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**COMMITTEE ON THE RIGHTS OF THE CHILD
STUDY ON THE REPORTS SUBMITTED BY THE
NGOs OF THE STATES PARTIES IN
ACCORDANCE WITH PARAGRAPH I OF ARTICLE
12 OF THE MEDICAL PROTOCOL TO THE
CONVENTION ON THE RIGHTS OF THE CHILD
RELATED TO THE SALE OF CHILDREN, CHILD
PROSTITUTION AND CHILD PORNOGRAPHY**

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I. INTRODUCTION

Knowledge about commercial sexual exploitation of children and teenagers of both sexes (CSEC) in Spain is very limited, since it only comes from the cases that are reported or reach the courts, which are but a small percentage out of the real number of crimes¹. However, even if they are not reported, those cases do happen, and we know the main victims of prostitution are underage women (from 15 to 17 years old), while child pornography affects minors of both sexes, usually below 13 years old².

Every year in Spain, many prostitution and child abuse rings are disbanded and thousands of photographs and videos are confiscated during the search. The seized items were meant to be sold between private individuals or to be published in catalogues, and in most cases they were to be sent abroad to prevent the children from being identified. A study conducted by ANESVAD in 2001 revealed that Spain is the world's second largest consumer of child pornography and the first one within the European Union³. Other recent studies, such as the one conducted by the Internet Watch Foundation, place Spain lower in the list⁴. In 2002, according to a study from the Spanish Internet Observatory, child pornography was the most reported crime in the net (out of 24,000 denunciations, 8,000 were related to it). In spite of that, only 1 per cent of the websites hosting such contents are located inside Spain⁵.

In 1996, government sources estimated that in Spain there are more than 5,000 children trapped in prostitution rings⁶. Most of the cases of minors

¹ Save the Children, *Explotación Sexual Infantil- Análisis de su situación en España* (Sexual Exploitation of Children – An Analysis of their Situation in Spain). Pages 17-18 www.savethechildren.es/download.asp?IdItem=1241

² Ministry of Work and Social Affairs and University of Valencia, *Informe para la Elaboración del II Plan Nacional de Acción contra la Explotación Sexual de la Infancia y la Adolescencia 2006-2009* (Report for the Draft of the Second National Plan of Action against the Sexual Exploitation of Children and Teenagers 2006-2009).

³ ACPI – *Acción Contra la Pornografía Infantil* (Action against Child Pornography): www.asociacion-acpi.org/prostitucioninfantil.htm

⁴ Internet Watch Foundation, 2006 Half-Yearly Report: www.iwf.org.uk/documents/20060719_2006_half_yearly_report.pdf

⁵ ANESVAD, *Informe sobre la pornografía infantil en Internet, 2003* (Report on child pornography on the Internet, 2003): www.anesvad.org

⁶ Declarations by Amalia Gómez, Secretary General of Social Affairs of the Spanish Ministry of Work and Social Affairs, to Europe Press Agency, published by the Spanish newspaper *El Mundo* on 31.08.2006 (the statement can be found in the section about Society in an article entitled “*El vecino de al lado. Los expertos dicen en Estocolmo que los pedófilos ‘son gente como nosotros’*” (“The neighbour next door. Experts in Stockholm say that pedophiles ‘are people just like us’”). <http://www.elmundo.es/papel/hemeroteca/1996/08/31/sociedad/155488.html> Eight years after those declarations were first published, since ACIM – ECPAT Spain and other NGOs were still spreading that information, a high-ranking official of the Ministry denied them. Please read the press allusion to this



coerced into prostitution which were registered in 2002 and 2003 (87.60%) involved children between the ages of 15 and 17 years old. In 2004, even though most of the victims (70%) were still between 15 and 17 years old, the fact that 23.30% of the victims were under 13 years old⁷ is worth noticing.

Spain is also a source of sex tourists, whose destinations usually include Central and South America. Studies estimate that between 30,000 and 35,000 Spanish tourists go every year to Latin America with the only purpose of engaging in sexual acts with children and teenagers⁸. However, no field investigation has been made to back up those estimations, and that is but a statistic approximation made from international comparative data. To evaluate and make a diagnosis of the current situation in Spain, ACIM – ECPAT Spain has recently organised a study in Barcelona, supported by the Spanish Ministry of Work and Social Affairs, as well as the Department of Social Action and Citizenship of the Generalitat de Catalunya (Catalonia's Autonomous Government) and the Department of Tourism and Civil Rights of Barcelona's City Council, among others. This study, which is known as "*Diagnóstico Explotación Sexual Comercial Infantil en España- Proyecto Piloto de la ciudad de Barcelona*" ("Diagnosis: Commercial Sexual Exploitation of Children in Spain- Pilot Project of Barcelona")⁹, includes first-hand information provided by workers related to the tourism industry, among others. Just to name an example, taxi drivers have reported that they have been approached by tourists looking for places that provide children to have sex with. Moreover, some hotel staff members have reported that sometimes minors go into the rooms accompanying a client who is not one of their relatives, and they state that this practice is much more common than one might think.

Apart from Spanish children, minors from Morocco, Portugal, the Dominican Republic and Eastern Europe are also frequent victims of sexual

incident, sent to us by Lucía Figar, Secretary of Social Affairs in the Spanish Ministry of Work and Social Affairs, which was published by *El Mundo* on 6.01.2004 (the article can be found in the section about Spain, an is entitled *Asuntos Sociales anuncia una campaña contra el turismo sexual* [The Ministry of Social Affairs announces a new campaign to combat sex tourism]). The article is available at: <http://www.elmundo.es/papel/2004/02/06/espana/1581233.html>

⁷ Ministry of Work and Social Affairs, *II Plan Nacional de Acción contra la Explotación Sexual de la Infancia y la Adolescencia, Madrid 2006* (Second National Plan of Action against the Sexual Exploitation of Children and Teenagers, Madrid 2006).

