., sez. III, 03 aprile 2008, n. 19729 (dep.16 maggio 2008)

³⁰³ See Russo C., "*L'abuso sui minori dopo Lanzarote. L. 1 ottobre 2012, n. 172*"

Another aspect that is definitely innovative is provided by Art. 609-novies: the norm envisages the mandatory application of the proper security measure in case of a conviction sentence. In other words, the judge who has to pronounce a sentence against the most serious sexual crimes against children should contextually apply one of the measures in comment for a period of one year starting from the end term for the sentence's enforcement.

As known, for the application of a security measure it is necessary, pursuant to Art.202 c.p., beside the necessary presence of an objective prerequisite, consisting in the commission of a crime or of a "quasi-crime", there is also the need for a subjective condition, consisting in the social dangerousness of the subject, or the likelihood that these commit new facts considered by the law as a crime.³⁰⁴

This position was also confirmed by Art.31, paragraph 2, of Law 663/1986, which held that "all personal security measures are ordered prior to the verification of the social dangerousness of the subject.

The law of 1986 put an end to the long controversy regarding personal safety measures as originally disciplined by the Rocco Code, which, in Art. 204, laid down some important exceptions to the principle of judicial verification of a socially dangerous individual, with the introduction of the so-called socially dangerous presumptions.

Such presumptions were in fact criticized both from a socio-anthropological science and criminology profile and, above all, from a purely juridical point of view.³⁰⁵

In particular, from this perspective, the discipline of Art.204 c.p. was considered by the doctrine as scarcely reconcilable with the contents of Art.13 of the Constitution, as it would bind the judges to a social dangerousness assumption based on merely probabilistic indicators, preventing the judge from a discretionary exercise vital for the assurance of unjust personal limitations of citizens' freedom.³⁰⁶

Nevertheless, this position was not initially supported by the Constitutional Court, which, in 1967, had expressly excluded the orientation according to which the presumptions were contrary to constitutional principles.³⁰⁷

A first breakthrough in this direction began with sentence no.1, 1971, with which the judges of the Constitutional Council deemed as unfounded the presumption

³⁰⁴ See Padovani T., "*Diritto Penale*", IX edizione, Giuffrè Editore, Milano, 2008

³⁰⁵ See Musco E., "*La misura di sicurezza detentiva. Profili storici e costituzionali*", Giuffrè, Milano, 1978

³⁰⁶ See De Francesco G., "*Le misure di sicurezza*", in *Giurisprudenza sistematica di diritto penale*, a cura di Bricola, Zagrebelsky, Torino, 1984, vol. III

³⁰⁷ To this regard consider the Constitutional Court sentence of 12 June 1967, n. 68

of dangerousness, when it regarded the non-imputability of the minor of fourteen years, not regarding the presumption as founded on valid criteria of reasonableness and common experience.³⁰⁸

However, after a period of rethinking and "throwbacks" by the Court, a final breakthrough came with the two pronouncements of 27 July 1982, n. 139, and 15 July 1983, n. 249, with which Art.204 c.p. was declared as unconstitutional, in the part where it did not include, in case of psychic illness, the prior ascertainment of the persistent social danger resulting from the infirmity.

However, in any event, the general legitimacy of the presumptions of dangerousness was not questioned, indeed almost receiving an endorsement where the Court, in providing for the imposition of safety measures only to persons whose criminal dangerousness is judicially ascertained, excluded the relevance of how such assessment is made, admitting both a verification of danger made on case by case basis, as well as based on presumptions established by the legislator.³⁰⁹

In a nutshell, therefore, the meaning of the legislative modifications and the relevant case law application is that the application of personal safety measures is never mandatory, because they should always be subject to an investigation on the concrete prerequisites of social dangerousness.

Therefore, the mandatory imposition of the planned measure provided by the new wording of Art. 609-nonies, paragraph 2, c.p., would seem to be screeching with the entire system; it does not, however, if we consider that there is a difference between the mandatory application of the measure, and the mandatory imposition of the same, as required by the new law: the court will be obliged to apply the measure in judgment, but for its execution it will always be necessary to ascertain the real social dangerousness of the subject.

viii) Efforts undertaken by the Italian authorities

As already broadly discussed, Art.14 of L. 269/1998 lays down detailed provisions aimed at strengthening law enforcement efforts against paedophilia.³¹⁰

³⁰⁸ See AA. VV., "Misure di sicurezza (Profili sostanziali)" in *Digesto delle discipline penali*, Vol. VIII, Utet, Torino, 1994

³⁰⁹ See De Francesco G., "Le misure di sicurezza", in *Giurisprudenza sistematica di diritto penale*

³¹⁰ See Paragraph 1

The first paragraph confers specific powers to judiciary police officers working in "specialized institutions for the prosecution of sexual crimes or for the protection of children, or those established for the contrast of organized crime".

Paragraph 5 of the provision, in fact, states that the Minister, complying with the agreement between the European Ministers of Justice in 1996, which aimed at extending the competence of EUROPOL to crimes involving sexual exploitation of children, should establish among the flying squad of each police station, a specialized unit of the judicial police. The institution is also called to introduce, at the headquarters of the police, a police squad with the task of collecting all the information related to investigations of such offenses and to coordinate them with similar sections in other European countries.

The officers of such structures, as part of the operations disposed by the superintendent or by the responsible at least at provincial level body, having obtained the judicial authorization and in order to acquire elements of proof for the crimes provided under Art.600-bis, paragraph 1, 600-ter, paragraphs 1, 2 and 3 and 600-quinquies c.p., can proceed with the simulated purchase of child pornography (taking part in the related intermediation activities as well) and participate in initiatives related to sexual tourism.

This provision is substantially comparable to those envisaged for the simulated purchase of drugs and weapons, ammunition or explosives; unlike those assumptions, here the prior authorization of the judicial authority is prescribed.

Moreover, such authority, where the purchase of the above material then should intervene, shall receive notice and may, by reasoned decree, postpone the seizure until the conclusion of the investigation.

Equally significant is the content of the second paragraph of Art.14 for the hypothesis that the considered crimes are committed "by means of computer systems or electronic media or using publicly available telecommunications networks".

In this case, law enforcement activities are carried out by the relevant personnel at the Ministry of Interior, for the safety and regularity of telecommunications services established to perform police duties of telecommunications; it can activate sites, manage communication areas of networks or computer systems that take part to them.

Moreover, the judicial authority, with motivated decree, is also allowed to delay the issue or arrange the delay in the execution of measures of capture, arrest or seizure,

when it deems it necessary to obtain important evidence or to identify or catch the perpetrators of the crimes (paragraph 3).

An equivalent disposition is inserted inside the L.172/1992, as amended by L.38/2006, in which it is stated that, in cases of urgency, the delay of the executive measures may also be arrayed orally, but the written order should be issued within the next forty-eight hours.

For the same reasons, the officers of the judicial police may delay acts of their own competence, giving immediate notice to the public prosecutor competent for the investigations and ensuring to transmit to the same a motivated report within the next forty-eight hours. These deferrals, such as to facilitate the investigation, could endanger the person harmed by offense, therefore, the measure is adopted once the public prosecutor at the tribunal of minors, in whose district the child has his usual residence, is heard.

On 24 January 2000, the European Parliament and the Council signed Decision No. 293/2000 / EC and adopted a program of EU action against violence against children, young people and women ("Daphne program"), with the aim of contributing to the assurance of a high level of protection of their physical and mental health, through the prevention of exploitation and sexual abuse and the support for the victims.³¹¹

The enucleated initiatives in the program intended to promote:

- transnational actions to set up multidisciplinary networks and to exchange information and best practices, and cooperation at the Community level;
- transnational actions to increase awareness of public opinion;
- complementary actions.³¹²

The program significantly contributed to the development of a common European Union policy on the fight against sexual violence, trafficking and pornography, with implications that transcended the national boundaries.

In light of a success well above expectations, it was decided to comply with that first ambitious project with Decision 803/2004 / EC ("Daphne II "), so as to ensure continuity for plans financed by the DAPHNE I program and prepare new strategies on the basis of the experiences gained. The program strengthened, among others, actions to:

³¹¹ See EUR-Lex - I33062 - EN

³¹² For further insight on the single strategies see Minnella C., *La tutela della famiglia e dei minori*, Experta, Forlì, 2012

study phenomena related to violence and the possible methods of prevention; encourage assistance to victims and reporting of incidences of violence to the competent authorities; collect data and produce statistics; increase society's awareness about the issue of violence, through the organization of seminars and meetings to disclose the information collected.

Given the delay with which Italy implemented the programs, with CEDAW Recommendation n. 32 of 2005, the government was urged, not only to apply them at full capacity, but also to monitor the effectiveness of the law on sexual and domestic violence, to create rescue centres, to provide for protection and counselling services to victims, punish and rehabilitate offenders, provide for the training of public officials, the judiciary and the public.

With the establishment of the Authority for childhood and adolescence, which took place with L. 112/2011³¹³, the legislator gave implementation, to internal regulations as well as to conventions and international acts that had long been emphasizing the need for a strengthening of the legislative and administrative remedies in favour of minors.³¹⁴

In fact, the sensitivity to juvenile issues had already had occasion to express itself in the past through various forms: the reference is to numerous bodies with specific expertise in this area, which arose in course of time, and the many initiatives undertaken at regional level.³¹⁵

With the approval of the law in question the belief that, in matters relating to children, State intervention should be limited to emergency cases was superseded: the task entrusted to the new supervisor is, in fact, to ensure a stable monitoring on the status of respect for the rights of childhood and adolescence, preferring a wide-ranging perspective, which knows no selection of specific issues.

The Authority is as a monocratic body, jointly appointed by the Chairmen of the House and Senate and chosen "among persons known for their independence, unquestioned morality and specific and proven personalities in the field of children's

³¹³ See Gazz. Uff. 19 luglio 2011, n. 166

³¹⁴ Just to mention a few, Art.31 Cost., stating that "the Republic protects mothers, children and youths, promoting the institutions necessary for this purpose "; Art.149 of the EU Treaty which places the focus on education and vocational training of youth; the Convention on the Rights of the Child (1989), which in Art. 18, paragraph 2, provides that "for the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children".

³¹⁵ See Minnella *supra*

rights as well as the problems regarding the family as well as the educational promotion and protection of minors".

