



Down to Zero
Fighting sexual exploitation of children

EXTRATERRITORIAL JURISDICTION AND EXTRADITION LEGISLATION AS TOOLS TO FIGHT THE SEXUAL EXPLOITATION OF CHILDREN



ISSUES PAPER

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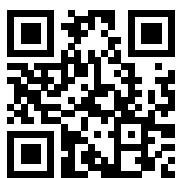
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Sexual exploitation of children happens in every country on earth. Children from all socioeconomic groups, genders, ethnic and cultural groups, and in different geographic settings, are affected.

Globalisation and technological advancements have also made this crime borderless, and drivers like increased mobility of people and widespread access to technology and the Internet, have transformed the nature of child sexual exploitation crimes.¹ For example, in travel and tourism contexts, international travelling offenders continue to be amongst those committing child sexual exploitation.² Furthermore, widespread and affordable access to mobile devices with Internet connectivity and sophisticated, online networks of offenders go hand-in-hand to make it easier for travelling offenders to connect with children to exploit.³ Offenders use encrypted messaging platforms and un-regulated peer-to-peer networks (bypassing more monitorable server based networks) to connect and cooperate online, evade identification and share child sexual abuse material.⁴ Trafficking crimes may also be transnational in character. Although awareness of domestic trafficking is growing, transnational trafficking networks continue to operate – requiring transnational cooperation from law enforcement to retaliate.⁵

- 1 ECPAT International. (2020). *Summary Paper on Sexual Exploitation of Children in Travel and Tourism*. Bangkok: ECPAT International. 1.
- 2 *Ibid.*, 4.
- 3 *Ibid.*, 5.
- 4 ECPAT International. (2020). *Summary Paper on Online Child Sexual Exploitation*. Bangkok: ECPAT International. 2.
- 5 UNODC. (2018). *Global Report on Trafficking in Persons*. 13.

Legislation needs to enable cross-border responses in order to protect children everywhere and avoid impunity for offenders.⁶ Extraterritorial jurisdiction and extradition mechanisms have become essential tools in the fight against the sexual exploitation of children over the last decades. Although there are examples of these mechanisms existing since antiquity,⁷ territoriality was considered a defining pillar of international law and extraterritorial jurisdiction was rarely exercised until the twentieth century.⁸ By the mid-1900s, as economies became more and more interconnected, there was an increased interest in regulating cross-border activities and addressing transnational crimes.⁹ Since the 1990s, international legal instruments increasingly called on States to assert extraterritorial jurisdiction.¹⁰ The creation of the United Nations Office on Drugs and Crime, the signing of the [United Nations Convention against Transnational Organized Crime](#) and the additional [Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children](#), as well as the adoption of a [Model Treaty on Extradition](#), signalled the increased political will to strengthen international cooperation in transnational criminal matters.¹¹ Over the last decades, many countries have developed extraterritorial legislation and extradition mechanisms to combat transnational crimes, including child sexual exploitation. Despite this admirable progress, these legal frameworks contain weaknesses and are hampered by practical obstacles that continue to enable impunity for transnational offenders.

Some child sex offenders purposely target children in a particular country because of more lenient laws or legal loopholes which inhibit prosecution. Others may choose to target children with complex residence status – such as irregular child migrants (especially migrant working children) and refugee children – as they may be or feel they are less well protected by laws.

Of course, if all countries enhance their legal frameworks to criminalise all offences related to sexual exploitation of children and establish appropriate penalties for such crimes, traveling child sex offenders cannot take advantage of weaknesses and gaps. On-going global advocacy has seen great progress in this work needed, country-by-country. For example, by lobbying for ratification of relevant international conventions and the consequent amendment of national legislation. Most countries currently have criminal legal systems which include provisions criminalising and enabling the prosecution of sexual exploitation of children offences committed in their territory. Furthermore, prosecution ideally should happen in the place where the crime is committed because it is where the victim, witnesses and evidence are found.

EXTRATERRITORIAL JURISDICTION: AN ESSENTIAL TOOL TO ADDRESS THE SEXUAL EXPLOITATION OF CHILDREN

Basic principles on criminal jurisdiction: Territorial and extraterritorial jurisdiction

The term jurisdiction generally refers to the power or right of a State to exercise legal authority over a particular individual or matter.¹² In order for a State to have jurisdiction over a crime and proceed with the arrest and prosecution of the alleged offender, a link must exist between the alleged crime and the State claiming jurisdiction. The primary and most widely accepted of these links is the territorial principle, according to which a State can prosecute crimes committed in its territory.