<http://www.mtas.es/SGAS/FamiliaInfanc/infancia/PlanesInformes/ExplotSex.pdf>

⁸ Ignacio Baño Ona, *Informe complementario al segundo informe presentado por España al Comité de los Derechos del Niño de Naciones Unidas sobre la aplicación de la Convención sobre los Derechos del Niño*. (Additional report to the second report submitted by Spain to the United Nation's Committee on the Rights of the Child). Platform of the organizations defending children. Madrid, September 2004, page 4: www.crin.org

⁹ ACIM – ECPAT Spain "*Situación de la explotación sexual comercial infantil en España – Informe final del estudio piloto en la ciudad de Barcelona*" (2007). ACIM-ECPAT Spain.



exploitation. In 2004, INTERPOL's Group V received more than 215 reports related to child pornography through the Internet¹⁰.

Regarding the statements included in the Spanish Government's report, we deem necessary to clarify some points:

- 4th point: several legislative reforms have been necessary to try to keep the international compromises undertaken by Spain as demonstrated by the many additions and amendments to the law submitted in the course of the years (some of these reforms are listed in the report provided by the Spanish Government.)
- 5th point: while it is true that many reforms have already been made, there is not an instrument which manages to comprehensively tackle all the goals proposed by the Medical Protocol, since the commercial sexual exploitation of minors includes child prostitution, child pornography, trade and traffic of children -the Protocol mentions "sale of children"- and the sexual exploitation of minors set in the context of travels and tourism.

Some clarifications on the notes about the legislative reforms:

- **Organic Law 10/1995 of 23rd November, which amended the Spanish Criminal Code.** It was reformed many times since it removed the crime of corruption of minors, which was added again (by the Organic Law 11/1999 of 30th April), as it made completely impossible to punish certain criminal conducts that were not covered by other kinds of criminal offences. This law was also criticised since the sentences it established to punish the crimes and offences against children were too soft, and did not follow the international and regional standards (ignoring the compromises undertaken by Spain with the European Council and the European Union).
- **Organic Law 11/199 of 30th April, which amended the Title VII of the Second book (Crimes against sexual freedom).** This reform was not as profound as the Spanish Government states in its report. While the crime of corruption of minors was incorporated to it, no change was made in order to regulate the sale of children for sexual exploitation. Some sentences were strengthened, but they were not adapted yet to the international and regional regulations, nor to the

¹⁰ Spanish Ministry of Work and Social Affairs, Child Rights Observatory. *II Plan Nacional de Acción contra la Explotación Sexual de la Infancia y la Adolescencia*, 2006 (Second Plan of Action against the Sexual Exploitation of Children and Teenagers, 2006).

(<http://www.mtas.es/SGAS/FamiliaInfanc/infancia/PlanesInformes/ExplotSex.pdf>)



seriousness of the crime committed. As for extraterritoriality, it is included when it comes to prostitution and corruption of minors, but not when it comes to abuse or sexual aggressions against children (both of them crimes which are often related to child sex tourism).

- **Organic Law 14/1999 of 8th July.** It amended the Spanish Code of Criminal Procedure, so that underage witnesses would not be forced to a face-to-face confrontation with the prosecuted, provided that an expert report is submitted recommending that. This way, this kind of meetings become exceptions. However, in most cases the choice is at the Court's discretion, so usually children are forced to confront their assailant face-to-face or to testify in a trial even if they had already testified, and expert reports advising against such confrontation are sometimes ignored¹¹.
- **Organic Law 11/2003 of 29th September, specific measures regarding public safety, domestic violence and social integration of foreigners.** Even though it adds to the Spanish Criminal Code new regulations regarding the fight against the illegal trade of human beings, they are included in the Title XV bis called "*Delitos contra los derechos de los ciudadanos extranjeros*" ("Crimes against the rights of foreign citizens"). Therefore, Spanish children who are victims of the illegal traffic are excluded from it, regardless of whether they are also subjected to sexual exploitation or not.
- **Organic Law 15/2003 of 25th November.** While it categorizes for the first the crime of pseudo pornography (the alteration of images by pasting the face of a minor over the face of an adult or adding things to an image), it does not regulate virtual pornography (the creation of sexual material which does not use real children but includes drawings, animations, or any kind of computer graphics depicting them). Even if no real minors are used in virtual pornography, it encourages and promotes the consumption of child pornography.

¹¹ News on the subject:

"Un menor víctima de abusos sexuales, obligado a declarar a pesar de los consejos de los psicólogos" ("A sexually abused minor is forced to testify in spite of the psychologists advising against it"). La Vanguardia, 06/02/2007 http://www.lavanguardia.es/lv24h/20070206/imp_51305985815.html

"Un tribunal obliga a 4 niñas a declarar sin mampara ante su presunto agresor sexual" ("A court forces 4 girls to testify without a screen in the same room as their alleged sexual assailant"). El País, 14/05/2005 <http://www.malostratos.org/actualidad/10%20noticias%2005-05-14.htm>



II. PROHIBITION ON THE SALE OF CHILDREN, CHILD PORNOGRAPHY AND CHILD PROSTITUTION

The current Spanish Criminal Code does not expressly regulate the crime of “selling children”, and there is not a type of criminal offence which includes all the crimes related to the commercial sexual exploitation of minors, namely prostitution, labour exploitation, illegal adoptions, sale of children, child pornography and organ trafficking. Because of this, the impact and strength of the Law are minimised; therefore, the Spanish legal framework is much weaker compared with the international instruments and European regulations on the same matter.

