

CORPORATE RESPONSIBILITY AND LIABILITY OF THE TRAVEL AND TOURISM INDUSTRY IN CASES OF SEXUAL EXPLOITATION OF CHILDREN IN TRAVEL AND TOURISM

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1 OBJECTIVES

It is necessary for States to have adequate legal and institutional frameworks to protect children from sexual exploitation in travel and tourism. Companies that fail to protect children or even violate children's rights should be held liable.¹ With international law being directed primarily at States, the question of liability for corporate violations has proved difficult. Yet, it is central when considering the role of a child victimised by sexual crimes in tourism.

The overall objective of this study is to analyse the existing legal and 'soft law' instruments that address corporate liability in the context of sexual exploitation of children in travel and tourism (SECTT). The study also explores the possibility of holding companies liable to international and domestic law and, accordingly, identify gaps and future challenges.

Despite the progress with regulations (binding and non-binding), corporate responsibility and liability still seem under-developed and in its infancy. New and emerging forms of tourism necessitate further development and clarity of existing regulations. There is an emergence of private accommodation websites that offer greater privacy for travelling child sex offenders, where the owner/operator may not be aware of the risks,² or may permit the situation. New forms such as 'voluntourism', where volunteer work becomes a tourist product, have emerged. These new trends create new areas of vulnerability and abuse, reducing the risk of being detected by hotel staff, other tourists or concerned locals.³ Case studies also show that paedophiles seem to operate mostly from private homes.⁴ For instance, the Australian Federal Police (AFP) found that 25 percent of the travelling child sex offenders from Australia stayed in private homes in Vietnam.⁵ Legal regulations need to address these emerging trends.

A lack of screening and proper recruitment procedures for staff with potential contact with children or access to children perpetuates the situation. As reported by United Nations Office on Drugs and Crime (UNODC),⁶ Asian Law Enforcement Agencies have stated that child sex offenders from the West (Western preferential and paedophile child sex offenders) are increasingly likely to be long-term residents living and working in the region, as opposed to short-term tourists, working as teachers, tutors or in child-contact occupations.

Cooperation between tourist companies in fighting SECTT must be supported and encouraged. Internal codes of conduct can deter perpetrators as well as raise awareness of the problem. In addition, through cooperation between tourist companies, successful policies can be implemented by different actors in the tourism industry. Efforts to combat SECTT should focus on both new trends in the tourism sector as well as on the more established traditional forms of tourism.

1 UN Committee on the Rights of the Child, 'General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights', Convention on the Rights of a Child, UN Doc. CRC/C/GC/16, 17 April 2013.

2 UNODC, 'Protecting the Future: Improving the Response to Child Sex Offending in Southeast Asia', 2014, p.8.

3 ECPAT INTERNATIONAL, 'Sexual Exploitation of Children in Travel and Tourism', 2012, p.17.

4 United Nations, General Assembly, Human Rights Council, 'Report of the Special Rapporteur on the sale of children, child prostitution and child pornography', Najat Maalla M'jid, A/HRC/22/54, 24 December 2012, p. 8.

5 AFP, 'Thematic Paper. Australian travelling child sex offenders: Strengthening cooperation between law enforcement agencies and analysing trends', 30 April 2015.

2 TREATIES AND CONVENTIONS DIRECTED TOWARD STATES

2.1 INTERNATIONAL REGULATION

The following treaties and conventions include important provisions regarding corporate responsibility and liability for child sexual exploitation crimes. As international law is directed to States, corporate liability provisions in international law are also directed toward States and not individual corporations. Corporate liability is an important and still under-developed issue, specifically when it comes to SECTT crimes. Corporate liability provisions for child sex tourism crimes need to be strongly developed at the international, regional and, especially, domestic level.

The following international instruments outline specific obligations for States to enact legislation that is directed towards companies:

The ILO Recommendation No. 190 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour indicates that States should provide ‘as a matter of urgency’ criminal, civil or administrative measures. Among these are ‘special supervision of enterprises which have used the worst forms of child labour, and, in cases of persistent violation, consideration of temporary or permanent revoking of permits to operate’ as well as specific training for employers, workers, and civic organisations.⁷

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime mandates States to establish the obligation ‘of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State’ in order to prevent and detect trafficking in persons.⁸

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC) requires States to adopt corporate liability legislation for some of the offences characterised as crimes of child sex tourism. However, a State is only required to establish liability “where appropriate” and [s]ubject to the provisions of its national law’.⁹

6 UNODC, ‘Protecting the Future...’, p. 9.

7 ILO Recommendation No. 190 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 14 and 15 (b).

8 United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Article 11.

9 The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, article 3 (4).

2.2 REGIONAL REGULATIONS

At regional level, Europe has addressed the issue of corporate liability in connection with the sexual exploitation of children:

The *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)*: Corporations shall be directly liable when a crime is committed for their benefit by a natural person or when a lack of supervision or control by a natural person has made possible the commission of a crime for the benefit of the legal person. Some of the sanctions imposed are exclusion from public benefits or aid, temporary or permanent closure of the corporation and disqualification from operating commercial activities.¹⁰

The Directive 2011/93/EU of the European Parliament and of the Council, 13 December 2011, on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA mandates that extraterritorial legislation should cover: (i) Offences committed abroad for the benefit of a legal person established in its territory; (ii) Offences committed by means of information and communication technology accessed from the territory where the legal person resides.¹¹

The Council of Europe Convention on Action against Trafficking in Human Beings: Imposes the establishment of border control measures (such as the obligation of commercial carriers to ensure that all passengers are in possession of valid travel documents required for entry into the receiving State).¹² It criminalises acts related to travel and the identity documents (such as forging travel or identity documents).¹³

The Directive 2011/36/EU of the European Parliament and of the Council, 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA: introduced provisions to strengthen the Trafficking Convention, such as sanctions for legal entities¹⁴ and requirements to introduce extraterritorial jurisdiction when the offences are committed abroad for the benefit of a legal person established in its territory.¹⁵

As previously stated, the issue of establishing a forward-looking legal framework to address corporate liability covering SECTT is in its infancy, but all relevant stakeholders increasingly acknowledge the need for such regulations. The two declarations adopted at the *World Congresses against Commercial Sexual Exploitation of Children* held in Stockholm (1996) and in Rio de Janeiro (2008) highlighted the need for the regulations. In the former, the approach was softer, requesting States to encourage the establishment of national and international networks and coalitions with the business sector.¹⁶ In the latter, the efforts focused on the active mobilisation of the *'business sector, including the tourism industry'*¹⁷ by increasing the support for the adoption of codes of conduct. However, child abuse materials were exempted, according to the declaration adopted at the Rio de Janeiro Congress,¹⁸ 'legal liability should be extended to entities such as corporations and companies in case the responsibility for or involvement in the production and/or dissemination of materials'.¹⁹ Whether international treaties are the best way to regulate corporate liability is questionable, as they only impose obligations on States. However, States could be obligated to enforce national laws to regulate corporate liability.