Its term lasts four years and is renewable once. For the duration of the office, the same person cannot exercise, subject to forfeiture, any activity that interferes with the performance of the assigned duties.

Like any other Authority, the Ombudsman for children and adolescents exercises functions conferred "with independent powers of organization, with administrative independence and without hierarchical subordination". For this reason, the law also establishes the Office of the Supervisor for children and adolescents, in the Authority's dependencies.³¹⁶

As for what regards competences, the new figure is attributed, first, a power of legislative proposal through the exercise of opinion on Plan action and intervention for the protection of the rights and the development of children. It is, furthermore, called to collaborate with others institutional and supranational bodies to promote the implementation of international conventions and European legislation in force.

The coordination with the Guarantors (or with similar facilities) set up by other countries and by the Regions should be constant, in order to ensure a constant exchange of data and enforce common lines of action. Moreover, the commitment to the audition of children and to the preparation of studies and focused researches should also be emphasized.

Finally, the Ombudsman also receives reports concerning violations of children's rights and actively carries out reports to the relevant departments about harmful situations or cases of abandonment, examining events of which it may become aware in any way. In such cases, taken the necessary information and made the resulting evaluations, the Authority may report to the Public Prosecutor at the tribunal for minors, or to the competent prosecutor of the Republic for abuses having criminal relevance or for which steps can be taken by the prosecutor itself.

Moreover, with Res.165 of 12th December 2011, the Italian Ministry of Foreign Affairs sought to anticipate the implementation of the contents of the Lanzarote Convention insofar as it concerns the profiles of international cooperation.³¹⁷

³¹⁶ For more information on the Authority <http://www.garanteinfanzia.org/>

³¹⁷ DGCS 163 of 12th December, http://www.cooperazioneallosviluppo.esteri.it/portaledgcs/portaledgcs/Documentazione/PubblicazioniTrattati/2011-12-12_LineeGuidaMinori2012.pdf

The ministerial document entitled "*Guidelines on Italian Cooperation on Children 2012*"³¹⁸ is the result of the collaboration between the Ministry and other public institutions, the support of research centres and non-governmental organizations active in the field of children's rights.

It aims to strengthen the collaboration of the Italian government with other international partners, simplifying procedures of supranational cooperation and encouraging the international community to develop national policies aimed at harmonizing its laws regarding protection of children's rights in the criminal field, while still reserving a leading role to close dialogue mechanisms between the private sector and the public administration.³¹⁹

All the same, one of the most significant aspects of the Guidelines is a marked change in perspective, directly evoking the principles of the Lanzarote Convention, in the cultural perception of the child, moving on from the perception of the minor as a mere recipient of protection, to perceive him as a socially active subject, capable of promoting the right he is entitled to.³²⁰

Through this method, the "*Italian Path*" to promote cooperation for children rights is realized.³²¹

The mentioned program is characterized by the integration of the decisive efforts of all components of civil society, without exception, developing forms of subsidiarity and division of tasks between all national and international actors, in order to increase efficiency and avoid a fragmented and disharmonious development of interventions.

Returning to the document, this, using as its reference the contents of the Convention on the Rights of the Child, focuses the attention on seven sensitive topics, constituting the main areas of priority action: education, sexual exploitation and child trafficking, justice, labour, crises situations, disability and immigration.³²² The document also sets up three tools for intervention, i.e. social communications, plans for sustaining development, and international standards on the rights of the child to be adopted by international organizations and to be used as a model.³²³

³¹⁸ Document elaborated by the Italian Ministry of Foreign Affairs, Directorate General for Development Cooperation, full version available at

http://www.cooperazioneallosviluppo.esteri.it/pdgcs/documentazione/NormativaItaliana/2013-04-19_LineeGuida_Minori_ENG.pdf

³¹⁹ Ibid.

³²⁰ See Art.9, Lanzarote Convention

³²¹ See A.A. V.V., "*The role of international cooperation in tackling sexual violence against children, Background Paper for the International Conference in Rome*"

³²² Ibid.

³²³ Ibid.

Among the areas of intervention, the real priority is still considered the fight against sexual exploitation and child abuse.

The Italian strategy is essentially based on the prevention and the fight against the phenomena of child prostitution, sex tourism and child pornography, through the adoption of policies and programs at the national and supranational level.

These measures are divided in:

- procedures of juridical alignment, in order to not only establish standards, at the European level, for what concerns the formal aspects of the offense, but also to achieve an even alignment with the laws of third countries, especially those where the phenomena of abuse are most common;
- education and training of personnel working in close contact with minors;
- acquisition of data and statistics on cases of abuse, to facilitate constant monitoring of the phenomenon;
- adoption of strong prevention policies, also through a network welfare actions;
- closer cooperation between police and judiciary offices, public services and the private sector;
- strengthening of the support given by the society, among other initiatives, through the establishment of recovery programs for victims of abuse;
- strengthening of the collaboration between Internet service providers and law enforcement authorities, in order to combat the forms of exploitation which take place through the network in a more efficient way;
- involvement of tourism operators in the active struggle against sexual tourism.³²⁴

³²⁴ Ibid., p.25

Chapter IV

Future outlooks. European co-operation in the field of criminal law

i) Processes of judicial harmonization and the need for a joint European action

As we have seen in the previous chapters, the adoption of the Lanzarote Convention opened up the path for a stronger cooperation in the field of children's protection against sexual abuse and exploitation.

The extent of the issue is such that there is the need for a global response in order to effectively prosecute the perpetrators of these crimes in every jurisdiction. This entails a uniform legislation on a global scale: heterogeneous national systems weaken the effective prosecution of predators and nurture the practice of exploiting children in countries where the legislation is not strong enough. A uniform international approach allows for a concrete fight against these practices, providing for consistency in their criminalization and punishment, raising public awareness and improving the overall law enforcement efforts at both levels.

As Pellegrino points out, especially in the criminal field, the generally considered positive factor of increasing integration and circulation of people and services is one of the main reasons behind the need for a stronger cooperation between international authorities. The progresses made, affecting different aspects of modern society, both technologically and legislative wise, and favouring the globalization process, have here a negative influence as they favour the growth of interstate criminality.³²⁵

The general assumption would be that, for such a sensible topic, there would be strict laws in place but, as we have thoroughly examined, it is not uncommon for countries to not have any kind of provision in the field.

As previously stated, one of the biggest problems is that without a uniform legislation, what might be criminalized in one state might not find an equivalent punishment in another.³²⁶

³²⁵ See Pellegrino M., *Cooperazione Giudiziaria Penale nell'UE – Dalle origini alla Procura europea*, EXEO Edizioni, Feb. 2016

³²⁶ See Akdeniz Y. "Internet Child Pornography and The Law. National and International Responses", p. 163

These differences in jurisdictions might lead to problems in terms of cross-border law enforcement operations as well as extradition and investigation proceedings, therefore leading to further complications in terms of detention and successful prosecution of the criminals.³²⁷

Generally, international judicial cooperation is considered as the activity carried out by a State concerning a proceeding in a third state, regardless of whether it is still pending or has reached a conclusion.³²⁸

Therefore, we may infer the two implied aims of international judicial cooperation:

- Hinder cross-border criminality, through a system that grants the international nature of operations;
- Favour the course of action of proceedings that, while not directly concerning cross-border crimes, require the cooperation of a third state lacking jurisdiction.³²⁹

Starting from a European perspective, EU action in the field of criminal law has been growing increasingly fast, but the evolution of its framework went through a gradual process.

Speaking of the relationship between criminal law and the European process of regulation means facing, at a glance, the problem of the coexistence of two legal systems, both sovereign, in a matter that, for its delicacy and its implications, has historically always showed off a high degree of resistance to interference from supranational sources.

In fact, even if the process of European integration started from economic policy and movement of capital, goods and people, the problem of a closer cooperation at the level of the key sector of criminal justice soon assumed a central importance in the debate.

Especially in the criminal field, tensions between the Union and the Member States are not uncommon, as the former both encourage the adoption of community measures and strive to protect their sovereign power from EU interference and, therefore, do this through the exclusion of legislative harmonisation.³³⁰

Nevertheless, the nature of EU criminal law is still not certain, as it is still limited to a different pillar of the EU Treaty – the third pillar – that separates this field from Community law.

³²⁷ Ibid.

³²⁸ Pellegrino M., cit. work

³²⁹ Ibid.

³³⁰ See Mitsilegas V., *EU Criminal Law*, Hart Publishing, Oxford and Portland, Oregon, 2009

This division entails that it will be more likely for intergovernmental methods to be applicable, rather than for the European institutions to intervene in the field.³³¹

Moreover, as significant doctrine has pointed out, the nature of the third pillar has been “*accused of having a bad transparency taste and as such been criticized for constituting a democratic deficit with minimum involvement of the European Parliament in the legislative process and with minimum jurisdiction of the Court of Justice (Art 35 EU)*”³³²

Up until Lisbon, the Union only had an ‘indirect’ competence in the criminal field. It could only issue directives or framework decisions, through which it imposed the harmonization and alignment of national legislation.³³³

The school of thought not recognizing a direct European criminal jurisdiction based its arguments both on the assumption that EU legislative organs lack of democracy and, mainly, on the *principle of conferral*, as provided for in Art.5 and 7 of the TCE.³³⁴

Starting from this assumption, the doctrine argued that there was never an express attribution of powers to the Union in this field and rather that where the States wanted to confer specific competences to the supranational organ; they did so through the procedures provided for under Title VI of the old version of the TUE.

Finally, as Romoli points out, until the entry into force of the Lisbon Treaty, it could be said that a European jurisdiction over matters relating to criminal law did not exist: the Community did not have the power to issue regulations that would be directly enforceable in the Member States and through which protect common values.³³⁵

Notwithstanding the theoretical issues and wanting to look at the progression of cooperation mechanisms in this field, collaboration between Member States in criminal matters is traditionally traced back to 1975, when TREVI (acronym for Terrorisme, Radicalisme, Extrémisme et Violence Internationale) was created within the framework of the Council of Europe. It was an informal group that served as a starting point for the first collaboration procedures between the ministries of justice and internal affairs of Member States, up to the entry into force of the Maastricht Treaty.

³³¹ Ibid.

