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'Cyber' Trafficking? An Interpretation of the Palermo Protocol in the Digital Era

SABINE WITTING — 28 June, 2017



The digital era has changed the traditional realm and *modus operandi* of organised crime, such as human trafficking. With the increasing access to and usage of the internet, major criminal activity has expanded to the online sphere. Law enforcement around the world is however largely not prepared for combatting cybercrime. Many states have not yet reached the capacity of drafting cyber specific legislation. In Africa for example, only 11 states have basic substantive or procedural law on cybercrime in place, while 30 countries have no cyber specific legislation at all. Additionally, law enforcement in many countries is not sufficiently equipped with the specialised knowledge to investigate these kinds of offences. As a result, conducting a crime online entails a significantly lower risk of being detected or prosecuted, in particular if the perpetrator acts with high-level technical know-how and the offence is committed in a complex transnational set-up.

Making use of this legal vacuum and the limited law enforcement response, criminals are using the internet to recruit or exploit their victims. In the last decade, it has been recognised that certain

if the whole process of trafficking in persons takes place in the online sphere?

This question is of utmost importance as 'cyber' trafficking poses tremendous legal challenges, for example in the field of online child sex tourism, also called 'cybersex trafficking'. A child that has been recruited online to perform sexual acts in front of a webcam, is typically a victim of a 'child pornography' offence. (As a side note, the term 'child pornography' should be avoided in the general debate, as it implies that a child is able to give consent to this abusive and exploitative treatment. However, as this is a legal publication, the author will stick to the term 'child pornography', as this term is still prevalent in most international and regional conventions e.g. Optional Protocol to the CRC on the sale of children, child prostitution and child pornography; 'Budapest' Convention; 'Lanzarote' Convention; African Union Convention on Cyber Security and Personal Data). However, child pornography offences are often not comprehensively criminalised under the respective national legislation – which leaves a legal vacuum and often no charges can be laid against the perpetrators. As human trafficking legislation is often more advanced, prosecutors have been investigating whether 'cyber' trafficking cases, such as online child sex tourism, can be considered human trafficking.

Therefore, this article investigates whether a person who has been both recruited and exploited online can be considered a victim of human trafficking under the Palermo Protocol, even though she never left her spot in front of the computer.

Trafficking in Persons and the Palermo Protocol

The online expansion of human trafficking offences poses major challenges for international law. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, also called 'Palermo Protocol', was adopted on 15 November 2000, at a time when cybercrime had just started to be on

trafficking in Art 3 generally as 'recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'.

Of perpetrators, accessories and the term 'harbouring'

As a first reaction, practitioners and researchers alike might feel that an interpretation which includes 'cyber' trafficking conflicts with the 'classic' understanding of human trafficking, as the person never left his or her safe and familiar environment. The removal of the victim from this safe zone is a decisive factor in the entire human trafficking process, to ensure that the victim's ties to the outside world are cut and the victim is fully dependent on the trafficker. This goal is usually achieved through either inter- or intranational displacement. Applying this understanding to the problem of 'cyber' trafficking, the question arises whether victims that never left their spot in front of the computer are equally vulnerable and should hence be considered victims of human trafficking.

Many international tools point out that the element of movement is not necessarily required to constitute a human trafficking offence, citing as proof the term 'harbouring' in Art 3 Palermo Protocol. Indeed, harbouring means that a person is only hosted and hence the conduct is rather passive than active. But a simple example shows that, from a systemic perspective, a minimum of movement is always necessary. If a family offers her child to be sexually exploited at home, by welcoming clients to the house to sexually abuse the child, the family is technically 'harbouring' the child for sexual exploitation, and this would theoretically already constitute human trafficking. However, in such a case, nobody would think of laying charges of human trafficking against the family, but rather charge the family members with child prostitution or similar offences. This shows that the 'harbouring' person must have received the victim from somewhere, and hence

movement is necessary to constitute a human trafficking offence.

However, the rationale behind the inclusion of assistive actions like 'recruiting' is that human trafficking is typically part of organised crime and hence, various players are involved who split the work. Including often mere assistive actions such as 'recruiting' and 'transporting' in the definition serves the purpose that the 'recruiting' or 'transporting' person should be prosecuted as perpetrator, and not just as mere accessory ('secondary participant'), which might in many cases lead to a lower range of sentence. The inclusion of the term 'recruiting' in the definition is therefore a mere result of criminal policy considerations, and does not aim to eliminate the requirement of movement.

Geographical dislocation at some stage of the trafficking process is hence an inherent component of trafficking in persons in order to remove victims from their familiar environment. A possible reason why some argue that no movement is required in order to constitute human trafficking is that the international community tries to counter the layman's perception that a victim of human trafficking must have crossed country borders or travelled long distances. In order to facilitate the understanding that even the smallest movement is sufficient for trafficking, the attention was entirely shifted away from the aspect of movement; this simplification might have led to the misconception that no movement is required at all. As pointed out above, the decisive factor is not how far a victim has been moved, but rather that the victim has been removed from his or her safe and familiar environment – that is the key element in human trafficking. Such a removal usually requires an element of movement.

Combatting the legal vacuum of online facilitated offences

As a result, 'cyber' trafficking is currently not considered to fall under the definition of the Palermo Protocol, which might create a legal vacuum in many countries, as cyber specific legislation is still not enacted worldwide. The limited leeway of interpretation of the Palermo Protocol is therefore problematic not only for international

interpretation of their own national legislation.

In order to reassess the interpretation of the Palermo Protocol in the digital era, it might be useful to build on the discussion around the element of movement as means of removing victims from their familiar environment. Controlling victims via the internet and hence using psychological methods to isolate them, might also be considered as removing them from their familiar environment. Against this background, there is a strong need to challenge the presumption that victims of non-contact internet abuse suffer less harm than those who experience contact sexual abuse. Studies show that victims of online abuse experience the same serious psychological impact, such as self-harm and depression. Further, many victims even experience magnified trauma, as they were not physically forced into complying with sexual abuse, but 'voluntarily' agreed to sexual abuse and exploitation online. Online abuse and exploitation can therefore to the same extent 'remove a victim from his or her safe and familiar environment', as compared to geographical displacement in cases of offline violence. Rethinking the idea of victim removal by expanding the focus on the psychological consequences might be an option of interpreting the Palermo Protocol in the digital era, so that cases of cyber trafficking are also covered.

As this proposal shows, thinking outside the box and rethinking international law in the digital age is crucial – in particular when it comes to transnational crime. Cybercrime is a pressing threat, and in contrast to legislators and law enforcement, organised crime seems to be well-versed in the digital sphere and always a step ahead. An international cybercrime convention could therefore serve as important guideline for national legislators. Currently, the most far reaching convention on cybercrime is the Council of Europe Convention on Cybercrime ('Budapest Convention'), which is also open for ratification/accession by non-member states of the Council of Europe. As this Convention was adopted in 2001, many states feel that it is outdated and have called for a new convention, which would also allow for greater inclusion of states from all over the world in the



high that certain countries become a hub for organised cybercrime due to the legislative framework not being in place. When speaking of cybercrime and transnational crime in general, this task is not simply the responsibility of one country alone, but rather the responsibility of the international community as a whole.

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Cite as: Sabine Witting, "Cyber' Trafficking? An Interpretation of the Palermo Protocol in the Digital Era", *Völkerrechtsblog*, 28 June 2017, doi: [10.17176/20170629-162348](https://doi.org/10.17176/20170629-162348)

ISSN 2510-2567

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