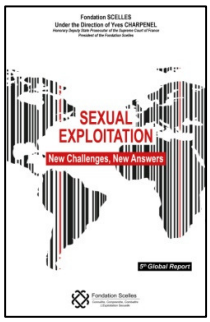

Fondation Scelles
Connaître, Comprendre, Combattre l'Exploitation Sexuelle

Excerpt from the book:
Fondation Scelles, Charpenel Y. (under the direction of), *Sexual Exploitation: New Challenges, New Answers (5th Global Report)*, Paris, 2019.

***Cautionary note**: The terms 'child prostitution' and 'prostituted children' are used in this text to denote children that are sexually exploited and sexually trafficked. The connotative manner in which these definitions are perceived and analyzed may differ due to linguistic, cultural, and perceptual differences.*

EXTRATERRITORIAL LAWS AGAINST CHILD SEX TOURISM

The enforcement of repressive extraterritorial laws is subject to the rules of jurisdiction of ordinary law, or of derogatory jurisdiction in criminal and tort matters, and depends on the quality of the implemented international cooperation. The French courts' jurisdiction was extended by means of the universal jurisdiction. The issue of limitation periods for prosecution must give way for a thorough reflection on the irreversible trauma that victims endure, and on the effective involvement of destination countries. The sharing of information and international cooperation regarding crimes of child sex tourism are encouraged.

While sex tourism is not penalized by French law when it only implicates adults, its most sordid form is illustrated by the research on every continent for minor victims, offered or available to international and local sex buyers who are in search for sexual relations with minors, most often being children.

It is clear that this "research" is more akin to the action of organized predators than to a touristic approach, the meaning of which is perverted. Every year, according to *UNICEF*, more than three million children throughout the world are victims of commercial sexual exploitation.

Even though countries in South-East Asia, Sub-Saharan Africa and Latin America are the most represented in this sinister "market", one needs to know that today certain sex buyers have a special predilection for children of every continent.

This trend is observable all over the world, and for destination countries (often developing countries) this "market" represents a significant source of revenue and an important part of their gross domestic product (GDP).

Starting at the beginning of the 1990s, numerous NGOs mobilized to denounce the extent and growth of child sex tourism, showing a premonitory support for the adoption of the Optional Protocol to the Convention on the Rights of the Child by the General Assembly of the United Nations on May 25th, 2000, as this protocol concerned the sale of children, child prostitution and child pornography.

Repressive laws, in destination countries, that do not exist, are inadequate or not implemented implicitly encourages demand. Sex buyers are perfectly capable of ferreting out countries that offer the best opportunities for their criminal activities, or that present the least risk of investigation or prosecution.

Extra-territorial repressive law is one of the legal means available in fighting this cross-border crime and counterbalancing the inaction of destination countries, allowing the offenders' country of origin to

pursue them, whether they are nationals, residents or sometimes even visitors. Before investigating the existence or interest of other tools or legal models that might be better adapted to countering this devastating epidemic, extra-territorial law warrants further examination to assess its viability.

Enforcement of Repressive Extraterritorial laws

Ordinary jurisdiction

Regarding matters of ordinary law offences, the rules of jurisdiction, which give to the French courts the authority to hear the case of facts committed abroad by a French national, are laid down in Articles 113-6, 113-8, and 113-9 of the Criminal code:

- the offense must be recognized by and punishable under the law of the country where the offense was committed (double criminality requirement);
- the offender can only be prosecuted by the Ministère public (national prosecutor) and only upon the filing of a complaint by the victim or upon an official accusation by the competent authority of the country where the offense was committed;
- the foreign court must not have definitively sentenced or acquitted the offender for the same facts.