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- 6 ECPAT International. (2020). [Summary Paper on Sexual Exploitation of Children in Travel and Tourism](#). Bangkok: ECPAT International, 16-18.
- 7 Blakesley, C.L. (1981). [The Practice of Extradition From Antiquity to Modern France and the United States: A Brief History](#). Scholarly Works. 317.
- 8 Ireland-Piper, D. (2013). [Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine](#). *Utrecht Law Review*, 9(4), 69.
- 9 Parrish, A. (2008). [The Effects Test: Extraterritoriality's Fifth Business](#). *Vanderbilt Law Review*. 1469.
- 10 For example, the Convention on the Rights of the Child ([CRC](#)) and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography ([OPSC](#)); the United Nations Convention Against Corruption ([UNCAC](#)); the [International Convention for the Suppression of Terrorist Bombings](#) and the [Convention against Torture and Other Cruel, Inhuman and Degrading Treatment](#) all require or permit a degree of extraterritorial jurisdiction. See: Ireland-Piper, D. (2013). [Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine](#). *Utrecht Law Review*, 9(4), 70.
- 11 UNODC. (2004). Foreword to the [UN Convention against Transnational Organized Crime](#) and the Protocols thereto.
- 12 B. H. Oxman. (1987). [Jurisdiction of States](#). In R. Bernhardt. (1987). [Encyclopaedia of Public International Law](#). 277.

However, territorial jurisdiction might be insufficient when the State in which the crime is committed may be unwilling or unable to prosecute for a variety of reasons: for instance differing legislation and definition of the crimes, foreign offenders returning home and escaping prosecution, or capacity issues.¹³ Additionally, more and more crimes include a transnational dimension which poses a challenge to prosecution based solely on territorial jurisdiction. In these cases extraterritorial jurisdiction may provide a solution.¹⁴

Indeed, through extraterritorial jurisdiction a State can deem an offence committed abroad as an offence committed within its borders.¹⁵ This means that courts may prosecute offences of sexual exploitation of children based on the nationality of the offender (active personality principle) or the nationality of the victim (passive personality principle). Strong examples of such legislation also cover offences that by their nature are so heinous as to justify prosecution regardless of the place of commission or the nationality of the offender/victim (universality principle).

Relevant international legal instruments, such as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (hereafter OPSC) and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (hereafter Lanzarote Convention), encourage States to prescribe jurisdiction under the principles of active and passive personality.¹⁶ The OPSC further suggests that in the case of active personality, the concept of “nationality” of the offender should be interpreted broadly to also include residents of a certain country.¹⁷ The Lanzarote Convention makes this mandatory for State Parties.¹⁸

With regards to the universality principle, the inclusion of sexual crimes against children under the category of heinous crimes, which would

justify the application of this principle to assert jurisdiction, is very rare and not mentioned in relevant international legal instruments to date. Additionally, when universal jurisdiction is recognised in domestic legislations, it is generally subject to the condition that the suspect is in the territory of the State.

One of the few examples of domestic legislation providing for universal jurisdiction over offences related to sexual exploitation of children is the Swiss Criminal Code, including trafficking, indecent assault, rape, encouraging prostitution, sexual acts with dependent persons, sexual acts with minors against payments, and offences related to child sexual abuse material.¹⁹

In its Guidelines regarding the Implementation of the OPSC, the Committee of the Rights of the Child has recommended State Parties to establish universal jurisdiction for all offences covered by the OPSC due to the increased concern about the use of information and communication technologies to commit sexual offences against children and the new challenges to territoriality.²⁰

HOW DOES EXTRATERRITORIAL JURISDICTION APPLY TO SEXUAL EXPLOITATION OF CHILDREN?

Extraterritorial jurisdiction for sexual exploitation of children reduces impunity by creating grounds for prosecution of crimes that an offender may have avoided punishment for because of weaknesses or loopholes in the country they offend in. Furthermore, it can deter offending in the first place as avoiding prosecution is technically impossible, regardless of where in the world the offence is committed.

13 Stigall, D.E. (2013). [Ungoverned Spaces, Transnational Crime and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law](#). *Notre Dame Journal of International and Comparative Law*. 1.

14 *Ibid.*

15 ECPAT International. (2020). [Summary Paper on Sexual Exploitation of Children in Travel and Tourism](#). Bangkok: ECPAT International. 16.

16 United Nations General Assembly. (2000). [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#), Article 4; Council of Europe. (2007). [Lanzarote Convention](#), Article 25.

17 United Nations General Assembly. (2000). [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#), Article 4.

18 Council of Europe. (2007). [Lanzarote Convention](#), Article 25. However, the application of this jurisdiction rule to habitual residents may be subjected to reservation (Article 25(3)).

19 See: Federal Assembly of the Swiss Confederation. (1937). [Swiss Criminal Code](#), Article 5.

20 United Nations Committee on the Rights of the Child. (2019). [Guidelines regarding the implementation of the OPSC](#). para. 87.

Active Personality Principle

The principle of active personality is particularly important for crimes of sexual exploitation of children committed in travel and tourism or facilitated online.