1. Prohibition on the sale of children.

Spanish legislation does not include specific regulations regarding the trade of human beings or the sale of children and teenagers, even though since 1st August 2004 it is obligatory to inclusion of all the dispositions stipulated in the Framework Decision 2002/629/JAI of the United Nations Council of 19th July 2004 regarding the fight against the sale of human beings. Among those dispositions, the United Nations “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children” of 2002 which supplements the United Nations Convention against Transnational Organized Crime is specially noteworthy.

- All criminal offences related to those practices are considered part of other kind of crimes which are included in the Spanish Criminal Code, such as those related to prostitution (Article 187), the rights of workers (Article 311 and other following articles) and the rights of foreign citizens concerning illegal immigration.
- The Spanish Criminal Code, in Section 1 of Article 318 bis, when mentioning trafficking of people, defines the perpetrator as the person who, directly or indirectly, instigates or facilitates the illegal trafficking or immigration of people, to or from Spain, and stipulates that this person will be imprisoned no less than 4 years and no more than 8 years. In its second article, it considers the traffic whose purpose is the exploitation of minors for profit as an aggravating circumstance, punishing it with prison sentences ranging from 5 to 10 years. Nevertheless, the aforementioned article is included in the Title XV bis, concerning the offences against foreign citizens, thus excluding Spanish minors, even if they are subjected to “the recruitment, transportation, transfer, harbouring and



subsequent reception and the exchange of control over him or her..." as defined by the United Nations Protocol on Trafficking in Human Beings.

- On the other hand, underage immigrants who are unaccompanied by adults or in a situation of abandonment in Spain, and have become victims of the sex trading, could be considered, if they are near adulthood, as emancipated, and therefore out of the sphere of action of laws protecting minors. In this case, expulsion from the country might also be authorised.
- We think that the law regarding crimes related to the activities of organizations and associations that, albeit temporarily, engage in the sexual exploitation of minors (as defined by Article 181 or 181.5 of 2006 reform draft, related to sexual abuse, and Article 187 which is related to prostitution and corruption of minors), should take into account all the casuistry and circumstances which allow those crimes to happen, and include the persecution of the strategies used to attract victims, both from Spain and other countries, with the purpose of subjecting them to sexual and commercial exploitation.

2. Prohibition on using children in pornography and on child prostitution.

In Spain, the legal age of sexual consent is 13, one of the lowest in the European Union. In addition, the minors' vulnerability is increased, since the Spanish legal framework takes into account many different ages before the coming of age, which is established at 18: minimum ages for criminal liability, protection of sexual integrity and consent, working, emancipation and contractual capacity are not the same.

- Chapter V of the Title VIII of the second book of the Spanish Criminal Code called "*Delitos contra la libertad e indemnidad sexual*" (Offences against freedom and sexual integrity), which was introduced into the current legislation by the Organic Laws 11/1999 and 15/2003, includes in part some of the crimes related to commercial sexual exploitation describing them as mere offences. It is obvious that the Spanish legal framework does not distinguish between offence and crime when it comes to measuring the seriousness of the CSEC. This way, the offences against a person that are deemed serious are punished with prison sentences longer than 5 years, while less serious offences are punished with sentences from 3 months to 5 years. Lastly, we can conclude that most of the crimes related to CSEC in Spain are included in the intermediary category as lighter offences.
- While the European Union's recommendations on the matter are much firmer when it comes to classifying and persecuting those crimes, the



response from Spain can be considered lower than in other neighbouring countries such as France or Italy. The Spanish legal framework has not incorporated yet all the regulations approved in the Framework Decision 2004/68/JAI of the United Nations Council on the 22nd December 2003 regarding the fight against the sexual exploitation of children and child pornography, which stipulates that all the states in the European Union should change their own internal legislation to comply with this Decision before January 2006.

- Furthermore, Spanish regulations do not provide any comprehensive definition of the crime of commercial sexual exploitation of children, thus hindering and weakening the persecution of the crimes related to CSEC and all the intermediaries such as organised and/or transitory crime rings, the transnationality of the crime, the profit and other benefits obtained by it, the difficulties when trying to identify the victims, the value of the evidences, or the many collaboration mechanisms the police and the judicial powers can use. For example, sex tourism or regulations against the sale of human beings inside the same country are never specifically mentioned in it.
- There have been two consecutive reforms of the Spanish Criminal Code regarding the crimes related to CSEC, the first one being the Organic Law 11/1999, whose purpose was to amend the Title VIII of the Second Book of the said Code. This reform added new regulations against prostitution and corruption of minors and established the principle of universal justice when persecuting these crimes (extraterritoriality). The second amendment, the Organic Law 15/2003, went less deep into the subject we are dealing with, as it included dispositions about a wide range of other crimes. However, it introduced two basic changes: namely in terms of the possession of materials containing child pornography for private use as a crime and in terms of the use of material made from images or voices of minors as child pornography (pseudo-pornography). It also made the punishment for this kind of crimes much heavier in an effort to reach the level that other countries have when it comes to fighting CSEC.
- Lastly, on 14th June 2006 the Spanish Council of Ministers passed a new draft of the Organic Law to reform the Criminal Code adding some new dispositions regarding the protection of minors through the inclusion of some new categories, such as the figure of the client of child prostitution, the hardening of the sentences punishing the crimes related to the prostitution of minors as well as lengthening the period of prescription of the crime once the victim has become of age. As in a previous reform passed in 2004, in this occasion no legal text that exclusively revolves around the combat against the CSEC was included either. It is merely a part of a series of reforms concerning very different matters such as road traffic, illegal immigration or sexual harassment. When this report was



written, we had the following information at our disposal: the passing of the aforementioned bill is still waiting approval by the Spanish General Court, but when the approved dispositions will come into effect is still unknown.