The rules of derogatory jurisdiction in tort and criminal matters

For less serious sex crimes, numerous laws (n.94-89 of February 1st, 1994, n.98-468 of June 17th, 1998, n.2002-305 of March 4th, 2002, and n.2006-399 of April 4th, 2006) have eliminated the requirement of double criminality and the need for a complaint to have been filed by the victim or for the relevant authorities of the country where the act was committed to denounce this act. This concerns prosecution of authors of crimes of sexual abuse without violence against a minor under 15 years of age by an adult abroad for payment (art. 227-25 of the Criminal code), the sexual assault of a child (art. 222-29 and 227-30 of the Criminal code), recourse to child prostitution (art. 225-12-1 of the Criminal code), corruption of minors (art. 227-22 of the Criminal code), child pornography (art. 227-23 of the Criminal code), and the procuring of minors over 15 years of age (art. 225-7-1 of the Criminal code). For sex crimes against minors committed abroad, only definitive sentencing or acquittal by the foreign court prevents prosecution under French extraterritorial criminal law. The victim or the offender is, however, still required to be a French citizen. This derogation to the principle of territoriality in the criminal law addresses a global issue. More than 40 countries, including France with law n.98-468 of June 17th, 1998, have adopted this legal instrument (*ECPAT International*, September 2008).These widened prosecution possibilities allow countries that incorporate this derogation in their law to adopt the position that the seriousness of such infractions, committed abroad by one of their citizens or residents, justifies prosecution in view of the violations of international and national human rights, and in response to the inertia of the foreign authorities. Certain conditions are required to be met before extraterritorial laws can be enforced, including the absence in the destination country of repressive local laws or of a criminal policy where such laws do exist, and of course the suspected offender not having served a sentence or been acquitted in the destination country, in order to respect the fundamental principle of the offender not being tried twice for the same offence. In this case, the decision must be a full sentencing or acquittal by the court, not an administrative decision to drop the case (*Cour de cassation, Chambre criminelle*, June 20, 2012).

The need for these derogatory rules

It should be obvious that the most attractive destination countries to child sex abusers are those that are inactive or tolerant to these crimes, or those with an ineffective legal system. "Sex tourists" looking for child victims are known to share information amongst each other and to write cartography of the destinations where their crimes can be committed with impunity. Certain "travel agencies", in either the offender's country or the destination country, facilitate these activities. Thus, the previously cited law of June 17th, 1998, and the law Perben II n.2004-204 of March 9th, 2004 (art. 227-28-1 of the Criminal code) helpfully provide for criminal liability of corporate entities.

Preference for local courts' jurisdiction

Regarding matters of jurisdiction, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography favor the primary jurisdiction, that of the country where the crime was committed, notionally the better-placed to take victim and witness statements and gather physical and non-physical evidence. But the local jurisdiction may be unable to effectively pursue the case for any reason, such as inertia or a hierarchical dysfunction paralyzing the local competent authority in charge of prosecution, when it is imperative that the crime be judged. Thus, there is indeed a need for derogatory rules, even subsidiary: it furthers the fight against impunity and allows the effective prosecution of child sex abusers under extraterritorial criminal jurisdiction. Two procedure principles allow a country, in this case, to assert extraterritorial jurisdiction:

- the 'Passive Personality Principle' allows a country to assert jurisdiction if the victim is a citizen of that country;
- the 'Active Personality Principle' allows a country to assert jurisdiction if the offender is a citizen of that country.

Applicable law in extraterritorial jurisdiction

When French extraterritorial jurisdiction is asserted, French criminal law applies to the merits of the case (art. 222-22 §3 of the Criminal code). This is not the case in certain other countries, as they apply the most favorable law in the case of double criminality. The same applies to procedural rules: as required by the French legal system, which is an inquisitorial system, the methods for gathering evidence depend upon the relevant prosecution authority and can be complex and constraining. This is even more so when the evidence needs to be gathered in a foreign country, in cooperation with local investigative services, that might be inadequately trained, unmotivated or even affected by corruption, and according to a process compliant with fundamental human rights and with the legal principles in force in the national law of the origin country. So the court can only accept evidence that has been collected faithfully, legally and in respect of the rights of the suspect. Moreover, certain countries require that their approval is given before evidence can be collected in a third country, demand that they participate in the investigation or will only allow an investigation if the victim has filed a complaint. Even when there is a bilateral or multilateral treaty between the countries concerned that organizes judicial mutual assistance, the execution of letters rogatory can be subjected to insurmountable difficulties, sometimes unwarranted or irrational. There are many examples of dysfunction, notably with countries in sub-Saharan Africa, Latin America and South-East Asia. The possibility of the destination country's