State A could prosecute a crime committed by a national or habitual resident of State A in the territory of State B, irrespective of the nationality of the victim

Indeed, if a State cannot prosecute alleged offenders of sexual crimes against children solely based on their nationality/residence status, then these individuals could choose to travel to countries with lenient laws to commit crimes against children knowing that they will not be prosecuted after returning home. Internet and communications technology are other ways offenders may evade legislation and target children. For example, practices such as live-streaming of child sexual abuse or online grooming of children for sexual purposes may pose a challenge to territorial jurisdiction by making it more difficult to establish a link between the online conduct and the territory of one State.²¹ The active personality principle would therefore enable States to assert their jurisdiction over crimes of sexual exploitation of children committed by their nationals/habitual residents using the Internet, irrespective of where the offence or its consequences took place.

Besides ensuring that child sex offenders face prosecution, extraterritorial legislation based on the active personality principle can also be a useful deterrence tool. Laws influence social norms and define ‘acceptable behaviour’ in any society. Including comprehensive active extraterritorial legislation sends a clear message that countries will not let their citizens take a ‘holiday’ from their legal systems and that sexual exploitation of children is unacceptable, no matter where it happens.

Active Personality Principle Allowed for the Prosecution of a Travelling Child Sex Offender from France

In 2016, a French citizen was sentenced by a criminal trial court of Versailles to sixteen years of imprisonment and a treatment order part of a ten-year social/judicial supervision, for having raped and/or sexually assaulted at least 66 underage boys in Sri Lanka, Tunisia and Egypt between January 2002 and December 2011. After having been identified by the FBI in 2011 in child sexual abuse material circulating online, the offender was tracked down and arrested by the French Police in the following year. In the hard drives seized from his home, the police found thousands of photographs and hundreds of videos featuring him with minors, during trips to Tunisia, Egypt and Sri Lanka, which he had visited many times after the 2004 tsunami on behalf of two humanitarian associations. In total, over ten years, 41 victims aged six to seventeen have been identified in Tunisia, 19 in Sri Lanka and 6 in Egypt.²²

Passive Personality Principle

In line with the passive personality principle, a State could prosecute, under national laws, foreign offenders who sexually exploited a child national of their State, even when the offence takes place abroad. This is especially important in cases where children are trafficked across borders to be abused. Although rare, strong examples of such legislation also cover offences committed abroad against a child who is a habitual resident of that State.²³

State A could prosecute a crime committed in the territory of State B against a child who is a national (and in rare cases a habitual resident) of State A, irrespective of the nationality of the offender

21 Brenner, S. W. and Koops B. (2004). *Approaches to cybercrime jurisdiction*. *Journal of High Technology Law*, 4(1), 10; Witting, S. K. (2021). *Transnational by Default: Online Child Sexual Abuse Respects No Borders*, *The International Journal of Children's Rights*, 29(3), 743.

22 Assize Court of Yvelines in Versailles. (2016, June 22). Sentence no. 39/2016.

23 See, for example: Republic of Austria. (1974). *Austrian Criminal Code*, Section 64.1 (4a)

If the passive personality principle cannot be used to assert extraterritorial jurisdiction for crimes of sexual exploitation of children, child victims could only obtain justice in the country where the crime was committed, even if this is not their country of citizenship (or habitual residence in rare cases). Children trafficked to other countries for the purposes of sexual exploitation would not be able to claim justice if they managed to escape and return back home. Failing to include extraterritorial legislation based on the passive personality principle could even lead to impunity if the State where the crime was committed and where the offender is from does not criminalise the offence, as neither State's authorities would be able to prosecute the child sex offender. A child's ability to access justice is a "*fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights.*"²⁴ As sexually exploited children have a right to access justice and legal remedies, access to justice should be available wherever the child is. The economic and psychological costs of travelling back to the country where the crime took place to access justice could result in re-traumatisation and additional harm for the child or simply represent an impossible barrier that deters the child or their family from seeking justice. Extraterritorial legislation based on the passive personality principle protects the best interest of the child by providing accessible ways for child victims to seek justice and obtain remedies.

Extraterritoriality provisions based on the active and passive personality principles obey different logics. One stems from the idea that countries should take responsibility for crimes committed by their nationals abroad while the other one aims to protect children not only domestically but also when they are abroad. However, when included together in national legislation, they result in the same outcome: closing any possible jurisdictional gaps and loopholes in transnational child sexual abuse cases to ensure prosecution of offenders at all times.

Obstacles to the Applicability of Extraterritorial Jurisdiction

The number of countries that have incorporated in their national legislation the possibility of applying extraterritorial jurisdiction over offences of child sexual exploitation continues to increase. (ECPAT's [global progress map](#) includes a regularly updated summary of States' legislative commitments on this issue). However, some obstacles remain in practice and at procedural level amongst them.