³³² See Herlin-Karnell E., *The Lisbon Treaty and the Area of Criminal Law and Justice*, Swedish Institute for European Policy Studies, April Issue 3-2008, full text available at <http://www.sieps.se/en/publications/european-policy-analysis/the-lisbon-treaty-and-the-area-of-criminal-law-and-justice>

³³³ Romoli F., “*Il nuovo volto dell’Europa dopo il Trattato di Lisbona. Un’analisi penalistica multilivello*”, in *Archivio Penale*, Gennaio –Aprile 2011, Fasc.1, Anno LXIII.

³³⁴ Ibid.

³³⁵ See, in particular, ECJ ruling n. C-176/03, overruling Council’s framework decision 2003/80/JHA

The group based its works on intergovernmental cooperation between 12 Member States, but it excluded both the European Commission and the European Parliament.³³⁶ TREVI had a tree-tier structure, with Ministers, Senior Officials (both meeting once every six months), and five Working Groups.

Notwithstanding the seemingly well-established organization, this instrument remained “an informal structure with no clear legal framework or standing under Community law”.³³⁷

In fact, the European Commission had no direct involvement in the organization, as TREVI’s accountability lied within the Council of Ministers, and therefore with the national governments.³³⁸

Moreover, the development of an EU internal market law, helped in the construction of a common criminal ground. Since the 1980s, the doctrine started noticing how cases closely related to economic matters, still raised questions and actions from the European institutions in the field of criminal law.

This, as well as the fact that steps taken to abolish internal frontiers in the market induced to a broader approach, which moved from issues strictly related to the economy to ones including criminal law.³³⁹

The next step was the approval of the Schengen Treaty on 14th June 1985, ratified on 19th June 1990 through the Schengen Convention; the document not only provided for the elimination of the boundaries between its ratifying members, but also strengthened the administrative and law enforcement collaboration procedures directed to the prosecution of cross-border crimes.

The Schengen Agreement fell outside the Community legal framework, but provided for further integration between the states, especially in the fields of immigration and criminal law, resulting in the Schengen *acquis*.³⁴⁰

However, it was only with the Maastricht Treaty, signed on 7th February 1992 and entered into force on 1st November 1993, that cooperation in criminal matters was officially included among the priority objectives of the newly born European Union.

In the effort to support the “*process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen*”³⁴¹,

³³⁶ Bunyan T., *Trevi, Europol and the new European state*, in *Statewatching the New Europe*, European Journal on Criminal Policy and Research, December 1993

³³⁷ See Mitsilegas V., cited work

³³⁸ Bunyan T., see *supra*

³³⁹ Mitsilegas V., see *supra*

³⁴⁰ *Ibid.*

the Treaty created a structure on three pillars, relating to matters in which the Member States showed the intention to move according to a common direction: Economic Policy (First pillar), Foreign Policy and Common Security (Second pillar), and Justice and Home Affairs, which later became, with the Amsterdam Treaty, Police and Judicial Cooperation in Criminal Matters (Third pillar).

After all, the institution of pillars demonstrated the will of the Member States to use the so-called "*community method*", that is, the sale of a greater or lesser proportion of sovereignty, only in matters pertaining to the First pillar. The aim was to incorporate in the EU framework such controversial topics, while ensuring that States' sovereignty in these delicate fields is subject to an intergovernmental legal framework.³⁴²

The importance of the values at stake in the matters concerning the other two pillars induced the signatories into opting for an "intergovernmental" approach, i.e. external co-operation with the European Community mechanisms, but strictly connected with it, in which state sovereignty would not yield to Community institutions.³⁴³

With regard to the implementation of intergovernmental cooperation on justice and home affairs, we should note that according to the Maastricht Treaty, prominent role at the institutional level is given to the EU Council with the help of a Coordination Committee.

The Council constitutes the cornerstone of the entire decision-making process under the Third pillar: it represents the formal framework of the intergovernmental agreement of states, and the institution competent to deliberate the adoption of tools enabling the pursuit of cooperation in the field of national security.

Nevertheless, the dispositions concerning "cooperation in the fields of Justice and Home Affairs", Title VI, Articles K– K9, are open to criticism.

First of all, the heading itself only refers to cooperation between Member States, not implying any change in the actual national policies in order to achieve a common European plan of action.³⁴⁴ Moreover, the phrasing of Art. K1 seems to be emphasizing the "matters of common interest" rather than the importance of integration.³⁴⁵

³⁴¹ See *Treaty on the European Union*, Art.1, *Official Journal C 326*, 26/10/2012 P. 0001 - 0390

³⁴² Mitsilegas V., *EU Criminal Law*, Hart Publishing, Oxford and Portland, Oregon, 2009

³⁴³ See Calamia A., Vigiak V., "*Manuale breve di diritto comunitario*", Giuffrè, Milano, 2008

³⁴⁴ See Mitsilegas V., *supra*, p.10

³⁴⁵ See TUE, Art. K1 "*For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and 'without prejudice to the powers -of the European Community, Member States shall regard the following areas as matters of common interest'*"

More importantly, the focus here is on the action to be taken by the single Member States and not by the European Union as an actor.³⁴⁶

With the Treaty of Amsterdam, a first redefinition of the third pillar content was elaborated, starting from the adoption of the *community method* for a range of subjects prior related to the Justice and Home Affairs section (i.e. regulation on visas, asylum, immigration and other policies related to free movement of persons).³⁴⁷

The key rule, opening the title dedicated to Cooperation in criminal matters, is the reformed version of Article 29 of the Maastricht Treaty: “[...]the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia”.³⁴⁸

Paragraph 2 of the same article states that the objective, as set out in the paragraph, must be achieved through the prevention and persecution of organized crime; specifically by repressing all forms of particularly odious and insidious crimes, even at Community level, such as terrorism, trafficking in human beings, crimes against children, trafficking drug and arms trafficking, corruption and fraud.

The version of the Treaty prior to the major changes introduced after Lisbon, advanced the idea of strengthening the cooperation between the different national actors and Community by providing for closer cooperation between the police and national customs. This either directly, with contact between the authorities concerned, or through Europol, the European Police Office established in 1995 precisely in order to carry out an interface between the Member States' authorities during the investigative and repressive procedures.

In particular, Europol was founded on the basis of Art. K3 (TEU) to support, assist and reinforce the cooperation among European member states in the fight against “organized crimes, terrorism and other forms of serious crime”.³⁴⁹

The work of the office was later formalized with Council Decision 2009/371/JHA establishing the Office (Europol Decision), the decision replaced the previous Convention and rescinded all of its provisions.

³⁴⁶ See Mitsilegas V., *supra*

³⁴⁷ See *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, OJ C 340, 10.11.1997

³⁴⁸ *Ibid.*, Art.1(11)

³⁴⁹ Decision 2009/371/JHA of the establishment of the European Police Office, Art.3

Europol has the task of collecting and analysing data and to “provide support to Member States in their tasks of gathering and analysing information from the Internet in order to assist in the identification of criminal activities facilitated by or committed using the Internet”.³⁵⁰

The European Parliament and the Council set out those tasks through the adoption of regulations, which also serve the purpose of controlling the activities carried out by Europol; moreover, it is established that any operational action should be taken in agreement with the national authorities of the affected territory.³⁵¹

There is, however, an ongoing doctrinal debate about the nature of Europol, with one approach seeing the agency as central police body supervising national action, and a different one recognizing the role of Europol as a coordinator of national police forces, without any actual operational power.³⁵²

Similarly, cooperation between judicial authorities was implemented through the inauguration, in February 2002, of Eurojust, European Cooperation Judicial Unit, the organ of the Union competent to bring together the efforts undertaken by national institutions in the prevention and prosecution of the most serious crime.³⁵³

The office’s duties are mainly set forth under Art.85 of the TFEU: strengthen cooperation among national authorities when investigating and prosecuting a crime involving two or more Member States, or requiring joint action. Similarly to the Europol structure, the European Parliament and the Council will adopt regulations arranging the structure and the powers of Eurojust.³⁵⁴

³⁵⁰ See Art.5(2) of Europol Decision

³⁵¹ See Carta M., *La cooperazione di polizia e giudiziaria in materia penale dopo il Trattato di Lisbona*, in *Democrazia e Sicurezza*, year II, n.2, 2012

³⁵² See Mitsilegas V., *EU Criminal Law*, Hart Publishing, Oxford and Portland, Oregon, 2009, p. 162

³⁵³ Decision 2002/187/JHA on the Establishment of Eurojust

³⁵⁴ See Article 85 TFEU, OJ C 326, 26.10.2012,

1. Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include:

(a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;

(b) the coordination of investigations and prosecutions referred to in point (a);

(c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

These regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities.

2. In the prosecutions referred to in paragraph 1, and without prejudice to Article 86, formal acts of judicial procedure shall be carried out by the competent national officials.

However, the impact of such a system, based on inter-european cooperation and seeking a common juridical basis, was not very effective in the beginning, since the European Community did not give the power to directly issue dispositions in the field of criminal law.

The arising problem is, therefore, if the documents issued by European institutions in the context of the third pillar are actually suitable to directly affect national systems.

If, in fact, the acts adopted in the areas covered under the first pillar, especially regulations and directives, were and are equipped with a more or less high degree of binding the State to the adoption of certain measures or of certain results, for the policies of police cooperation in criminal matters, Art.34 of the Treaty, provided that the Council could adopt "common positions", "framework decisions" (the latter introduced by the Treaty of Amsterdam), and "decisions", as well as recommending to the Member States the adoption of "conventions".

The difference with the acts under the First pillar is, however, not only terminological, but also substantial.

It is in fact acts that, being adopted by the Council unanimously, on a proposal of the individual Member State or of the Commission, presented all those issues of "democratic deficit" that we have mentioned above.³⁵⁵

This profile was particularly evident in the case of *common positions*, acts that "define the Union's approach on a particular matter", constraining the Member States not to adopt a behaviour which might be in contrast with the position, but which were entirely subtracted from the ECJ's review of legality power, reserved ex Art. 35(6) to judgments and framework decisions.³⁵⁶

The same applies, *mutatis mutandis*, for the decisions referred to in Art.34(2)(c), which, while excluding any reconciliation of the laws and regulations of the Member States, are binding but have no direct effect, as well as for the conventions issued in the Third pillar context, both adopted by the Council.

The incidence of framework decisions has indeed known, more recently, more fortune.

