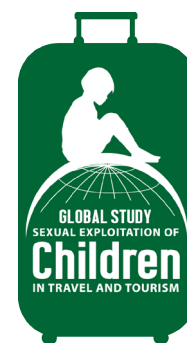


EXPERT PAPER

THE RIGHT TO PRIVACY OF TRAVELLING CHILD SEX OFFENDERS VERSUS THE RIGHT OF CHILDREN TO PROTECTION



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1 STRIKING A BALANCE

Striking a Balance between Child Protection and the Right to Privacy of Travelling Child Sex Offenders.

Children especially, those who have been victims of sexual abuse or exploitation by travelling sex offenders deserve protection at international, regional and domestic levels. At the same time, sex offenders and travelling child sex offenders, in particular, are entitled to privacy rights during and after criminal proceedings. Nevertheless, to ward against and protect children from the risk of sexual exploitation, it is reasonable to limit the right to privacy of convicted travelling child sex offenders by official mechanisms. Information on the offenders available in the public domain should be avoided. Limitations must be legal, compliant with the international standards, proportional and necessary.

High recidivism rates are often cited in support of repressive child sex offender legislation. However, the statistical evidence cited as justification for some preventive and protective measures limiting the right to privacy varies widely in the studies carried out to date.¹

Moreover, preventing the crime of sexual exploitation of children in travel and tourism (SECTT) requires setting legal standards to define boundaries of the right to privacy. These standards should allow the implementation of effective systems of information exchange on travelling child sex offenders and allow law enforcement to work within the boundaries of the right to privacy.²

The overall objective of this study is to analyse from a legal perspective, the balance between the right to privacy and information exchange systems and effective protection mechanisms for children from travelling child sex offenders. Based on a child's right to protection, this is accomplished by addressing existing regulations, law enforcement exercises and reviewing existing models to provide useful recommendations to comprehensively tackle current and future challenges.

1 The US Department of Justice found a 5.3 percent rate of sex offense recidivism among over 9,000 offenders within 3 years of their release from prison. Jill S. Levenson, "Public Perceptions About Sex Offenders and Community Protection Policies", 7 ANALYSIS OF SOC. ISSUES AND PUB. POL. 1, 17, 2007, p. 6.

The most comprehensive study of sex offender recidivism to date consists of a meta-analysis of numerous studies yielding recidivism rates for a period of up to 15 years post-release for people convicted of such serious offenses as rape and child molesting. The analysis, which included over 29,000 sex offenders, found that within four to six years of release, 14 percent of all sex offenders will be arrested or convicted for a new sex crime. Over a 15-year period, recidivism rates for all sex offenders averaged 24 percent. The study also found that recidivism rates varied markedly depending on the kind of sex crime committed. For example, recidivism within four to six years of release from prison was 13 percent for child molesters, and 24 percent for rapists. Human Rights Watch, "No Easy Answers: Sex Offender Laws In The United States", Vol. 19, No. 4(G), September 2007.

2 Privacy related with SECTT crime in this report is understood in a broad sense, that is including private information (such as travels) and private identity documents (such as identity cards or passports). Although this could have also connections with other fundamental rights (e.g. freedom of movement), the analysis is focused on the right to privacy.

KEY LEGAL ELEMENT TO ADDRESS: THE RIGHT TO PRIVACY WITH LIMITATIONS

Privacy is recognised as a fundamental human right at both the international and regional levels.

The right to privacy is enshrined in the Universal Declaration of Human Rights (Article 12³, the International Covenant on Civil and Political Rights (ICCPR, Article 17)⁴ and the Convention on the Rights of the Child (CRC, Article 16)⁵.

At the regional level, the right to privacy is recognised by the European Convention on Human Rights (ECHR, Article 8),⁶ the Charter of Fundamental Rights of the European Union (Article 7),⁷ the American Declaration of the Rights and Duties of Man (Article V),⁸ the American Convention on Human Rights (Article 11),⁹ the Asean Human Rights Declaration (Principle 21)¹⁰ and the Cairo Declaration on Human Rights in Islam (Article 18).¹¹ The only regional instrument which does not expressly recognise the right to privacy is the African Charter on Human and Peoples' Rights.¹²

Despite the widespread recognition of the right to privacy, the specific content of this right has not been fully developed by international and regional human rights frameworks. The lack of explicit articulation of the content of this right has contributed to difficulties in its application, enforcement,¹³ and the establishment of its boundaries.

The conceptual basis of the right to privacy is not univocal. What seems to be clear is that the right involves two competing '*core ideas*': privacy as freedom within society and privacy as dignity. In the latter, the concept is about protecting community norms which inextricably concern, among others, intimate relationships and public reputation.¹⁴ It also entails protecting children from potential recidivism by travelling child sex offenders who have already served their punishment imposed by a court.

3 United Nations, Universal Declaration of Human Rights, 1948, Article 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

4 United Nations, International Covenant on Civil and Political Rights, 1976, Article 17: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks"

5 United Nations, Convention on the Rights of the Child, 1989, Article 16: "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation. The child has the right to the protection of the law against such interference or attacks".

6 European Convention on Human Rights, 1950, Article 8: "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

7 Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, 2000/C 364/01, 18.12.2000, article 7. Accessed 18 June 2015, http://www.europarl.europa.eu/charter/pdf/text_en.pdf

8 American Declaration of the Rights and Duties of Man, 1948, Article V: "Every person has the right to the protection of the law against abusive attacks upon his honour, his reputation, and his private and family life".

9 American Convention on Human Rights, 1969, Article 11: "Everyone has the right to have his honour respected and his dignity recognised. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks".

10 Asean Human Rights Declaration, 2012, Principle 21: "Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person's honour and reputation. Every person has the right to the protection of the law against such interference or attacks".

11 Cairo Declaration on Human Rights in Islam, 1990, Article 18: "Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property. Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference".

12 African Charter on Human and Peoples' Rights. Accessed 29 April 2015, <http://www.achpr.org/instruments/achpr/>

13 United Nation, Human Rights Council, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue", A/HRC/23/40, 17 April 2013.

14 Oliver Diggelmann and Maria Nicole Cleis, "How the Right to Privacy Became a Human Right", Human Rights Law Review, July 2014, Article 14, pp. 441-458.

As the right to privacy is a qualified right,¹⁵ its interpretation raises challenges with respect to what constitutes the private sphere and the notions of 'public interest.' This is directly connected with the child sex offender register regulations (including travel bans or notifications and passport confiscations or notes), which could violate the right to privacy.

As explained below, international standards allow certain restrictions or limitations on the right to privacy. However, 'arbitrary or unlawful' interferences of the right to privacy constitute violations of this right which are not permitted.¹⁶

Before addressing the specific context of the child sex offender registers, restrictions regarding SECTT and the type information disclosure they involve, it could be useful to analyse the common understanding and the boundaries of the right to privacy established at the international and regional level:

At international level:

- The specific limitations acceptable for the right to privacy under international law have been stated by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression:

*'the right to privacy should be subject to the same permissible limitations test as the right to freedom of movement (...). The test as expressed in the comment includes, inter alia, the following elements: (a) Any restrictions must be provided by the law (...); (b) The essence of a human right is not subject to restrictions (...); (c) Restrictions must be necessary in a democratic society (...); (d) Any discretion exercised when implementing the restrictions must not be unfettered (...); (e) For a restriction to be permissible, it is not enough that it serves one of the enumerated legitimate aims. It must be necessary for reaching the legitimate aim (...); (f) Restrictive measures must conform to the principle of proportionality, they must be appropriate to achieve their protective function, they must be the least intrusive instrument amongst those which might achieve the desired result, and they must be proportionate to the interest to be protected (paras...)'.*¹⁷

These standards - legality, necessity and proportionality - apply to the restriction of any human right, and, therefore, constitute a well-established principle applicable to the right to privacy.

- According to the Human Rights Committee's General Comment N° 31:

*'States Parties must refrain from violation of the rights recognised by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights'.*¹⁸

¹⁵ A qualified right, as opposed to an absolute right, can be limited in some circumstances when fulfilling the conditions determined.

¹⁶ International Covenant on Civil and Political Rights, Article 17

¹⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, Council T, A/HRC/23/40, 17 April 2013, paragraph 29.

¹⁸ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc., CCPR/C/21/Rev.1/Add.13 (2004), paragraph 6.
Accessed 18 June 2015, <https://www1.umn.edu/humanrts/gencomm/hrcom31.html>

- The UN Human Rights Committee, which assesses compliance with the International Covenant on Civil and Political Rights (ICCPR), has stated that ‘restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected’. If a state action restricts a right, it can only do so to the extent consistent with ‘the provisions, aims, and objectives of the Covenant’ and only to the extent ‘reasonable in the particular circumstances’. Reasonability is achieved if the restriction is ‘both proportional to the end sought and (...) necessary in the circumstances’.¹⁹
- Similarly, the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, confirm the general norm that interference with any human right:

‘(1) must not jeopardize the essence of the right concerned,²⁰ (2) must be necessary, including for the pursues a legitimate aim, and is proportionate to that aim;²¹(3) must not be exercised unless provided for by national law,²² (4) must be subject to the possibility of challenge to and remedy against its illegal or abusive application.’²³

Therefore, the test for the permissible limitations of the right to privacy requires, inter alia, the following elements:²⁴

- Any restrictions must be provided for by the law.
- The essence of a human right is not subject to restrictions.
- Restrictions are necessary for a democratic society.
- Any discretion exercised when implementing the restrictions must not be unfettered.
- For a restriction to be permissible, it is not enough that it serves one of the enumerated legitimate aims. It must be necessary for a legitimate aim.
- Restrictive measures must conform to the principle of proportionality.

At regional level:

The European framework is the most progressive on this issue. Article 8 of the European Convention on Human Rights (ECHR) indicates the exceptions that can apply to the right to respect private and family life.

The right to private life includes respect for privacy when one has a reasonable expectation of privacy and the right to control the dissemination of information about one’s private life. This includes photographs taken covertly, travel notifications and personal documentation such as identification documents (e.g. passport or national identity cards).

19 Although the Committee was addressing freedom of movement, the criteria it enunciated applies to all protected rights. United Nations, General Comment 16/32, ICCPR/C/SR, 749, 23 March 1988, paragraph 4.
See also, Nicholas Toonen v. Australia, Human Rights Committee, 50th Sess., Case No. 488/1992, United Nations, Doc. CCPR/C/50/D/488/1992, para. 8.3.

20 Siracusa Principle 2.
21 Siracusa Principle 10.

22 Siracusa Principle 15.
23 Siracusa Principle 8.

24 United Nations, Human Rights Council, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue”, A/HRC/23/40, 17 April 2013, paragraph 29.

The ECHR has previously held that what constitutes *'private life'* cannot be the subject of exhaustive definition. In the absence of an all-encompassing definition of what privacy precisely is, the court has provided some guidance. It has held that private life encompasses both the *'physical and psychological integrity'* of an individual,²⁵ and also that it includes *'social identity'*.²⁶ Given this guidance, it follows that information which is linked to an individual's personal and private affairs falls within the definition of *'private life'*.

As in any situation of conflicting human rights, a fair balance has to be struck between the competing interests of the individual and of the community as a whole. In particular, any limitation must be in accordance with the law, necessary and proportionate and the least intrusive. It should be based on one or more of the following legitimate aims: the interests of public safety, the prevention of disorder or crime or the protection of the rights and freedoms of others.²⁷

Crimes, especially those violent and of sexual nature, perpetrated against children (the most vulnerable and defenceless persons) not only invades their freedom at the time of the crime but also has a dramatic and long-lasting effect on the victims. Punishment, therefore, should restore the freedom of the victims, prevent future victims while taking into consideration the rights of the child sex offender.²⁸ Such balance between a child sex offender's rights and protection of the victims is particularly hard. This is evident in the case of juvenile sex offenders, benefiting from a specific right to privacy (as explained later in Section 4-a).

DUTY TO PREVENT CRIME: THE EXCHANGE OF INFORMATION

States have an obligation to protect its people, including from sexual exploitation, and take appropriate steps to safeguard the lives of those within its jurisdiction and beyond. One element of that duty is to take measures to deter and prevent crime. The ECHR has explicitly noted that the gravity of the harm that may be caused to the victims of sexual violence places states under a duty to take measures to protect them from such harm.²⁹ However - as described in the previous chapter - this must be done within a human rights framework, which places restrictions on those measures that infringe on rights guaranteed to all.³⁰

Cooperation in information-sharing to prevent SECTT crime is essential given its transnational nature. Nevertheless, this also (and previously) requires proper and centralised systems to be effectively put in place at the domestic level and to facilitate transmission of data and targeted responses internationally. The duty of a state to cooperate in the exchange of information is recognised in international and regional legal frameworks targeting sexual exploitation against children and specifically SECTT.

25 European Court of Human Rights, *Pretty v. the United Kingdom*, No. 2346/2002, 2002.

26 European Court of Human Rights, *Mikulić v. Croatia*, No. 53176/99, 1999.

27 Liberty Human Rights Organization, "Article 8 Right to a private and family life". Accessed 2 May 2015 <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-8-right-private-and-family-life>

28 Anne-Marie McAlinde, "The Shaming of Sexual Offenders: Risk, Retribution and Reintegration", 2007, pp. 113-114.

29 European Court of Human Rights, *Stubbings and Others v. the United Kingdom*, 22 October 1996, Reports 1996-IV, paragraph 62-64.