unawareness or unfamiliarity with the constraining requirements of the offender's country can be prejudicial to the gathering of evidence or the collecting of witness and victim statements, potentially compromising the integrity of the evidence to be presented in the offender's country. For example, collecting genetic evidence requires a rigorous protocol to be followed. The absence of reliable forensics departments in destination countries threatens the evidence reliability and the evidence future use in court. Likewise, child victims' questionings must be recorded on video to avoid the victims having to repeat themselves and to ensure that the interview was conducted under the correct conditions (art. 706-47 of the French Code of Criminal Procedure of the aforementioned law of June 17th, 1998). The ignorance or disregard of these requirements can severely prejudice prosecution in the offender's country.

Procedures such as warranting, searching, seizing, confiscating, preserving evidence, and holding in custody or detention, etc, are strictly regulated by French law. Courts can reject them, as well as the subsequent acts, if those requirements are not met.

The application of extraterritorial law

While it is clear that the integration of extraterritorial law in the legal arsenal has constituted a noteworthy advance in the fight against child sex tourism, the question of the effective enforcement of these laws still remains and depends on the quality of the cooperation established between the judicial systems and police of the countries involved. Nonetheless, there have been a significant number of convictions of French citizens prosecuted for child sex tourism, pursuant to the French criminal legal principle of extraterritoriality at all levels of the judicial system. These convictions have not just been symbolic. In June of 2016, the director of a catholic retirement home was sentenced to 16 years' imprisonment by the Versailles Cour d'assises for having raped and sexually assaulted 66 boys from 6 to 17 years old, in a humanitarian context in Sri Lanka, Tunisia and Egypt. This conviction reflects numerous previous convictions by other French courts, such as:

- in 2010, the Paris Cour d'assises sentenced a 61-year-old man to 10 years' imprisonment for having raped and sexually assaulted 5 Nepalese boys;
- on March 11th, 2009, the Colmar tribunal sentenced two men to 7 years' imprisonment each for their use of a pedophile site, on which they appeared accompanied by young Cambodian and Thai girls under 15 years of age;
- in 2007, the Nanterre Cour d'assises sentenced a man to 12 years' imprisonment for the rape of children during his humanitarian missions in Togo from 1991 to 1995;
- in 2002 , the Paris tribunal condemned a man for using child prostitution, under article 225-12-1 of the Criminal code (it was irrelevant that the offense was perpetrated in France or abroad, as the tribunal reminded) without the possibility to know which country the crime was actually committed in;
- in 2000, the Paris Cour d'assises sentenced a 42-year-old man to seven years' imprisonment for the rape of an 11-year-old child in Thailand, the scene having been filmed by witnesses;
- on October 29th, 1997, the Draguignan tribunal sentenced five people to prison with terms of 5 to 15 years for the sexual exploitation of children in Thailand, the Philippines and Romania.

Even though these prosecutions were successfully conducted under extraterritorial law, such proceedings are very difficult to initiate because of the practical and legal difficulties aforementioned, and due to the

destination countries' willingness to pursue the crime, the distance to the crime zone, and the length of time since the crime was committed. This leads us to explore the limits of the useful enforcement of extraterritorial law as applied in the French legal system today and the possibilities to consider.