10 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Articles 26 and 27.

11 Directive 2011/93/EU, Article 17.

12 Council of Europe Convention on Action against Trafficking in Human Beings, Article 7.

13 Ibid., Article 20.

14 Directive 2011/36/EU, Article 5–6.

3 CORPORATE SOCIAL RESPONSIBILITY

3.1 CODES OF CONDUCT

Self-regulating mechanisms typically expressed via codes of conduct or other instruments that reflect international standards are referred to as 'soft or informal laws'.

United Nations World Tourist Organization (UNWTO) - Global Code of Ethics for Tourism is a comprehensive set of principles designed to guide leaders in the tourism sector. Aimed at governments, the travel industry, communities and tourists alike, it aims to help maximise the sector's benefits while minimising its potentially negative impact on the environment, cultural heritage and societies across the globe. The Code's ten principles cover the economic, social, cultural and environmental components of travel and tourism.²⁰ Although the Code expressly refers to the declaration made at the World Congress against Commercial Sexual Exploitation of Children held in Stockholm, the principles in the Code have a general scope and do not specifically address SECTT. During its 14th meeting, the World Committee on Tourism Ethics (WCTE) discussed and approved the principle of converting the Global Code of Ethics into a UNWTO Convention on Ethics in Tourism.²¹ This is based on findings that the legal nature of the Code is one of its main weaknesses: 'conscious of the non-binding nature of the Code, the stakeholders in tourism, including the States themselves, do not take the Code as seriously as they should'.²² Moreover, the lack of 'an efficient control mechanism' and the fact that the WCTE 'has not really played a role as a control body' are issues that are thought to be solved through the Convention.²³ This is a very important step toward the real (and binding) implementation and monitoring of companies' behaviour regarding children's rights in travel and tourism.

The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism (The Code) provides for monitoring and reporting mechanisms to be implemented and conducted by independent bodies at an international, national and local level. This is a particularly important element outlining an accountability process that ensures there are strong incentives to adhere to The Code. In 2007, a standardised implementation procedure was adopted for all new signatories, including requirements of filling in application forms and action plans before being accepted as Code members.

15 Ibid., Article 10.

16 First World Congress against Sexual Exploitation of Children, Declaration and Agenda for Action, Stockholm, 1996.

17 Third World Congress against Sexual Exploitation of Children, Declaration and Agenda for Action, Rio de Janeiro, 2008.

18 Ibid. Ibid.

19 UNWTO, 'Global Code of Ethics for Tourism'. Accessed 25 May 2015 <http://ethics.unwto.org/en/content/global-code-ethics-tourism>

20 The 14th WCTE meeting took place in Rome, Italy from 17-18 November 2014.

21 UNWTO, 'Report of the World Committee on Tourism Ethics, Addendum 2, Draft UNWTO Convention on Tourism Ethics', UN Doc. A/21/10 Add. 2, 30 July 2015, art. 8.

22 World Committee on Tourism Ethics, 'Converting the Code of Ethics into a UNWTO Convention on Ethics in Tourism', Fifteenth meeting Rovinj, Croatia, 26-27 May 2015, Draft Convention, Global Code of Ethics for Tourism, Explanatory note by Prof. Alain Pellet.

23 Child Wise, 'Code of Conduct'. Accessed 26 May 2015 <https://www.childwise.org.au/page/12/code-of-conduct>

Furthermore, country-specific codes have brought many successes in helping to deter SECTT. However, this format might not prove to be effective in all regions. For example, Child Wise, the Australian member of the End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes or the ECPAT network, has noted that such national codes of conduct have a limited effect. This is because SECTT involving Australian nationals tends to occur outside the mainstream tourism industry, with the help/complicity of taxi drivers, shop and restaurant owners, karaoke staff and printing shop staff.²⁴

The main criticism of The Code is the voluntary character of it. The private sector often voluntarily increases the standards it wants to adhere to in voluntary codes, compared to government legislation. Such voluntary regulation is however beyond the control or enforcement of the State since it surpasses the standards enforced by mandatory legislation.

While there are a significant number of tourism companies that are genuinely implementing The Code, another challenge is the inclusion of recommendations that clearly define the obligations and responsibilities of organisations. Codes of conduct without monitoring mechanisms are limited in scope.

Finally, non-compliance with voluntary codes can lead to increased legal risks for tourism companies if such codes are taken as evidence that the organisation or individual is not meeting industry standards or exercising due diligence. This can also lead to private lawsuits.²⁵ At the same time, compliance with voluntary codes may help companies to show that they have met the minimum standard of care.

The existence of codes of conduct can put pressure upon local governments to acknowledge abuses and bolster domestic legislation. This pressure could extend beyond national borders, strengthening mechanisms for enforcement on an international scale. The more optimistic supporters of codes of conduct have suggested that, for the reasons provided above, the private sector could surpass governments in protecting fundamental rights, and that such benchmarking could lead to a *'race to the top.'* As a result, private sector businesses can compete with each other to have the 'best' record for protecting children in their community.²⁶

24 INTERNATIONAL, 'Private Sector Accountability in Combating the Commercial Sexual Exploitation of Children', A contribution of ECPAT International to the World Congress III against Sexual Exploitation of Children and Adolescents, Rio de Janeiro, Brazil, 25-28 November 2008. Accessed 22 May 2015

25 http://resources.ecpat.net/worldcongressIII/PDF/Thematic/Thematic%20Paper_CSR_full.pdf

26 See also Elif Härkönen (2015): Corporate liability and international child sex tourism – with special reference to the regulation in the Nordic countries, *Scandinavian Journal of Hospitality and Tourism*, DOI: 10.1080/15022250.2015.1108861

3.2 UNITED NATIONS GLOBAL COMPACT

The *United Nations Global Compact* is designed to promote 'responsible corporate citizenship'.²⁷ Essentially, it signals that corporations are subject to obligations, born out of their desire to reduce the negative impact of their operations. Once a company signs onto the Compact, it is expected to change its business operations and public communication. Furthermore, companies are encouraged to enter into partnership projects with the UN and similar stakeholders to support the Compact's 10 principles.²⁸ The principles are divided into four subcategories which are human rights, labour, environment and anti-corruption. However, compliance with the 10 principles is not monitored.

As a voluntary initiative designed to encourage responsible corporate citizenship, the Global Compact states that corporations *should* adhere to specific principles, rather than introducing mandatory requirements. This permissive language may not necessarily give rise to a positive obligation of businesses to prevent human rights violations. The generality of terms may also prove problematic. Specifically, corporations can embrace, support and enact the principles without taking concrete action to promote human rights. Finally, the first principle refers the Universal Declaration of Human Rights, but the Compact does not highlight specific rights to be fulfilled by companies.