30 Human Rights Watch, "X. Human Rights and Sex Offender Laws", 2007. Accessed 5 May 2015 http://www.hrw.org/reports/2007/us0907/10.htm#_ftn428

1. The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC, 2000) obliges States to ‘take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. State Parties shall also promote international cooperation and coordination between their authorities, national and international non-governmental organisations and international organisations’.³¹
2. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000) mandates law enforcement, immigration or other relevant authorities of State Parties to ‘cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine: (a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons; and, (b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons’. Moreover, Protocol indicates that states that receive information shall comply with any request by the state party that transmitted the information that places restrictions on its use.³²
3. *The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* (2007) states that the Committee of the Parties (composed of representatives of the Parties to the Convention) shall facilitate ‘the collection, analysis and exchange of information, experience and good practice between States to improve their capacity to prevent and combat sexual exploitation and sexual abuse of children’.³³
4. The European Convention on Mutual Assistance in Criminal Matters (1959) focuses expressly on the obligation between the Member States to exchange information from judicial records: ‘Each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year. Where the person concerned is considered a national of two or more other Contracting Parties, the information shall be given to each of these Parties, unless the person is a national of the Party in the territory of which he was convicted’.³⁴
5. The Declaration of the Commitments for Children in Association of Southeast Asian Nations (ASEAN) (2001) recognises and encourages respect for children’s rights ‘through mutual sharing of information on the rights of the child by ASEAN members, taking into account the different religious, cultural and social values of different countries’.³⁵

The statutory duty to cooperate with states in the sharing of information needs to be completely clear and binding at the international and national level, removing intermediate formulas and encouraging states to include measures to strength cooperation. If the obligation is clear, and non-compliance carries legal consequences, it could ease the inclusion of the legal obligation referred at the domestic level. Besides, the media can play a role in sharing information whether to educate the public about sexual abuse or to report on notorious sex offender records (as explained later in Section 4-b).

31 OPSC, Article 10.

32 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. Article 10 (1) (3).

33 The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Article 41.2.

34 European Convention on Mutual Assistance in Criminal Matters, Article 22.

35 Declaration of the Commitments for Children in ASEAN, principle 4.

2 RESPONSES, MODELS AND GAPS

Responses, Models and Gaps linked with the Right to Privacy of Travelling Child Sex Offenders

OVERVIEW

Those who commit SECTT crimes can do so again. Therefore, states have a duty to prevent the crime and protect children. Accordingly, it is every child's right to be protected. Based on the aforementioned, some states have set up national laws which regulate the creation of sex offender registers. The registers log the personal details and location of convicted child sex offenders. It imposes obligations/restrictions (such as travel bans, travel notifications and/or passport confiscation or notes) in order to monitor and supervise offenders in a way which minimises the risk to children and the community. The specific content of the information or personal data requested by these laws, the manner in which the information is distributed, and the criteria used to justify a sex offender's presence on such a list have a clear impact on their right to privacy. Therefore, to be legitimate, these laws must surpass the test of limitation.

Furthermore, especially in SECTT crimes, sex offenders seek to avoid national law enforcement and controls when travelling abroad, trusting that their criminal record will not follow them. To foil such attempts, states should share such criminal records so that child sex offender's movements can be tracked and monitored.

Monitoring the criminal records of convicted SECTT offenders requires respecting international standards on privacy while addressing the effectiveness of national systems of information exchange. This demands overcoming different terminologies used domestically to classify sexual crimes against children and restrictions of information exchange based on national sovereignty. Hence, establishing standardised obligations and formats are essential.

There are currently different models of child sex offender registers - with their associated restrictions - and systems of information exchange. An analysis of key western legislative frameworks and the applicable law enforcement parameters will enable to draw conclusions as to what are the challenges of information-sharing regarding SECTT offenders and to identify some recommendations to improve existing models.

Below is a table summarising the adopted measures to fight SECTT in different geographical areas (United States, Europe, Canada and Australia) and focuses on some benefits and drawbacks of such measures:

Country	Adopted measures	Benefits	Drawbacks
UNITED STATES	<p>Child sex offender register: available to the public on an internet site; a large amount of personal information; annual registration for 10 years after being released from prison, sometimes lifetime registration in case of a sexually violent predator or recidivists.</p> <p>Community notification scheme allows communities to be informed about the presence of convicted child sex offenders living in close proximity. Imposition of residency restrictions.</p> <p>Notification of travel domestic or international.</p> <p>Confiscation of passport (only for international travels – not within the U.S. – and during parole or supervised services).</p>	Maintains public safety and fulfils the goal of crime prevention.	<p>Child sex offender register can be challenged with respect to the right to privacy.</p> <p>Existing system to be improved (risk- management system, lawful collection of data).</p> <p>Lack of efficiency for domestic travelling sex offenders and risk of discrepancy in laws between states.</p>
EUROPE	<p>Child sex offender register: in principle, only accessible to professionals dealing with children (from law enforcement to health or another type of social service), proportionate amount of personal information.</p> <p>Preventing child sex offenders from accessing a profession which implies regular contact with children: possible request from employers for criminal records or disqualifications or certificate of good conduct.</p> <p>Preventive measures: implementation of management risks programmes for convicted child sex offenders, regular awareness campaigns for the public on prevention regarding the risk of SECTT.</p> <p>Lawful monitoring and judicial supervision: of a convicted child sex offender (as part of the sanction for the committed crime).</p> <p>Efficiency of data protection: collection of personal data for policing purposes, limiting that data to what is necessary for the prevention of real danger or the deletion of a specific criminal offence, transmission of personal data restricted to the relevant professionals and used for criminal purposes.</p> <p>Information exchange systems of criminal records between the Member States: the creation of a standardised European system based notably on a central authority in every Member State.</p> <p>Sanctions for breach of confidentiality: avoid unnecessary public disclosure of criminal records.</p>	Implementation of national measures compliant with the right to privacy in accordance with Article 8 of the ECHR.	<p>Lack of a whole and strong European cooperation (Sex offenders across Europe do not register, mainly due to differences between EU criminal law systems).</p> <p>Information exchange between Member States to be improved.</p> <p>Quality, quantity and regularity of the collected information to be increased.</p>

AUSTRALIA	<p>Operational police with tools to consistently register and manage child offenders across Australia: the sex offender register allows authorised police officers to register, manage and share information about child offenders; information hold on offenders who are charged but not convicted, or after an offender’s reporting obligation has been completed.</p> <p>Reporting measures: Obligation for a registered offender to report intended travel outside of Australia; sustained calls for passport revocation measures in Australia.</p> <p>Cooperation within Australia and in a number of key overseas destination countries, including Cambodia, Indonesia, Philippines, Thailand and Vietnam.</p>	Existence of measures allowing the registration and the monitoring of child sex offenders within Australia and in key overseas destination.	Lack of efficiency of passport revocation measures; difficult to practically implement. Australian cooperation with third countries limited to key overseas destination countries.
CANADA	<p>Lack of information-sharing: front-line passport control officers from the Canada Border Services Agency do not have access to the existing sex offender databases (containing notable data on previous convictions and outstanding warrants).</p> <p>No existing rule on passport restriction to prevent SECTT: new bill proposal on the possibility to confiscate passports of sex offenders to be submitted to the Parliament.</p>		As of today, serious gaps remain in the system of monitoring convicted sex offenders.

THE UNITED STATES

The U.S. Constitution does not contain the right to privacy as a fundamental right. That means a test of limitations would not apply. Nevertheless, child sex offender registers have been challenged through the Fifth Amendment of the U.S. Constitution (as explained later in this section).³⁶ Moreover, some American States do have the right to privacy regulated along with the American regional legal instruments pointed out above. Nevertheless, U.S. ratified the ICCPR and is thus bound by the right to privacy under this covenant.

It is important to note that the American regulation of child sex offender registers was only adopted and amended after heinous sexual crimes against children were perpetrated. These incidents captured massive media coverage and brought about fear of children being sexually exploited or attacked.³⁷

Legally, at the federal level, the following milestones can be identified in the U.S.:

³⁶ The Fifth Amendment of the U.S. Constitution provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

³⁷ Caroline Louise Lewis, "The Jacob Wetterling Crimes...", p. 45.

1. The Violent Crime Control and Law Enforcement Act 1994 (*'Jacob Wetterling Act'*)³⁸ encourage states to establish a child sex offender register in accordance with the Act's guidelines: (i) registration of convicted child sex offenders; (ii) within a local law enforcement institution; (iii) annual registration for 10 years after being released from prison; and (iv) local child sex offenders laws could give the information on the registry to communities.

In case a court sentenced an individual as a *'sexually violent predator'*, lifetime registration applies, unless an expert determines that the person no longer suffers a disorder making him likely to reoffend. In those cases, data and fingerprints need to be transmitted to the Federal Bureau of Investigation (FBI).

Behind the law, the objective was to deter convicted child sex offenders from reoffending based on the *'perceived high rate of recidivism among sex offenders and tragic stories like Jacob Wetterling's'*.

2. The Amendment of Act 1994 in 1996 (*'Megan's Law'*)³⁹ introduced amendments requiring the community to be informed about the presence of convicted child sex offenders who are living nearby. Pam Lychner *'Sexual Offender Tracking and Identification Act 1996,'* required the Attorney General to establish the National Sex Offender Registry and a lifetime registration for recidivists.⁴⁰
3. The *'Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003'* (PROTECT Act) mandated that all states must create and maintain an internet website containing sex offender information when the crime has been perpetrated against a child.⁴¹

Moreover, in 2008, the U.S. Congress further imposed restrictions on those who violate the PROTECT Act, by including a provision (*'Restriction of passports for sex tourism'*). It stated that only those who have been found guilty of using a passport to travel abroad with the intent to engage in illicit sexual conduct could have their passport confiscated for the duration of their sentence and supervised release.

38 In 1989, 11-year-old Jacob Wetterling was abducted at gunpoint when he left his home to rent a video from a neighborhood store and never was found. His mother, Patty Wetterling, lobbied Congress to pass a federal sex offender law including registration of sex offenders and public notification of the presence of the convicted sex offender in communities. Upon running a criminal background check, law enforcement officials discovered that the man was a previously convicted sex offender. Further, the St. Joseph police learned that in October, 1989 the man had lived closer to Jacob's abduction site than did the Wetterling family; yet, local police had not been aware of his presence within the community.

Caroline Louise Lewis, "The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process", 31 HARV. C.R.-C.L.L.REV.89, 89 (1996).

See also, Douglas Griswold, "Sex Offenders in the Community: Their Public Persona and the Media's." Corresponding Privilege to Report, 15 Wm. & Mary Bill Rts. J. 653 (2006), p. 654.

39 In 1994, 7-year old Megan Kanka was killed by a neighbor that had been convicted of two prior sex offenses and spent six years in prison for child molestation. According to the Center for Sex Offender Management, Megan's parents believed that they could have avoided the death of their girl if they had known that a sex offender was living in the neighborhood.

Karne Newburn, "The prospects of an international sex offender registry: Why an international system modeled after United States Sex Offender Laws is not an effective solution to stop child sexual abuse?", February 2011, p. 552.

40 Lychner was assaulted by a twice-convicted criminal. Then she formed "Justice for All", a victim's right advocacy group and lobbied for tougher sentences for violent criminals.

Karne Newburn, "The prospects of an international sex offender registry...", p. 553.

41 United States, PROTECT Act, Section 604: "National Internet Site. The Crimes against Children Section of the Criminal Division of the Department of Justice shall create a national internet site that links all State internet sites established pursuant to this section."

Although the inclusion of this provision was deemed to be a big step by Congress to combat SECTT, it was also criticised for its limited scope because it only applies to those travelling internationally. Therefore, if a person commits a sex crime against a minor while travelling within the U.S., no passport revocation or denial can be ordered. Also, the revocation or denial is severely restricted in terms of time frame, because the convicted child sex offender can apply for a passport immediately upon the end of parole or other supervised release relating to his offense, rendering the passport restriction redundant.⁴²

4. The *'Adam Walsh Child Protection and Safety Act 2006'* (*'Adam Walsh Act'*)⁴³ was adopted with the purpose to unify the states' child sex offender register (where they differed according to different states). This was also done to expand the availability to public and law enforcement officials a wide range of sex offenses and offenders⁴⁴ *'in response to the vicious attacks by violent predators against the victims listed below'*.⁴⁵

Exceptions were made for consensual sex offenses in cases where the victim was at least 13 years old, and the offender, no more than four years older. Juvenile sex offenders do not have to register if they are under 13 years old.⁴⁶ Those convicted whose punishment has been overturned, sealed, pardoned or expunged are required to be registered as well. Required data includes (non-exhaustive list as established in the Act): name, social security number, name and address of the employers, and name and address of the places where they attend/attended school. It also required the license plate number, description of vehicles they own or operate, physical description, current photograph, fingerprints, palm prints, DNA sample, the text of the law under he/she was convicted, criminal records (dates of any arrest, convictions, outstanding warrants, parole, probation, supervisory release and registration status) and a photocopy of a valid driver's license.⁴⁷

Registered offenders must notify authorities when they intend to travel domestically or overseas. Failure to comply with that obligation is punished with a fine or up to 10 years in prison.⁴⁸ The Supplemental Guidelines for Sex Offender Registration and Notification require child sex offenders to report their international travel 21 days before leaving the United States.⁴⁹

The Act sets up a three-tier system for the length a person needs to be registered based on the original conviction of the offender, varying from 15 years for Tier I, 25 years for Tier II to a lifetime for Tier III.⁵⁰ The majority of sex offenses against a minor fall into Tier II and Tier III.⁵¹ However, these sentences could be reduced in case a clean record is maintained for Tier I and Tier III.⁵²

42 John A. Hall, "Sex Offenders and Child Sex Tourism: The case for Passport Revocation", *Virginia Journal of Social Policy & the Law*, 2011, p. 172.

43 Adam Walsh was an American child who was abducted from a department store in Florida, in 1981. Later he was found murdered and decapitated. His father, John Walsh, became an advocate for victims of violent crimes and the host of the television program *America's Most Wanted*.

Charles Doyle, "Adam Child Protection and Safety Act: A legal Analysis", Cong. Research Service, RL 33967,4,2007.

44 United States, Adam Walsh Child Protection and Safety Act 2006, Section 111(5) (7).

45 United States, Adam Walsh Act, Section 102.

46 United States, Adam Walsh Act, Section 111.

47 United States, Adam Walsh Act, Section 114.

48 United States, Adam Walsh Act, Section 2250(2) (3).

49 United States, Department of Justice, Office of the Attorney General, Supplemental Guidelines for Sex Offender Registration and Notification. Accessed 7 May 2015 http://ojp.gov/smart/pdfs/FR_SORNA_051410.pdf

50 United States, Adam Walsh Act, Sections 111 and 115.

51 Autumn Long, Comment, "Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reform", 18 *TRANSNAT'L L. & CONTEMP. PROBS.* 145, 149 (2009).