International cooperation of law enforcement: A challenge to extraterritorial jurisdiction in practice

When evidence and witnesses are located in another State, international cooperation is needed to ensure extraterritorial jurisdiction can be enforced in the process of investigating the offence and trying the accused.²⁵

Cooperation between law enforcement and judicial authorities faces formidable practical problems, including language barriers, differing organizational arrangements and cultures between police forces, problems identifying contact points for information exchange and requests for evidence, delays in transferring or exchanging documents, difficulties in gathering material evidence and testimony from abroad, and differences in national laws for data protection, among other issues.²⁶

To minimise these obstacles and allow for evidence gathering, States have enacted laws to enhance international cooperation of their police and judicial bodies and have enacted regional or bilateral agreements on mutual legal assistance in criminal matters.²⁷ The OPSC requires State Parties to grant each other the greatest measure of assistance in connection with investigations in respect of offences related to sexual exploitation of children.²⁸ More concretely, the CRC Committee recommends State parties

24 Human Rights Council. (2013). [Access to justice for children: Report of the United Nations High Commissioner for Human Rights](#), para. 3 and 4.

25 Boister, N. (2012). [An Introduction to Transnational Criminal Law](#). Oxford: Oxford University Press. 159.

26 *Ibid.*, 161.

27 In 1998, UNODC developed the [Model Treaty on Mutual Assistance in Criminal Matters](#) to be used by States in the negotiation of bilateral instruments of this nature. In 2007 it adopted the [Model Law on Mutual Assistance in Criminal Matters](#) to be used as a tool by States when drafting domestic legislation in this regard. Additionally, article 18.7 of the [UN Convention against Transnational Organized Crime](#) states that, in the absence of a treaty, State Parties to the Convention shall apply the provisions under Article 18 (para. 9-27) as basis for mutual legal assistance.

28 United Nations General Assembly. (2000). [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#), Article 6.

to share information that may be useful in the investigation of offences and contribute in any way possible to facilitating investigations in their territory.²⁹

Different offences of sexual exploitation of children present different challenges. For example, additional challenges arise in cases of child sexual exploitation with an online element, due to the intrinsically transnational nature of online evidence and the specific expertise and highly technical tools required for effective policing of these crimes.³⁰ As institutional capacity and resources vary considerably across countries, cooperation across jurisdiction may face additional challenges. Furthermore, there is a need to harmonise approaches to the sharing of case-related information on child victims of online sexual abuse and exploitation between countries, including through cooperation agreements enabling secure use and sharing of data.³¹

Collaboration of national law enforcement with INTERPOL and regional agencies can help overcome some of these obstacles. As the only global law enforcement agency, INTERPOL enhances cross-jurisdictional investigations and provides tools for information exchange.³²

It is also difficult to know how States that have applied extraterritorial jurisdiction have managed, because there is very little data available on arrests and convictions in ‘destination’ countries, with separate information on cases prosecuted in the ‘sending’ country. The Committee on the Rights of the Child asks States who are reporting to it under the OPSC to submit disaggregated data, including data on prosecutions and convictions. However, even if a State submits its figures for arrests and convictions, the convictions recorded in the ‘sending’ country would not be part of the criminal statistics of the ‘destination’ country; although the arrest might be.

The double criminality requirement: A complex legal hurdle in prosecuting sexual exploitation of children

Apart from the practical difficulties associated with enforcement of extraterritorial jurisdiction, it is usually also subject to a number of conditions that further complicate its application. One of the most usual is the requirement of double criminality.

The principle of double criminality³³ requires that in order for extraterritorial jurisdiction and/or extradition to be enacted,³⁴ an offence must be considered a crime both in the State exercising extraterritorial jurisdiction (or the requesting State in extradition cases) and in the State where the offence was committed (or the requested State in extradition cases).³⁵ In practice, this requirement prevents individuals from being extradited for conduct which are not considered crimes in the country where they are located. This concern arises with regards to offences whose criminalisation differs greatly from country to country. Examples include laws related to blasphemy, abortion, or euthanasia.

State A could not prosecute crimes committed by its own nationals in State B or crimes committed against its own nationals in State B if the actions for which the jurisdiction or extradition is alleged are not punished by law in State B

However, in relation to crimes that may be universally agreed between many States – such as offences related to sexual exploitation of children – the principle has been argued as unnecessary to apply and represents an obstacle for effective transnational cooperation.³⁶ Newly developed legal instruments, particularly within the European Union, seek to abolish the requirement, at least partially. The European Arrest Warrant,

29 United Nations Committee on the Rights of the Child. (2019). *Guidelines regarding the implementation of the OPSC*. para. 108.

30 ECPAT International. (2020). *Summary Paper on Online Child Sexual Exploitation*. Bangkok: ECPAT International. 12-13.