An additional concern may exist with the responsibility of parent companies for subsidiaries not supporting and respecting human rights. Parent companies may argue that the particular subsidiary is not within its sphere of influence as formulated in the Global Compact. Not only is the choice of language problematic, but so is the meaning given to particular terms. For example, the Compact promotes a Western version of corporate social responsibility that is not compliant with national values and laws of non-Western states.²⁹

27 UN Global Compact, 'Principles'. Accessed 24 May 2015 <https://www.unglobalcompact.org/aboutthegc/thetenprinciples/>

28 Ibid.

29 Ibid.

3.3 COMMITTEE ON THE RIGHTS OF THE CHILD

General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights is extracted from the UN Committee on the Rights of the Child, which consists of 18 independent experts tasked with monitoring the CRC. It is relevant to note the following considerations of the committee that clearly reflect the need for a strong developed legal framework:

- Voluntary actions such as The Code are not a substitute for State action and regulations. Businesses must adhere to its obligations of conduct as stipulated under the CRC and the OPSC.
- States must ensure that public procurement contracts are awarded to bidders that are committed to respect children's rights. Any other form of collaboration with firms who do not respect children's rights should be prohibited. Moreover, States must adopt laws and regulations, with effective enforcement and monitoring mechanisms, to prevent business enterprises from causing and contributing to abuses of children's rights. States should also investigate, adjudicate and redress violations of these rights caused or contributed by a private company, including prosecution and sanctions on concerned business actors.
- There are specific contexts where the impact of business enterprises can be significant and where a State's legal and institutional framework is insufficient, ineffective or under pressure. The child sex tourism industry is one such example. This can become increasingly problematic due to the use of the internet and social media to exchange information and propel sex tourism. Another example is when businesses operate on a global scale through complex networks of subsidiaries, contractors, suppliers and joint ventures. This makes it harder to investigate and prosecute perpetrators since they often operate through legally separate entities located in different jurisdictions. Therefore, there is a need for effective international assistance and cross country investigations.
- States should endorse a firm process of due diligence and effective monitoring systems, putting in place verification and enforcement mechanisms to ensure compliance with children's rights. This requires a sound legislative framework to create specific obligations and a specialised agency to conduct the investigations. States should introduce provisions to regulate collective complaints (class action suits and public interest litigation) to increase the accessibility to the judicial system to a large number of children similarly affected by actions of businesses.

In addition to General Comment No. 6 by the Committee on the Rights of the Child, *UNICEF's Corporate Social Responsibility Unit* has produced a report entitled '*Effective Remedy and Corporate Violations of Children's rights*'. Not only does this report evaluate legal efforts to hold the private sector accountable for human rights violations, it also provides a succinct explanation of the barriers to obtaining judicial remedies, such as the lack of legal standing of children, the lack of knowledge of their rights, the costs of bringing cases, the statutes of limitations, the impact of out of court settlements and the lack of class actions.

3.4 UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS; CHILDREN'S RIGHTS AND BUSINESS PRINCIPLES

In 2008, the Human Rights Council approved the *'Protect, Respect and Remedy'* framework designed by the Special Representative to the Secretary-General on the issue of human rights and transnational corporations, John Ruggie. Though not a legally binding document, the framework outlines that States have a duty to protect adults and children against human rights abuses perpetrated by businesses. Businesses, in turn, have a responsibility to respect human rights. According to the framework, there is a need for greater access by victims to effective remedies, both judicial and non-judicial. The framework has been complemented by a set of Guiding Principles as of 2011 named the *'UN Guiding Principles on Business and Human Rights'* that, among others focuses on child protection and sexual violence, when carrying out business activities.

The Guidelines, a joint initiative between UNICEF, the United Nations Global Compact and Save the Children, resulted in a landmark set of 10 Children's Rights and Business Principles. These principles aim to guide companies on the full range of actions they can take to respect and support children's rights in the workplace, the marketplace and the community. The Principles call on businesses everywhere to uphold children's rights in all aspects of their operations; from instituting child-friendly workplace practices, marketing and advertising practices to playing a role in aiding children affected by emergencies.³⁰ KUONI, a Swiss tourism company, has been one of the most active in the development of a UNICEF Corporate Social Responsibility Tool. It is designed to investigate the impact on children's rights and has already been used in assessments in Kenya and India.³¹

³⁰ UNICEF, Partnership Profile 2012, 'UNICEF's engagement in the Children's Rights and Business Principles Initiative'.

³¹ UNICEF, 'The CRBP and the Travel and Tourism Industry', presentation SECTT Global Study Chiang Mai Consultation, May 2015.

3.5 OTHER SELF-REGULATORY INITIATIVES

The Universal Federation of Travel Agents' Associations has developed a *Child and Travel Agents' Charter* with over 100 member countries. This agreement has a section that deals with helping child victims of commercial sexual exploitation.³²

Furthermore, in August of 2003, the Sub-Commission for the Promotion and Protection of Human Rights adopted the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*. There is debate surrounding the current legal status of the Norms. While it is clear that the Norms do not have the same status as a UN treaty, there is hope that it may one day develop into a binding, legal instrument.³³

Finally, the *Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises* was created to enhance all areas of business ethics, developed multilaterally and agreed by governments. They include general principles but also detailed recommendations such as promoting compliance with laws, respecting human rights (especially children's rights, with a focus on child labour), caring about employment, industrial relations and protecting the environment.

The *Declaration against Child Sex Tourism by the Group of National Travel Agents and Tour Operators Association within the European Union (ECTAA)*³⁴ and the *Declaration against the Sexual Exploitation of Children by the Confederation of the National Associations of Hotels, Restaurants, Cafés and Similar Establishments of the European Union and the European Economic Area* are also important soft law documents to highlight in the framework discussing corporate social responsibility initiatives related to SECTT.

32 INTERNATIONAL, 'Private Sector Roles and Responsibilities to End Sexual Exploitation of Children, 2009. Accessed 26 May 2015 http://www.ecpat.net/sites/default/files/private_sector_roles_and_resp.pdf

33 University of Minnesota, Human Rights Library, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Document E/CN.4/Sub.2/2003/12/Rev.2 (2003). Accessed 27 May 2015 <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>

34 UNWTO, Ethics and Social Responsibility, 'Protect Children Campaign Partner: ECTAA'. Accessed 27 May 2015 <http://ethics.unwto.org/en/content/protect-children-campaign-partner-ectaa>

4 CORPORATE LIABILITY

4.1 INTRODUCTION

Effective prosecution of companies when they are liable for human rights violations such as SECTT, usually occur only at the domestic level. Despite some progressive legislation, national legal frameworks have not yet outlined the role and obligations of companies. Corporate liability can be divided into criminal liability and civil liability. Western European countries (apart from the United Kingdom) have relied on public prosecution to a greater extent than on private enforcement. Until recently, the expansion of tort law to SECTT crimes seemed plausible in the United States. However, this development has been halted by recent judgements restricting the use of international law in U.S. courts.³⁵

The prosecution of companies within the travel and tourism industry for SECTT crimes is highly complex and often unsuccessful. However, legislation targeting tourist companies does help diminish SECTT, because of its potential to eliminate entire avenues, raise public awareness and deter perpetrators. Therefore, individuals and companies involved in SECTT must be subject to strict criminal laws combined with severe punishments (strong fines and the prohibition to operate) that reflect the grave nature of sexual offences against children.