- Child Pornography

Since 1995, criminal liability of the offences related to child pornography has evolved a lot, as the legislator wished to adapt Spanish regulations to European and international instruments, such as the United Nations Protocol or the European Union's Framework Decision 2004/68/JAI.

- Article 189 of the Spanish Criminal Code imposes prison sentences ranging from 1 to 4 years to those who force minors to engage in pornographic or exhibitionist shows, public or private, or use children to create any kind of pornographic material on any medium, or provides funds for any of these activities.
- In the second section of this article, the "production, sale, distribution or exhibition of any kind of pornographic material by any means" is referred to as a criminal act. All materials of such kind, whether of Spanish, foreign or unknown origin, are to be taken care of by the Spanish police and judicial powers.
- After the Spanish Criminal Code was reformed in 2003, possession of any material depicting any kind of child pornography, regardless of whether it was intended for personal use only (which is punished by prison sentences ranging from 3 months to 1 year, and the payment of a fine during a period of 6 months to 4 years), or to be produced, sold, distributed or exhibited (which carries a prison sentence of 1 to 4 years).
- However, some of the notions established by it are restricted because of its jurisprudential interpretation. Because of the lack of an explicit and detailed definition of the term "child pornography" as the one provided by the first Article of the Framework Decision, everything depends on a case analysis usually based in the lack of artistic, literary, scientific or pedagogic values of the confiscated images. Thus, a feeling of legal insecurity, which the usual consumers of these materials take advantage of, is created.
- Furthermore, the illegality of the distribution and possession of pornography material showing minors should also apply to all the means and entities that allow it, such as telecommunications operators, Internet Service Providers (ISPs), hosting websites and search engines. However, as established in the *Ley 34/2002 de Servicios de la Sociedad de la Información y de Comercio electrónico* Law (Services provided by the Information Society and Electronic Commerce Act), the Law's spirit is



opposite to that view. Under the Law, those service providers cannot be held responsible for the contents they transmit, host or provide access to, if they have not taken part in their creation. If they know that those contents are illicit but do not report them to the authorities or stop people from accessing them, they cannot be held liable for it either. However, the European Framework Law used as a model for this law defines very clearly the responsibilities of the legal entities when it comes to such matters.

- Access to the data and the information about Internet users suspected of participating in any of the activities already mentioned is not regulated either. As a matter of fact, traffic data related to electronic communications cannot be kept for a period longer than 12 months (a minimum period is not established), which makes the identification of the terminals used to transmit the illegal materials much more difficult, thus hindering the investigation. Last but not least, the legislator recommends implementing some self-regulation codes for the Internet industry, especially directed to the protection of minors, even though this practice has not spread yet to the new technologies and information industry.
- As for the spread of child pornographic materials thanks to new technologies, it is worth noting the progress made by the 2003 reform, which includes pseudo pornography for the first time. However, visual pornography is still not considered, although it promotes the sexual exploitation of the image of children and violates the principle of dignity and respect to children. Furthermore, Spanish criminal law does not consider statements in favour of both children prostitution and children pornography an offence, unlike other countries in the European Union.
- Section 3 of Article 189 of the Criminal Code, from 10th January 2004 considers a group of aggravating circumstances which increase sentences up to 4-8 years when the victim is below 13 years old, when the facts are particularly degrading or humiliating, when the economic value is relevant, when physical or sexual violence is used or when the aggressor/s is/are organized or share a relationship of superiority. There are differences in the criminal approach to children pornography and prostitution. Sentences are inferior to the latter crime, and aggravating circumstances do not consider the same assumptions.
- Despite the fact that considering any possible means in committing the crime is positive, police action and legal procedures are facing poor current regulations as for those terminals which are considered of exclusive personal use and which do not generate economic benefits, such as personal computers and personal telephones.
- Considering the legal evolution regarding this subject, although the consecutive reforms since 1005 such as the Organic Law 11/1999 and the Organic Law 15/2003 have successively permitted to delimit in our legal code the crimes related to the creation, elaboration, spread and



possession of materials related to child pornography, sentences are still inferior to those contained in the framework decision 2004/68/JAI of the Council of the European Union, which exhorts imprisonment sentences from at least 5 to 10 years in order to serve as a deterrent. In this sense, save for the Organic Law 11/99, all subsequent amendments to the Criminal Code have been integrated into a wider reform which deals with several subjects of criminal law, thus reducing the social and dissuasive impact that a specific integral law dealing with the protection of children, the persecution of offenders and the responsibility of direct and indirect beneficiaries would have given rise to.

- Child prostitution

- Child prostitution is contained in the Title VIII of the Criminal Code, which considers “Offences against sexual freedom and safeguarding”. This title states that the sex offender of a particularly vulnerable victim, who has committed an offence with violence and intimidation, and when the victim is below 13 years old, will be sentenced from 4 to 10 years of imprisonment for committing a crime against the victim’s sexual liberty, and from 12 to 15 years of imprisonment in case of rape (Articles 178-180).
- The Criminal Code provides for sentences from 1 year and a half to 3 years (Article 181) in those cases when there is no violence, but taking into account that the victims below 13 years old do not give their consent, otherwise sentences range from 7 to 10 years.
- According to the provisional draft of the reform of the Criminal Code of July 2006, sexual abuse to children below 13 years old and committed within a criminal organization will be punished with a sentence ranging from 3 to 5 years (Article 185.1). The crime of sexual abuse will make it possible to consider a situation of child prostitution in which an organized criminal structure whose goal is to instigate prostitution of children below 13 years old, as the current Code provides for offences of prostitution to children below and above 13 years old in the Article 187.3. Thanks to the reform proposal it would be possible to maintain the special protection for children from 13 to 16 years old which is presently contained in our regulations when the victim is deprived of the capacity of giving consent due to the deception of the offender.
- Consequently, the spirit of the Law allows to extend the range of persecution, considering different offenders apart from the direct abuser. This is complemented with the Article 187, based on a sanctioning reaction in terms of the go-betweens which instigate, promote and facilitate prostitution. The article of reference in terms of the fight against child prostitution is presently Article 187, which protects sexual integrity and safeguarding of the victim, although it is worth noting the fact that in case