³⁵⁵ See Romoli F., *Il nuovo volto dell'Europa dopo il Trattato di Lisbona. Un'analisi penalistica multilivello*, in *Archivio Penale*, Gennaio –Aprile 2011, Fasc.1, Anno LXIII

³⁵⁶ For more information on the procedure visit

http://ec.europa.eu/codecision/stepbystep/text/index3_en.htm

This happened both through the enactment of the framework decision establishing the European arrest warrant procedure³⁵⁷, in which the European Parliament played a more active and authoritative role, and mostly due to the famous judgment of the Court of Justice of June 16, 2005.

This ruling is better known as the Pupino case, a judgment in which the European judge held that the wording of Art.34(2)(b) is in fact very closely related to the third paragraph of Art.249 EC. Namely, the former confers a binding character to framework decisions, as they “*bind the Member States ‘as to the result to be achieved but shall leave to the national authorities the choice of form and methods’*”, while the latter, still recognizing binding force to framework decisions, places on national authorities and courts the “*obligation to interpret national law in conformity*”.³⁵⁸

One can therefore conclude that, in essence, the Court here had the aim of accosting, not only formally but also substantially, framework decisions and directives, attributing to the first ones a larger capacity of influence over national law, and then somehow anticipating the "communitarisation" of the third pillar which would however only be completed by Lisbon.

ii) *Rearrangements following the Lanzarote Convention: the principle of fair collaboration*

The values of international cooperation in the promotion of children’s rights and in the fight against crimes affecting them are one of the leitmotifs of the Convention approved in Lanzarote in 2007, which devotes Title IX to the principles of fair collaboration among national authorities.

Art.38, norm around which rotates the entire title, imposes the adoption of wide-ranging cooperation practices, with the purpose of targeting the action against sexual exploitation and abuse of children in three directions: prevention, protection of victims and prosecution of the offenders.

Not further elaborating on this strong declaration of intents, having thoroughly discussed it in Chapter 2, it is necessary to dwell on the ways and instruments through which the set goals are achieved.

³⁵⁷ See Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States

³⁵⁸ See *Pupino ruling*, European Court of Justice, Grand Chamber, case C-105/03, 16th June 2005

Art.38 generally lists “*relevant applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws*” among the tools that States parties might use, without, however, further clarifying the nature and modalities of the implementation of such measures and without introducing new ones.³⁵⁹

This is a choice wished for by the signatories to the Convention, as the Explanatory Report unveils.³⁶⁰

The objective is to channel cooperation interventions towards those instruments, such as the European Convention on Extradition, the European Convention on Mutual Assistance in Criminal Matters and the 2002 Framework Decision on the European Arrest Warrant, which already exist at the International and Community level and which, given their general range, may well apply to the matters addressed by Lanzarote as well.

However, in reality, the space left to the initiative of the signatories is much broader and is likely to encourage the use of several instruments and programs to complement the initiatives taken at the supranational level.

Starting with perspectives on the prevention of the exploitation of minors, the Lanzarote Convention carries a patchwork of rules, scattered in articles that provide an early indication of those mentioned “*necessary legislative or other measures [...]*”.³⁶¹

In principle, Art.5 requires that specific attention should, first of all, be given to subjects who work in constant contact with children in the education, health, social protection, justice and public safety. According to the Convention, those individuals should be provided with sufficient knowledge of the phenomenon of sexual exploitation and abuse and, moreover, persons convicted of sexual crimes must not be allowed to work in close contact with children.³⁶²

This process of education and awareness, *mutatis mutandis*, must also be applied to children, who must be actively involved in the development and implementation of

³⁵⁹ Art.38(1), *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, CETS No.201, Lanzarote, 25th October 2007

³⁶⁰ See *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Explanatory Report*, par. 251-254

³⁶¹ Art.38(2), Lanzarote Convention

³⁶² See Explanatory Report, par.54-57 and Art.9(1), Lanzarote Convention, “*Each Party shall encourage the participation of children, according to their evolving capacity, in the development and the implementation of state policies, programmes or others initiatives concerning the fight against sexual exploitation and sexual abuse of children*”

policies and programs addressed to them and for all the “actors” in the civil society, namely the private sector, the media and the general public.³⁶³

If we want to look at the concrete measures adopted in the field of prevention, the so-called development and co-operation programs are, in this context, the best possible tools to implement efforts of civil society especially when adopted in the context of national or international cooperation initiatives.

Few examples of these tools include: bilateral or multilateral agreements; measures of legislative harmonization; development and implementation of preventive and welfare programs, coordinated as to ensure universal access to health and education; implementation of surveillance mechanisms and of strategic partnerships on a legal level; development and implementation of protective initiatives and programs of victims’ assistance.³⁶⁴

Alongside the programs thus conceived, is of fundamental importance the work of other bodies, including independent national institutions, such as ENOC (European Network of Ombudspersons for Children), and, more generally, other non-governmental organizations.

Their support is particularly important because they are able help state authorities with the prevention of sexual crimes against children, through an activity based on informative campaigns implemented through the mass media, through the training of the staff working in close contact with minors and, finally, with the drafting of codes of conduct and assisting the victims.³⁶⁵

For what, instead, concerns the perspective of protection of victims of paedophilia and child pornography, the Convention promptly pinpoints a whole range of activities that the Signatory States must put in place.

³⁶³ Art.9, par.1-4, ““Each Party shall encourage the participation of children, according to their evolving capacity, in the development and the implementation of state policies, programmes or others initiatives concerning the fight against sexual exploitation and sexual abuse of children. Each Party shall encourage the private sector, in particular the information and communication technology sector, the tourism and travel industry and the banking and finance sectors, as well as civil society, to participate in the elaboration and implementation of policies to prevent sexual exploitation and sexual abuse of children and to implement internal norms through self-regulation or co-regulation. Each Party shall encourage the media to provide appropriate information concerning all aspects of sexual exploitation and sexual abuse of children, with due respect for the independence of the media and freedom of the press. Each Party shall encourage the financing, including, where appropriate, by the creation of funds, of the projects and programmes carried out by civil society aiming at preventing and protecting children from sexual exploitation and sexual abuse”.

³⁶⁴ See A.A. V.V., “The role of international cooperation in tackling sexual violence against children, Background Paper for the International Conference in Rome”, 29 e 30 novembre 2012, Istituto degli Innocenti, Firenze

³⁶⁵ Ibid.

Among these measures, assume remarkable importance: the establishment of effective social programs and of facilities capable of providing all the necessary support not only to victims but also to the people responsible for their care. They moreover call for a system ensuring that the secrecy imposed by national laws in the perpetration of business in specific professional fields does not constitute an obstacle to the prosecution of offenders who committed sexual crimes against children.

The Convention also encourages citizens to report acts of exploitation and child sexual abuse; it sustains assistance to the victims, in the short and long term, to ensure a full mental and physical recovery, taking into due consideration the needs of the child. Finally, it advises for cooperation with non-governmental organizations and other elements of civil society engaged in victim assistance.³⁶⁶

Particular attention should be given to the role of communities in the protection of the victim.

It is well known that, in some specific social and cultural contexts, acts of sexual violence are associated with a type of stigmatization that plagues not only the author of the crime but, in most cases, the victim. If we add to this unpleasant circumstance the particular fragility of a victim who happens to be a minor, it is easy to understand how such a situation will potentially result in further serious damage to an already troubled psyche, because of the abuse suffered.

In such a situation, it is clear that the role played by the social contexts in which the child lives assumes a central importance and, therefore, a direct involvement of the social realities to which the victim refers to is desirable and should be implemented in any way.

Moreover, UNICEF has provided patent guidance in this sense.³⁶⁷

Another very useful tool for the protection of the child victim, sometimes even used in terms of prevention, as well as cooperation, is represented by the databases collecting information about perpetrators and about the status of monitoring the programs concerning the protection of child victims. Using the databases might be extremely useful, as they can be synched to the databases on sexual offenders and might even be shared among international networks.³⁶⁸

³⁶⁶ For a complete list, see Art.31 and ss., Lanzarote Convention

³⁶⁷ See *UNICEF Child Protection Strategy*, UN Children's Fund Executive Board, Annual Session 2008, E/ICEF/2008/5/Rev.1

³⁶⁸ See A.A. V.V., "*The role of international cooperation in tackling sexual violence against children, Background Paper for the International Conference in Rome*", 29 e 30 novembre 2012, Istituto degli Innocenti, Firenze, p.14

It should be however pointed out that it is not uncommon, especially in this field, to encounter legal problems connected with the issue of protecting personal data.

Finally, we can include, in a broad sense, among the tools for the protection of the victims, the so-called "*helplines*", i.e. phone and internet services destined to receive complaints from minors. An important example of these instruments, in Europe, is provided by the *116111 Helpline*, set up by the European Commission. The instrument was conceived to help minors seeking the help of an adult.³⁶⁹

Moving to the larger sector of international cooperation in the persecution of the actors of the offenses covered by the Lanzarote Convention, we should focus on few key aspects.

The cooperation procedures, as imposed by the Convention, are probably the most problematic aspect of the whole text, and are directly placed on the wake of earlier actions by the European institutions, aimed at realizing the slow and progressive harmonization of penal systems, so to realize a minimum standard of punishment.

The absence of such a standard and the insufficiency or the incompatibility present not only in terms of legislation, but also of policies, was in fact considered the most significant obstacle to the achievement of concrete objectives in the fight against child abuse and child pornography.

The awareness of this fact is proven by the fact that, as early as 2011, Interpol, driven by the initiative of the Virtual Global Taskforce (VGT), proposed the adoption of a strategy on the legislative level. This strategy pushed the members of the international community to tighten their criminal legislation using as common reference the provisions and principles arising from the Budapest Convention on Cybercrime and from Lanzarote.

From a formal point of view, we can preliminarily say that the Convention does not present discrepancies with the previous approach, but neither explicitly provides for additional and stricter forms of cooperation, except for the generic reference to a generic implementation of cooperation as a *per se* element. This approach is certainly laudable and positive, but does not offer a satisfactory answer to the concrete ways in which this process should be completed.

Six years after the drafting of the Convention, the process has not come to a stop yet, but neither has there been progression in the processes of supranational cooperation,

³⁶⁹ Ibid.

if we exclude some actions carried out by Europol, but always under the impulse of the state police.

We should therefore try to identify what may be, in this area, the possible steps that will lead to an actual strengthening of the good cooperation practices between national and supranational jurisdictions.

Currently, it is clear that cross-border police cooperation is and remains one of the areas of intervention that can ensure the most rapid and efficient responses and is therefore able to support in a more incisive way the goals that Lanzarote proposes.