The following conduct should, at least, be criminalised to ensure that the company/operator's liability does not end once the clients have reached their destination:

- Procurement, by any means, and/or the engagement of exploitative sexual conduct with a child.
- Benefiting, by any means, from exploitative sexual conduct with a child.
- Advertising or promoting SECTT.
- Organising or making travel arrangements for a person to engage in sexual activity with a child at a destination.
- Transporting of a person for the above crimes with reasonable knowledge of purpose.

³⁵ For a more in depth analysis, see Elif Härkönen (2015): Corporate liability and international child sex tourism– with special reference to the regulation in the Nordic countries, *Scandinavian Journal of Hospitality and Tourism*, DOI: 10.1080/15022250.2015.1108861

4.2 BEST LEGAL PRACTICES ON TRAVEL AND TOURISM INDUSTRY LIABILITY

Although insufficient, there has been some progress with legal liability in the travel and tourism sector.

AUSTRALIA includes any corporation incorporated under Australian law or which carries out activities principally in Australia, into the subjective scope of the Criminal Code title 'Child Sex offences outside Australia'. Therefore, all the provisions of the referred title apply to individuals as well as companies.

The **EUROPEAN** legal framework³⁶ contains progressive provisions including: (i) direct liability of corporations when the crime is committed for their benefit by a natural person or when lack of supervision or control by a natural person has made possible the commission of a crime for the benefit of the legal person, (ii) operational sanctions imposed in order to sanction the business and (iii) extraterritorial legislation for offences committed abroad by a company or for its benefit or by means of information and communication technology accessed from the territory where the legal person is established.³⁷

In **FRANCE**, holders of a travel licence can be declared criminally liable for offences in relation to child sex tourism, within the general conditions applicable to a legal person's criminal liability (French criminal code, art. 121-2). More specifically, the French criminal code provides that persons may be held criminally liable as accomplices (within the conditions outlined in Articles 121-6 and 121-7 of the same code) for (non-exhaustive list of offences):

- soliciting, accepting or obtaining payment for sexual intercourse with a minor exploited in prostitution, even when such a criminal offence occurred out of the country (Articles 225-12-1 and further of the same code);
- facilitating or tentatively facilitating corruption of a minor, even when such criminal offence occurred out of the country (Articles 227-22, 227-27-1 and 227-28-1 of the same code);
- recording or transferring child sex abusive images, even when such criminal offence occurred out of the country (Articles 227-23, 227-27-1 and 227-28-1 of the same code).

Legislation related to fighting SECTT is widely ignored in European domestic law despite it being an obligation under the abovementioned *EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography*.

36 Particularly, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and Directive 2011/93/EU.

37 Directive 2011/92/EU, Article 17.

However, **ITALY** has been cited as having progressive legislation especially in relation to tackling the promotion and organisation of SECTT.³⁸ Law No. 269/98 established 'Provisions against the exploitation of child prostitution, pornography and sex tourism as new forms of slavery' and introduced advancements, such as the possibility to punish Italian citizens who commit sexual offences against minors abroad, including when they act as accomplices of foreign nationals. This piece of legislation has been further strengthened with the enactment of Law No. 38/2006 on 'Provisions to Fight the Sexual Exploitation of Children and Child Pornography, including through the internet'.

As a result, specific provisions against SECTT have been introduced:

- Article 600-quinquies of the Italian Criminal Code on 'Tourist initiatives aimed at the exploitation of child prostitution' stipulates that 'anyone who organises or promotes foreign travels which promote child prostitution or encourage such activity is liable to imprisonment for a term of six to 12 years and a fine of 15.493 to 154.937 Euros'.³⁹
- The Italian Criminal Code also provides for accessory penalties for those who promote tourist initiatives aimed at the exploitation of child prostitution (as well as for other relevant CSEC offences). Article 600-septies on '*accessory penalties*' states that '*in the case of conviction for any of the offences provided in Articles (...) 600-quinquies (...), there is mandatory confiscation of the goods (...), and closure of the business which gave rise to the offences, together with the revocation of the business permit or the concession or authorisation to broadcast. Moreover, the conviction provides for the perpetual ban from any job in any type of school and office or service in public or private institutions or organisations mainly attended by minors*'.⁴⁰

Sanctioning the advertising of SECTT, Italy has set the bar higher by requiring tour operators to expressly repudiate it in their promotional materials. Art. 38 of Law No. 38/2006 reaffirms and makes it a permanent, obligation for tour operators organising collective or individual travel outside of Italy (already provided for by Art. 16 of Law n. 269/1998) to insert a warning against SECTT in their printed material, advertising, itinerary and other travel documents. The materials stress that under Italian law, crimes related to child prostitution and pornography are subject to prison sentences in Italy, even if perpetrated outside the country. The new law also increases the pecuniary fine envisaged for those tour operators who violate this obligation.

Like Italy, **MALTA** has a similar law directed to punish the act of promoting SECTT. Chapter 9 of the Maltese Criminal Code states that:⁴¹ '*Whosoever disseminates any materials advertising the opportunity to commit any of the offences under Articles 204, 204A to 204C, both inclusive, 208A(1) and 208A(1A), or is involved in the organisation of travel arrangements with the purpose of committing any of the said offences, shall, on conviction, be liable to imprisonment for a term from two to five years*'.⁴²

38 Italy, Pedophilia Observatory, 'Sex Tourism'. Accessed 28 May 2015 http://www.osservatoriopedofilia.gov.it/dpo/en/turismo_sessuale.wp?jsessionid=1E5E9596040D117D8397640725FC2AEF.dpo1

39 Italy, Criminal Code, Article 600-quinquies.

40 Italy, Criminal Code, Article 600-septies.

41 Malta, Criminal Code, Article 208AB (Advertisement of sexual tourism. Added by: VII. 2010.12. Amended by: IV. 2014.13).

42 Malta, Criminal Code, Chapter 9. Accessed 29 May 2015 <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574>

JAPAN regulates the liability of the Japanese travel industry from organising sex tours abroad in the 1999 Law for Punishing Acts Related to Child Prostitution and Child Pornography and Protecting Children.

In the **UNITED KINGDOM**, relevant acts are the Safeguarding Vulnerable Groups Act 2007 (England) and the Protection of Vulnerable Groups Act 2007 (Scotland) that impose obligations on employers with respect to vetting employees who work in regulated activities, which includes caring for children or teaching them.