that the victim is below 13 years old the punishment for sexual abuse will be applied. However, the figure of the client was not specifically designed after the 2003 reform, and therefore the it was necessary to follow Supreme Court rulings that were based on case law and were consequently random. The Supreme Court considered in its sentence of 1998 that “the legislator does not sanction any sexual relationship with a child involving money without any further reason (...)”¹². Moreover, this approach directly affects collateral elements which allow to promote the situation of exploitation of minors such as child trade or sexual tourism. According to the reform draft, sentences will increase from 1 to 5 years (instead of 4 years) in terms of the Section 1 of the Article 187.

- The Article 188 of the current Criminal Code also establishes that the offender who takes a child to the situation of prostitution, be it through violence, intimidation or deception, or taking advantage of a situation of superiority, need or vulnerability of the victim, will be sentenced to a maximum period of 4 years of imprisonment. The wide legal interpretation of the degree of incidence of the alleged offender in the level of corruption of the minor has provoked up to now a situation of lack of legal protection of the victim. The fact of estimating whether the client or the go-betweens condition the minor being kept in the aforesaid activity should be analysed in each specific case and “paying attention to the reiteration and the circumstances of the facts and the more or less early age of the minor”¹³, according to the decision of the Supreme Court in 1999. Therefore, the client of child prostitution is not included when he/she has had sporadic sexual relations with the same child or when he/she shows recidivist behaviour but with different children.
- According to the provisions of the Draft Bill of July 2006, the Article 189 is enlarged (apart from the relatively more severe sentences) thanks to a new section in 187.1 which currently states the following: “The same sentence (that is, from 1 to 5 years of imprisonment) will be imposed to those seeking, accepting or obtaining sex relations with minors or unfit people in exchange for money or promises”. Consequently, the practically total impunity of the client of child prostitution is modified, being considered in our legal framework. However, it is still necessary to wait for the enforcement of the said principle (and with the condition that it is not modified or repealed during the parliamentary processing), and see which is the jurisprudence interpretation of the concepts of “compensation”

¹² Supreme Court, STS 1207/1998, of 7th April 1998. Web portal of the Supreme Court: http://www.poderjudicial.es/jurisprudencia/pdf/28079120001999101358.pdf?formato=pdf&K2DocKey=E:\Sentencias\20031011\28079120001999101358.xml@sent_supremo&query=%28%3CYESNO%3E%283237%2F1997%3CIN%3CNumero_recurso%29%29

¹³ Criminal Division of the Supreme Court, Plenary Session of 12th February 1999 contained in the sentence referred to in the previous note.



(economic, in kind, with favours, etc.) and “promise” that the courts when seeing the case.

ACIM – ECPAT Spain would have wanted clearer and more conclusive regulations, such as those contained in the Framework Decision of the Council of the European Union 2004/68/JAI, which provides for every member state should guarantee the punishability of the following behaviours: to coerce a child to prostitute himself/herself or take part in pornographic shows, or to do well out of a deal or exploiting in any other way a child in order to do that, lure a child into prostitution or taking part in pornographic shows, practicing sexual activities with a child (by means of coercion, duress or threats), offer the child money or other kinds of remuneration or assistance in exchange for letting himself/herself practice sexual activities, taking advantage of an acknowledged situation of trust, authority or influence over the child.

III. CRIMINAL PROCEEDINGS

C. & D. Jurisdiction and Extradition

- Without any doubt, one of the most innovative aspects introduced by the Organic Law 11/1999 was extending the principle of universal justice in such a way that Spanish jurisdiction is able to know about the offences of “prostitution and corruption of minors and unfit people” committed by Spaniards or foreigners outside Spain thanks to the reform of the Article 23.4 of the Organic Law of the Judiciary, introducing the principle of absolute extraterritoriality.
- However, at present this principle does not include the offences of sexual aggression and abuse. Consequently, the client of prostitution of children below 13 years old outside Spanish territory is not punished, considering that the facts would not be an area of competence of Spanish courts.
- Furthermore, considering the obstacles to accuse a client of the prostitution of children below 13 years old in our country, in practice it is impossible to prove before a Spanish court the recidivism outside the Spanish territory and the degree of corruption of a victim in an extreme situation of risk.
- To date, in spite that in our legal framework the principle of extraterritoriality in terms of child prostitution and corruption, not a single sentence has been pronounced in this context by a judge in Spain against a sexual tourist.
- Nonetheless, given that the reform proposal fostered by the Draft of July 2006 considers the figure of the client of prostitution of minors, it makes it possible to notice a change of situation in terms of the current impunity of



sexual tourists. It will be necessary to analyze the first legal action to address this, considering the level of implementation of the instruments of international police and legal collaboration and their subsequent necessary resources in order to do so, as well as the protection and the safeguard that competent Spanish authorities may be able to provide to the foreign victims and the development of criminal proceedings in an extraterritorial context. The sentences will range from 1 to 5 years of imprisonment with fines from 12 to 24 months passed by a judge.