Exploring other legal instruments and legal models

Universal jurisdiction of French Courts

In the fight against the impunity of the most serious international crimes, universal jurisdiction is a legal instrument that allows national jurisdictions to act subsidiary to the International Criminal Court (ICC). The extension of French courts authority through universal jurisdiction (art. 689 et seq. of the French Code of Criminal Procedure), without resolving the difficulties in conducting an investigation in the destination country, would eliminate the condition of the offender's nationality or residency in France before initiating prosecutions for child sex crimes perpetrated abroad. The legal provisions concerning universal jurisdiction are included in article 689 et seq. of the French Code of Criminal Procedure. These articles enable, in France, the prosecution of the perpetrators of crimes committed outside French territory, as enumerated by an international convention assigning jurisdiction to the French courts. These crimes include torture, terrorism, use of nuclear materials, naval or air piracy, and corruption. The simple presence of the offender in French territory, under these laws, allows for the crime to fall within French jurisdiction unless another international or national authority otherwise claims jurisdiction. The ideal would be to have child sex tourism included within the scope of the international conventions listed in articles 689 et seq. of the French Code of Criminal Procedure, more specifically the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, December 10, 1984). However, it seems that international institutions are not yet ready to extend the scope of article 1 of the aforementioned convention to child sex tourism. Is the organization of commercial sexual exploitation of children not fully comparable to torture and other cruel, inhuman or degrading treatments or punishments? This commercial exploitation is surely one of the worst displays of modern slavery, preying upon the particularly vulnerable, the same victims targeted by organ trafficking and forced labor, and subjected to cruel and humiliating treatment. The enslavement and exploitation of slave children that are less than 15 years old is a particularly serious infringement of fundamental human dignity and is rightfully sanctioned to 20 or 30 years of imprisonment under French law (art. 224-1 of the Criminal Code). The international nature of this market, notably through the active or passive support of some "travel agencies" who are complicit to these sex crimes, should warrant the assertion of universal jurisdiction. This exception to extraterritorial law could be based on article 34 of the Convention on the Rights of the Child (New York, November 20, 1989), ratified by France on January 26th, 1990. The article invites signatories to undertake all appropriate national, bilateral and multilateral measures to prevent "the exploitative use of children in prostitution or other unlawful sexual practices".

The issue of limitation periods for prosecution

The prosecution of child sex crimes has derogatory extended limitation periods for

prosecution in French criminal law: 10 or 20 years, depending on the gravity of the crime, with a starting point set at the time at which the victim reaches the age of majority. This might seem like an exceptionally long time given the complexity of conducting an investigation sometimes more than 30 years after the event, exacerbated by the distance from the destination country, and by the difficulty in finding victims and collecting evidence and useful testimonies, but this limitation period is justified considering the significant traumatism of victims and the advances in forensic evidence gathering techniques. The legislature decided (Law n.2018-703 of August 3rd, 2018) to extend the limitation period to 30 years for child sexual crimes and crimes of murder and premeditated murder against minors, even when they were not preceded by rape, torture or barbaric acts, or weren't repeat offenses, which is a very important step forward. The complete elimination of the limitation period for crimes committed in the context of the organized commercial sexual exploitation of children is worthy of serious consideration, on the basis that crimes against children are crimes against humanity. This proposition must lead to a thorough reflection on the irreversible nature of the traumatism suffered by surviving victims and the effective implication of the destination countries.

Defining new offences

As for what was done in the United States (Protection Act 2003), the penalization of attempted child sex tourism would allow having for necessary elements the preparatory acts of a referent and separate crime that could be sex crime against minors. Even though it would seem audacious to legally classify as a crime what is essentially design of a criminal project, child sex tourism is often organized in advance with the support of some "travel agencies" or on the Internet. Steps taken for this activity, even though they only are preparatory acts, leave no doubt as to the purpose of the trip and completely justify their criminalization.