The new Anti-Social Behaviour, Crime and Policing Act 2014 has introduced provisions which allow police to require hotels and similar establishments, in which they reasonably believe child sexual exploitation is taking place, to provide information about guests.⁴³ Persons who fail without reasonable excuse to comply with such a requirement (i.e. they do not provide the requested information) commit an offence and are liable to sanctions.⁴⁴

More recently, the UK has introduced the Modern Slavery Act 2015, which aims to tackle the issue of human trafficking, exploitation and abuse, including sexual abuse of children as well as issues of forced labour. Section 54, of the Act introduces a provision called *'Transparency in Supply Chains'* which places legal obligations on all companies with a high turnover and with UK operations (the size to be determined), to publish an annual statement disclosing the steps that they are taking to ensure there is no slavery or human trafficking in their business and supply chains. Alternatively, the companies must prepare a statement that the organisation has taken no such steps.

In the **UNITED STATES**, the Mann Act could be used to hold travel agents and/or tour operators liable.⁴⁵ Depending on the facts, the Trafficking Victims Protection Act and possibly the Alien Tort Statute (28 U.S.C. § 1350) may also prove fruitful in cases of aiding and abetting liability.

The Hawaiian State of the **UNITED STATES** passed legislature HB 2020, an Act relating to prostitution, which was signed into law, as Act 82, on May 19, 2004. The Act makes it a felony offence, to sell or offer to sell travel services for the purpose of engaging in prostitution and authorises suspension or revocation of a travel agency registration for engaging in such acts. Many states in the U.S. have laws against promoting prostitution, which could be used to prosecute sex tour operators. Hawaii is the first state, however, to specifically criminalise the activities of sex tour operators. The new law recognises the link between sex tourism and trafficking.⁴⁶ *'Prostitution and related activities, which are inherently harmful and dehumanising, contribute to the trafficking in persons, as does sex tourism. The low status of women in many parts of the world has led to a burgeoning of the trafficking industry. Discouraging sex tourism, which is an estimated \$1,000,000,000 annual business worldwide, is key to reducing the demand for sex trafficking (...). The purpose of this Act is to promote and protect the human rights of women and girls exploited by sex tourists. In so doing, the legislature forcefully declares Hawaii's unequivocal opposition to any form of sex tourism, whether it is child sex tourism or sex tourism involving adults'*⁴⁷

43 United Kingdom, Anti-Social Behaviour, Crime and Policing Act 2014, Article 116.

44 United Kingdom, Anti-Social Behaviour, Crime and Policing Act 2014, Article 116.

45 Relevant sections of the Mann Act are 18 U.S.C. §§2421-2424 (West).

46 Equality Now, 'Hawaii: Legislation Passed to End Sex Tourism and Hold Sex Tour Operators accountable'. Accessed 30 May 2015 <http://www.equalitynow.org/node/279>

47 Hawaii, Bill HB 2020. Accessed 1 June 2015 http://www.capitol.hawaii.gov/session2004/bills/HB2020_cd1_.htm

4.3 GENERAL TORT LAWS

Tort laws present a viable alternative to criminal prosecution when it comes to corporate liability of multinationals (MNC) or transnational companies (TNC). Tort laws represent the strongest basis for action against businesses that violate children's rights.⁴⁸

While tort laws can differ slightly in different jurisdictions, the principle is usually similar. In international cases, the application of national tort laws is determined by territorial sovereignty. An important principle often used to determine the applicable law is where the tort was committed.

For tort claims to succeed the harm must be '*foreseeable*' and they must be *in proximity*' between the person seeking redress and the defendant; this may relate to physical proximity, a pre-existent relationship, a causal connection between the conduct and the harm produced or an assumed responsibility. Once these two tests of foreseeability and proximity have been satisfied, then courts weigh public-policy considerations and justice considerations of the case.⁴⁹

It is essential that the legal mechanism of tort laws should not substitute the international, regional and domestic judicial apparatus to prosecute companies when they are liable for an SECTT crime. The basis for action should rely directly on the effective protection of children's rights, something that tort laws are not primarily designed to do.

However, tort actions do serve to make companies accountable to the extent that they involve claims for compensation and are invariably costly for companies. In theory, the payment of damages and, in particular, strategic litigation can help to prevent future violations of children's rights. Nonetheless, the main emphasis in tort cases is on providing personal compensation rather than ensuring permanent changes to corporate policies and practices which have a negative impact on children.

4.4 KNOWN OBSTACLES TO HOLDING CORPORATIONS LIABLE

Company structures (especially TNCs, given their operations straddle national boundaries) may lead to a lack of liability. As TNCs are subject to domestic law in the countries they are incorporated or have their seats; their subsidiaries could be incorporated and based in countries where legal regimes provide lower levels of child rights protection. In this way, the company may elude legal responsibility by arguing that it is only a shareholder of the subsidiary and cannot be held responsible (using the '*principle of separate legal personality*'). A company can argue the same even in cases when the parent company is actively involved in the violation and/or knew of this conduct, tolerated it or even directed it, although the principle above can sometimes be pierced in those cases.

48 UNICEF, 'Effective Remedy and Corporate Violations of Children's Rights', October 2011. Accessed 3 June 2015 http://www.unicef.org/csr/css/effectiveremedy_10Oct11.pdf

49 UNICEF, 'Effective Remedy and Corporate Violations...', p. 4.

As UNICEF has stated, 'holding the parent company liable in such instances is very important as a way of deterring future violations but also as a way of obtaining a remedy and meaningful compensation for the children affected.'⁵⁰

Another way of avoiding human rights standards is working through sub-contractors where the company ordering services/products cannot be held liable for the actions of the sub-contractor. The frameworks of laws, regulations and initiatives that govern the activities of TNCs have been described as '*piecemeal, fragmented and unequal to the task of ensuring companies respect human rights.*'⁵¹

Obstacles to hold corporations liable are:

- Collection of evidence in the form of documents, records and archives in the control of the parent company located at its headquarters in the home state, and not in the host state where the subsidiary is based and prosecution is taking place.
- Unequal access to financial resources in preparing cases. Children and their representatives often do not have access to required evidence to make their case when they are suing a big company. States should ensure fair and equal judicial procedures in all stages for both parties.
- The basic principle of *forum non-conveniens* is that a court having jurisdiction can choose not to exercise it if it is confident that another court has jurisdiction and that justice can better be served in that other court. For instance, factors such as the location of evidence and witnesses are examined. This principle as an obstacle varies from jurisdiction to jurisdiction. It poses a strong barrier in the U.S. while there is no such concept in Germany. Indeed, a decision of the European Court of Justice in 2005, clarified that the national courts of the EU do not have the power to halt proceedings on the grounds of *forum non conveniens* in cases brought against defendants from the EU, where the alternative venue is outside the EU.⁵²

All the procedural obstacles that prevent children from obtaining an effective remedy needs to be legally addressed as a matter of urgency at the domestic level. Establishing solid legal frameworks at the international and regional level that impede companies from escaping responsibility through complex corporate structures would significantly help in the prosecution of cases in the national courts.