- Finally, although Section 3 of Article 187 of the Criminal Code currently considers sentences that add up to 4 years (5 according to the reform proposals of 2006) for the organizations or associations that instigate, promote or favour the prostitution of a minor, even if they have a temporary nature, our legislation does not consider any specific rule against tour operators promoting or organizing travels whose aim is child sexual tourism, as some European legislations establish (UK and Italy).
- Active extradition is regulated in the Articles 824-833 of the Criminal Trial Laws, which state that it will only be possible to request or suggest active extradition when:
 - The Spaniards that have committed an offence in Spain have taken shelter in a foreign country.
 - The Spaniards that have attempted in a foreign country against the exterior security of the State have taken shelter in a country different to that in which they committed the offence.
 - The foreign citizens that should be prosecuted in Spain have taken shelter in a country which is not theirs.

IV. PROTECTION OF THE VICTIMS' RIGHTS

A. Criminal proceedings

- The Criminal Trial Law was improved in terms of the participation of minors as victims or witnesses in order to avoid visual confrontation with the prosecuted, therefore establishing the exceptional nature of the confrontation with the child witnesses and with some orders related to the confidentiality of the given data presented during the proceedings when they relate to minors. In any case, we reiterate, as it was previously pointed out in this report, that the application of such measures lays on the authority of each Court, which will even be able to make the minors testify in front of their aggressor or repeat the declaration during the oral proceedings even if this is not recommended by the experts' reports or even though the Public Prosecutor's Office asks not carrying them out. With this discretion, it is up to the criteria and the sensibility of every Court contributing to a secondary victimization of the minor.



- Furthermore, there is a profound lack of specialized and proper education of minors and their circumstances by all those professionals who interact with the minors, intervening in the actuaciones or having any kind of contact with the victim, specially in relation with police and legal professional.

B. State compensations to the victims of violent crimes

- The Preliminary Recitals of the Law 35/1995 of 11th December, related to Help and Assistance to the victims of violent crimes and against sexual freedom, provides that the public aids granted by this law must be distinguished from others such as compensations. It points out that it is not possible to admit that the economic provisions that the State assumes are compensations, because the State cannot be held responsible for the compensations in place of the offender. It also states that in this “public aid” including moral damage that the offence has caused.
- The crimes likely to generate public aids will only be those which result in death, serious injuries or severe damage to physical or mental health. As for the seriousness of the injuries or damages, the Law refers to the regulations of the Social Security (which is directly related to the degrees of disability) for the purpose of its evaluation.
- The quantity of the aids is based on the determination of the maximum amounts corresponding to every type of disability considered by the regulations of the Social Security. Considering these maximum amounts, the aids which may be received will be determined applying correcting coefficients depending on the economic situation of the victim, on the number of people economically depending on the victim and on the degree of the damage. The same criterion is followed in case of death: determination of a maximum amount of aid and application of correcting coefficients. Thus, the aids that the minor may receive are much smaller depending on the damage.
- The economic aid is considered incompatible with the compensations for the damages caused by the offence that are granted by a court decision.

V. PREVENTION OF THE SALE OF CHILDREN AND THE USE OF CHILDREN IN PORNOGRAPHY AND PROSTITUTION

- The *Child Rights Observatory*



The Child Rights Observatory was created at a state level by an Agreement of the Council of Ministers on 12th March 1999, in accordance with the Law 6/1997 of Organization and Functioning of the General Administration of the State as a collegiate organ affiliated to the Ministry of Work and Social Affairs.

It is constituted by all the agents belonging to public administrations and NGOs involved in the promotion and the protection of the rights of children and teenagers. Thus, it fulfils the roles of coordinating policies and instances that deal with the protection of children. Although it is a monitoring organism with functions of coordination, it has no authority to intervene directly and it is a mere consultative body the resolutions of which do not have the category of laws.

Within the Child Rights Observatory, a Working Team on Child Abuse was created. It prepared the proposal for the first National Action Plan against CSEC in 2001, which was later on evaluated and afterwards it also adopted the Second Plan in 2005. Both Plans were passed by the plenary session of the Child Rights Observatory, which represents the Ministries of the Central Administration of the State, the Autonomous Communities and local authorities. Furthermore, it should be noted that this Working Team only meets few times a year and that, due to the regulations, it does not have the authority to take decisions, propose or issue mandatory reports which may serve as a base for the decisions of other administrative bodies, nor can it monitor or control the action of other organs of the General Administration of the State or other Administrations. In fact, its own internal regulations, which were approved on 30th November 1999, confer to this body only objectives of diagnosis and proposal of social policies.

Moreover, the experience accumulated during the two years of development of the First Action Plan and this period of development of the Second Plan (2006-2009) have confirmed that the Child Rights Observatory is, in its current configuration, legally incapable of carrying out the functions inherent to a centralized organ of coordination, execution, control, monitoring and evaluation.

Although we think that the existence of an organ like the Observatory as a forum of participation of the Administrations and the organizations devoted to children with the functions of study and analysis of the reality is positive, it would be necessary to give it executive capacities, or else create another structure which is able to carry them out in the terms provided in the Law 6/97 of Organization and Functioning of the General Administration of the State.

- National Action Plan against CSEC

The Child Rights Observatory has passed for the moment two National Action Plans (2002-2003 and 2006-2009). Both Plans have been drafted within



the Working Team on Child Abuse belonging to the said body, with the advise of organizations such as ACIM – ECPAT Spain, the Federación de Asociaciones para la Prevención del Maltrato Infantil (FAPMI, Federation of Associations for the Prevention of Child Abuse) or the Spanish Committee of Unicef.

The First Plan was officially presented during the 2nd World Congress against Commercial Sexual Exploitation of Children held at Yokohama, Japan, in December 2001. The Second Plan was approved in December 2005. Both Plans considered very similar general objectives:

- a) Knowing the reality about sexual exploitation of children and teenagers in Spain and structuring mechanisms of detection and report.
- b) Awareness, social mobilization and prevention of situations in which children are sexually exploited.
- c) Setting up an appropriate legal framework to combat sexual exploitation of children, both at a national and an international level.
- d) Protecting and intervening with children suffering exploitation and abuse.
- e) Strengthening institutions and organizations (public and private) which take part in the fight against sexual exploitation of children and their protection.