Besides, in a context of a more closely related Europe and of bilateral and multilateral agreements for inter-state cooperation, continuing on this road could certainly lead to important results. The same is true even for the cooperation between judicial authorities, as indicated by the positive examples of action taken at EU level, which culminated in more efficient procedures of surrendering and in the European arrest warrant, able to solve the problems previously raised by the old extradition procedure as governed by criminal law.

A particularly effective example of cooperation at the level of Police authorities is represented by the Virtual Global Taskforce (VGT): an international organization whose twelve members are all national or supranational police authorities, as well as different authorities for the public safety.³⁷⁰

The Lanzarote Convention has certainly favoured the activity of the Virtual Global Taskforce, even if some members of the VGT are not among the Parties to the Convention, allowing the adoption of wide-ranging actions on a regional or even global level. These actions have culminated in a series of interventions of great success, with hundreds of arrests and the removal of some hundreds of children from the hands of their persecutors.

If we want to take a closer look at what has been done, we should mention four main operations:

1. *Operation Endeavour*: in January 2014 an organized group that helped in the live streaming of on demand sexual abuse in the Philippines was taken down. It saw the collaboration of the UK's National Crime Agency, the Australian Federal Police and the U.S. Immigration and Customs Enforcement. It resulted in 29 international arrests and over €60,000 worth of payments made to see the live streams.

³⁷⁰ <http://www.virtualglobaltaskforce.com>

2. *Operation Rescue*: took place in March 2011, a global paedophile network made up of thousands of users was dismantled, with more than 200 children removed from their exploiters and 184 paedophiles arrested worldwide. The operation began in 2007 and involved the cooperation of seven associated VGT agencies, including the Australian Federal Police, the Child Exploitation and Online Protection Centre, the Italian Postal and Communications Police Service, the National Child Exploitation Coordination Centre and the U.S. Immigration and Customs Enforcement
3. *Operation Basket*: allowed, in December 2010, the shutting down of about 230 websites dedicated to the commercial sexual exploitation of children and allowed the arrest, in Ukraine, of five key members of the criminal organization that was behind these websites.
4. *Operation Elm*: in August 2008 more than 360 suspects were identified across the world, more than 50 arrested in the UK and at least 15 children were rescued.

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Moreover, thanks to the Lanzarote Convention, the VGT has been able to extend its skills, to the point it took the initiative, together with the Council of Europe and the Philippine Department of Justice, of founding a working group.

The workshop was held in Manila from the 23rd to the 24th of May 2013, in order to promote the general application of the Lanzarote Convention as the foundation for enhanced international cooperation to protect children from sexual abuse.³⁷²

Another area where the Lanzarote Convention has been influential is, without a doubt, the one concerning the achievement of a system of common definitions of criminal offenses, an issue that has often plagued cooperation procedures. The text also helped attenuating the difficulties raised by the task of creating a common legal ground for those situations that presented heterogeneous constituent elements because of the different judicial system, as well as assisting with the barriers created by translating different terms in several languages.

From this point of view the Convention, as has already been said, takes a step forward with respect to other existing documents, dealing with the same matters,

³⁷¹ For more information about the operations visit <http://virtualglobaltaskforce.com/what-we-do/>

³⁷² http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/Documents/2571_philip_child_ws_outline_v5.pdf

striving to develop a common definition of criminal cases in all their constituent elements, going beyond the mere linguistic differences.³⁷³

Finally, another aspect that should necessarily be taken into account, after the Lanzarote regulation was adopted, is the training of Police employees: courses, seminars, international conferences, employee mobility between the countries of origin and destination of the victims of human trafficking. Such initiatives, however commendable, are too often to the initiative of the individual entity or police academy, losing most of the desired effectiveness.

In fact, the very character of such crimes, presenting an increasingly global reach, calls for a distinguished training; it is therefore desirable that police forces, throughout the international community, start increasing the exchange of common experience.³⁷⁴

iii) Towards a European Charter of victims of crime. The relevance of Directive no.29/2012

On 14 November 2012, a month after the passage of Law 172/2012, the Directive of the European Parliament and of the Council No.2012/29/ EU on "Minimum standards on the rights, support and protection of victims of crime" was published in the Official Journal of the European Union.³⁷⁵

The 2012 Directive replaced Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, implementing one of the main points of the Stockholm Agenda, as expressly mentioned in the preamble: improving legislation and practical support measures for the protection of victims.

From a subjective point of view, who is the "victim" targeted by the Directive? Art.2 par. 1 of the Directive identifies with the term "victim" the "natural person who has suffered an harm, should it be physical, mental, or emotional, or an otherwise economic loss, caused directly by the offense". The European legislator intended to include in this definition also the "family of a person whose death has been caused by a criminal offense and who has suffered damages as a result of the death of such person".³⁷⁶

³⁷³ See AA. VV., "The role of international cooperation in tackling sexual violence against children, Background Paper for the International Conference in Rome", p.14-15

³⁷⁴ Ibid.

³⁷⁵ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>

³⁷⁶ See Art. 2 par. 1 lett. a) e b)

For the first time, a European instrument is addressed not only to the direct victims, but also to the indirect victims of the crime, the families who have suffered a loss as a result of the offense, meaning by family the "spouse, the person living with the victim in a intimate relationship, in the same home and in a stable and continuous manner, relatives in direct line, brothers and sisters, and the dependents of the victim".

Family members will also be able to exercise and enjoy the rights granted to the victim by the Directive, within the limits provided by the Member States, which may adopt specific procedures for establishing the number and the priority of family members eligible for these rights.³⁷⁷

The directive could not overlook the needs of the people closest to victims, holding legal interests that can be asserted in the established criminal proceedings, as a result of the offense, and often needing to be supported and protected by the same dangers threatening the direct victims of the crime, such as the risk of secondary victimization, retaliation and intimidation by the offender or his partners.

For these reasons, the European legislator decided to extend the scope of the application of the Directive also to subjects not previously mentioned in the Framework Decision.

Moreover, in order to establish an adequate standard of protection both during the process and outside it, an individual evaluation of the victim is essential in order to identify his or hers characteristics as well as the specific protection needed. This methodology also gives the possibility to establish whether it is adequate to apply restorative justice methods.

While defining a new status of the victim, the Community legislator also listed those rights that must be recognized not only in terms of compensation, but also to grant the victim with protection and assistance, confidentiality and rightful information during criminal processes that, aimed solely and exclusively to the repression of crime, often cause secondary victimization.

Crime victims should, in fact, be protected from secondary and repeated victimization as well as from intimidation and retaliation.

They moreover should receive appropriate support to facilitate the recovery and should be provided with sufficient access to justice, particularly with respect to specific categories of victims (including minors, for which the Directive provides a definition substantially coinciding with that of the Lanzarote Convention).³⁷⁸

³⁷⁷ See Considerando n. 19, Art. 2

³⁷⁸ Art.1, Commal(c), "*minor*: a person under 18 years old".

For these vulnerable subjects the legislator opted to dictate special provisions, ranging from rights of information, easier access to justice, use of techniques such as teleconference and recordings, in order to prevent, as much as possible, the occurrence of deleterious processes of secondary victimization.³⁷⁹

Moreover, especially vulnerable victims or those exposed to high risk of injury, are entitled to receive specialist care, taking into due account the specific needs of the victims, the seriousness of the injury and their relationship with the social environment and with the offender.

It is interesting to point out the substantial identity of such a provision with that of Art.35 of the Lanzarote Convention, especially in light of the necessary presence of an expert for the fulfilment of the interview.

With specific attention to minors, Directive 2012/29/EU explicitly states, “*children's best interests must be a primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child adopted on 20 November 1989. Child victims should be considered and treated as the full bearers of rights set out in this Directive and should be entitled to exercise those rights in a manner that takes into account their capacity to form their own views*”.³⁸⁰

A provision that, although not recalling its Lanzarote predecessor, cites a common antecedent, namely the Declaration of 1989, and bears substantially the same message. Directive 2012/29/EU, in other words, seems to share numerous contents with the Lanzarote Convention.

Nevertheless, its real innovative lead is another, namely "the idea to equate the victim and the author of offense trying to offer guarantees that are, in some sense, symmetrical: on the one hand, 'protection' of the victim, on the other 'defensive guarantees'".³⁸¹

Following this perspective, Art.17 of the Directive deals with the rights of "cross-border victims", or, in other words, the victims who reside in a Member State other than that in which the crime was committed.

³⁷⁹ See, respectively, Artt.3-7, 10-14, and, in particular Art.24. The norm, titled *Right to protection of child victims during criminal proceedings*: “In addition to the measures provided for in Article 23, Member States shall ensure that where the victim is a child: a) in criminal investigations, all interviews with the child victim may be audiovisually recorded and such recorded interviews may be used as evidence in criminal proceedings [...]”.

³⁸⁰ See Directive 2012/29/EU, Preamble, point 14.

³⁸¹ See Confalonieri A., “*Profili internazionali di tutela della vittima da reato*”, Processo Penale, La Magistratura, Organo della Associazione Nazionale Magistrati (http://www.associazionemagistrati.it/media/79510/05_Confalonieri.pdf)

The subjects who undergo a criminal offense in a state other than that of affiliation usually have to endure a complex and particularly burdensome experience lived, but the guidelines laid down by the Directive may create "a bridge" between European states, by facilitating both the access to justice for transnational victims and the course of criminal proceedings that interest them.

To this end, the authorities of the State in which the offense was committed are required to take a statement from the victim immediately after the complaint relative to the offense and to use for the purpose of the hearing of victims residing abroad the instruments of video and telephone conferencing as well as communication tools that allow the victims to be heard in the proceedings without being present in court, avoiding them the stress of unnecessary trips.

If the victim has not been able or, in case of serious offenses, did not want to report the crime in the State in which it was committed, he or she is entitled to file a complaint before the competent authorities of the State in which he or she resides. The authorities, where not able to exercise their jurisdiction, are required to transmit the complaint "without delay" to the authority of the State in whose territory the victim suffered the crime.

Finally, considering the overall instrument, the choice of use of the indicative tense for the wording of the Directive should not be taken lightly.