52 United States, Adam Walsh Act, Section 115(b).

Under the Walsh Act, Tier III offences are those punishable by more than one year in prison and require at least one of the following premises: a) aggravated sexual abuse or sexual abuse; b) abusive sexual conduct with a minor under the age of 13; c) kidnapping of a minor; or d) that the offense be committed after the offender becomes a Tier II offender. Tier II offenses are also punishable by more than one year in prison and include one of the following premises: a) sex trafficking; b) coercion and enticement; c) transportation with intent to commit sexual activity; or d) committing an offence after becoming a Tier I offender.⁵³

Also, the Act authorised a national database accessible to the public via the internet,⁵⁴ erasing the name of the victim and arrests that have not resulted in a conviction and the social security number of the offender. Under the legal mandate, every state was forced to implement the Act to avoid revoking of government funds.

Finally, the Act provides for treatment and management of child sex offenders within the Bureau of Prisons⁵⁵ and mandates the conduct of a study on risk-based sex offender classification system focusing on reducing threats to public safety and assisting in the identification of the most dangerous sex offenders.⁵⁶ Up to now, the results of the study are not known.

Under the Adam Walsh Act, every state has developed a sex offender register and community notification scheme. Discrepancies between states highlight the enormous amount of discretion provided by the Adam Walsh Act:

- Vermont's '*Community Notification of Sexual Offenders Statute*' does not automatically publicise convicted child sex offender information. In case the court determines a sex offender to be a 'sexually violent predator' by convincing and clear evidence, the offender will be placed on the sex offender registry for life and be subject to community notification.

The statute requires child sex offenders to provide the information suggested by the federal guidelines in the Adam Walsh Act: name, general physical description, sentence, address, place of employment, nature of the offense and compliance with treatment recommendations. The police still have access to all sex offender information.

- Alabama '*Sex Offender Registration and Community Notification*' Act requires all offenders who have been convicted of a sex offense to join the registry and be subject to public notification of their status. Sex offenders are required to verify their registration in person every three months.
- California Megan Law is enforced by the '*Sex Offender Tracking Program*' at the California Department of Justice (CDOJ) which maintains the registered child sex offender database. CDOJ also updates the registered child sex offender information on their website on a daily basis. Since 2004, the public has been able to view information on child sex offenders required to register with local law enforcement. Previously, the information was available only by personally visiting police stations and sheriff offices or by calling a 900 toll-free number.⁵⁷ Some child sex offenders can apply for exclusion from the website (e.g. the crimes lascivious act with a child under 14 years or continuous sexual abuse of a child).⁵⁸

53 Kate Hynes, "The Cost of Fear: An Analysis of Sex Offender Registration, Community Notification, and Civil Commitments Laws in the United States and the United Kingdom", 2 Penn. St. J.L. & Int'l. Aff. 351, Vol.2, Iss.2, 2013, pp. 358-359.

54 United States, Adam Walsh Act, Section 118.

55 United States, Adam Walsh Act, Section 622.

56 United States, Adam Walsh Act, Section 637.

57 State of California, Office of the Attorney General, "About Megan's Law" Accessed 4 May 2015 <http://www.meganslaw.ca.gov/homepage.aspx?lang=ENGLISH>

58 State of California, Office of the Attorney General, "Megan's Law - Sex Offender Registration and Exclusion Information". Accessed 2 May 2015 <http://meganslaw.ca.gov/sexreg.htm>

- In February 2015, New York's Highest Court ruled that the state law which prohibits where child sex offenders can live in a community, setting boundaries around parks, schools and other areas where children are likely to gather was lawful. In fact, the state law already prohibits offenders considered Level 3, or at the highest risk of reoffending, from any school grounds or a publicly accessible area or parked car within 1,000 feet while on parole or supervised release.⁵⁹
- Massachusetts regulation forces those who request child sex offender information to provide some proof of identification and to provide justification for their requests for the sex offender register. To obtain photographs and addresses, proof of identification and a valid reason must be given on a form that must be notarized before being submitted for processing. This access scheme is thought to increase the degree of privacy for the offender because it is assumed that fewer people will make the effort to request information than those who would see it if it were broadcast publicly. As a result, the dissemination of personal information will be less widespread, and so the risk of exposure to registry-related privacy invasions would likely decrease. Also, by requiring requesters to provide personal information about themselves and their motivations, lawmakers hope to protect registrants from unwarranted invasions of privacy.⁶⁰
- The Connecticut website where child sex offender data is published states: 'The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. The Department of Public Safety has not considered or assessed the specific risk of re-offense with regard to any individual prior to his or her inclusion within this registry and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by their conviction record and state law. The main purpose of providing this data on the internet is to make the information more easily available and accessible, not to warn against any specific individual'.⁶¹

Therefore, despite the differences between the states, the key legal elements of the American child sex offender registers and restrictions focusing on the right to privacy could be listed as follows:

- Most important in terms of privacy is the fact that all sexual crimes committed against a child (including SECTT) required all personal information of the registered child sex offender available to the public on a website. Therefore, the use of the information is extremely widespread.
- Inclusion in the register is based on the type of crime committed and not on the level of the reoffending risk.
- The data registered involves a large amount of personal information.
- Limited implementation of risk management systems to assess the risk of recidivism of a convicted child sex offender, along with his or her associated obligations and restrictions.
- Imposition of residency restrictions, personal verification in the register periodically (every 3-4 months on average). Notification of travel is also one of the conditions established for the registered sex offenders. Confiscation of passport is also possible, although the legal scope of this measure appears to be too limited in its effectiveness (only for international travels and during parole or supervised services).

59 Michael Virtanen, "Court: State law trumps local limits on sex offender homes", *The Legislative Gazette*, 17 February 2015. Accessed 5 May 2015 <http://www.legislativegazette.com/Articles-Top-Stories-c-2015-02-17-90815.113122-Court-State-law-trumps-local-limits-on-sex-offender-homes.html>

60 Megan Burns, "Do Sexual Predators Have the Right to Privacy? Confidentiality Provisions for Registered Sex Offenders in California and Massachusetts", 1999.

61 Supreme Court of the United States, *Connecticut Department Of Public Safety v. Doe*, No. 01-1231, 5 March 2003. Accessed 3 May 2015 <https://www.law.cornell.edu/supct/html/01-1231.ZO.html>

Thus, restrictive regulations for child sex offenders vary in how and to whom they provide information s (such as travel bans or notifications or confiscation/notes of identity documents) and thus vary in the level of confidentiality they afford. The approach illustrates two major issues that sex offender legislation addresses: public safety versus the right to privacy of convicted sex offenders who have perpetrated crimes against children.

The rationale for such statutes has been clearly articulated in the courts: public safety is the primary goal. The intrusion suffered by the offender is outweighed by the community and, in particular, the need to protect children from those sex offenders most likely to reoffend. As one court observed: *'The remedy goes directly to the question of what a community can do to protect itself against the potential of reoffense by a group the Legislature could find had a relatively high risk of recidivism involving those crimes most feared, and those crimes to which the most vulnerable and defenceless were exposed, the children of society'*.⁶²

The child sex offender register has been challenged federally under the Ex Post Facto (retroactively increases the consequences of crime after its commission), *Double Jeopardy* (prohibition of being subject to adjudication of the same offence twice),⁶³ and *Due Process Clauses* (acts as a safeguard from arbitrary denial of rights without hearing) of the U.S. Constitution's Fifth Amendment. Similar challenges to child sex offender registries have been brought in some states regarding *Right to Privacy Clauses* that requires a strict scrutiny analysis of the law to be *'narrowly tailored'* to serve a compelling state interest.⁶⁴ Nevertheless, as a general rule, domestic courts have established that child sex offender privacy rights remain secondary to maintain public safety,⁶⁵ based on necessary prevention measures that are not considered to be punitive. A Kansas Appeal Court stated in 1999 that an individual does not have a protected privacy interest in his or her arrest and conviction record.⁶⁶

Human Rights Watch has continuously argued that *'US registration laws are overbroad in scope and overlong in duration'*.⁶⁷ Moreover, that community notification laws have resulted in public harassment and violence against registrants, and the residency restrictions exile registrants from entire areas, isolating them from support networks necessary for rehabilitation.⁶⁸ The National Society for the Prevention of Cruelty to Children (NSPCC) report highlighted that increasingly stringent sex offender laws in the U.S. have led many offenders *'going underground'* to avoid registration.⁶⁹ The negative results stemming from public notification of personal data indicate that the goal of public safety is not served by these laws.⁷⁰

Taking into consideration the legal framework, the courts statement and the effects reported by several institutions, the conclusion seems to be clear: the measures put in place by the American laws (specifically, the widespread use of the personal information of convicted child sex offenders) have given much more weight and importance to the protection of children and many would argue that the laws do not pass the test of permissible infringements on the right to privacy established by international standards.

62 United States, Cannon v. Igborzurkie, 779 A.2d 887, 890, 2001.

63 Centre for Sex Offender Management, "An Overview of Sex Offender Community Notification Practices: Policy Implications and Promising Approaches", November 1997.

64 Johnna Preble, "The Shame Game: Montana 's Right To Privacy For Level 1 Sex Offenders", Montana Law Review, Volume 75 Issue 2 Summer 2014, Article 4.

65 Kimberly B. Wilkins, "Sex Offender Registration and Community Notification: Will These Laws Survive?", 37 U. RICH. L. REV. 1245, 1254-55, 2003.

66 Reporters Committee for Freedom of the Press, "Sex-offender registry with stand privacy challenges", 2000.

67 Human Rights Watch, "No Easy Answers: Sex Offender Laws in the United States", Vol. 19, No. 4(G) (Sept. 2007).

68 Karne Newburn, "The prospects of an international sex offender registry...", p. 549.

69 Karne Newburn, "The prospects of an international sex offender registry...", p. 558.

70 Kate Hynes, "The Cost of Fear..."

U.S. experts have argued that without an additional inquiry into the perpetrator's propensity for future danger, using a strict liability conviction to require sex offender registration creates a disproportionately damaging label, one based on a generalized notion of assumption of the risk.⁷¹ A proper risk management system is advised.⁷² Its criteria and methods are regulated within national regulations.

Moreover, data in the registry needs to be justified to fulfil the goal of crime prevention. Therefore, all the data that serves the police and law enforcement agencies to monitor convicted child sex offenders must be lawful, but must be treated with confidentiality and purpose. Legislation should include an obligation stating the need to have internal protocols (they do not need to be public) that address the specific need of all data requested of the child sex offenders.

Travel bans, travel notifications and confiscation/note of passport are lawful measures (conforming to the test of limitation previously stated: proportionate, necessary and non-arbitrary) that are targeted to deter convicted child sex offenders from reoffending and accordingly prevent SECTT crime. These measures enhance international cooperation in the fight against SECTT. Nevertheless, to be effective, their scope should also focus on domestic travelling sex offenders. Moreover, the sentence or length of the measures should be directly linked with the risk of reoffending arising from a proper risk management system.

Linked with the previous analysis and directly related with SECTT crime, it is worth mentioning the U.S. proposal to create an International Sex Offender Registry.

In 2010, the U.S. House of Representatives passed the '*International Megan's Law to Prevent Demand for Child Sex Trafficking*'. Its goal is to monitor offenders convicted of crimes of a sexual nature against children when they move to other countries (presumably, because of inadequate protective laws, weak enforcement mechanisms and a highly commercialised sex industry) and when authorities in destination countries are not aware of their presence. Hence, it is directly addressing SECTT. The regulation aims '*to protect children from exploitation, especially sex trafficking in tourism, by providing advance notice of intended travel by registered child-sex offenders outside the United States to the government of the country of destination, requesting foreign governments to notify the United States a known child-sex offender is seeking to enter in the United States*'.⁷³ This law has been conceived as an extension of the Megan and Adams Walsh's regulations.

Key legal provisions would be as follows:

1. Establishment of the '*Angel Watch Centre*'⁷⁴ within the Child Exploitation Investigations Unit of U.S. Immigration and Customs Enforcement (ICE) of the Department of Homeland Security. The main function is to coordinate the reception and transmission of information on travelling child sex offenders.⁷⁵ The countries of destination would be notified when a registered U.S. national is a sex offender. Conversely, foreign governments are expected to notify the U.S. of those arrested, convicted, sentenced or completed a prison sentence for a child sex offense in a foreign destination.⁷⁶

71 Catherine L. Carpenter, "The Constitutionality of Strict Liability in Sex Offender Registration Laws", Boston University Law Review, Vol. 86, 2006.

72 Richard G. Wright, "Sex Offender Registration and Notification: Public Attention, Political Emphasis and Fear", Criminology & Public Policy, 2003.

73 United States, H.R. 515 "International Megan's Law to Prevent Demand for Child Sex Trafficking", received from the Senate for approval on February, 4, 2015.

The Law has not yet been approved. It is placed at the Senate according to official information of the U.S. Congress. Accessed 30 April 2014 <https://www.govtrack.us/congress/bills/114/hr515/text>

74 U.S. have implemented the "Angel Watch Operation" to prevent SECTT. However, it should be taken into account that, although related, "Angel Watch Operation" (it will be explained later) and "Angel Watch Centre" are different concepts and practices.

75 United States, Bill International Megan's Law, Sec. 4 (d).

76 United States, Bill International Megan's Law, Sec. 5.

The centre would seek to engage NGOs specialised in preventing SECTT and caring for victims and governments interested in being part of the international registry. The centre is also interested in *'Internet services and software providers regarding available and potential technology to facilitate the implementation of an international sex offender travel notification systems, both in the United States and in other countries'*.⁷⁷

2. For the effectiveness of the system, the U.S. would provide technical assistance to foreign authorities.⁷⁸ It would also seek to negotiate agreements with foreign governments to establish a system to receive and transmit notices. The help of private companies or NGOs can be obtained to report suspected situations on a voluntary basis.⁷⁹
3. Section 108 (b) (4) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7106(b) (4)) is amended by *'including severe forms of trafficking in persons related to sex tourism'*.