The Second Plan is more complete than the previous one, and it includes some of the claims that our organization proposed when the latter was being drawn up, but which had not been included, such as the introduction of some specific objectives or the use of indicators of evaluation. Although we consider that it is very positive that Spain has a Plan and that the great effort carried out by the Spanish Ministry of Work and Social Affairs (because its actions have permitted to strengthen actions against CSEC that some organizations were carrying out in parallel, we still can see some lacks already present in the First Plan which have not been corrected in the second one:

- There is not a coordination body for the Plan with clear and defined competences and with executive powers, as we previously said;
- There are no effective coordination mechanisms between the General Administration of the State, Autonomous Communities and local Administrations, in order to carry out the actions included in this Plan throughout the Spanish territory in a harmonic and coherent way;
- Lack of normative clarification and vagueness of its category in legal terms, thus making the agreements included lose their capacity to bind the involved agents;



- Lack of an economic report attached to the Plan which quantifies its total cost and the ways of financing for its development by all the public administrations and private institutions involved;
- Scarce social awareness of the existence of the Plan itself and of the problems it tried to tackle;
- Vagueness of the deadlines and dates of the scheduled objectives and actions.

- Project of unified record of cases of child abuse (RUMI)

The Child Rights Observatory is working on the implementation of the *Worksheets of detection and notification of child abuse* in the different fields of action (public health, education, police, social services, etc), as well as its corresponding approved and unified data record (RUMI, unified record of cases of child abuse in Spanish). This system was approved unanimously in the Plenary Session of the Observatory in December 2002.

The proposed system, following the model of worksheets and record of the medical field of the Community of Madrid, consists on the fact that the different professionals have at their disposal notification sheets of cases of abuse specific for each fields and with common criteria for all Autonomous Communities. At present, there are some researches in various stages of development in the Autonomous Communities of Murcia, Canarias, Cantabria, Madrid, Extremadura, La Rioja and Cataluña, and the final phase for their incorporation into the Sistema de Información de Usuarios de Servicios Sociales (SIUSS, Information System for the Users of Social Services).

The Project considers that there are three levels of detection and notification and record of cases:

- 1) Detection sources: public health, education, social services.
- 2) Municipal social services.
- 3) System of protection of minors of the Autonomous Community.

The subsequent sending of the statistical data of the different Autonomous Communities to the Child Rights Observatory of the Ministry of Work and Social Affairs will permit to find out about the situation and the evolution of the detection of cases of child abuse in Spain.

We do not have information regarding the degree of introduction of these two instruments (sheets of detection and notification and RUMI) in the different Autonomous Communities that form Spain, nor about their effectiveness and standardization.



- Other initiatives related to commercial sexual exploitation of children and teenagers which have the Government's support

During the last years, ACIM – ECPAT Spain has been carrying out different actions regarding the CSEC, and which are economically and technically supported by several public Administrations and private organizations and which do not appear in the Government's report:

a) Fem Xarxa (Let's network) Programme

It is carried out from 1998 in the province of Barcelona, with the support of the Social Welfare Department of the Diputació de Barcelona and a great number of city councils. Its objective is to create local networks of intervention in cases of child abuse composed of professionals and attention measures to children and families in each area. To date, several actions have been carried out in approximately 20 municipalities.

b) ACULL Programme

Since 2004 there is a service known as ACULL functioning in Barcelona, which is composed of a team of psychologists, lawyers and social workers who fully take part in cases of child abuse (victims, families and aggressors), and which has a specific area for victims of commercial sexual exploitation at its disposal, although the cases that have been attended are still scarce. This service receives funding from the Ministry of Work and Social Affairs, the Department of Social Action and Citizenship of the Generalitat de Catalunya (government of the Autonomous Community) and the Advisor Department of Social Welfare and Civil Rights of the City Council of Barcelona, among others. At present this service is working on the creation of a specific intervention protocol for victims of commercial sexual exploitation of children and teenagers, an instrument which is still not available in Spain.

c) Code of Ethics for the protection of children against sexual exploitation in tourism

This programme is funded by the Ministry of Work and Social Affairs and by the Advisor Department of Civil Rights of the City Council of Barcelona, among others, and is part of an international initiative promoted by ECPAT



International with the support of UNICEF International and the World Tourism Organization, among other organizations. It aims at raising awareness among the tourism industry (companies and clients) through the signing and the application of a code of six objectives which condemns explicitly the possible use of tourism infrastructures to commit offences of commercial sexual exploitation to children and teenagers and implements a series of company policies aimed at preventing, tackling and denouncing specific cases.

d) Make IT Safe / New secure technologies

As a part of the world campaign Make-IT-Safe of ECPAT International, and with the economic support of the Ministry of Work and Social Affairs and the Advisor Department of Civil Rights of the City Council of Barcelona, ACIM – ECPAT Spain has carried out several activities and projects of prevention in the area of new technologies. The general objectives of this campaign in Spain are the following:

- Raising awareness among children, teenagers and their fathers and teachers and teaching them the good practices and the safe and responsible use of new technologies;
- Having the support of public Administrations for the introduction of regulation measures in this sector;
- Raising awareness among the information technology (IT) industry to it implements measures which make their products be totally safe for children and teenagers.