31 *Ibid.*, 13.

32 Some examples of such tools in relation to sexual exploitation of children offences are INTERPOL’S Green Notices on convicted sex offenders and INTERPOL’s IWOL lists (INTERPOL worst-of list), which lists known domains containing very severe child sexual abuse material to be shared with Internet service providers willing to reduce the availability of this kind of material in their platforms.

33 Also known as ‘dual criminality’.

34 Double criminality might also be required for processes of mutual legal assistance.

35 Cryer R. et al. (2010). *An Introduction to International Criminal Law and Procedure* (2nd ed.). Cambridge: Cambridge University Press. 89.

36 *Ibid.*

for example, does not require double criminality regarding selected crimes deemed as particularly serious – including many offences related to sexual exploitation of children.³⁷

Double criminality, when required in cases of sexual exploitation of children, can make extraterritoriality and extradition inapplicable in practice, if the offences are not criminalised in one of the countries or qualification differs from country to country, making it very difficult to assess the fulfilment of the requirement.³⁸ In this sense double criminality can perversely undermine one of the fundamental aims of extradition: avoiding the creation of safe havens through the misuse of international boundaries by offenders.³⁹ In its Guidelines regarding the

Implementation of the OPSC, the CRC Committee argues that the requirement of double criminality “creates a gap in the law which enables impunity” and that “State parties should remove the requirement of double criminality, making it possible to exercise extraterritorial jurisdiction over offences covered by the Optional Protocol committed in another State even if the relevant offence is not criminalised in that State”.⁴⁰

Furthermore, double criminality may encourage offenders to seek out countries with weaker laws⁴¹ where children are not adequately protected, and where double criminality might prevent other States from exercising extraterritorial jurisdiction or extradition.

The Exclusion of the Double Criminality Requirement in French Legislation Allows for More Effective Prosecution of a Travelling Child Sex Offender⁴²

In 2019, a French citizen was arrested in Thailand for sexually exploiting two children aged 13 and 14 in his hotel room, where police also seized child sexual abuse material. The suspect was taken into custody but for unknown reasons he was released on bail after a few days and got his passport back which allowed him to leave the country and fly back to France.⁴³ During his detention, the case was reported to the French Embassy in Thailand, which alerted the French Authorities. A preliminary investigation was opened by the Prosecutor's Office and a search warrant was issued, making use of the extraterritorial legislation in France.⁴⁴ As soon as the suspect arrived in France, he was arrested and indicted for the crimes of “rape”, “assault on a minor” and “possession of child pornography”. The investigation revealed that he was suspected of having committed offences in different countries in Asia, including Thailand, Malaysia, the Philippines and India. The case is still ongoing and the offender remains in custody.

French law does not require double criminality for proceeding with active extraterritorial jurisdiction for offences related to sexual exploitation of children committed by French nationals or habitual residents abroad under art. 222-22 of the Criminal Code.⁴⁵ This removes an obstacle to the exercise of extraterritorial jurisdiction over travelling child sex offenders.

If double criminality was a requirement under French law, this case would have been much more difficult to prosecute with regards to the offences committed in countries where, for example, there isn't consistency in the definition of a child.

37 See: Council of Europe. (2002). [Framework Decision on the European Arrest Warrant](#), Article 2. Other examples of legislation abolishing the double criminality requirement would be the UK's [Sexual Offences Act of 2003](#), which under Section 72 excludes double criminality for extraterritorial jurisdiction over UK nationals committing an offence related to sexual exploitation of children abroad (although this exemption does not apply to foreigners who are UK residents).

38 Griffith, G. & Harris, C. (2005). [Recent Developments in the Law of Extradition](#). *Melbourne Journal of International Law* (9)1, 33-54.

39 UK Home Office. (2011). [Independent Report: A Review of the United Kingdom's Extradition Arrangement](#). 189.

40 United Nations Committee on the Rights of the Child. (2019). [Guidelines regarding the implementation of the OPSC](#). para. 84.

41 Also known as ‘forum shopping’.

42 Le Parisien. (2019). [Un professeur de français soupçonné d'avoir violé 50 enfants en Asie](#).

43 ECPAT International has previously noted this problem as recurrent. In its [Global Study on Sexual Exploitation of Children in Travel and Tourism](#) it noted that “travelling sex offenders whose passports are confiscated but who are released on bail can often obtain laissez-passer at their embassies and leave the country, further undermining prosecution in the country where the crime occurred.”

44 Republic of France. (1994). [Criminal Code](#). Article 222-22, as amended by [Law 2021-478](#) of 21 April 2021.

45 *Ibid.*

EXTRADITION MECHANISMS: BRINGING OFFENDERS TO JUSTICE FOR SEXUAL EXPLOITATION OF CHILDREN

What is extradition?