To conclude, the U.S. is stepping up measures to prevent SECTT crimes. The proposals seek to cooperate with foreign governments and other actors, to stop international child sex offenders from abusing children abroad. The goal cannot be more necessary and legitimate.

EUROPE

At the regional level, Europe⁸⁰ has the most progressive framework on the issues regarding the right to privacy and exchange of information of convicted child sex offender records.

Relevant legal provisions are the following:⁸¹

- Council of Europe Convention on the Protection of Children against Sexual Exploitation and Abuse (2007):
 - States parties shall adopt legal measures to ensure conditions to accede to professions whose job implies regular contacts with children. This means that the candidates have not been convicted of acts of sexual exploitation or sexual abuse of children.⁸²
 - States Parties shall ensure the implementation of effective intervention programmes or measures designed to evaluate and prevent the risk of sex offences against children. States shall ensure that these programmes are available for persons who fear that they might commit sex offences against children⁸³ and also for persons' subject to criminal proceedings or convicted,

77 United States, Bill International Megan's Law, Sec. 4 (g).

78 United States, Bill International Megan's Law, Sec. 4 (h).

79 United States, Bill International Megan's Law, Sec. 5 (a, 1 and 2).

80 It should be mentioned the coverage difference between the European Union and the Council of Europe. The former is a politico-economic union of 28 member states that are located primarily in Europe. The EU operates through a system of supranational institutions and intergovernmental-negotiated decisions by the member states. The institutions are: the European Commission, the Council of the European Union, the European Council, the Court of Justice of the European Union, the European Central Bank, the Court of Auditors, and the European Parliament. For instance, Russia, Switzerland or Ukraine are non-EU members. The latter is not linked to the European Union and is an international regional organisation formed by 47 European countries. Observer status was designed for non-European democracies willing to contribute to democratic transitions in Europe. Canada, Japan, Mexico, the U.S. and the Holy See have observer status with the Council of Europe and can participate in the Committee of Ministers and all intergovernmental committees. They may contribute financially to the activities of the Council of Europe on a voluntary basis.

81 To understand the legally binding level of the European instruments it is important to note that Regulations are binding and applied simultaneously and in the same way in all member states. Directives are binding on the objective to be achieved in the directive and aims to harmonise the legislation of the member states. However, it is up to each member state to determine how the directive is to be implemented in national legislation or other national regulations. Decisions are binding only for the person or persons to whom the decision applies. Recommendations and Opinions are not binding.

82 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Abuse, Article 5 (3).

83 Ibid., Article 7.

inside or outside prison. They must be adapted in case of juvenile offenders to address sexual behavioural problems.⁸⁴

- Intervention programmes shall be targeted to preventing and minimizing the risks of repeat offences of a sexual nature against children. An assessment of the danger and possible risk of reoffending must be evaluated with the aim of identifying appropriate programmes or measures.⁸⁵
- Participants in the intervention programmes should be fully informed of the reasons for the proposal and consent in full. They have the right to refuse participation.⁸⁶
- States Parties shall take appropriate legal measures to promote or conduct awareness raising campaigns and provide education on prevention regarding the risks of sexual exploitation of children.⁸⁷
- One of the sanctions established for persons convicted of sexual offences against children is their placement under judicial supervision.⁸⁸
- For prevention and prosecution, states shall take necessary legislative or other measures to collect and store data. States shall implement relevant provisions on the protection of personal data and other appropriate rules as prescribed by domestic law relating to the identity and the genetic profile (deoxyribonucleic acid, DNA) of convicted persons.⁸⁹
- The establishment of DNA databases is not wholly supported by the criminal justice community. One of the arguments raised is related to the potential legal challenges grounded on the premise that DNA collection constitutes an invasion of an individual's right to privacy. These criticisms are based on the idea that an individual's genetic material should remain private unless the individual chooses to relinquish it for examination. Other critics recognise the utility of the DNA databases in criminal investigations efforts, yet express concern regarding the potential for the genetic material to be used for more intrusive purposes. As a result of these concerns, special protection has been granted to ensure that the use of these databases will be confined solely to criminal investigations and identification purposes.⁹⁰ Nevertheless, a controlled use of DNA, especially in cases of sexual crimes against children could be relevant. Same concerns could be pointed out for the use fingerprints, but this method is more commonly accepted when registering information about child sex offenders.
- In order to centralise information, states have to communicate to the Secretary General of the Council of Europe the name and address of a single national authority in charge of data collection. Information must be transmitted to the competent authority of another state, in conformity with the conditions established in its domestic law and the relevant international instruments.⁹¹
- States shall cooperate at the international level in the prevention of sexual crimes against children.⁹²

84 Ibid., Article 16.

85 Ibid., Article 15(3).

86 Ibid., Article 17.

87 Ibid., Articles 6 and 8.

88 Ibid., Article 27(4).

89 Ibid., Article 37(1).

90 Colleen McCue et al., "Criminal Histories of Sex Offenders Identified through DNA. Cold Hits", Virginia Division of Forensic Sciences, 2001. Accessed 5 May 2015 http://www.denverda.org/DNA_Documents/Criminal%20Histories%20of%20SO%20ided%20by%20DNA.pdf

91 Ibid., Article 37 (2) and 37 (3).

92 Ibid., Article 38.

- Directive 2011/92/EU, 13 December, of the European Parliament and the Council, on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (2011):

It complements and strengthens the provisions of the previously analysed Convention, as follows:

- Employers, when recruiting, shall be entitled to request the criminal records or the evidence of any disqualifications from exercising activities involving direct and regular contacts with children arising from those criminal convictions.⁹³
 - Intervention programmes to prevent the sexual exploitation and abuse of children should be proposed to offenders or to persons who may fear of offending on a voluntary basis. These should meet a broad, flexible approach focusing on the medical and psycho-social aspects, without prejudice to other measures or programmes imposed by competent judicial authorities.⁹⁴
 - Members may consider adopting measures such as registration in a sex offender registry. Access to registers should be subject to the limitation in accordance with national constitutional principles and applicable data protection standards. For instance, by limiting access to the judiciary and/or law enforcement authorities.⁹⁵
 - The Member States are encouraged to create mechanisms for data collection or focal points at national or local levels for the purposes to produce comparable statistic on the phenomenon of sexual abuse and sexual exploitation of children.⁹⁶
- Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981):⁹⁷
 - The purpose is to protect the right to privacy with regard to personal data⁹⁸ (Article 1).
 - Personal data shall be: (i) obtained and processed fairly and lawfully, (ii) stored for specified and legitimate purposes, (iii) adequate, relevant and not excessive, (iv) specific and, where necessary, kept up to date, (v) preserved in a form which permits identification of the data subjects to no longer than is required for the purposes for which those data are stored.⁹⁹
 - The above provision may be derogated in cases provided for by the law of the State Party and when a derogation constitutes a necessary measure in a democratic society in the interest of, among others, '*public safety*' or the '*suppression of criminal offences*'.¹⁰⁰
 - Appropriate security measures need to be taken against accidental or unauthorized destruction or accidental loss, and against unauthorized access, alteration or dissemination of secured personal data.¹⁰¹

The collection of personal data for police purposes should be limited to the prevention of real danger or the suppression of a specific criminal offence.¹⁰²

93 Directive 2011/92/EU, Article 10 (2).

94 Ibid., Preamble 37 and Article 22.

95 Ibid., Preamble 43.

96 Ibid., Preamble 44.

97 After this Convention, the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data was approved. Nevertheless, its scope excludes processing personal data operation "concerning public security (...) and the activities of the State in areas of criminal law" (Article 3.2).

98 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Article 1.

99 Ibid., Article 5.

100 Ibid., Article 9(2).

101 Ibid., Article 7.

102 The Council of Europe's Recommendation No. R (87) 15, "Regulating the use of personal data in the police sector", 17 September 1987, principle 2.1.

- Council Framework Decision 2009/315/JAH, 26 February, on the organisation and content of the exchange of information extracted from the criminal record between Member States (2009):
 - High level of safety within the area of freedom, security and justice presupposes the exchange between competent authorities of Member States of information extracted from criminal records.¹⁰³ Improve the quality of information exchange.¹⁰⁴
 - Creation of a central authority in every Member state to collect and request all information provided from criminal records of their convicted nationals.¹⁰⁵ To have an effective system, mutual understanding is enhanced by the creation of a '*standardised European system*' allowing information to be exchanged in a uniform, electronic and easy way.¹⁰⁶
 - Criminal records should only be used to inform authorities responsible for the criminal justice system. And those involved with administering criminal proceedings in accordance with domestic laws. The use of criminal records for other purposes might compromise the possibility of social rehabilitation for a convict.¹⁰⁷

The framework decision established basic rules for the transmission of information to Member States of a convicted person's nationality and disqualifications arising from criminal convictions, including the conviction for a sexual offence against a child.

By improving the exchange of information, the framework decision aims at ensuring that a person convicted of a sexual offense against a child can no longer conceal that conviction or disqualification.

The framework decision also regulates the storage of information but makes it clear that it does not aim to harmonise national systems of criminal records or require the convicting member state to change its internal system of criminal records. Specifically, the framework decision requires the convicting Member States to: (1) ensure that all convictions made within its territory are accompanied by information on the nationality or nationalities of the convicted person; (2) inform the central authorities of the other member states of any convictions handed down within its territory against nationals of other member states; and (3) immediately transmit information on subsequent alteration or deletion of information contained in the criminal record of the convicted person.

The central authority of the convicted member state is required to (1) store all information transmitted on the convictions of their nationals, for the purpose of retransmission; and (2) alter or delete information received if the information has been altered or deleted by the convicting Member State.

The scope of the data to be transmitted includes the full name, date and place of birth, and nationality of the convicted person; the nature of the conviction; the offense giving rise to the conviction; and the contents of the conviction. Optional information may also be included such as the convicted person's parents' names, the place of the offense and any disqualifications arising from the conviction. All of the information stored is for the purpose of retransmission. The use of the personal data collected is strictly regulated under the framework decision. This is because the EU considers that any use that might compromise the chances of social rehabilitation of the convicted person must be as limited as possible.

¹⁰³ Council Framework Decision 2009/315/JAH, 26 February, on the Organisation and Content of the Exchange of Information Extracted from the Criminal Record Between Member States, Preamble 1.

¹⁰⁴ Ibid., Preamble 4.

¹⁰⁵ Ibid., Preamble 12.

¹⁰⁶ Ibid., Preamble 17 and Article 9.

¹⁰⁷ Ibid., Preamble 15.

According to the NSPCC, this framework decision will help better protect children in a number of ways. The requirement that all conviction information must be transmitted to the member state of the person's nationality will help guarantee that all relevant information regarding an individual can be accessed and will include any information on disqualifications, including bans from working with children.¹⁰⁸

Legislation should ensure all persons working with children, whether in a professional or volunteer capacity, are screened for sex offenses. The current framework decision allows the use of criminal records information for pre-employment checking, but it does not mandate it. Instead, it leaves the decision to provide that information up to the national law of the Member State. While full data protection is necessary, it is essential that the information is available for pre-employment checks in case the job involves contact or potential contact with children.

Another area that needs clarification is the disqualifications of an offender. The framework decision calls for Member States to share any disqualifications arising from a person's conviction, but some disqualifications are not entered into criminal records. For example, some convictions are not added to a person's criminal record if an administrative and not a judicial authority handed them out. All disqualifications should be on a person's criminal record when the crime was committed against a child.

- The Recommendation No. R (84) 10, of the Committee of Ministers of the Council of Europe on the Criminal Record and Rehabilitation of Convicted Persons pointed out the need to limit the transmission to criminal records only to the authorities responsible for criminal justice and those exceptionally authorised under the law.
 - The information mentioned in the extract transmitted will be strictly limited to the legitimate interest of the recipients.
 - It is also important to avoid unnecessary public disclosure of criminal records during criminal proceedings to prevent stigmatisation of the person concerned while encouraging cooperation between the press and judicial authorities.
 - Sanctions for breach of confidentiality should be put in place.
 - It must be ensured that certificates of good conduct are restricted for their use and cover only criminal records, avoiding references to private life or morals of the person concerned.
 - The Member States should follow the rules on the protection of personal data when transmitting information.¹⁰⁹
 - The information should be transmitted to a third country for criminal proceedings.¹¹⁰
 - Type of information transmitted: full name/previous names, date of birth, gender, nationality, nature of the conviction and the type of offense (date of conviction, name of the court, legal classification of the offence, reference to the legal provisions, the sentence, any supplementary penalties, security measures, etc.). Optional information: parent's names, place of the offence, disqualifications arising from the convictions, reference number of the conviction. Additional information if available to the central authority: identification number, fingerprints, and pseudonyms.¹¹¹

108 Nat'l Soc'y for the Prevention of Cruelty to Children, "Council Framework Decision on the Organization and Content of the Exchange of Information Extracted from Criminal Records Between Member States", 2008. Accessed 10 May 2015 http://www.nspcc.org.uk/Inform/policyandpublicaffairs/Europe/Briefings/CriminalRecordsExchange_wdf59755.pdf

109 Recommendation No. R (84) 10, of the Committee of Ministers of the Council of Europe on the Criminal Record and Rehabilitation of Convicted Persons, Preamble 13.

110 Ibid., Article 9(4).

111 Ibid., Article 11.

Therefore, key elements are:

- A sex offender registry implies a legitimate limitation on the right to privacy. It must respect data protection and can only be accessible to professionals dealing with children (from law enforcement to health or other social service officers). Exceptionally, and based on necessary and particular reasons, other persons can have access to that information.
- Preventing convicted child sex offenders from accessing a profession which implies regular contact with children. Employers can request criminal records or disqualifications for this purpose or ask the potential employee for a certificate of good conduct. Disqualification should be mandatory within the criminal records for every sex crime perpetrated against children.
- The obligation to implement risk management programmes for convicted child sex offenders as a preventive measure. Also, regular awareness campaigns for the public on prevention regarding the risk of SECTT.
- The lawful monitoring and supervision of a convicted child sex offender is part of the sanction for their crimes.
- Information exchange systems of criminal records should be put in place. Effectiveness is dependent on mutual understanding and, therefore a standardized system is needed. Furthermore, centralising uniform information at the domestic level is required. Data protection rules must be strictly adhered to (avoiding the collection of any unnecessary personal information regarding a person's private life), and the transmission of personal data must be restricted to the relevant professionals and used for criminal purposes alone.