50 Ibid.

51 Amnesty International UK, 'Memorandum of Evidence to the Joint Committee on Human Right', p. 5.

52 UNICEF, 'Effective Remedy and Corporate Violations...', p. 10.

5 CASES

In the U.S., corporate criminal and civil liability has been accepted by courts for more than one hundred years while in Europe, there has been a reluctance to accept corporate liability.

Below, are cases from different jurisdictions. The function of this section is to serve as a precedent for future litigation. It draws attention to loopholes and the existing difficulties for a company to be prosecuted, especially, when complex structures between parent, subsidiaries or another type of contractors arise or due to the lack of binding obligations in regulations.

1

Citation: British Airways Case

Jurisdiction: United Kingdom

Year of ruling: Ongoing

Summary: A British law firm Leigh Day with a history of challenging international companies (Nigerian Shell oil leak) on corporate social responsibility issues, has commenced landmark legal action against British Airways, for child sexual abuse committed by one of its airline employees, the now deceased Mr Simon Wood.

Mr Wood was facing criminal proceedings on two counts of taking indecent photographs of a child and one count of possessing indecent images of a child. However, the case never went to trial because he committed suicide shortly before his first scheduled court date.

Leigh Day is now pursuing legal action against the airline, claiming that the airline had a duty to care for the victims. The case was strengthened when recent allegations surfaced that the company was informed of Mr Wood's dismissal from a charity for questionable behaviour and that a mother of one of the victims sent an email complaining about Mr Wood.

British Airways has stated that they cannot comment on the case while legal proceedings are on-going.

Sources: Leighday.co.uk, 'British Airways accused of not acting over pilot abuse concerns'. Accessed 28 May 2015 <http://www.leighday.co.uk/News/2015/March-2015/British-Airways-accused-of-not-acting-over-pilot-a>

2

Citation:: United States v. Bryant, No. 15-MJ-02092 KSM, 15-CR-00184-JG (N.D.Ohio Aug. 3, 2015).
Jurisdiction: United States
Year of ruling: 2015

Summary: An Ohio man, Corey L. Bryant, travelled between Honduras and United States ten times between 2011 and 2014, working as a volunteer at two ministries providing services for poor and homeless children in Honduras. While working as a volunteer, teaching fourth grade at a local private school, Bryant repeatedly sexually abused three Honduran minors who were living at the ministries. After admitting to the sexual abuse, Bryant was sentenced to 90 months in prison in the Ohio Northern District Court. The case was brought as part of Project Safe Childhood, a nationwide initiative in the United States, focused on combating the growing number of children subjected to sexual exploitation and abuse. The case is one of a few cases, where a volunteer has been charged with illicit sexual conduct in a foreign country. It illustrates the growing phenomenon of predators travelling to other countries as volunteers, while at the same time sexually abusing vulnerable children in the destination country.

3

Citation: Plaintiff v. Schair LLC, No. 12-16542 (11th. Cir., March 7, 2014)
Jurisdiction: U.S.
Year of ruling: 2014

Summary: The civil motion was initiated by four Brazilian women who alleged that the company Wet-A-Line Tours facilitated sexual abuse of native girls by elderly American men. The initial motion was supported by *Equality now* and law firm King and Spalding, under the U.S. Trafficking Victims Protection Act.

The defendant Mr Richard Schair filed for a stay of the proceedings as he was being investigated for criminal charges at the time by both the U.S. and Brazilian governments. In July 2012, the plaintiffs sought to lift the stay citing a lack of prosecution by the U.S. government. This action was challenged by the defendant arguing that there was no proof that the investigation had ended and that a stay order was mandated for an ongoing domestic or foreign investigation. Arguments from both parties were received by the U.S. District Court in October 2012. The court held that a November 2012 status report 'conclusively establish[ed] that the [domestic] federal criminal action [was] no longer pending against the defendant'. Furthermore, the statutory requirements did not mandate a stay of civil proceedings for a foreign criminal prosecution.

The defendant appealed this decision with the result being delivered on March 2014. The appeal was dismissed for a lack of appellate jurisdiction. It is not clear if the trial has commenced or if Schair settled the case outside court.

Sources: Case details taken from the appeal accessed 28 May 2015 <http://caselaw.findlaw.com/us-11th-circuit/1659652.html>, Sandy Frost, Newsvine, 'The Reveal Part 7 Updated: Richard Schair Human Trafficking Case Settled After Brazilian Women File Appeal' accessed 28 May 2015 http://sandyfrost.newsvine.com/_news/2014/12/02/26880089-the-reveal-part-7-schair-human-trafficking-case-dismissed#google_signup

4

Citation: Douglas Allen
Jurisdiction: U.S.
Year of ruling: 2013

Summary: On 3rd December 2010, following an undercover operation, Mr Douglas Allen was arrested for promoting prostitution in the third degree. The original indictment was dismissed, based on problems with admissible evidence and improper presentation of the case. However, he was finally convicted of promoting prostitution in the third degree in July 2013 and sentenced to five years' probation.

Sources: Equality Now, 'Statement on Arrest of Alleged Sex Tour Operator Mr Allen for promoting prostitution'. Accessed 28 May 2015 <http://www.equalitynow.org/equality-now-statement-arrest-alleged-sex-tour-operator-douglas-allen-december-3-2010-promoting-pros>; Lohud.com, 'Westchester judge tosses sex –tourism indictment', accessed 28 May 2015 <http://archive.lohud.com/article/20111228/NEWS02/312270069/Westchester-judge-tosses-sex-tourism-indictment>, Badboylookout.wordpress.com, 'Douglas Allen of Poughkeepsie, NY sentenced for running overseas sex tours'. Accessed 28 May 2015 <https://badboylookout.wordpress.com/2013/11/19/douglas-allen-of-poughkeepsie-ny-sentenced-for-running-overseas-sex-tours/>

5

Citation: M.C. v. Bianchi, 782 F. Supp. 2d 127 (E.D. Pa. 2011) See also United States v. Bianchi, 386 F. App'x. 156 (3d Cir. 2010).
Jurisdiction: U.S.
Year of ruling: 2011

Summary: Plaintiffs were four Moldovan child victims of sex tourism. Mr Anthony Mark Bianchi was the perpetrator. He had been convicted of 12 counts related to the crimes in the case United States v. Bianchi, 386 F. App'x 156, 157 (3d Cir. 2010). Here, the individual victims brought a civil suit under the Alien Tort Statute and were awarded damages. While it does not directly concern liability for a travel operator, other cases have found corporate liability under the Alien Tort Statute. However, the questions relating to corporate aiding and abetting liability for Alien Tort Statute claims for torts committed in a foreign jurisdiction has been severely restricted by recent judgements.

Sources: See Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013).

6

Citation: People v. Ahmed, 72 A.D.3d 502 (N.Y. Supr. 2010)
Jurisdiction: U.S.
Year of ruling: 2010

Summary: Mr Saeed Ahmed owned and operated the sex tour company Jump Off Destinations, which arranged tours between the U.S. and the Dominican Republic. Through his website, Ahmed provided pictures of women with whom potential tourists could arrange to have sex on tour. Jump Off Destinations also advertised the sex tours.