Once a State has established its jurisdiction over a case, then an investigation is initiated. The often transnational nature of crimes of sexual exploitation of children implies that in cases where the alleged offender is abroad (be it due to the exercise of extraterritorial jurisdiction or because the offender has fled the country where the offence was committed), the State might need to request their enforced return to face prosecution and/or punishment. This process is known as extradition.⁴⁶

The consensus in international law is that a State does not have any obligation to surrender an alleged criminal to another State, as it has legal authority over the people within its borders. Despite the absence of an international obligation, the desire for the right to demand such criminals from other countries has caused a web of extradition treaties to evolve. When no applicable extradition treaty is in place, a State may still request the extradition of an individual pursuant to the requested State's domestic law.⁴⁷ In addition, in the absence of extradition treaties between two States, the OPSC may be considered as the legal basis for extradition in respect of offences related to child sexual exploitation if both are State parties of this protocol.⁴⁸

State A requests State B to arrest and return a suspect found in the territory of State B to face prosecution or punishment in State A

Strong extradition mechanisms that encompass all offences related to sexual exploitation of children make it possible to close loopholes that could foster child sex offenders' impunity.

This is particularly important for offences constituting sexual exploitation of children where the offender is likely to travel to another country as the exploitation may not be detected until the offender has departed the country where the offence took place.⁴⁹ The same applies in situations of porous borders, where offenders can easily move between different countries undetected.⁵⁰ When States do not have mechanisms in place to enable extradition for sexual exploitation of children (via legislation and/or extradition treaties), child sex offenders might simply move to countries where offences of sexual exploitation of children are not extraditable to avoid prosecution.

The optimum way to apply extradition in relation to offences of sexual exploitation of children is to bring offenders back to the country where the offence was committed for effective prosecution in the country where the evidence, child victims and witnesses are located. Given the hurdles that international law enforcement cooperation entails when States exercise extraterritorial jurisdiction, strengthening extradition mechanisms to enforce territorial jurisdiction remains the most efficient solution.

However, extradition mechanisms are equally relevant in instances where extraterritorial jurisdiction is exercised to prosecute offenders when the State in which the crime is committed is unwilling or unable to prosecute for a variety of reasons. In these situations, extraterritorial legislation and extradition mechanisms go hand-in-hand. If a State has comprehensive extraterritorial legislation that enable the prosecution of its nationals for crimes of sexual exploitation of children committed abroad but lacks extradition mechanisms to request the arrest and surrender of those national offenders who remain abroad, prosecution could turn out impossible and extraterritorial legislation would become essentially ineffective in practice.

46 UNODC. (2004). *Model Law on Extradition*, Section 1 (Definitions): "Extradition means the surrender of any person who is sought by the requesting State for criminal prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence".

47 Cryer R. et al. (2010). *An Introduction to International Criminal Law and Procedure* (2nd ed.). Cambridge: Cambridge University Press. 95.

48 United Nations General Assembly. (2000). *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, Article 5.2; The OPSC has been ratified by 177 States, making it an almost universal instrument.

49 UN. (2019). *Guidelines regarding the implementation of the OPSC*. para. 85.

50 *Ibid*, para. 86.

Extradition Mechanisms Allows for the Detention and Return of a British Child Sex Offender who had Previously Evaded Justice

In 2013, an English citizen was arrested in Thailand on suspicion of sexually abusing children in the country. Before he could be prosecuted, he fled Thailand. In 2015, the suspect was identified in Spain, where he was eventually detained and extradited back to the UK under a European Arrest Warrant issued by the UK, after Dutch police uncovered incriminating web chats against him on the computer of a man in the Netherlands. He faced prosecution for 22 offences including contact sexual abuse with boys aged 10-14 in Thailand, and in 2016 he plead guilty to all 22 charges. Subsequently, several victims came forward in the UK claiming they too were sexually abused by the offender through his 25-year career as a school teacher and senior Scouts volunteer in the 80s and 90s. He was subsequently charged with 67 additional offences committed in Thailand and the UK and pleaded guilty to 23 of these. In 2017 he was sentenced to 13 life sentences primarily for offences committed in Thailand.⁵¹

States to extradite their own nationals. As mentioned above, the principle of double criminality requires that in order for extradition to be enacted, an offence must be considered a crime both in the requesting State and in the requested State.⁵² The double criminality requirement is a deeply ingrained principle of extradition law, where it originated, and it is included in many bilateral and multilateral agreements on extradition, as well as in the UN Model Treaty on Extradition.⁵³ However, the principle has been argued as unnecessary and an obstacle to effective international cooperation in the fight against certain transnational crimes deemed as particularly serious such as sexual exploitation of children, whose criminalisation is widely included in domestic legal frameworks worldwide. As a matter of fact, newly developed legal instruments such as the European Arrest Warrant do not require double criminality regarding selected crimes, including many offences related to sexual exploitation of children.⁵⁴

Beyond double criminality, one common limitation of extradition is the prohibition of States to extradite their own nationals. This widely common principle is based on a historical duty of the State to protect its citizens and sovereignty and it is often constitutionally protected.⁵⁵ It should be noted however, that the European Arrest Warrant framework has excluded this prohibition for extradition between EU Member States when the request is issued for the purpose of prosecution.⁵⁶ This development is however an exception⁵⁷ and the general rule is for some form of limitation to be in place.