This area requires a strong legal framework to be effective, lawful and sustainable, as analysed in subsequent sections.

- Implementation of sanctions for breach of confidentiality by involved institutions.

Although the European legal framework is advanced and well developed, some issues are not sufficiently regulated and could affect the implementation of the obligations of Member States. Therefore, concrete legal measures concerning the right to privacy within the registries and the exchange of information systems need to be addressed. The European Parliament has encouraged states to evaluate their legal framework to verify that they have appropriate safeguards and, if necessary, to amend their legislation to create a comprehensive system to manage child sex offenders.¹¹²

Among the measures needed are:

- Introducing, as part of their national system, in accordance with the provisions of the European Convention on Human Rights and in particular in compliance with the principle of proportionality, a child sex offender register which contains accurate and regularly updated information on persons convicted of such offences. The register will produce a central file allowing an exchange of information between entitled authorities.
- Include in the regulations a comprehensive package of legal measures aimed at controlling and monitoring the movement of child sex offenders, particularly, when they travel abroad. This requires increasing the quality, quantity and regularity of the information shared with other member states on child sex offenders in order to effectively oversee the movement of offenders who travel.

¹¹² European Parliamentary Assembly, "Reinforcing measures against sex offenders", Doc. 12243, 4 May 2010. Accessed 6 May 2015 <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileId=12426&Language=en>

- Introducing a system of ‘vetting and barring’ for employment purposes to ensure that those who pose a risk cannot work with children. This requires improving the information exchange with other Member States on persons convicted of sex offences so that unsuitable persons are not able to gain employment abroad to work with children or other vulnerable persons. Disqualifications should be included within the criminal record.
- Ensure that national legislations fully respect individual rights, in particular, the right to privacy and private life, and, therefore, restricts access to the child sex offenders register.
- Any disclosure of information to a particular member of the public considered necessary to protect a particular child or children should be strictly regulated and accompanied by adequate technical or other safeguards to protect against unauthorised access or misuse.
- Establish awareness-raising campaigns concerning detection of sexual abuse against children and ways to address the issue.

Therefore, it is clear that accurate national information, carefully managed and properly shared internationally, is the key to keeping children and other vulnerable people safe from repeat sex offenders. The prevention of SECTT must be based on laws that fully respect human rights and fundamental freedoms, in particular, Article 8 of the ECHR, but it also requires strong international cooperation due to the transnational nature of the crime. However, contrary to the U.S. proposal, Europe does not support the introduction of a Europe-wide sex offenders register (based, mainly, on the huge differences between criminal law systems and to maintain state sovereignty). Therefore, the European model focuses on promoting effective national measures to prevent sexual offences bolstering international exchange of information systems and related measures.

In this regard, the European Parliament recalls that some of those systems which include a child sex offender register (such as in France and the United Kingdom) have been deemed to be compliant with Convention rights by the European Court of Human Rights.

Under this legal framework at the European level, the United Kingdom, France and Netherlands are examples of the implementation by European countries of national policies to address the SECTT issue.

UNITED KINGDOM

In 1998, the UK adopted the ECHR into law through the Human Rights Act of 1998. Hence, the right to privacy is protected as a fundamental right.

Similar to the U.S., a highly publicized criminal case involving a child and a previously convicted offender created political pressure in the UK to ensure public safety. However, the country refused to create a system of absolute public notification as the U.S. did.¹¹³ Instead, in 2000, the UK added the Child Sex Offender Disclosure Scheme (‘Sarah’s Law’), which allowed victims and their families to be informed about specific perpetrators. The latest version of Sarah’s Law, adopted in 2009, is even more permissive, allowing parents to request the child sex offender status of an individual who has regular, unsupervised contact with their children. The provision applies only if the child sex offender was incarcerated for more than a year. Even though Sarah’s Law does not allow the general public to access child sex offender information, there is a potential for an individual’s sex offender status to spread across a wider community.¹¹⁴

¹¹³ Autumn Long, Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reforms, 18 TRANSNAT’L. L. & CONTEMP. PROBS. 145, 159, 2009.

¹¹⁴ Kate Hynes, “The Cost of Fear...”.

Again, the limitation test on the right to privacy appears. Every national system needs to protect the public while still maintaining the privacy of child sex offenders. The legislation remains focused on public safety because child sex offender records are provided to the police. Child sex offender information should lie solely in the hands of law enforcement officials for two reasons. First, when citizens are given access to public information, there is always the possibility of vigilantism. Second, the responsibility of monitoring dangerous situations should be left to officials who are trained to deal with offenders rather than unqualified citizens.

The test of limitation regarding some issues that created controversy between privacy-protection has been largely overcome by the UK judicial system:

- In 2010, the UK Supreme Court laid down a significant decision regarding the rights of sex offenders. The court decided in *R v. Secretary of State for the Home Department* based on Article 8 of the ECHR.¹¹⁵ In the case, two child sex offenders, who were subject to lifetime registration requirements, appealed to the Supreme Court arguing that the Section 82 of the Sexual Offences Act of 2003 violated their right to privacy under Article 8 of the ECHR. They argued that there was no mechanism within the statute for the courts to review lifetime registration case-by-case. The court decided in favour of protecting the victims due to the serious nature of the sexual offenses; yet, the court acknowledged that the scheme must not effect additional punishment on the offender. Even though the protection of victims was its primary concern, the court still reasoned that lifetime registration requirements for sex offenders, without the ability to appeal, interfered with privacy rights under ECHR Article 8.

The court took into account whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right, (ii) the measures designed to meet the legislative objective are rationally connected to it, and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.¹¹⁶

The court took into consideration the statistics on recidivism and were also concerned about the statistical likelihood of the offenders reoffending, which links directly to the question of whether the lifelong restrictions were proportionate:

'Caution must, of course, be taken in relying on reconviction statistics because these will necessarily be lower than the actual incidence of reoffending. Nonetheless, these statistics show that 75 percent of the sexual offenders who were monitored were not reconvicted. No light is thrown on the question of whether it was possible to identify by considering these whether there were some reliable indications of offenders who did not pose a significant risk of reoffending'.¹¹⁷

The Supreme Court issued a '*declaration of incompatibility*' with the Human Rights Act 1998 which requires waiting for Parliament to approve the declaration and accordingly change the law.

- Also, in 2010, a UK Court of Appeal considered the disclosure of child sex offender information under Article 8 of the ECHR in *H and L v. A City Council*. The court reasoned that the need for disclosure must be determined on a case-by-case basis. In this instance, a blanket disclosure to several organisations violated the sex offender's privacy right.¹¹⁸

¹¹⁵ *R and Thompson v. Secretary of State for the Home Department*, 2010, UKSC 17, 2011, 1 A.C. 331.

¹¹⁶ Adam Wagner, "Sex offenders' lifelong living and travel restrictions were breach of human rights", UK Human Rights Blog, April 21 April 2010.

¹¹⁷ Adam Wagner, "Sex offenders' lifelong living and travel restrictions were breach of human rights", UK Human Rights Blog, 21 April 2010.

¹¹⁸ *H and L v A City Council*, 2011, EWCA (Civ) 403.

Both cases show the importance of adopting restrictive measures according to an individual and case-by-case basis.

- The High Court of Justice in Northern Ireland stated that including the name of a convicted child sex predator on the web page *'Keeping Our Kids Safe From Predators'* hosted by a Facebook page, infringed his right to privacy. The plaintiff argued that he was in fear for his safety and in a *'state of constant anxiety'* as he believed *'if this material continues to be published it will only be a matter of time before the threats materialise into the attack on me or my home'*. The court resolved the balance of convenience test by granting an injunction to the plaintiff and considering that *'while his offences were repulsive, he has been punished appropriately'*. Thus, the dissemination of personal data was not compatible with his right to freedom from inhuman and degrading treatment under Article 3 of ECHR, together with his right to respect for private and family life under Article 8 of ECHR.¹¹⁹

In this regard, the UK stated in 2008 that there should be a legal duty for the authorities to consider the disclosure of information about convicted child sex offenders if the offender presents a risk of serious harm to a child in the community.¹²⁰

If a disclosure is made, the information must be kept confidential and only be used to keep the child in question safe. Legal action may be taken if confidentiality is breached. Disclosure is delivered in person (as opposed to in writing) with the following warning:¹²¹

- The information must only be used for the purpose for which it has been shared i.e. to safeguard a child.
- The person to whom the disclosure is made will be asked to sign an undertaking that they agree that the information is confidential. A warning should be given that legal proceedings could result if this confidentiality is breached. If the person is unwilling to sign the undertaking, the police must consider whether the disclosure should still take place.

In 2012, the UK extended the compulsory notification requirements under the Sexual Offences Act 2003 to provide *'valuable information to the police when tracing missing registered sex offenders. For instance, providing bank account details could assist the police in investigating offences of accessing indecent images, where payment was involved. Passport numbers could assist the police in monitoring offenders who travel overseas'*.¹²² Thus, persons on the register have to notify the police, among others, their intention to travel abroad, their passport number and all their bank accounts and credit card details.

More to the point, the UK's reformed travel notification system encompasses the Sexual Harm Prevention Orders (SHPO) and Sexual Risk Orders (SRO) which came into force by the Anti-Social Behaviour, Crime and Policing Act 2014, which regulates the restrictions for convicted sex offenders. Sexual Harm Prevention Orders can be applied to anyone convicted or cautioned of a sexual or violent offence, including when offences are committed overseas. Sexual Risk Orders can be applied to any individual who poses a risk of sexual

119 XY v Facebook Ireland Ltd., NIQB 96, (30 November 2012).

See also, Rosalind English, "Keep our kids safe from predators Facebook page on the rampage again", UK Human Rights Blog, 25 February 2015; and Rosalind English, "Judge strikes down Facebook page Keeping our Kids Safe from Predators", UK Human Rights Blog, 5 December 2012.

120 Part 11, section 140 of the Criminal Justice and Immigration Act 2008 inserted a new section, 327A and B, into the Criminal Justice Act 2003.

121 National Society for the Prevention of Cruelty to Children (NSPCC), "Child Sex Offender Disclosure", February 2013. Accessed 5 May 2015 <https://www.nspcc.org.uk/globalassets/documents/information-service/factsheet-child-sex-offender-disclosure-scheme.pdf>

See also, United Kingdom, "Child sex offender disclosure scheme guidance document." Accessed on 5 May 2015 <https://www.gov.uk/government/publications/child-sex-offender-disclosure-scheme-guidance-document>

122 UK Government, Home Office, "Reforming the Notification Requirements for Registered Sex Offenders", 2011, paragraph 1.10.

harm in the UK or abroad, even if they have never been convicted. The court needs to be satisfied that the order is necessary for protecting the public, or any particular members of the public, from sexual harm, (though it's not possible at this stage to identify what criteria the court will use) or protecting children from sexual harm from the defendant outside the UK. The order prohibits the defendant from doing anything described in the order, and can include a prohibition on foreign travel through the confiscation of the defendant's passport.

For practical and legal purposes, the best practice to adopt regarding any kind of restrictions for convicted child sex offenders would mirror the UK system which takes into account personal circumstances. The bans imposed are not arbitrary but applied by taking into account personal circumstances.

FRANCE

In France, the right to privacy is considered as one of the components of individual freedom and is, therefore, a constitutionally-guaranteed right.¹²³ The freedom of movement is also protected by the France's Constitution as one of the components of the general principle of individual freedom protected under articles 2 and 4 of the 1789 Declaration of the Rights of Man and of the Citizen.¹²⁴ However, both rights can be subject to limitations imposed by the French Courts and administrative measures. The Constitutional Council has especially recognised that the freedom of movement should be counterbalanced with public order.¹²⁵

Creation of a register

The prevention of the SECTT crime in France mainly consists of measures to fight recidivism of child sex offenders. In this respect, the '*Judiciary National Automated Database of Sexual Offenders*'¹²⁶ created by the law of 9 March 2004¹²⁷ is one of the key instruments to combat sexual offenders recidivism. Any persons, minor or adult, who is found guilty of a sexual offense,¹²⁸ is automatically registered in this database unless otherwise decided by the judge or the public prosecutor. For some offences punished with less than five years of imprisonment,¹²⁹ the judge may order the registration in the database.¹³⁰ This database contains information related to the identity of sexual offenders, their successive addresses and information related to the court decision at the origin of such registration. It also displays the nature of the criminal offense committed. Any registered individual has a duty to notify his/her address once or twice a year or once a month depending on the case, and any change of address within a period of 15 days after such change.¹³¹ Non-compliance with these obligations is punishable by up to two years imprisonment and a fine.¹³² The registration lasts for 30 years if the committed sexual act is considered as a crime or an offence punished by a 10-year imprisonment within the meaning of the French Criminal Law and for 20 years in all other cases. However, any registered individual can apply to the public prosecutor for the deletion of his/her entry in the database.

This database is not open to the public and is only accessible to judicial authorities, the police, gendarmerie and the prefects and officers of state administration concerned with the screening and managing of workers having access to children. Unauthorized access to the database is an offence in itself.

123 Constitutional Council, No. 99-419 DC, 9 November 1999.

124 Constitutional Council, No. 79-107 DC, 12 July 1979; French Constitutional Court, No. 99-411 DC, 16 June 1999.

125 Constitutional Council, No. 80-127 DC, 19 and 20 January 1980.

126 The name has changed with the law n°2005-1549 of 12 December 2005 and is now called the "Judiciary National Database of Sex or Violent Offenders".

127 Law n°2004-204 of 9 March 2004 on the adaptation of justice to the criminality evolution.

128 Offences restrictively listed in article 706-47 of the Code of criminal procedure.

129 Offences restrictively listed in article 706-47 of the Code of criminal procedure.

130 Article 706-56-2 of the Code of criminal procedure.

131 Article 706-53-5 of the French Criminal Proceeding Code.

132 Articles 706-53-1 to 706-53-12 of the French Criminal Proceeding Code.

Article 8 of the ECHR has been tested within the French register.