The European Union demands a real commitment by the Member States in the process of harmonization of their laws and the abrogation of national peculiarities in favor of the adoption of a "European charter of victims of crime" whose radius of action should extend throughout the European territory.³⁸²

Despite the limit set by Art.82 TFEU, the European Parliament and the Council, under the Directive, are not limited to the establishment of "minimum standards", but they have the power to predispose a real apparatus for the protection of the victim, expressed, as we have previously mentioned, in rights of information, assistance, protection and participation in criminal proceedings or alternative procedures to the ordinary one.

The European legislator essentially incorporates the project started with Framework Decision 2001/220/JHA in order to remedy the shortcomings that had prevented this instrument from the achievement of sufficient results within individual national legal systems.

³⁸² See Allegrezza S., *Il ruolo della vittima nella direttiva 2012/29/UE*, in Luparia L. (edited by), *Lo statuto europeo delle vittime di reato, Modelli di tutela tra diritto dell'Unione e buone pratiche nazionali*, CEDAM, 2015

It remains to determine whether this goal was achieved or not.

From an effectiveness point of view, the change of the legal instrument is itself an important step forward compared to the past. Unlike the Framework Decision, the Directive benefits from a more binding force, allowing it to capture the attention of individual States, "forcing them" to comply with its guidelines and to follow a common path.

Even from the point of view of content, the differences between Directive 2012/29/EU and Framework Decision 2001/220/JHA are substantial.

The Directive has a scope of wider application than the Framework Decision. By including in the definition of "victim" also family members of persons injured by the offense, it shall ensure that the rights granted to the direct victims may also apply in respect of indirect victims of the crime.

The most innovative aspect of the Directive is the introduction of the instrument of "individual assessment", to which all victims should be subjected, in order to check whether it is necessary to apply special measures of protection and, if so, which of them are best suited. The ability to recognize a protection calibrated on the specific needs of the people offended by the crime is a step forward in the direction of "humanization" of the treatment of victims, and this assumes a fundamental relevance in light of a more efficient system for the substantial protection of children before and during criminal proceedings.

However, the directive does not lack of critical aspects. In addition to the failure to specify the ways in which the individual assessment should be made, the Directive lacks precise information about other rights provided for in its wording.

It entrusts the Member States with the determination of the ways in which it is necessary to proceed, for example, during the hearing of the victim, the reimbursement of expenses incurred by the victim, the return of goods seized during the proceedings and the payment for sustained damages.

Nevertheless, the large "room for maneuver" conferred on the Member if, on the one hand, can foster transposition of the directive within a single system, on the other hand, is likely to compromise the achievement of a homogeneous result in light of a European judicial area.

All the same, just as the "safeguard clauses" previously mentioned, which characterized the Framework Decision, were envisaged for the protection of national peculiarities against the harmonizing intervention of the European Union, so, the possibly excessive

discretion left to the States by the Directive may have the effect of creating differences in the treatment of the rights of victims within the European Union.

iv) Final perspectives for a common European criminal law system

The issues raised with regards to the institutional framework, particularly with regard to the third pillar, were thoroughly discussed during the *Convention on the Future of Europe*. This convention resulted in the production of several final reports, recommending the modification of the legislative framework as well as advocating for a stronger implementation of EU criminal law.³⁸³

Steep in the aftermath of the European Constitution, the adoption of which had been rejected by the French and Dutch referendums in 2005, the Treaty of Lisbon transforms and rebuilds in legal reality the founding principles of the European constitutional project. While not managing to bring together the previous Treaties in a single act, the new Treaty reaches the goal of a European Union's institutional unity, ending the forced cohabitation between the European Community of Rome and the Maastricht European Union.

The unification process started in the nineties reached a conclusion, leading to the overrun

of the division into pillars in favour of an “open-space” European Union.

The operating mode of the former community pillar are therefore extend to other European policy areas and, in particular, cooperation in the fields of justice and internal affairs, regulated under the previous third pillar (JHA).

The legal system provided for under the Lisbon Treaty brings together two existing instruments: the TEU, which provided for general constitutional and foreign policy provisions, and the TFEU, mainly about the different communitarian policies and areas of action.

³⁸³ See Mitsilegas V., *EU Criminal Law*, Hart Publishing, Oxford and Portland, Oregon, 2009, p.36

The entry into force of the Lisbon Treaty on 1st December 2009, has led to important changes in the *modus operandi* and in the functioning of the "Area of Freedom, Security and Justice".

This area was already envisaged in the original text of Art.29 of the Treaty on the European Union, and was incorporated in Art.67 and following of the new Treaty on the Functioning of the European Union.

This confirms the underlying trend that, as early as Maastricht, there has been a slow but constant transition from an originally purely mercantile approach to a way of conceiving the European Union as no longer just an economic area but a reality in which the people must be actually recognized the possibility of being able to freely circulate in safe conditions, with the creation of a legally harmonized area.

The adoption of the Lisbon Treaty and the new provisions of Art.82 TFEU provided the European legislator with a solid legal basis and the tools needed to guide the process of rapprochement of criminal procedural regulations towards a shared protection of victims' rights, thus putting remedy to the legitimacy gap that was criticized at the time of the adoption of the Framework Decision 2001/220/JHA, the first act of semi-hard law to recognize the rights of the victim in criminal proceedings. The Lisbon Treaty opens "advanced scenarios for the European Criminal Procedure Law" as well as an important new chapter in the process of European integration.³⁸⁴

In fact, the title not only expands the provisions of the former TCE, but it conceives the setting up of such a space with the specific intent of eliminating border controls and developing a common policy on asylum, immigration and national borders.³⁸⁵

It is worth noting how the European legislator decided to use the phrasing "*offering an area of freedom, security and justice*" in Art.3(2) TEU, which, while implying a duty for the Union, serves as a privilege granted to EU citizens only.

The area of police and judicial cooperation in the criminal field has been one of the areas in which the Lisbon Treaty expressed its influence more decisively. In a nutshell, the main news is the communitarisation of the Third pillar, namely the adoption of a method characterized by greater democracy, transparency and effectiveness, where decision-making processes are based on a legislative procedure

³⁸⁴ See Simonato M., *Deposizione della vittima e giustizia penale. Una lettura del sistema italiano alla luce del quadro europeo*, Cedam, 2014

³⁸⁵ See Carta M., *La cooperazione di polizia e giudiziaria in materia penale dopo il Trattato di Lisbona*, in *Democrazia e Sicurezza*, year II, n.2, 2012, p.4

which does not see the Council as the only actor, but foresees the involvement of the Parliamentary body.

Such communitarisation of the criminal justice sector is summed up in the elimination of the pillar structure and in the consequent incorporation of the European Community in the Union.³⁸⁶

In this new asset, the uniformity of the system is granted by the fact that, those subjects still regulated under Title VI of the TUE, are provided for in Title V of the TFUE, opened by an emblematic norm establishing an area of freedom, security and justice “*with respect for fundamental rights and the different legal systems and traditions of the Member States*”.³⁸⁷

Necessary corollary of this approach is the abandonment of the "atypical" regulatory containers, specific to the previous system (framework decisions and conventions) in favour of a full "Communitarisation" of the sources regarding a “european judicial space” and the consequent use of primary instruments of integration: regulations and directives. In particular, the outcome of this provision is that EU criminal law is granted the possibility of having direct effect on national legislations.

In any case, the integration of the old title with the subjects dealt with in the former Third pillar, in order to create a unitary and uniform discussion of the matter, seems to conceive the creation of a similar space not only as a function of freedom of movement of persons in a purely mercantilist and economic key. It instead seems to look at it as a goal to be considered on its own, with the objective of abolishing internal borders, and developing a shared policy on asylum, immigration and control of its borders based on solidarity and sincere cooperation between Member States, as well as fairness towards non-EU citizens.³⁸⁸

Precisely the principle of loyal cooperation, regulated today under Art.10 of the new Treaty is one of the leitmotifs intervention carried out by Lisbon.

It has been discussed whether this principle, thoroughly applied for the subjects of the First pillar, could find partial application in the criminal system, but the nature of the intergovernmental decision-mechanisms seemed to root against it.

However, this doctrinal conclusion had already been proven wrong in 2005, when the European Court of Justice, with the Pupino ruling, affirmed that “*It would be*

³⁸⁶ See Campailla S., “*La circolazione giudiziaria europea dopo Lisbona*”, in *Processo Penale e Giustizia*, Anno I, n.2-2011, http://www.processopenaleegiustizia.it/file_download.php?type=rt&rid=2

³⁸⁷ Art.67, the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012

³⁸⁸ See Carta M., *supra*

difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions”.³⁸⁹

Therefore, today, the duty of cooperation between Member States and Union's Institutions has a range that characterizes it as a principle not limited to the existence of generic good faith in the relations between the actors of the decision-making processes implemented in the Community. Indeed, it now operates as a general clause for the protection the objectives that the Union aims to reach, even in criminal matters, opening to the possibility of being subject to the control and censorship of the Court of Justice's Judges.³⁹⁰

In fact, the Court now has jurisdiction for all the infringement proceedings in criminal matters, which, according to part of the doctrine, is a move strengthening “*the Commission's role as 'guardian of the Treaties' to monitor the implementation of EU criminal law by Member States*”.³⁹¹ The Court should also have full jurisdiction on actions for compensation of damages and review of legality; contributing to the achievement of an effective overall judicial protection.³⁹²

In any case, it is worth nothing that there was a definitive undermining of the pillar structure, with the attribution of the matter of Police and Judicial Cooperation in criminal matters to the ordinary decision-making and judicial review procedures, as provided by the new Treaty.³⁹³

The old decision making process, which was based on an entirely intergovernmental perspective, both because of the predominant role played by the Council in the legislative process and due to the need of an unanimous deliberation, was thus abandoned in favour of the ordinary legislative procedure as governed by Artt.289 and 294 of the Treaty. The outlined procedure calls for close cooperation, or rather a co-decision procedure between Parliament and Council; this mechanism considerably strengthens the Parliament's position, since it is granted the power of veto.

³⁸⁹ See *Pupino ruling*, European Court of Justice, Grand Chamber, case C-105/03, 16th June 2005, point 42

³⁹⁰ See Carta M., *supra*

³⁹¹ See Mitsilegas V., *EU Criminal Law*, Hart Publishing, Oxford and Portland, Oregon, 2009, p.40

³⁹² Ibid.