Refusal of extradition based on this principle may be mandatory or discretionary.⁵⁸ In any case, this principle potentially challenges the possibility of States to prosecute foreign offenders for sexual exploitation of children offences committed within their territory if the offender flees the country and returns home after committing the offence. It additionally challenges the possibility

OBSTACLES TO THE APPLICABILITY OF EXTRADITION

Extradition is also affected by a number of practical and procedural obstacles. These include the already mentioned double criminality requirement which is often applied to extraterritorial legislation and extradition, as well as other limitations such as the prohibition by

- 51 UK Independent Inquiry into Child Sexual Abuse. (2018). *Independent Inquiry into Child Sexual Abuse- Protection of Children Outside the UK Investigation: Case Study- Children Outside the UK Phase Two*.
- 52 Cryer R. et al (2010). *An Introduction to International Criminal Law and Procedure* (2nd ed.). Cambridge: Cambridge University Press, 89.
- 53 UNODC. (2004). *Model Law on Extradition*, Section 3.
- 54 See: Council of Europe. (2002). *Framework Decision on the European Arrest Warrant*, Article 2. Other examples of legislation abolishing the double criminality requirement would be the UK's Sexual Offences Act of 2003, which under Section 72 excludes double criminality for extraterritorial jurisdiction over UK nationals committing a offence related to sexual exploitation of children abroad (although this exemption does not apply to foreigners who are UK residents).
- 55 Cryer R. et al. (2010). *An Introduction to International Criminal Law and Procedure* (2nd ed.). Cambridge: Cambridge University Press. 97.
- 56 European Arrest Warrant Framework Decision, Art 4.6.
- 57 Other exceptions encompass exclusions to the principle in bilateral Extradition Treaties between Stated which do not confer this principle constitutional status, such as in the *Extradition Treaty between Italy and the US 1983*, Article 4.
- 58 UNODC. (2012). *Manual on Legal Assistance and Extradition*. 49.

to prosecute foreigners for offences related to sexual exploitation of children committed abroad against nationals in pursuit of the passive personality principle if the offender returns to his or her country of origin, which may refuse extradition – thus protecting them.

It should be noted, however, that non-extradition does not necessarily mean non-prosecution as in international law States have the alternative obligation to prosecute if extradition has been refused on the basis of nationality or other motives (*aut dedere aut judicare*, extradite or prosecute).⁵⁹ This obligation has been included in numerous international treaties and conventions, including the OPSC with regards to offences related to sexual exploitation of children as well as national legislation.⁶⁰ However, in situations where the crime was not perpetrated in the country of origin of the offender, it may lead to difficulties to successfully mounting a prosecution due to a lack of evidence as well as differences in legal processes and systems between where the investigation was conducted and where the case is to be tried.⁶¹ For this reason it is always preferable to extradite the offender back to the place of commitment for prosecution.

Another alternative to soften the prohibition to extradite nationals is including provisions that allow their *conditional* extradition. This means that States could grant the extradition of their nationals upon the condition that they are returned for the service of any sentence imposed.⁶² In these cases, difficulties may arise if the requesting and requested States do not coordinate their efforts with regards to the amount of time needed to try the offender and the maximum amount of time the requested State is willing to allow one of its nationals to remain in a foreign State's custody.⁶³ However, if applied successfully, conditional extradition ensures that witnesses and forensic evidence do not need to travel potentially long distances to the home country of the offender. Be that as it may, conditional extradition provisions should

assure the compliance with the full penalty imposed by the prosecuting authorities.

CONCLUSION

Extraterritorial legislation is especially needed in cases where legal frameworks are weak and do not criminalise child sexual exploitation. In these instances, when offences are committed in a country lacking laws that protect children from sexual exploitation, extraterritoriality offers a way to prosecute offenders in a different country and closes the impunity gap generated by weak legislation in some parts of the world.

However, there has been a substantial improvement of numerous States' domestic legislation in recent years and there are now legal frameworks in place in almost every country which include provisions against child sexual exploitation.⁶⁴ Furthermore, it is generally preferable that offenders be tried in the country where the offences were committed as this is where the victim is situated and where witnesses and other evidence are available, to avoid the practical hurdles posed by investigations involving two or more jurisdictions.⁶⁵ For these reasons, where an offender has escaped the State in which they committed the offence, extradition back to that State is the best option.