In *Garda v. France*,¹³³ the ECHR held that ‘registration in the database of sex offenders and the resulting obligation were to be regarded as a preventive measure to which the principle of non-retroactivity did not apply’¹³⁴ and the inclusion in the database had struck a fair balance between the competing private and public interests at stake, given that right to consult the database was restricted to authorities under a duty of confidentiality.

In *B. v. France*,¹³⁵ the ECHR also recalled that a database of sex offenders pursues legitimate goals in a democratic society, which include the protection of public order as well as the prevention of criminal offences. The court added that the protection of personal data is of primary importance in the right to privacy and that therefore all appropriate guarantees should be put in place to avoid any misuse of personal data, especially when such data are automatically processed. According to the court, however, the length of data’s retention in the database was proportionate to the aim pursued, *i.e.* the protection of public order.

However, because the protection of personal data is of utmost importance, the French Administrative High Court (*Conseil d’Etat*), considered that data processing by a private company to control and prevent paedophile behaviours was illegal under Article 9 of the French Data Protection Act of 6 January 1978.¹³⁶

Finally, where a criminal procedure is opened abroad, the accused person may refuse to inform the French consular authorities. As a consequence, the sex offender will not be registered in the French database.

International cooperation

Despite the reinforcement of French legislation, very few French sexual offenders have been convicted in France for sexual tourism-related acts. Indeed, local authorities in countries exposed to sexual tourism very rarely (or almost never) report to French authorities’ cases of French citizens being suspected of sex tourism. This is due to the confusing, or lack of information regarding the reporting of sexual offences and also due to bribery of local authorities in developing countries. In addition, the cooperation with local authorities is often difficult in practice.

Efforts are also engaged to raise awareness concerning sexual tourism targeting children. For instance, the Ministry of Tourism has developed an ‘*ethical charter for tourism*’ dedicated to professionals in the tourism industry.

NETHERLANDS

Under the Dutch Passport Act, it is possible to cancel/refuse granting a passport to a person convicted of child sex offences in the last 10 years. This decision is based on whether there is a valid reason to suspect that the convict will recommit a sexual offence. The ability to make such a decision rests with the minister, not a judicial body; it is not clear what criteria will be taken into account when arriving at a decision. A further limitation is that this only applies to Dutch passport holders and not their local identification cards, allowing convicted Dutch citizens free to travel in Europe.¹³⁷

¹³³ European Court of Human Rights, Information Note on the Court’s case-law No. 125, December 2009, *Gardel v. France* - 16428/05, Judgment 17.12.2009, Section V.

¹³⁴ The registration to the Judiciary National Automated Database of Sexual Offender cannot be considered as a punishment under article 7, paragraph 1 of the ECHR but only as a preventive measure to which the principle of non-retroactivity is therefore not applicable.

¹³⁵ European Court of Human Rights, 17 December 2009, *M.B. c. France* n°22115/06, section V.

¹³⁶ French Administrative High Court, 11 May 2015, No. 375669.

¹³⁷ Netherlands, National Rapporteur on Trafficking in Human Beings and Sexual Violence towards Children “Barriers against Sex Tourism”. 2013.

Terre des Homes has advocated for a note in the passport of individuals convicted of sexual offences involving minors, rather than revocation based on the high level of recidivism in cases of child sexual abuse. It is also held that this measure is *'less lenient, less time consuming and less costly than other forms of monitoring.'*¹³⁸ The passport note would be preventative in three ways. The preventative effects are first seen at the immigration desks of the destination country. Immigration officers can refuse entry to convicted child sex tourists on the basis of that record and could not deny they were not aware of the risk the offender may pose. The annotation would work as a red flag for child support agencies at home and abroad. If the staff at these agencies carry out passport checks as part of their application procedure, they will know immediately whether an applicant poses a threat and can thus prevent future abuse. Passport checks are not yet mandatory for these agencies (an identity card is sufficient), so an amendment to the legislation is necessary for the measure to be effective. Also, an annotation in the passport can alert local police officers if they apprehend a travelling sex offender for a new offence. The annotation tells them about previous offences and can provide added motivation to open a new investigation.¹³⁹

Revocation of identity documents or restrictions should be considered for national and international travel. Travelling sex offenders are found within their own country, as well as overseas.

AUSTRALIA

The National Child Offence System (NCOS) provides operational police with tools to consistently register and manage child offenders across Australia. The NCOS consists of the Australian National Child Offender Register (ANCOR) and the Managed Person System (MPS).

The ANCOR established in 2004 supports online crime prevention and allows authorised police officers to register, manage and share information about registered persons. More than 16,000 people are currently on the register.¹⁴⁰ It assists police to uphold child protection legislation in their state or territory. It also requires each Australian territory to pass legislation based on a common model.

The MPS holds information on offenders who are charged but not convicted, or after an offender's reporting obligations have been completed. The Australian Federal Police (AFP) actively monitor and prosecute those involved in SECTT. A registered offender must report intended travel outside of Australia (full travel details including accommodation and travel companions). In accordance with its functions on crime prevention as set out in the Australian Federal Police Act 1979, the AFP may provide information relating to a registered offender's international travel to a Foreign Law Enforcement Agency.¹⁴¹

Moreover, there have been sustained calls for passport revocation measures in Australia.¹⁴² Although, a specific measure itself is not in place, Section 14 (1) (a) (ii) of the Passport Act allows officials to request passport cancellation from a federal minister in a variety of situations including when it is suspected that a child may be sexually abused abroad.

Also, within the field of travelling child sex offenders, the AFP has already undertaken a number of strategies and programmes designed to address the issue, both within Australia and in a number of key overseas destinations. Domestically, the AFP has strong relationships

138 Terre des Hommes, "Tipping the Scales. Recommendations for a better balance in combating child sex tourism", September 2013, p. 44.

139 Ibid.

140 AFP, "AFP-MPS Early Intervention Strategy to Protect Children from Sexual Exploitation Vietnam and Australia", Presentation. Consultation Global Study on SECTT held in Chang Mai, Thailand, 6-7 May 2015.

141 Australian Federal Police. Child exploitation in Travel and Tourism. Accessed 5 May 2015 <http://www.afp.gov.au/policing/child-protection-operations/child-sexual-exploitation-in-travel-and-tourism>.

142 Sisha International, "Australian Child Sex Offenders – our governments obligation to protect children in a foreign land". Accessed on 8 May 2015 <http://www.sisha.org/australian-child-sex-offenders-our-governments-obligation-to-protect-children-in-foreign-lands/>

through a number of arrangements, with key stakeholders within the arena of child protection, especially travelling child sex offenders. This includes the development of a National Strategy to Combat Child Exploitation to unify and simplify the way in which Australian law enforcement manages anti-child exploitation operations. Besides, the AFP also has a number of liaison officers in key regional locations, including Cambodia, Indonesia, the Philippines, Thailand and Vietnam who in partnership with relevant regional partner agencies assist in providing a response to Australian travelling child sex offenders. This includes boosting engagement on-the-ground with relevant NGOs and community partners.¹⁴³

CANADA

Canada had recently addressed some of the problems the country faced when monitoring convicted sexual offenders abroad. In this regard, Canada's Public Safety Minister agreed there are serious gaps in the system. Although measures have not materialised yet, it seems that the focus is on allowing more information-sharing regarding offenders among law enforcement and border agencies in Canada and with sex tourism destination countries.

One of the main gaps in cooperation at the national level is the lack of access for Canadian passport control officers from the Canada Border Services Agency (CBSA) to the names of the 30,000 Canadians on the National Sex Offender Registry or the 16,000 on the Ontario Sex Offender database. These agents also have no direct access to the Canadian Police Information Centre database, which contains data on previous convictions and outstanding warrants. The privacy rules governing the Sex Offender Registry within the country restricts its use solely to law enforcement officers directly involved in policing sex offences, which would exclude border agents.¹⁴⁴ Effective law enforcement must be designed and articulated in a way that, preserving the right to privacy, helps to prevent crime. In 2011, ECPAT UK recommended that a wide range of agencies should be made aware of key issues including those responsible for customs, immigration, consular services, passport and visa offices, and probation; and not just the police.¹⁴⁵

With regards to passport restriction, Canada has also important gaps to address. The federal government can refuse or revoke anyone's passport under the power of Royal Prerogative '*the monarch's historical powers that haven't been superseded by statutes passed in Parliament*' though this power is scarcely used. The Minister of Foreign Affairs may use this power to refuse or revoke a passport on the grounds of national security, but it has never been used to prevent SECTT. The lack of clear, principled reasoning for when this power may be used questions its conformity with the rule of law.¹⁴⁶ In May 2015, the Canadian Public Safety Minister and Citizenship Minister proposed a new bill to parliament to confiscate the passport of sex offenders.¹⁴⁷

Criteria allowing the confiscation of passports for crime prevention purposes must be balanced with the non-arbitrary and proportionality requirements to ensure the right to privacy of convicted sex offenders.

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

144 Julian Sher, Robert Cribb, Jennifer Quinn, "Almost nothing stops Canadian sex offenders from re-offending abroad", 18 March 2013. Accessed 2 May 2015 http://www.thestar.com/news/world/2013/03/18/almost_nothing_stops_canadian_sex_offenders_from_reoffending_abroad.html

145 ECPAT UK, "Off the Radar. Protecting Children from British Sex Offenders who Travel", 2011. Accessed 5 May 2015 http://www.ecpat.org.uk/sites/default/files/off_the_radar_-_protecting_children_from_british_sex_offenders_who_travel.pdf

146 ECPAT Canada, Beyond Borders, "How Canada Allows its Convicted Sex Offenders to Feely Travel Abroad". Accessed 10 May 2015 <http://beyondborders.org/wp/wp-content/uploads/2009/06/fact-sheet-how-canada-allows.pdf>

147 The Canadian Press, "Ottawa cracking down on passports for would-be terrorists or sex offenders", 7 May 2015. Accessed 10 May 2015 <https://ca.news.yahoo.com/ottawa-cracking-down-passports-terrorists-sex-offenders-213835316.html>

3 MEASURES TO BE DEVELOPED

Measures to be Developed FOR EFFECTIVE Prevention of SECTT

IMPLEMENTATION OF RISK MANAGEMENT SYSTEMS

The collection of personal data, the length of the availability of data, the transmission and confidentiality of the data has to be justified, as well as the restrictive measures to be imposed based on the risk of recidivism. To have effective and legitimate systems of preventing SECTT through monitoring convicted sex offenders (based on the risk of recidivism) it is of essential relevance that these systems are justified by legitimate purposes. This means that legitimate restrictions on the right to privacy must be based on an appropriate risk management system.

States should develop procedures for assessing risks using empirically derived risk factors and tools that have demonstrated validity and reliability. Though they cannot predict that a specific individual will or will not reoffend, risk assessment instruments are useful for screening offenders into relative risk categories. These tools, although not foolproof, do allow the level of risk posed by sex offenders to be assessed on an objective basis. Information disclosed to the public should be carefully considered with regard to its potential for enhancing community protection (e.g. offence descriptions, victim age and gender preference) and should not include information which may hinder successful reintegration while providing little potential benefit to public safety (e.g. employment, address, telephone).¹⁴⁸

Sex offenders are not a homogeneous group, they have different characteristics and pose different levels of risk. Accordingly, the best way to ensure respect for international standards is the establishment of risk management systems which identify high-risk offenders and focus efforts on them.¹⁴⁹

Therefore, state legislation must regulate comprehensive management systems when dealing with convicted sex offenders. Mandatory provisions should focus on the use of evidence-based risk assessment tools. It is aimed to identify the higher risk sex offenders including specific criteria and standardised tests, appropriate rehabilitative interventions (in and out of prison) combined with a more active supervision and monitoring of higher risk sex offenders after their release from prison. (e.g. publication of details of convicted sex offenders who have failed to notify their names and addresses or have failed to notify the changes to those names and addresses).

Ultimately, the effectiveness of prevention through these systems directly depends on the cooperative mechanisms in place for sharing information at the national and international level, as analysed below.

¹⁴⁸ Jill S. Levenson, "Public Perceptions About Sex Offenders and Community Protection Policies", 7 ANALYSIS OF SOC. ISSUES AND PUB. POL. 1, 17, 2007, pp. 20-21.

¹⁴⁹ Ireland, Department of Justice and Quality, "The Management of Sex Offenders. A Discussion Document", January 2009.

COOPERATION DOMESTICALLY AND INTERNATIONALLY FOR MONITORING CONVICTED SEX OFFENDERS

All the domestic criminal justice agencies need to include a more integrated and coordinated approach to add value to the management of the risk of recidivism of sex offenders. This requires considering the establishment by domestic law of a statutory duty to cooperate and exchange relevant information to protect the public and to promote the rehabilitation of sex offenders.

Under a solid domestic framework, existing protocols for cooperation would be reviewed and extended where necessary, taking into account requirements for data privacy and protection.

One of the challenges is to assess if other government/jurisdictions and non-government organisations should be involved and participate in the process of managing the risk posed by sex offenders and what type of protocols should be put in place to guide interaction between all the institutions acceding and transmitting personal data.

An integrated and coordinated approach at the national level would imply, at least, the police, the prison services, judicial institution, the health system as key institutions in managing the higher risk convicted sex offenders. To achieve the optimum added value, the institutions should have the possibility to exchange, in a confidential and secure manner, all information that might be relevant to the protection of the public and the assessment, management, supervision and rehabilitation of convicted sex offenders. Subject to the need to protect the public and not to prejudice criminal investigations, offenders should have the right to be aware of personal data being retained in respect to them and to correct any inaccuracies or mistakes. To avoid any doubt, it may be appropriate to impose a statutory duty on these national institutions to cooperate and exchange information and to establish concrete areas and enumerate how this should be carried out. The confidentiality and security of the information must be guaranteed by a lawful authority, and the sharing must be necessary and proportionate. The practice must prevent publicising the identity of sex offenders unless, for example, a high-risk person is evading monitoring and poses a real danger to the community derived from the assessed risk of recidivism.