³⁹³ See Campailla S., “*La circolazione giudiziaria europea dopo Lisbona*”

However, the news brought from Lisbon are not limited to the adoption of a different legislative method. The European Union is in fact equipped with broader powers for the realization of its institutional tasks, also in the field of criminal justice. If previously, in fact, the criminal jurisdiction of the European Union could only be actualized in "indirect" interventions, now we can say that it is recognized a "quasi-direct" jurisdiction, capable of directly providing for binding incriminatory norms.³⁹⁴

Moreover, the strengthening of the Union's legislative power in criminal matters derives from the inclusion, for the first time, of the criminal law principle in a Treaty, through the Nice Charter and the accession to the European Convention on Human Rights. Through this mechanism, the Convention acquires the same legal value as the Treaties and, constituting an inescapable reference, may well ensure the monitoring by the Community institutions of the respect of the rights it embodies, throughout the legislative process conducting to the approval of the criminal act.³⁹⁵

The same applies to the extension of the control by the Court of Justice to acts including criminal provisions. The latter circumstance, in particular, giving more unity and centrality to the role of the Court, allows to overcome the limitation provided for in the old Art.35 of the Treaty, which stated that the jurisdiction of the EU Court would be limited to "*a declaration made at the time of the signing of the Treaty of Amsterdam or, thereafter, at any time*".

Such a system, had of course the effect of weakening the judicial protection, especially with regard to the requests submitted by individuals, and could lead to an unequal application of European law, being such application substantially bound to a declaration of "*good will*" of the Member State.

The new text of Art.35 cuts the "Gordian knot" regarding the eligibility or not of preliminary rulings, specifically determining that the Court "*has jurisdiction to give preliminary rulings on the validity and interpretation of framework decision and decisions*" issued by criminal courts.

This principle should be read in concertation with the new procedures and the new instruments introduced by Lisbon, through which the Union may act in criminal proceedings.

³⁹⁴ See Marchetti G., "*I recenti passi avanti compiuti dall'Unione Europea nella direzione di un'armonizzazione dei sistemi penali. Aspetti positivi, profili problematici e prospettive di riforma*", Centro studi sul federalismo, 2010

³⁹⁵ Ibid.

In fact, with the abrogation of former Art.34 of the Treaty, which listed the types of acts applicable to the field of cooperation in criminal courts - decisions, framework decisions, common positions and conventions - these instruments are intended to be used less and less and to leave the place to the discipline provided for under Art.288, dedicated to the Union's legal acts, namely regulations, directives and decisions.³⁹⁶ This, with the fundamental result that, today, EU criminal law will have that direct effect characteristic of the regulations and the detailed guidelines and which was instead lacking under the Third pillar.

We can distinguish two main types of directives, adopted by the Union in criminal matters, which, while sharing a common formal structure, differ for their content.³⁹⁷

First, there are directives essentially aimed at contrasting forms of crime affecting the interests of several Member States, through the creation of standards for the definition of those crimes and the consequent imposable sanctions. It is worth stressing the importance of this provision. The possibility of introducing criminal offences in the national systems directly through supranational instruments was considered, before the Lisbon Treaty, incompatible with the legislative exclusive power in criminal law reserves due to States' sovereignty.

The aforementioned States' prerogatives were, however, regarded as not sufficient in face of the need to achieve the harmonization of penal systems with a more incisive action from the EU.

There is more. The discretion to impose, through directives, a set of minimum rules responds to the need of better prosecuting the most serious crime forms, homogenizing, if not the treatment, at least the description of the punishable conduct in different systems. This is fundamental in order to prevent the offender from taking advantage of normative gaps or differences in treatments provided under the different national legislations and that may lead to a stall in the incrimination as well as to the failure of the procedures for cooperation between the police and the judicial authorities.

³⁹⁶ Art.288 of the Consolidated version of the Treaty on the Functioning of the European Union (ex Art.249 TCE), OJ C 326, 26.10.2012:

“To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force”.

³⁹⁷ See Marchetti G., *supra*

A second type of directives have, instead, the purpose of ensuring the implementation of minimum standards in areas that have already been subject to some sort of legal harmonization. In this case, jurisdiction is not determined *ratione materiae*, but concerns the harmonization of the laws and regulations in a sector, which has already been subject to harmonization measures, when the correlation is necessary for the effective and coordinated pursuit of a specific policy by the Union.³⁹⁸

Moreover, especially the latter instrument raises the issue of the admissibility of an extensive interpretation, allowing the overrunning of the limits granted by the Treaty, leading toward the possibility of adopting minimum standards also in areas that have not been subjected to harmonization yet.

The answer to this question will essentially determine, to a large extent, the entire scope of EU criminal jurisdiction. If the tendency will lean towards a broad interpretation, it could be possible for the Union's bodies to intervene both in areas of exclusive competence and in the field of concurrent jurisdiction, in the latter case with measures that go beyond the mere harmonization and bring about a process of unification.³⁹⁹

Briefly mentioning the concrete implementation procedures of the revised EU action in criminal matters, a first essential tool is the mutual recognition of judgments or other decisions of national judicial authorities. This is the arrival point of cooperation in criminal matters within the Union, allowing a coordination whose key points are therefore the activity of harmonization of national legislation, the establishment of unique procedures and the almost automatic circulation of judgments.

The system is completed by the fundamental statement contained in Art.83 of the Treaty (Art. 31 of the Treaty on European Union), prescribing the method by which the cooperation in criminal matters must be implemented: *“The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis”*.⁴⁰⁰

In other words, these directives are no longer only regulating and providing for cooperation procedures, but they go beyond establishing "minimum standards", as a fundamental common basis for crime species and the subsequent penalties.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Art.83(1), Consolidated version of the Treaty on European Union, *OJ C 83, 30.3.2010*.

From an organizational point of view, judicial cooperation is pursued, on the one hand, with the strengthening of Eurojust's powers and tasks, which is now allowed to mandate the launch of criminal investigations, as well as control prosecution procedures, conducted by the national competent authorities (in particular those relating to offenses against the Union's financial interests), aiming simultaneously to a strengthening of judicial cooperation.

On the other hand, through the institution, with new Art.86 of the Treaty, of a new body, the European Public Prosecutor, responsible for investigating, prosecuting and bringing to judgment, in liaison with Europol, the perpetrators of offenses against the Union's financial interests and their accomplices, exercising the functions of prosecutor for such offenses before the competent courts of the Member states.⁴⁰¹

For what concerns, instead, police cooperation, Europol has the task of *“support and strengthen action by the Member States’ police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy”*.⁴⁰²

It is finally worth noting that, notwithstanding the great improvements brought about by the Lisbon Treaty, there still are certain intergovernmental elements presenting some sort of resistance to the “Communitarisation” process.

First of all, it is necessary to take into account different national legal systems, the respect for which under the Treaty is clearly stated in Art.67(1) of the TFEU.⁴⁰³ Moreover, EU inference for the harmonisation of criminal procedure is only necessary when facilitating mutual recognition, which does not necessarily involve the adoption of supranational acts and leaves States' sovereignty quite intact.

Another interesting aspect is that of “emergency-brake” procedures, which are used when a Member State thinks that an EU directive *“would affect fundamental aspects of its criminal justice system”*.⁴⁰⁴ In this case, it might refer it to the European Council, suspending the ordinary legislative procedure; if the Council disagrees, Member States who wish to proceed with the proposal are still granted the right to do so,

⁴⁰¹ See Romoli F., *“Il nuovo volto dell'Europa dopo il Trattato di Lisbona. Un'analisi penalistica multilivello”*, in Archivio Penale, Gennaio –Aprile 2011, Fasc.1, Anno LXIII

⁴⁰² Art.88(1), Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union

⁴⁰³ Art.67(1), *supra*, *“1.The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”*

⁴⁰⁴ Art.82(3), *supra*

providing for a mechanism where both reluctant and prepositive States will be allowed to follow a proper course of action.⁴⁰⁵

A second field in which we can find exceptions to the harmonization process is that involving security, counterterrorism and judicial control. The general provisions set out a system in which the Union continues to refrain from interfering with national provisions regarding internal security and police operations; even with regards to administrative countermeasures, such as the freezing of funds or economic gains, the procedure for their approval is quite elaborated.⁴⁰⁶

Moreover, the rule of majority voting in the Council and co-decision with the European Parliament for the process of decision making is still subject to some exceptions:

- **Legislation which would expand Union competence in criminal matters**

Given that the issue greatly affects national judicial systems, the provision must be passed with unanimity by the Council, given that the Parliament has given its consent; the same procedure applies to cases of harmonization of substantive criminal law in fields not listed under the Treaty, as well as to legislation establishing a European Public Prosecutor's Office.

- **Operational co-operation.**

In this case, for the adoption of legislation regarding measures of operational co-operation between national competent authorities or the conditions under which police and judicial authorities may act in another Member State, a unanimous decision by the Council is still required, but the Parliament's consent is not necessary given that it was consulted.

- **Measures implementing restrictive counter-terrorism law.**

Those limiting measure will only require a decision by the Council, the Parliament having no role in the decision process.⁴⁰⁷

In conclusion, with Lisbon, the EU legislator has created a regulatory framework that, besides having greatly expanded the jurisdiction in EU criminal matters, led to a strengthening of both judicial and police cooperation. This initiated a slow process of

⁴⁰⁵ See Mitsilegas V., cit. work

⁴⁰⁶ The Council will act only with a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission will adopt the eventual necessary measures

⁴⁰⁷ For a more in-depth analysis, see Mitsilegas V., *EU Criminal Law*, Hart Publishing, Oxford and Portland, Oregon, 2009

convergence of the laws of the Member States in criminal matters, at least for the most serious crimes, and set out, in essence, the real basis for a process of harmonization of substantive criminal law and for the realization of a European criminal law itself.

We can, at this point, try to find an answer to the question of whether it is now possibly to properly talk about a European criminal law system or if it is just an empty formula.

The European criminal law structure is perhaps the fastest growing area throughout the Community law. It also is, however, one of the most controversial areas of the European action, with measures that have a significant impact on the protection of fundamental rights and the relationship between the individual and the state. It moreover presents a challenge to state sovereignty, and could potentially reconfigure, in a significant way, the relationship between Member States and the European Union. Certainly, the Lisbon Treaty is an innovation of no small importance in the process of harmonization between criminal law systems of the Member States and, ultimately, in the construction of a fully-fledged European criminal law.

A firm and unambiguous assessment of the changes introduced by the Lisbon Treaty in relation to the harmonization of criminal law is not an easy task; however, in general terms, the impact of the innovations of Lisbon and the subsequent ones made by Lanzarote can be positively assessed.