Among the actions that were carried out in the framework of this campaign we may highlight: a study of the protection conditions that public premises of access to the Internet give to Spanish children and teenagers; a research on the psychological profile of the so-called “boylovers” based on the forums that they use when surfing the net; a study over the habits of use of children from 8 to 13 years old in the Internet; and several workshops of safe navigation in schools. We have also taken part in the creation of codes of self-regulation of webpages, firstly through IQUA (Internet Quality Agency), and from some months onwards with a working team organized by ACIM – ECPAT Spain with other organizations and experts from the academic world.

e) Faro (Lighthouse) Programme

During 2006 thanks to the co-funding of the Ministry of Work and Social Affairs, the Department of Social Action and Citizenship of the Generalitat de Catalunya and the Advisor Departments of Tourism and Civil Rights of the City



Council of Barcelona, a pilot study about the incidence of commercial sexual exploitation of children and teenagers in Barcelona was carried out. The results will be presented in a State Consultation that will be held on March 2007 in Barcelona, and the extension of this study to other areas of Spain through the proposal of methodology that our organization has designed will be studied.

VI. INTERNATIONAL ASSISTANCE AND COOPERATION

A. Cooperation funded by the Spanish Agency of International Cooperation

The level of coordination between Spanish authorities and those of the rest of countries of Spain's environment in terms of the fight against commercial sexual exploitation to children is still generally scarce. The new Plan of National Action (2006-2009) sets out to increase the level of international cooperation, especially with the rest of the European Union, with Latin America and with the countries of the Maghreb, but not specific measures. Although there have been some progress in terms of joint operations against offences of child pornography, police cooperation must be improved. In our opinion, the impact of international campaigns and projects of cooperation developed by AECI should be increased, especially in South America, a region with a great incidence of commercial sexual exploitation of children and teenagers, enhancing the activities of prevention, awareness and direct assistance.

B. Extraterritorial regulations

One of the good practices to establish an effective and realistic network of international cooperation regarding commercial sexual exploitation of children is, without any doubt, the application of the principle of extraterritoriality.

Actually, one of the most innovative aspects introduced by the Organic Law 11/1999 was considering the principle of universal justice enabling Spanish jurisdiction to know about the offences of "prostitution and corruption of minors and unfit people" committed by Spaniards or foreigners outside Spain through the reform of Article 23.4 of the Organic Law of the Judiciary.

For the reasons that have already been explained in the Title 3 ("Criminal Proceedings"), section C and D, and despite the fact that in the Spanish legal framework the principle of extraterritoriality regarding prostitution and corruption of children may be found, to date not a single sentence of conviction regarding this type of offences has been passed by a Spanish judge against a sexual tourist.



VII. OTHER LEGAL RESOLUTIONS

- Spain still has to ratify the Convention on Cybercrime of the Council of Europe.
- Spain has not signed yet the Convention for action against the slave trade of human beings of the Council of Europe.
- Spain has not incorporated in its legal framework the contents of the Framework Decision 2004/68/JAI of the Council of the European Union, which are related to the fight against sexual exploitation of children and child pornography. According to this Decision, all member states should adapt their internal laws to the opinion prepared by this Decision before January 2006.
- Similarly, Spanish criminal law has not been fully adapted yet to the contents of the Framework Decision 2002/629/JAI of the Council of the European Union, which is related to the fight against slave trade of human beings. According to it, all member states must adapt their internal laws to this Decision before August 2004 (as for the trafficking of children, see the previous sections).

VIII. FINAL RECOMMENDATIONS

- The Action Plan against Sexual Exploitation of Children and Teenagers 2006-2009 must be revised in order to set deadlines and dates to carry out the objectives and it must have proper budgetary allocation.
- A unified record with data about commercial sexual exploitation of children and teenagers based on common classification criteria must be established. Likewise, active participation of all the Administrations that are affected when establishing effective coordination mechanisms is fundamental.
- A greater involvement of Spanish tourism authorities to promote that the enterprises adopt effective measures against child sexual tourism is fundamental. A greater coordination with other countries and a more active and committed government presence is also necessary, as it is still scarce in this aspect.
- It is necessary to control the contents and the access to certain webpages and videogames and develop campaigns or information and/or awareness, aimed at children and adults, about the dangers of the use of new technologies. It is also necessary to promote codes of ethics of responsibility between the companies related to the new technologies.



- It is necessary to train professionals of all fields related to childhood and family in children rights, child abuse and, specifically, in commercial sexual exploitation of children. A sector which is specially important and which still has many lacks of training is the Court Administration and security forces.
- The categorization of the client and the prohibition of any kind of commercial relationship between an adult and a minor through Article 187 of the Criminal Code is fundamental to establish a framework that protects the victims regardless of case law.
- As for sexual abuse, which includes the most vulnerable victims such as children below 13 years old, it is necessary to enlarge its contents and integrate as an aggravating circumstance the fact that the offence is committed in the context of prostitution or child pornography. Furthermore, the principle of universal justice must be applicable to this type of offences, and also a social, political and legal debate regarding the age of sexual consent in Spain, which is far from European standards and creates a lack of legal protection within the European Union.
- Spain must integrate in its legal framework the persecution of the trade of children and teenagers with sexual purposes in such a way that it allows to combat the strategies of attracting victim, both native and foreign.
- As for criminal treatment of child pornography, it is necessary to use a clear definition, without giving rise to interpretations. Furthermore, it is recommended that regulations on data protection be compatible with police investigations and court summons related to the identification of users who spread any kind of material through new technologies and digital mediums, and adequate the processes of data storage for their analysis.
- A work of information compilation must be carried out, and cover both the victims and the aggressors by the creation of restricted access records that allow to speed up interventions.
- It is necessary to increase the penalty system for the offences of child prostitution and pornography.
- It is essential to have an integral law about commercial sexual exploitation of children which tackles the protection of children and teenagers, the pursuit of aggressors and the responsibility of direct and indirect beneficiaries on the whole.
- Finally, it is fundamental to have at our disposal mechanisms which make the interaction between different legal fields such as criminal, civil, administrative and procedural law easier.