Whatever new policing structures are introduced, the function of both intelligence and operational responses to overseas offending must be integrated with the work of child protection specialists and prosecutors.

There is also growing evidence of the need to consider the role of victims in an offender risk management strategy. Experts have suggested that *'perhaps more than during any other phase in the criminal justice process, concerns about personal safety are likely to be heightened for victims when sex offenders are released from prison. The victims of sex offences must, therefore, be recognised as key stakeholders with an important role in re-entry efforts and whose needs and interests must be considered. This involves ensuring that appropriate safety plans, services and support are in place for victims, that they understand the various management strategies that are designed to protect them, and that they are provided opportunities to be involved in the processes pertaining to sex offender management and re-entry, if they are interested'*.¹⁵⁰

150 Dr. Kurt Bumby, Tom Talbot, and Madeline Carter, U.S. Centre for Sex Offender Management (CSOM). Accessed 10 May 2015 http://www.csom.org/pubs/reentry_brief.pdf

4 GOOD PRACTICES

Good practices of exchange of information/cooperation

- A good example of strong national level cooperation could be found in Northern Ireland and Britain through the *Multi-Agency Sex Offender Risk Assessment and Management* (MASRAM). The main features of MASRAM include: (i) a strong emphasis on interagency cooperation at all levels (the Probation Service, the Garda Síochána, the Irish Prison Service, the Health Service Executive, with primary responsibility for child protection and welfare); (ii) using evidence-based risk assessment to classify offenders into low, medium and high-risk categories; (iii) detailed manuals, guidelines and interagency protocols that govern every aspect of the process, especially the sharing of information; and (iv) use of pro-active case management of higher risk offenders. MASRAM has a Strategic Management Committee chaired by an Assistant Chief and composed of senior representatives from the prison and probation services, social services, the Housing Executive, the Northern Ireland Office, Department of Health, Social Services and Public Safety as well as voluntary agencies such as the NSPCCC (child protection) and Nexus Institute (victims of sex offenders).

Timely, accurate and accessible information is essential to ensure the effective management of sex offenders and to ensure quality risk assessment and risk management.

A 'Protocol for the sharing of information on the management of sex offenders between the Probation Service and the Probation Board for Northern Ireland (PBNI)' was signed by the Heads of both Organisations in March 2006. The protocol established mutual arrangements for the management of sex offenders who are subject to supervision by the respective services. It facilitates best practice and effective case management of sex offenders between jurisdictions by enabling the exchange of relevant information on a structured and agreed basis. A 'Memorandum of Understanding on Information Sharing Arrangements' between Ireland and the UK relating to sex offenders was signed on 27 November 2006. The rationale for the memorandum is that such information will be shared between police forces to protect the public from risks presented by sex offenders and investigate serious sexual offences. The memorandum covers the transmission of any information necessary to achieve these purposes and the concrete process to do so.

The MASRAM cooperates and exchanges information formally and informally with a number of European and North American jurisdictions on a regular basis. In addition, to this general cooperation on matters of mutual interest, specific links have been developed with authorities at destinations with a higher prevalence of offences.

A good centralisation of information at the national level to ensure an appropriate balance among the protection of the population, the right to privacy, proportionality, necessity, effectiveness and sustainability of crime prevention through the provision of rehabilitation programmes requires a risk management system cohesive across all institutions (police, prisons, judicial, medical and psychological services, etc.). Its activity must be tightly regulated by laws and protocols/guidance to ensure an appropriate exchange of information. Without an effective and legitimate operations of national systems, the implementation of measures at international level to monitor convicted travelling sex offenders, and hence, prevent SECTT could be challenged in the long term.

- Project HAVEN – Halting Europeans Abusing Victims in Every Nation was launched in late 2010 by the European Law Enforcement Agency (Europol) to stop travelling child sex offenders. Main objectives include joint actions for the EU Member States Law Enforcement and the creation of a permanent flagging system or database of Europeans (and persons residing in the EU) posing a danger to children.

Joint Actions (joint investigation teams JITs consist of judicial and police authorities from at least two European member states) ¹⁵¹ have been coordinated in many of the EU Member States' main international airports focusing on arrival and departure check-ups of persons on flights from and to known hotspots for transnational child sexual offenders. JITs are responsible for carrying out criminal investigations into specific matters for a limited period to improve police cooperation. Other examples of good practice can be found in information sharing and building trust, along with practical technical assistance.

Despite good results and practices, effectiveness requires strengthening bilateral and multilateral impact upon both policy and practice. This system aims at being a progressive means of sharing information about known child sex offenders subject to investigation by foreign states, especially essential information to enhance cooperation with destination countries. Moreover, as the project focuses just on criminal investigations and convictions, efforts need to be put in place regarding non-criminal orders (e.g. disqualification from working with children). Currently, that information is not provided unless the member state holding the information does so voluntarily. This should be made mandatory, as it provides vital information to judge a person's suitability for working with children.

Operation *RAVEN* (Recording Europeans Abusing Victims in Every Nation) was launched within project HAVEN, by the Europol's Child Sexual Exploitation Team. The operation focuses on criminal intelligence by cross-matching persons who pose a danger to children because they have a sexual interest/preference in them. However, the territorial scope is limited. The operation is executed by the Europol Information System, to which only competent restricted EU law enforcement personnel have access.

Operation Raven also has other limitations. Law Enforcement should have access to proper passenger data in a timely manner to facilitate any database comparison allowing targeted actions, especially when dealing overseas. The pending Passenger Name Record (PNR) Directive in the EU could be a good regulatory opportunity to include this request. The removal of all legal obstacles to exchange information is crucial as well as to have standardised protocols in its transmission while preserving the confidentiality of the process (police, judicial staff, immigrations, customs, passport or visa offices, etc.).

¹⁵¹ The concept of the Joint Investigation Teams (JITs) originated from the 2000 EU Convention on Mutual Legal Assistance in Criminal Matters 2000 with the aim of improving co-operation between judicial, police and customs authorities by updating existing mutual legal assistance provisions.

- The U.S. Homeland Security Investigations (HSI) developed *Operation Angel Watch* to proactively identify individuals traveling to foreign countries who have been convicted of a sexual crime against a child. Under *Operation Angel Watch*, HSI and the ICE partner to identify passengers who are registered sex offenders when they travel from the U.S. to overseas destinations. Once identified, and travel arrangements are confirmed, the passenger's information is shared through HSI's extensive network with law enforcement in the arrival country for appropriate action. Between October 2013, and September 2014, *Operation Angel Watch* notified more than 100 countries of the arrival of over 2,200 traveling child sex offenders. Approximately 500 of these offenders were denied entry by the arrival country. Some countries, considered high-risk for sexual exploitation of children in travel and tourism, had correspondingly higher rates of travel by travelling child sex offenders during this same period.¹⁵²
- The *AFP Ho Chi Minh City (HCMC) Liaison Post* implemented a strategy in partnership with the Vietnam Ministry of Public Security (MPS) engaging with the tourism industry referred to as '*monitor to prevent and disrupt*'. The following actions are employed with respect to arriving registered sex offenders: (i) meeting at airport on arrival by police; (ii) covert surveillance/monitoring deployed to establish where the offender stays whilst in Vietnam; (iii) engage hotel management/tour company; (iv) monitor duration of stay, change of hotels/accommodation; (v) monitor point of exit from Vietnam and onward travel; and (vi) notify regional partner where necessary. Besides, the analysis of the data, the strategy provides insightful information about registered sex offenders use of tourism facilities and services, their preferred district/province, hotel type, quality/star rating, stay duration, return travel/stays and onward travel destinations.
- On June 2015, the U.S. Immigration and Customs Enforcement (ICE) and the UK National Crime Agency (NCA) officially signed an agreement to provide information on the travel of convicted child sex offenders between the two countries. The agreement establishes their intention to provide each other with known international travel of individuals previously convicted of a sexual crime against a child. The information is to be used to enhance the interdiction or investigation of these convicted child sex offenders, as well as making informed decisions regarding their admittance to the respective countries. The agreement also notes the intention of the two national law enforcement agencies to offer support and best practices to each other to combat sexual exploitation of children in travel and tourism as part of each country's efforts to protect children from sexual abuse.
- *European Criminal Records Information System (ECRIS)* was created as a response to the numerous subsequent studies that had demonstrated that national courts frequently pass sentences on the sole basis of past convictions featuring in their national register, without any knowledge of convictions in other countries. Consequently, criminals were often able to escape their past simply by moving between EU countries.¹⁵³ The goal of ECRIS was to improve the exchange of information on criminal records throughout the EU.

152 HSI and ICE, Paper submission of U.S. Immigration and Customs Enforcement. Homeland Security Investigations. Global Study on Sexual Exploitation of Children in Travel and Tourism, 2016.

153 European Commission, Criminal Justice Department, "European Criminal Records Information System". Accessed 5 May 2014 http://ec.europa.eu/justice/criminal/european-e-justice/ecris/index_en.htm

ECRIS is based on a decentralised architecture: criminal records data is stored solely in national databases and exchanged electronically between the central authorities of EU countries upon request. The EU country of nationality of a person is the central repository of all convictions handed down to that person. The country's authorities must store and update all the information received and retransmit them when requested. As a result, each EU country, upon request, is in a position to provide, from another EU country, exhaustive, up-to-date information on its nationals' criminal records, regardless of where those convictions were handed down. An EU country convicting a non-national is obliged to immediately send information, including updates on this conviction to the Member State of the offender's nationality.

Another method is through the electronic interconnection of criminal record databases to ensure that information on convictions is exchanged between EU countries in a uniform, speedy and easily computer-transferable way. The system uses a standardised format: using two reference tables listing categories of offences and penalties with common codes. This, in turn, facilitates automatic translation, enhances mutual understanding of the information transmitted and enables authorities to react immediately upon receipt of the information.

When sharing information, Member States are obliged to make sure they comply with the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, respecting the right to privacy of personal data relating to offenders.

The main challenge of ECRIS is to expand the scope to non-European countries because it is currently not possible to determine whether third country nationals were previously convicted in other EU countries without consulting them. However, this will require a complex implementation of a strong and common legal framework to preserve the confidentiality of data in every country.

ECRIS could be improved by expanding its mechanisms internationally and by adapting the system for travelling sex offenders. This could be implemented by establishing a solid framework for the exchange of information as part of the global fight against SECTT. The legal standardisation of different SECTT concepts and privacy standards across states are essential.

5 ADDITIONAL ISSUES

Additional Issues to Consider in the Prevention of SECTT

THE SPECIFIC RIGHT TO PRIVACY OF JUVENILE OFFENDERS

Article 40 of the CRC requires age-appropriate proceedings for children accused of criminal acts. In 2007, the UN Committee on the Rights of the Child issued a General Comment on Article 40 reminding governments that *'no information shall be published that may lead to the identification of a child offender because it leads to stigmatisation and will impair the child's right to obtain education, work, and housing'*. Although the committee recognised that governments have a legitimate interest in protecting the public, it observed that children *'differ from adults in their physical and psychological development'*.¹⁵⁴

Moreover, article 16 of the CRC protects the child from arbitrary or unlawful interference with his or her privacy and from unlawful attacks on his/her honour and reputation. Besides, the UN Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules') requires in Principle 8 that every child's privacy be respected at all stages of the juvenile justice process *'to avoid harm being caused to him or her by undue publicity or by the process of labelling'*. In principle, *'no information that may lead to the identification of a juvenile offender shall be published'*.¹⁵⁵

In this regard, clinical studies agree that juvenile sex offenders may act impulsively, and their sexual offending behaviour is not fixed. Juvenile sex offenders demonstrate that they differ significantly from adult sex offenders in terms of motivation, conduct and future risk. Sexual misconduct by children is generally less aggressive, often more experimental than deviant and occurs over shorter periods of time.¹⁵⁶

Again, we find two approaches on this issue. The U.S. federal model seeks to compel states to register certain juvenile sex offenders on the basis of the offense, without regard to individual circumstances or a risk assessment. Nevertheless, some states have also permitted juveniles who demonstrate successful rehabilitation to be removed from registries, which is consistent with the traditional philosophy of the juvenile justice system.¹⁵⁷ Even, in Hawaii the state legislature appointed a committee, the Adam Walsh Act Compliance Working Group, to study the federal requirements and decided juveniles adjudicated in a family court were not subjected to registration. The federal government has attempted to address these concerns by issuing supplemental guidelines that give states the discretion to exempt children who are placed on the registry from public website disclosure. Under these new federal guidelines, states also have greater discretion regarding the disclosure of juvenile adjudications to schools, public housing, social services, and volunteer

154 Committee on the Rights of the Child, General Comment No. 10, "Children's rights in juvenile justice", 25 April 2007. Accessed 10 May 2015 <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

155 UN Standard Minimum Rules for the Administration of Juvenile Justice, 29 November 1985. Accessed 10 May 2015 <http://www.un.org/documents/ga/res/40/a40r033.htm>

156 David Finkelhor, Richard Ormrod, and Mark Chaffin, "Juveniles Who Commit Sex Offenses Against Minors," p. 3.

157 Amanda Petteruti & Nastassia Walsh, "Registering Harm: How Sex Offense Registries Fail Youth Communities", 3 JUST. POL'Y INSTITUTE, 2008. Accessed 3 May 2015 http://www.justicepolicy.org/uploads/justicepolicy/documents/walsh_act.pdf

agencies. However, the new federal guidelines do not prohibit states from publishing this information.¹⁵⁸ But still states have the legislative power to decide to include all juvenile sex offenders within the registries.

Human Rights Watch¹⁵⁹ conducted comprehensive studies on the issue and concluded that the impact of being a youth offender subject to registration are multigenerational, affecting the parents, and also the children, of former offenders. Thus, if some youth offenders are subject to these laws, they should never be automatically placed on registries without undergoing an individualised assessment of their particular needs for treatment and rehabilitation, including a periodic review of the necessity to register.