No doubt, they both represent a long awaited response to the inadequacy of the legal instruments that could have been adopted in this field.

It is also mostly clear, from what we have examined throughout this work, that both the Conventions and the framework decisions were not the most appropriate means through which introduce substantial changes in the legal framework.

Conventions, as well as international treaties in this area, have not yet been adopted by all Member members of the European Union, while the main challenge for what concerns framework decision has been the lack of any sanctions for their non-implementation.

The changes introduced by the combined provisions of Lisbon and Lanzarote allow a further harmonization of the substantive law system, dealing with crimes considered more afflictive for the Community interests.

It is therefore appropriate, as well as interesting, to point out some of the more significant aspects of these changes.

The first concerns the adjustments in the different legislative procedures, enabling a greater role for the European Parliament and for the national parliaments. This development is particularly significant in the areas of criminal law.

Among all Member States, criminal law is regarded as belonging exclusively to the competence of the sovereign state.

The modification of the method adopted in criminal matters, moving from an intergovernmental one to a more Community-centred one, deserves due consideration.

The procedure under the First pillar seems to be faster, simpler and fundamentally more democratic.

However, it is important to not forget that an obstacle to the adoption of decisions on criminal matters can derive precisely from the use of such a method, in which Member States can be outvoted during voting procedures. Such a system could result as “indigestible” to governments that witness negotiations on criminal law issues without taking into due account the specificities of each national legislation.

Another risk is connected to a distorted use of the so-called “emergency brake” clauses. These specific instrument, albeit enabling the extension of the ordinary legislative procedure to policy areas, which were previously subject to the unanimous deliberation procedure of the Council (as is the case for police and judicial cooperation in criminal matters), allow a Member State to invest the Council with the power of dealing with the matter in the case of a supposed “threat” to the fundamental principles of its social security or criminal justice system.

Finally, we should examine the legislative changes brought by the Lisbon Treaty in criminal matters.

Directives have been the most popular instruments throughout the evolution of juridical tools within the European Community and their application to criminal matters definitely strengthens the coherence of the common legal system.

However, as we have already pointed out, the arising problem here is the direct effect or not of these directives, from which flows the crucial problem of the existence of an obligation on Member States to implement the directive in question.

Conclusions

The route taken in this work is not a simple issue, as it may seem. The investigation conducted has clearly shown that the phenomena of paedophilia and child pornography are continuously increasing.

One can say that the increase is quantitative, as demonstrated by data testifying to an ever-greater economic profit and to an increasing number of individuals involved. From this point of view, the numerical increase relates both to the amount of paedophiles, whom progressively overlook the crime scene, and a number of other subjects making up the so-called category of profiteers. These subjects, exploiting the sexual instincts of paedophiles, intermediate with victims of the paedophile market, organizing meetings, facilitating the distribution of child sexual abuse material, predisposing tourism initiatives with the purpose of sexual activities with minors. The phenomenon is, as said, in constant growth also from a qualitative point of view, because the intervention of sophisticated means such as Internet, new telematics instruments and increasingly sophisticated pornographic material, implies a real breakthrough also in the utilization of the means that increase the paedophile market. This is a segment of paedophilia that has aroused numerous concerns lately, being on the agenda in the agenda of both the internal and international legislators, whom increasingly worry about the introduction of instruments and enforcement measures gradually more and more advanced.

This aim explains the Convention on Cybercrimes as well as the introduction in the national criminal laws of incriminations such as virtual pornography and sex tourism.

Initiatives that, seemingly answer to the specific needs of legal alignment in the criminal codes, at least in Europe, in this matter.

Moreover, the questions and problems to deal with when you have to deal with what concerns children are plentiful and often vary; this happens for a number of reasons, starting with the subjects that are deemed to be included in the concept of the child.

We have seen how the 1989 Convention on the Rights of the Child refers to identifying children with any physical person under eighteen years of age; it leaves, however, in the hands of individual States parties the possibility of giving a broader meaning to the concept, also including the unborn, to protect in this way the most remote forms of life.

Regardless of this inclusion, we still have the perception of a rather wide discourse: there is a substantial difference between the hardships that may affect a young child and those that may confront a teenager; it is therefore not easy to delineate the most appropriate solutions.

It seems then necessary to create a series of particularly significant obligations imposed on States, which must adopt the necessary tools to cope with the various problems affecting the "child" in its various stages of evolution. These obligations are created not only for States Parties of the Convention on the Rights of the Child, but also for all subjects of international law having full juridical capacity.

The Lanzarote Convention represents a fundamental protection tool for the most vulnerable members of society, highlighting their active role, not as mere recipients of legislative provisions, but as protagonists of the protection processes that affect them, and creating the conditions for the integration of a network of caution to be taken not at a merely national level but at a supranational one, in which international cooperation, in all sectors, must represent the main focus of initiatives for the protection of minors.

Nevertheless the Convention itself does not go so far as to replace the necessary work of integration, mediation and adaptation of its contents by the State legislatures, preferring to indicate, in substance, the main guidelines to be followed in this procedure, still configuring certain principles as obligatory, given that they are essential for the objective of effective protection of the child and therefore strictly binding, especially in the determination of the notions of paedophilia and child pornography, and in the reconstruction of some criminal cases.

The underlying problem here is that when facing episodes of sexual abuse of children, the risk of being overwhelmed by the wave of emotion and only analysing the

surface of the problem, omitting a thorough investigation on the phenomenon, also affects the legislator.

This “ritual” has been repeated in recent years almost constantly: the news of judicial proceedings after the reporting of a case of sexual abuse arouse the indignation of the community which, in a loud voice, called for the establishment of punitive exemplary measures, to which usually followed the invoked intervention.

The problematic aspect is not, of course, the tendencial immediacy of the response, but the repercussions of that immediacy, with the purpose, rather than to ferret out sexual abusers and exploiters, to calm tempers, or better, to make the sworn enemy out of the abuser, against which strike up a fight without quarter.

Even for what concerns the national case, the penal code becomes a mosaic in which to add, from time to time, new tiles, making it an almost mechanical action, where attention is wrongfully not concentrated on a meticulous elaboration and systematic coordination of the criminal provisions in this field.

The recent and numerous legal instruments that have proliferated in the past years, have enriched the criminal system through the introduction of numerous crimes, implementing the level of protection of the minor, among which, however, is complicated to extricate a consistent and efficient doctrine.

Sometimes the boundaries are so labile that the validity of the formulation of a typology of offense is not measured on the substantial act, but on a more convincing motivational system.

One thinks especially to those killings marked with a distinct anticipation of the criminal threshold: whether you are in presence of consummation or attempt can be particularly difficult to discern, and rough choices are not permitted, given the severity of the penalties.

There is also no lack of situations in which the difficulty lies in the framing of the same interpretation of the conduct: an example is the case of virtual pornography. Despite the definition of "virtual images" provided for in Art.600 quarter c.p., there remain perplexity in its nature in practice.

Moreover, with reference to what we have examined in the last chapter and the wish for a uniform European criminal law system, unlike other EU countries, Italy has not taken steps to adopt a unified legislative act to introduce the shift promoted by the European legislator and that would provide, with the necessary adaptations, the

conversion of the provisions of the "European Charter of the victim" to national standards susceptible of direct application in ordinary criminal proceedings. This determines that, fourteen years after the adoption of the framework decision 2001/220/JHA and three after Directive 2012/29/EU, the victim of criminal proceedings, with concrete implications for the protection of children still does not enjoy real "citizenship" in the Italian criminal proceedings, to the point it is only named in a single norm of the procedural code that, in the remaining cases, refers to the victim as the person offended by the crime.

The Italian legislator should, therefore, take a different path from the one so far followed.

Legislative provisions taken in light of "emergencies" and dictated by emotional responses to specific requests, intervening only in specific sectors and giving instant answers to the demands of civil society, must be replaced by a legislation that is the result of a wide-ranging vision, giving coherence to the internal legislation, accepting the critical evidence uncovered from the doctrine and legal professionals, and opening significant breakthroughs to the supranational input, taking inspiration from the good practices gained from others Member States in this subject.

In the new regulatory framework characterized by the changes of Lanzarote and Lisbon, the jurisdiction of the Court of Justice in criminal matters is on the same level of that of any other matter regulated earlier, under the first pillar.

The European Commission therefore has the right to file an action against a Member State, which does not exercise its duty to implement a directive.

Even more important is the unlimited jurisdiction of the Court for the interpretations of legal acts concerning criminal matters.

In essence, the role of the Court, or rather of the Community Courts, is crucial in trying to harmonize a variety of legal systems, in which the respective basic standards define the legal boundaries, leading to great tension between the fundamental principles of their individual jurisdiction.

Tensions which are precisely mitigated by an incessant and fruitful work of interpretation of the Court of Justice, which, at this point, has become a crucial point with reference to problems regarding "safeguard pretensions" of the internal sovereignty of Members States as well as the relationship between Community and national law.⁴⁰⁸

⁴⁰⁸ See Del Giudice G., *"Diritto penale "europeo" e diritto penale "domestico". Una "legalità" assediata?"*, 22 novembre 2010, in altalex.com

The Luxembourg judges have played and play a pioneer role in the incessant search for solutions to interpretive doubts, and more than anything else, they have carved out for themselves a privileged position with regard to the sudden development of directives, which saw the Court operating on the ground of institutional changes, to the point it is almost possible to speak of “judicial activism”.⁴⁰⁹

In this context, the role of the Courts, particularly the European Court of Justice and the European Court of Human Rights, acquired an aura of authority and a leading role in the path that must be followed.

Nevertheless, an increase in the competences, or worse, the attribution of new ones, as well as the constitution of non-typified obligations in the international pacts, if on the one hand responds to demands of development of the system, on the other hand could be an interference of no small importance when untied from any democratic accountability.

We can conclude with the words of an eminent scholar, who argued that "a unified law without a unified interpretation is a fiction. It should be expected that this competence of the Court of Justice would have a tomorrow the greatest impact on the future of European criminal law ".⁴¹⁰

⁴⁰⁹Ibid.

⁴¹⁰ Rozmus M., Topa I., Walczak M., “*Harmonisation of criminal law in the EU legislation – the current status and the impact of the treaty of Lisbon*”, in <http://www.ejtn.net/Documents/Themis/THEMIS%20written%20paper%20-%20Poland%201.pdf>

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