Although the Big Apple affair is the most cited, this case was the first time someone was successfully convicted under the New York State law that prohibits the promotion of prostitution. Ahmed appealed the decision on the basis that the evidence was legally insufficient to establish his guilt of promoting prostitution in the third degree. He argued unsuccessfully that the conviction should have been reduced to a lesser charge of promoting prostitution in the fourth degree. *Equality Now* played a part in raising awareness about the case.

Four months after Mr Ahmed's initial conviction, penal code section 230.25(1) was amended to include 'proscribed conduct which is the advancement or profiting from prostitution by managing, supervising, controlling or owning a business that sells travel-related services knowing that such services include or are intended to facilitate travel for the purpose of patronising a prostitute'.

While the court acknowledged that Mr Ahmed was not prosecuted under this amendment, it stressed that the purpose of the amendment was to clarify that someone who sells travel services to sex tourists may be found guilty of promoting prostitution in the third degree.

The court differentiated this case from the BAOT case by noting sufficient legal evidence to prove that the owners 'managed, supervised, controlled, or owned a prostitution enterprise' when they procured tour guides to 'take customers to locations where prostitutes were available, and paid the prostitutes on behalf of the customers'.

7

Citation:: People v. Barabash, 828 N.Y.S.2d 122 (N.Y.A.D. 2006).
Jurisdiction: U.S.
Year of ruling: 2006

Summary: The Big Apple Oriental Sex Tours (BAOT) is one of a few cases where legal action has been taken against a company (or those managing it) rather than individuals in relation to sex tourism, with the charges focusing on the facilitation aspect and not direct engagement in sexual conduct.

The initial prosecution was the result of a long and sustained lobbying campaign by *Equality Now*, a non-governmental organisation (NGO). Their campaign started in 1996, however, the first round of legal proceedings was in July 2003. The New York state Attorney General filed a civil suit against the company. This prevented Big Apple from advertising any of its tours.

In 2004, Mr Norman Barabash and Mr Douglas Allen were charged with promoting prostitution in the third degree. However, these charges against Big Apple Oriental Tours managers were dismissed on grounds that they lacked sufficient evidence and that evidence introduced amounted to 'hearsay'. Significant questions remained regarding the applicability of the underlying law to the case. The judge concluded 'there was no competent evidence before the grand jury of a specific house of prostitution, prostitution business or enterprise'.

In May 2005, the Appellate Division ruled that the hearsay evidence was improperly introduced to the grand jury, which allowed the case to be resubmitted to a second grand jury. However, the charges were again dismissed. The court noted that: '*There was [...] evidence presented that tours could include such activities as golf and scuba diving, shopping for clothes and jewellery and that wives and companions are welcome at discounted prices [...] What the tour customer did when he arrived at the location is not part of the Big Apple Oriental Tours enterprise*'.

The decision was appealed, and in what can be described as the last round of proceedings on December 26, 2006, the Appellate Division of the Supreme Court of the State of New York upheld the dismissal on the charge of promoting prostitution in the third degree but reinstated the charge of promoting prostitution in the fourth degree against the operators of Big Apple Oriental Tours.

In January 2009, Mr Barabash and Mr Allen were acquitted by a jury of criminal charges for promoting prostitution under New York State law. To convict the sex tour operators, the judge told the jury they had to find that New York had jurisdiction over the case by first, finding that BAOT's conduct violated state law; second, that the defendants intended to promote prostitution in the Philippines; and third, that prostitution is illegal in the Philippines. Only then could the jury find whether or not the defendants were guilty of promoting prostitution by knowingly advancing prostitution. While the jury affirmed that New York had jurisdiction over the case, it failed to find Mr Barabash and Mr Allen guilty of promoting prostitution. An interesting twist in the Big Apple Oriental Tours case is the temporary restraining order the Attorney General obtained against the company while the first case was pending. The temporary restraining order restricted the company from organising future tours. According to the New York Executive Law, if a person is repeatedly engaged in illegal acts or has otherwise demonstrated persistent illegality in the conducting of business, the Attorney General may apply to the court for an order enjoining the continuation of the illegal business, directing restitution and damages.⁵³

Sources: The John Hopkins University, 'International child sex tourism: scope of the problem and comparative case studies', January 2007, p. 28; Equality Now, 'Sex Tourism: Big Apple Oriental Tours Re-Indicted for Promoting Prostitution', accessed 28 May 2015 <http://www.equalitynow.org/node/170>

53 New York Executive Law § 63.12 (2016); see also New York Business Corporation Law, art. 1, § 109 (b) (3) (2016).

8

Citation: United States v. Timothy Julian, 427 F.3d 471 (7th Cir. 2005).
Jurisdiction: U.S.
Year of ruling: 2005

Summary: Mr Timothy Julian and Mr Robert Decker ran a resort in Mexico with the primary purpose of organising trips to facilitate commercial sexual relations between tourists and children. Mr Julian and Mr Decker met in Acapulco, Mexico and soon agreed on launching a hotel business geared towards men who liked to engage in sexual relations with young boys. They leased a hotel property in Castille Vista del Mar, Mexico, and recruited boys ranging from 7 to 18 years of age as ‘staff’ at the resort. The sexual services of the boys were included in the resort price. Mr Julian was responsible for funding the business while Mr Decker managed the day-to-day operations of the resort. The Castille Vista del Mar tourism operation is an illustrative example of a business organising child sex tourism. Such businesses are usually small-scale operators organised as sole proprietorships or unregistered partnerships. Also, it is an illustrative example of paedophiles arranging their accommodation and travel outside the mainstream tourism establishments.

9

Citation: Kaye v. The Queen, 2004 W.A.S.C.A. 227, 2004 WL 2361990, 54 (2004) (Austl.).
Jurisdiction: Australia
Year of ruling: 2004

Summary: The defendant, Mr Jonathan Kaye, placed an advertisement in a local newspaper in Australia according to which he could facilitate contact between a Thai ‘guide’ and ‘older men’. When contacted by Mr Adair, a prospective customer, Mr Kaye explained that he operated a travel service for persons wishing to travel to Thailand. He owned or had an interest in a condominium unit in Pattaya, Thailand and could arrange sexual relationships with girls or boys of any age in Thailand. Mr Kaye arranged the trip for Mr Adair and offered advice on everything ranging from accommodation to sexual encounters with young boys. The proposed trip never occurred because the Australian police arrested Mr Kaye about a week before the departure date. He was charged and later sentenced to six years in prison for ‘offering to assist a person to engage in committing an act of indecency on a person under the age of 16 years outside Australia’. Mr Kaye was charged under the Australian Crimes Act of 1914. This case is another example that businesses organising child sex tourism tend to be small-scale operators, often operating outside or on the fringes of the mainstream tourism sector.