The UK Supreme Court has stated that 'a person's right to have his status reviewed is even stronger in the case of child offenders because of the fact that children change as they mature'.¹⁶⁰

Based on the reasons above and under the CRC legal framework, a child sex offender who has perpetrated a sexual crime against another child should only be placed on a sex offender registry in extreme cases (for example, when an individual risk assessment demonstrates that the child offender poses a danger to the community). The community response to child sex offenders should be age appropriate and take into account the differences between juveniles and adults, as well as the enormous variation among juvenile offenders themselves. Legislators must also be careful not to subject children to a legal framework that may impede their treatment and rehabilitation, which are methods benefitting society and are among the primary aims of the juvenile justice system.¹⁶¹ An initial determination of lifetime inclusion should not be permitted. A one-size-fits-all approach to sex offender registration does not contribute to public safety because the most dangerous offenders are often supervised in the same way as very low-risk offenders who are not likely to commit new sex offenses. This causes an additional burden on law enforcement. Moreover, judges, after clear and exhaustive examination should confirm that public safety cannot be adequately protected by any means other than the youth being subject to registration. At the same time, judges must prohibit any type of publication/dissemination of the offender's records to the public.

THE ROLE OF THE MEDIA ON RIGHT TO PRIVACY AND DISSEMINATION OF INFORMATION

The media should be a partner in educating the public about sexual abuse through the dissemination of accurate and research-based information about sexual violence, sexual predators and victimisation. The media is clearly influential in shaping public opinion, which affects the development of social policy in this particular area. Research has shown that exposure to accurate information can facilitate changes about important social issues.¹⁶²

Despite the positive role of the media and the right of freedom of expression to which they are entitled, tension exists between the media's right to report on matters of public concern and the individual's right to privacy.

158 Carole J. Petersen & Susan M. Chandler, "Sex Offender Registration and the Convention on the Rights of the Child: Legal and Policy Implications of Registering Juvenile Sex Offenders", *William & Mary Policy Review*, Vol. 3:1.

159 Human Rights Watch, "No Easy Answers: Sex Offender Laws in the United States" Vol. 19, No. 4(G), September 2007

See also, Human Rights Watch, "Raised On The Registry. The Irreparable Harm of Placing Children on Sex Offender Registries in the U.S." (May 2013).

160 Linda Szymanski, "Megan's Law: Judicial Discretion over Requiring Juveniles to Register as Sex Offenders", 10 *NCJJ*, 2005.

161 Daniel S. Nagin et al., "Public Preferences for Rehabilitation versus Incarceration of Juvenile Offenders: Evidence from a Contingent Valuation Survey", 5 *CRIMINOLOGY & PUB. POL'Y* 301, 2006.

162 Jill S. Levenson, "Public Perceptions about Sex Offenders and Community Protection Policies", 7 *ANALYSIS OF SOC. ISSUES AND PUB. POL.* 1, 17, 2007, p. 20.

There are some elements that are essential to resolving these existing tensions:

- Whether the nature of the information disseminated is public or private. It is clear that just the information of public concern could be reported by the media.
- What is the person's specific role in society to determine the public nature of his/her actions? The fundamental question to be answered with regard to this concrete issue is whether sex offenders are public figures due to the controversy that undoubtedly surrounds their crimes and thus are subject to inevitable media scrutiny. Some arguments suggest that sex offender status is accordingly defined by the consequences of their actions, and therefore, individuals who choose to engage in criminal activity against children effectively expose their reputations to injury and warrant public figure status as a result.¹⁶³ Even though criminal activity by itself does not create public figure status, it is a convincing factor that often leads courts to determine that law-breaking individuals are public figures.
- Whether a sex offender's right to privacy is sufficiently compelling to dictate government regulation of the media's right to report on their status as a convicted sex offender. This argument is particularly relevant to sex offenders who argue that, after serving the punishment imposed by the corresponding court, their depiction or other personal identification data within the media is an invasion of their privacy and unfairly stigmatises them as dangerous.

From a legal point of view, media access to convicted sex offender records must be restricted to prevent the widespread dissemination of their notorious status, upon completion of the sentence. That is based on the lawful boundaries on the right to privacy. If personal data of convicted sex offenders are used to monitor these persons to prevent crime, the media cannot disclose the information to the general public. This does not prevent the media's right to report on cases and provide information. But, the media should be limited by privacy laws to disseminate confidential data that the general public does not have given access. Moreover, regulations should stipulate to the media the legal criteria on disclosing confidential data that could harm the right to privacy of convicted sex offenders. Similar legal rules must apply to social media (Facebook, Twitter, etc.).

The European Court of Justice recently held that individuals have the right, under certain conditions, to request search engines to remove links to their personal information.¹⁶⁴ The so-called 'right to be forgotten' is however not absolute and needs to be put in balance with other fundamental rights such as the freedom of expression and the right of the public to access information. Each request for removal is therefore considered on a case-by-case basis by search engines that try to reach the right balance between individual's private life and the public interest to access information. Personal information should be removed if the information is inaccurate, inadequate, irrelevant or excessive. In consequence, search engines have received many delisting requests from convicted paedophile.

Between 13 May 2014 and 1 October 2015, Google search engine received 3,23,095 requests from European internet users asking for the removal of more than 1 million URL addresses.¹⁶⁵ Google delisted less than half of the requests (41.3 percent). Some of the requests were made by sex offenders asking Google to delist articles concerning their sexual offense due to an infringement of their privacy rights. Google took into account the criteria laid down by the European Court of Justice, such as the requestor's role in public life, the nature of the information and the time criterion, to potentially delete the URL addresses. The time criterion is especially relevant when it comes to criminal issues as it raises the question of the relevance of the information. Search engines should then look for the right balance between the public interest in the information and the privacy right of sex offenders.

163 Douglas Griswold, "Sex Offenders in the Community: Their Public Persona and the Media's Corresponding Privilege to Report", 15 Wm. & Mary Bill Rts. J. 653, 2006.

164 ECJ, 13 May 2004, Google Spain SL et Google Inc. v. Agencia Española de Protección de Datos (AEPD) et Mario Costeja González, Case C-131-12.

165 Source: "European privacy requests for search removals" from Google Transparency Report.

6 RECOMMENDATIONS

To protect children against SECTT within a human rights framework, some legal provisions need to be clearly stated within regulations. However, considering the complex and lengthy process this could involve at the international level, in order to be effective, these legal duties should be made compulsory and included within the domestic legal instruments. An analysis of the key western legislative frameworks and the different models of child sex offender registers reveals some weaknesses and drawbacks that still need to be addressed. Below are some recommendations aiming to improve the existing system:

RECOMMENDATION 1 – Legal obligations to register child sex offenders. Establish child sex offender registers in every country which complies with international standards on confidentiality and privacy.

- Public dissemination must be prohibited. Only authorised officials must have access to the information provided on the register. Exceptions may be contemplated in extreme cases affecting the safety of a child and accompanied by adequate technical or other safeguards to protect against unauthorised access or misuse.
- Strong sanctions (e.g. dismissal) must be provided for those officials misusing data on the registry for unlawful purposes or disclosing them to non-authorised persons (including the media).
- Disqualifications that are not placed in the criminal records because their nature is administrative or civil (non-judicial) should also be included within the registration data. Alternatively, authorities and employers should have access to that information when hiring someone to work in direct or indirect contact with children.
- Based on proportionality, monitoring or surveillance must be considered as necessary measures to prevent SECTT, although limited to a set period of time to be determined in the sentence.
- Mandatory provisions on the use of evidence-based risk assessment tools to identify the risk of the sex offenders are essential. States should be accountable in case of non-compliance with proper and lawful risk management systems.
- In connection with the previous recommendations, sensitive information that is placed in the registry should be limited to a period of time, and regularly informed by the team in charge of rehabilitating and assessing the risk of recidivism of convicted offenders. Nevertheless, general data and criminal records must be stored for a long period of time in a confidential manner.
- States should contemplate strong economic sanctions within their regulations for those individuals or companies who publish online and offline confidential information. Nevertheless, the type of confidential information that cannot be published needs also to be regulated.

RECOMMENDATION 2 – Legal obligations regarding restrictions on travelling child sex offenders

- Every restrictive measure for convicted travelling sex offenders should be adopted on a case-by-case basis with the assessment of a multidisciplinary team (judicial staff, psychologists, police, etc.). In this regard, countries should consider replicating the UK model on Sexual Harm Prevention Orders and Sexual Risk Orders.
- Travel notifications to law enforcement agencies should be done at least 15 days prior to any travel within or outside the country.¹⁶⁶ Full details of the travel must be disclosed: a form of transportation, date of departure, the countries and/or municipalities they intend to visit, details of accommodation arrangements and date of return. While this should not deter the offenders from travelling, it requires them to disclose certain information to the official institutions, which can act as a strong deterrence measure.
- Identity documents for travel (passport for international travel and identity card for domestic travel) could be marked with a note or confiscated for convicted sex offenders who are considered to have a high-risk level of recidivism. The length of the note or the confiscation should be assessed on a case-by-case basis by a professional team in charge of their evaluation.

RECOMMENDATION 3 – Legal obligations regarding exchange of information

- Pre-employment checks should be mandatory for any positions involving indirect or direct access to children. This obligation should be on the employer's side (regardless if the candidates are national or foreigners). Employers must contact the corresponding authorities to be provided with a certificate directly from them, in order to avoid false documents made by convicted sex offenders. Employers who fail to conduct mandatory police checks should be held liable.
- The inclusion of statutory duty to cooperate in the exchange of relevant information of convicted sex offenders for prevention purposes at the international and domestic level. Law enforcement agencies should be free to exchange information in a confidential and secure manner. This obligation to cooperate should focus not only between different agencies with a country but also at the international level. Legislation should stress that states cannot refuse to cooperate in the exchange of information. Rejection should be a punishable offence.
- Legislation should include, at least, the basis for transmission of information mechanisms. In this regard, the European Council Framework Decision on the Organisation and Content of the exchange of information, as well as the ECRIS, could serve as a good reference to be replicated, although with improvements needed (as previously analysed in Section 6), at the regional and domestic level.
- Based on the obligations included in the legislation, protocols, memorandum of understanding or other bilateral agreements should be adopted by the national agencies and with third countries, especially those which are the most popular destination countries. Nevertheless, an exchange of information with third countries without a bilateral agreement should not hinder monitoring of convicted sex offenders. Therefore, in the case of need, countries must be obliged to exchange information without a bilateral agreement on the basis of the general legal obligation with proper safeguards to preserve confidentiality.
- Centralization of information at the national level is essential in order for effective cooperation between countries. This requires a common standardisation of criminal information (e.g. tables and codes as done within the ECRIS). Also, a common terminology of SECTT for every child under 18 years, regardless of the domestic age of sexual consent, is essential for the exchange of information systems to work internationally.

¹⁶⁶ A period of 15 days can be considered enough time for national officials to contact foreign authorities when the convicted person has to travel.

- Centralisation requires that every state appoints a lawful authority to control the exchange of information. This authority could also be appointed as the focal point for the collection of information and the requesting and sharing of information with third countries. Among the functions of this authority must be the monitoring and transmission of private and confidential data according to legal obligations, rules and protocols.
- The creation of specialised units for SECTT cases in the exchange of information of convicted sex offenders could ease the management and sharing of information at national and international level.
- At the national level access to information for customs, immigration, consular services, passport and visa offices and probation officers is recommended. This is of extreme importance in cases of SECTT given its transnational nature. Besides, structures of cooperation should include both intelligence and operational responses to overseas offenders and they must be integrated within the work of mental health services and child protection networks.

RECOMMENDATION 4 – Special exceptions for juvenile sex offenders

- A juvenile sex offender must be placed on a register only in extreme cases after a special evidence-based assessment of their personal situation and the specific threat or danger he/she could pose to children's safety. Lifetime inclusion on a register must be expressly prohibited. Similar conditions should apply when taking restrictive measures regarding travel bans or notifications, as well as identity document confiscations or notes. Moreover, any of the aforementioned measures, when necessary, should be imposed considering the age of the juvenile sex offender and within rehabilitation programmes associated with the measures. Any measures should be adopted by a judge after hearing the juvenile sex offender and the psychosocial experts assigned to the case. These legal premises should be incorporated at the international level for states to be binding and accountable.

RECOMMENDATION 5 – Regulation of the media with regards to the right to privacy for travelling sex offenders

- When reporting a case, the media should be made aware of what constitutes as confidential data that can harm the right to privacy of convicted child sex offenders. This does not prevent that media's right to report on cases and provide data, but they should be limited by the right to privacy to avoid disclosure of confidential information.

ABOUT

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ACRONYMS

AFP	Australian Federal Police
ASEAN	Association of Southeast Asian Nations
ANCOR	Australian National Child Offender Register
CBSA	Canada Border Services Agency
CRC	Convention on the Rights of the Child
DNA	Deoxyribonucleic Acid
CDOJ	California Department of Justice
ECRIS	European Criminal Records Information System
The EU	European Union
ECHR	European Convention on Human Rights
EUROPOL	European Police Office
HSI	Homeland Security Investigations
ICE	Immigration and Customs Enforcement
ICCPR	International Covenant on Civil and Political Rights
JIT	Joint Investigation Teams
MPS	Managed Person System
MASRAM	Multi-Agency Sex Offender Risk Assessment and Management
NSPCC	National Society for the Prevention of Cruelty to Children
NCOS	National Child Offence System
OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
PNR	Passenger Name Record
SECTT	Sexual Exploitation of Children in Travel and Tourism
SHPO	Sexual Harm Prevention Orders
SRO	Sexual Risk Orders

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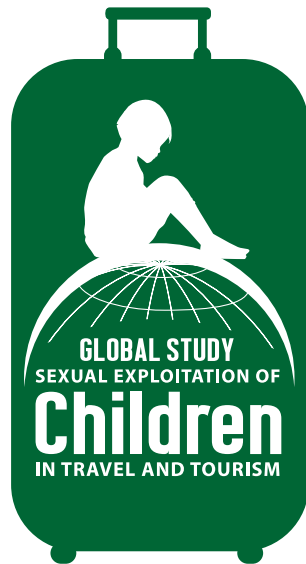
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