The additional penalty of banning offenders from leaving French territory if they have been convicted by the French courts for child sex tourism crimes would be a particularly useful preventative measure, as suggested by the working group presided by Carole Bouquet (*Midy, Merchadou, Bouquet*, September 2004). This penalty should be associated with other penalties if attempted child sex tourism becomes punishable under French law.

Sharing tools

Common sense suggests a number of avenues for States and international organizations:

- the elimination, for child sex offences, of the double criminality requirement in extradition treaties;
- the inclusion of child sex crimes in all extradition treaties;
- promoting the creation of national databases in countries most exposed to child sex tourism;
- the sharing of information between concerned countries of sexual offenders registries;
- the development of mutual assistance procedures between countries concerned, even in the absence of double criminality;
- finally, the requirement that all decisions to drop cases in destination countries be justified by prosecutors and opened to recourse by victims.

In conclusion, the boldness of these final recommendations and of the guidelines outlined in this chapter should not be deceptive as to the immediate solution to the issue of child sex tourism.

Reflection on this topic demands propositions that may seem utopian, but reports on all continents by the most objective observers, be they NGOs, international organizations, or national, European or international criminal police agencies (INTERPOL, EUROPOL), requires the immediate and forceful condemnation of the sexual slavery of children, which is fuelled globally by the inaction of offenders' home countries and by the sometimes active tolerance exhibited by destination countries.

Faced with the reality of the situation, it is imperative that national and international institutions are pressured to move towards the absence of limitation periods for crimes committed against children in the context of organized and commercial child sex tourism; that universal jurisdiction for these crimes is recognized for national courts; and that child sex tourism is assimilated to crimes against humanity, the highest criminal expression of the infringement, collective and deliberated, of human dignity.

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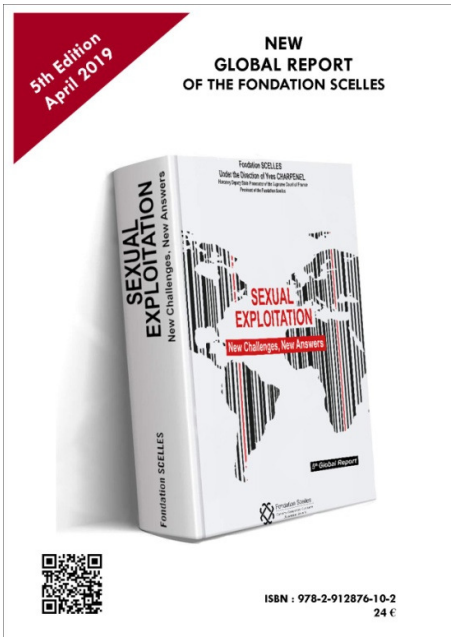

The Global Report is produced by the International Observatory on Sexual Exploitation, in collaboration with internal and external experts (magistrates, lawyers, social workers, NGO leaders…), and the support of local NGO correspondents or international researchers.

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The **Fondation Jean et Jeanne Scelles**, recognized as a public utility since 1994 and as a consultative status with ECOSOC, is an independent, non-profit organization based in Paris (France) dedicated to fight the system of prostitution and the exploitation of prostituted persons, through information, analysis, advocacy, trainings, awareness initiatives and legal actions. The **Fondation Jean et Jeanne Scelles** is a co-founding member of the Coalition for the Abolition of Prostitution (CAP International) which was launched in 2013 and today brings together 28 abolitionist NGOs from 22 countries.

The **International Observatory on Sexual Exploitation** is a worldwide hub which allows for information exchange on the system of prostitution. The hub is regularly consulted by French and foreign experts including NGOs, institutions, journalists, lawyers, researchers and those involved in the defense of human rights. The goals of the **International Observatory on Sexual Exploitation** are:

- to analyze all the aspects of the phenomenon: prostitution, sex tourism, procurement, child pornography, sex buyers, human trafficking for the purpose of commercial sexual exploitation…
- to encourage reflection and to take a stand
- to inform the public who are interested in these issues

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