10

Citation: Camp v. Loughran, 285 A.D.2d 483, 727 N.Y.S.2d 471, (2001).
Jurisdiction: U.S.
Year of ruling: 2001

Summary: Plaintiff went on a ski trip and while staying at a motel, a fellow participant sexually assaulted her. She sued the motel and the travel agent. The court held that neither the travel agent nor the motel could be held liable because they (1) did not breach a duty to protect her from foreseeable harm, and (2) it was not reasonably foreseeable for the defendants to know that a crime would occur. Though the outcome of the case is disappointing, the distinction made in the case could prove fruitful. If it is reasonably foreseeable that a travel operator could foresee its clients committing a crime, they may be held liable for the conduct of clients.

11

Citation: Pantages v. L.G. Airport Hotel Associates, Inc., 187 A.D. 2d 273, 589 N.Y.S.2d 426 (1st Dep't. 1992).
Jurisdiction: U.S.
Year of ruling: 1992

Summary: The plaintiff was brutally raped, sodomised and assaulted by three men. Some of the acts took place in a motel room rented for 'short-stays' at the defendant's hotel. The plaintiff was unable to walk and was carried into the motel by the three men in full view of the hotel clerk, who rented the room to the three men. Later, the plaintiff sued the motel for breach of its duty of reasonable care. The court stated that *'[s]uch evidence was sufficient to support a finding that [the] defendant breached its duty of reasonable care to persons lawfully on its premises.'* A hotel owner does have a duty to protect persons lawfully on its premises against criminal acts and *'certainly it has a duty to prevent its premises from being used for the commission of a crime committed upon one of its guests'*. Therefore, the hotel had a duty to confront the three men and refuse a room to prevent the crime from taking place.

6. RECOMMENDATIONS

Recommendation 1 – Develop and strengthen binding and soft law instruments

A company should be held responsible in cases of SECTT crimes committed by their employees when they have facilitated, had known or tolerated or even when they, without directly knowing the exact behaviour did not implement their ‘*watching obligations*’ (*culpa in-vigilando*). International, regional and domestic legislation lacks express obligations on companies in this regard. Today, it has emerged on the international agenda as a priority area within SECTT.

Some important progress has been made and it should serve as an entry point and reference to tackle the issue. For instance, the provisions regarding the direct liability of corporations when the crime is committed (i) for their benefit by a natural person or (ii) when lack of supervision or control has made the crime possible. Also, the inclusion of the extraterritorial legislation of (i) the offences committed abroad for the benefit of a legal person established in its territory or (ii) the offences committed by means of information and communication technology accessed from the territory where the legal person is established.

As previously mentioned, corporate obligations when dealing with SECTT cases are more expressly articulated in voluntary codes of conduct or soft law instruments. Even though these instruments are essential to the involvement of the companies in this regard, they also serve to enhance pressures upon local governments to acknowledge abuses and bolster domestic legislation. Their provisions need to be reinforced to make companies accountable in the correspondent cases. This pressure could extend beyond national borders, strengthening mechanisms for enforcement of protections on an international scale. Nevertheless, monitoring mechanisms of this type of non-binding instruments need to be put in place and ensure they are effective through regular use and evaluation by an external and specialised body.

Companies that are not signatory to a code of conduct should be obliged to include, in their internal procedures certain obligations. These obligations should include, to report to police any suspicious child sexual abuse committed by an employee or client of the company.

Training and awareness for employees in the company about detection of cases and prevention obligations, as well as performance protocols and consequences of breaching them need to be regularly provided.

Recommendation 2 - Address the new trends on private and small tourist infrastructure used by travelling child sex offenders

While improving and strengthening obligations for established hotel companies, legislation and voluntary codes should also focus on private accommodation websites that offer greater privacy for travelling child sex offenders, where the owner/operator may not be aware of the risks, or may permit the situation. Furthermore, law enforcement should also focus on the different types of travelling child sex offenders.

Recommendation 3 - Criminalise SECTT committed by the tourist industry

At a minimum, the tourist industry (including international and local suppliers) should be directly liable for the following crimes: (i) procuring, by any means, the engagement of an exploitative sexual conduct with a child, (ii) benefiting, by any means, from an exploitative sexual conduct with a child, (iii) advertising or promoting SECTT, (iv) organising or making travel arrangements for a person for the purpose of engaging in sexual activity with a child at a destination and (v) transporting of a person for the above purpose. The aforementioned conducts should be strongly penalised, including individuals involved in the actions. Sanctions should be imposed to block the business in question. It is important to recognise liability for facilitation of SECTT, instead of only focusing on the organisation of SECTT.⁵⁴

Recommendation 4 – Legislation should ensure access to justice in cases of corporate liability

This would require the following issues to be addressed:

- Provisions regulating collective complaints (class actions and public interest litigation) to increase accessibility to the courts, a large number of children similarly affected by business actions at the domestic level.
- Ensure access to justice where children can sue companies in a civil suit for compensation through the provision of high-quality legal aid. States shall protect this situation by ensuring fair and equal judicial procedures in all stages for both parties.
- Legislation should pay strong attention and regulate the liability of the parent company and subsidiaries when the link between them is clear in terms of control or profiting. Complex corporate structures as a way to elude legal responsibility should be eradicated. This implies the inapplicability of separate legal personalities when dealing with corporate liability in SECTT cases.
- Disable the application of the principle of *forum non- conveniens* in procedural rules when dealing with corporate liability in SECTT cases.

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⁵⁴ See more in detail Elif Härkönen (2015): Corporate liability and international child sex tourism with special reference to the regulation in the Nordic countries, *Scandinavian Journal of Hospitality and Tourism*, DOI: 10.1080/15022250.2015.1108861

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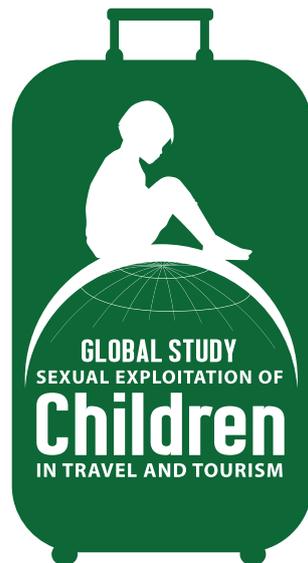
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ACRONYMS

CRC	Convention on the Rights of the Child
ECTAA	Group of National Travel Agents and Tour Operators Association within the European Union
MNC	Multinational Companies
OPSC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
OECD	Organisation for Economic Co-operation and Development
SECTT	Sexual Exploitation of Children in Travel and Tourism
TNC	Transnational Companies
UNODC	United Nations Office on Drugs and Crime
UNWTO	United Nations World Tourist Organization
WCTE	World Committee on Tourism Ethics



**The Global Study was made possible thanks to financial support from the
Ministry of Foreign Affairs of the Netherlands through Defence for Children
ECPAT Netherlands**

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