Domestic legislation in many countries may still contain gaps and fail to criminalise an evolving range of child sexual exploitation online offences such as live streaming of child sexual abuse, online grooming, online sexual extortion and coercion.⁶⁶ In these instances, extraterritorial legislation provides for a useful tool to fight child sexual exploitation by holding offenders accountable. Furthermore, in cases where extradition faces legal and procedural obstacles, such as the prohibition to extradite nationals, extraterritorial legislation provides a way to ensure prosecution.

- 59 Galicki, Z. (2006). *Preliminary Report by Special Rapporteur on The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)*. International Law Commission. 259-271.
- 60 United Nations General Assembly. (2000). *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, Article 4.3: *Each State Party shall also take such measures as may be necessary to establish its jurisdiction over the above-mentioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.*
- 61 UNODC. (2012). *Manual on Legal Assistance and Extradition*. 50.
- 62 Cryer R. et al. (2010). *An Introduction to International Criminal Law and Procedure* (2nd ed.). Cambridge: Cambridge University Press. 97-98.
- 63 UNODC. (2012). *Manual on Legal Assistance and Extradition*. 50.
- 64 ECPAT International. (2016). *Power, Impunity and Anonymity: Understanding the Forces Driving the Demand for Sexual Exploitation of Children*. Bangkok: ECPAT International. 78.
- 65 ECPAT International (2008). *Strengthening Laws addressing child sexual exploitation*. Bangkok: ECPAT International. 105.
- 66 ECPAT International. (2020). *Summary Paper on Online Child Sexual Exploitation*. Bangkok: ECPAT International. 9.

RECOMMENDATIONS

ECPAT International recommends that States review and amend their criminal law to ensure cases of sexual exploitation of children are prosecuted and offenders apprehended no matter their or their victims' nationality and the location where they committed the crime. This requires enacting comprehensive extraterritorial legislation and extradition mechanisms and adopting measures to remove possible practical and procedural obstacles that may affect the applicability of these laws.

In particular, States should:

- Exercise jurisdiction over sexual exploitation of children crimes based on the active and passive personality principles (applying to both nationals and residents and including cases of attempt and complicity) to ensure that no offender goes unpunished.
- Establish solid domestic legislation and bilateral agreements to allow for mutual legal assistance procedures which enhance effective law enforcement cooperation in cases related to sexual exploitation of children.
- Establish harmonised approaches to the secure use and sharing of case-related data on child victims of online sexual abuse and exploitation between countries.
- Increase financial resources to support specialised capacities within law enforcement dealing with cases of sexual exploitation of children, especially those with an online element.
- Double criminality should be removed as a requirement for extraterritorial jurisdiction, extradition and mutual legal assistance for all offences related to sexual exploitation of children, in line with the recommendation of the Guidelines regarding the implementation of the OPSC.⁶⁷
- If double criminality is required the focus should always be on the substantive criminal conduct, and not the denomination given to such crime in the national legislation.⁶⁸ This is especially relevant for offences related to sexual exploitation of children due to the differing terminology used in domestic legislations to criminalise some of these offences.⁶⁹
- Include all offences related to sexual exploitation of children as extraditable offences in national legislation and extradition treaties.⁷⁰
- Consider the OPSC as the legal basis for extradition in respect of offences related to child sexual exploitation, in cases where a State makes extradition conditional on the existence of a bilateral extradition treaty and receives an extradition request from another State with which it has no extradition treaty, if both are State parties of the OPSC.⁷¹
- Ensure nationals can be extradited to the requesting State to face prosecution if they committed an offence related to sexual exploitation of children in that State. Since the non-extradition of nationals is constitutionally protected in many countries, an alternative to this prohibition could be the conditional extradition of nationals, who shall be returned by the requesting State to serve the imposed sentences in their country of origin after prosecution.
- A State which refuses to extradite its nationals for offences they committed abroad must prosecute these alleged offenders to ensure that they do not escape punishment.⁷²

⁶⁷ United Nations Committee on the Rights of the Child. (2019). [Guidelines regarding the implementation of the OPSC](#). para. 84.

⁶⁸ This interpretation first outlined in the [UN Convention against Corruption](#) (art. 43.2) has been gaining general acceptance in international cooperation in criminal matters.

⁶⁹ This issue has been outlined by ECPAT International in the [Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse](#). (Interagency Working Group, 2016).

⁷⁰ United Nations General Assembly. (2000). [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#), Article 5.1.

⁷¹ United Nations General Assembly. (2000). [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#), Article 5.2; The OPSC has been ratified by 177 States, making it an almost universal instrument.

⁷² United Nations General Assembly. (2000). [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#), Article 4.3.

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