An Evaluation of Canada's Child Sex Tourism Legislation Under International Law

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Most of the boys are homeless and range in age from 10 to 14. Some are shoe

> shine boys and others beggars. Some sniff glue and others don't…I am paying them 2000 Riel if they do nothing. I pay 1 U.S. dollar if they give me a massage and 2 U.S. dollars if they give me anything extra. With these boys you don't have to coax them as they are so horny.
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> - Two Teachers Share Information on Their Adventures in Cambodia[1]

Introduction

Each year, untold numbers of citizens from Canada and other developed nations travel to foreign countries and proliferate one of the world's most pressing human rights concerns, that of child sexual abuse and exploitation. Developing nations are continually having to cope with burgeoning prostitution industries that generate vast revenues from tourists but which intentionally force the most vulnerable of children into the local sex trade. While the term 'child sex tourism' often conjures up images of children enslaved in brothels, many children are abused and exploited by foreigners in non-commercial contexts. In either situation, the psychological and emotional harm inflicted on the child victim is often irreparable.

In the fight against child sex tourism, one response from the international community has been the enactment of extraterritorial legislation, which prescribes criminal jurisdiction over sexual offences committed against children in another country. The following presents a critical analysis of the validity of Canada's 'child sex tourism' legislation in the context of Canada's traditional approach to criminal law jurisdiction and principles of international law.

What is 'Child Sex Tourism?'

Article 1 of the United Nations Convention on the Rights of a Child provides the foremost definition of a 'child': "every human being below the age of 18 years unless, under the

[1] Excerpts from Emails Intercepted by Cambodian Law Enforcement, *Beyond Borders Newsletter* (Issue No. 5, Fall 2004) at 4, online: Beyond Borders Inc. <http://www.beyondborders.org> (last visited: 1 December 2004)

law applicable to the child, majority is attained earlier."[2] In most countries, however, the age of majority is reached by the age of 16.[3]

The World Congress against the Commercial Sexual Exploitation of Children defines the commercial sexual exploitation of children as: "sexual abuse by the adult and renumeration in cash or kind to the child or to a third person or persons…it constitutes a form of coercion and violence against children and amounts to forced labour and a contemporary form of slavery."[4] This comprehensive definition appears to cover all forms of commercial sexual exploitation and abuse against children, including pornography, prostitution and trafficking.

However, the term 'child sex tourism' may be somewhat of a misnomer. Individuals who abuse children while in another jurisdiction may not necessarily be tourists; offenders may be foreigners who are temporarily living in the area for one reason or another but retain citizenship with their home country. Additionally, children may be just as easily sexually abused or exploited outside of a commercial context. To this effect, extraterritorial legislation enacted in many countries expands beyond the commercial sphere to criminalize other forms of non-commercial sexual abuse.

The Victims and Offenders

Obtaining accurate statistical information showing the true extent of child prostitution around the globe has proved to be difficult.[5] Estimates for the number of child prostitutes in Asia alone hover around one million.[6] In addition, organizations such as UNICEF and ECPAT

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[2] *United Nations Convention on the Rights of the Child*, art. 34, 20 Nov 89, G.A.Res. 44/25, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/736 (1989) [hereinafter CRC].

[3] S. Carter, S. Clift and J. Hoose, "Combating Tourist Sexual Exploitation of Children" in S. Carter & S. Clift (eds.), *Tourism and Sex: Culture, Commerce and Coercion* (London, Pinter, 2000) 74 at 75.

[4] United Nations (1996) *Report of the World Congress on the Commercial Sexual Exploitation of Children.* Stockholm: United Nations.

[5] Clift & Hoose, *supra* note 3, 74 at 76.

[6] E.T. Berkman, "Responses to the International Child Sex Tourism Trade" (Summer, 1996) 19 B.C. Int'l

(End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes) estimate that 500,000 child prostitutes exist in Brazil and thousands more are exploited in Latin America and Africa.[7] Recently, UNICEF expressed alarm over the hundreds of thousands of women and children trafficked into the South Asian sex trade and domestic service industry each year, equating the situation to a 'modern-day slavery.'[8]

There are undoubtedly many causes of child prostitution and trafficking, but the most noted cause is extreme poverty. Oftentimes, parents in rural villages willingly sell their child into prostitution, and may be falsely led to believe that their child will be placed into a legitimate job.[9] As a result, the child endures a form of debt bondage, and is forced to remain in the sex industry until the debt is paid off, which usually is impossible to do.[10] Other commonly noted causes include escape from abusive family situations, the vulnerability of children orphaned by war or AIDS, and the desire for material wealth.[11]

Of course the demand for child prostitution would not exist but for the offenders. A distinction can be made between pedophile tourists who travel with the intent to abuse children, and tourists who happen to take advantage of the opportunity when it arises (also called "situational" sex tourists).[12] Assistance in seeking out underage prostitutes may be facilitated by

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& Comp. L. Rev. 397 at 399; and D. Edelson, "The Prosecution of Persons Who Sexually Exploit Children in Countries Other Than Their Own: A Model for Amending Existing Legislation" (December 2001) 25 Fordham Int'l L.J. 483 at 491.

[7] Status of Women Canada, *Round Table on Child Sex Tourism: Summary Report* (Vancouver, 1996) at 3.

[8] Colombo (Reuters), *South Asia Child Sex Trade, Traffic Booming - UNICEF* (September 29, 2004), reproduced online: ECPAT <http://www.ecpat.net/eng/Ecpat_inter/IRC/newsdesk_articles.asp?SCID=1533> (last visited: 29 November 2004).

[9] K.D. Breckenridge, "Justice Beyond Borders: A Comparison of Australian and U.S. Child-Sex Tourism Laws" (April, 2004) 13 Pac. Rim L. & Pol'y J. 405 at 410, online: Westlaw.

[10] K. Jullien, "The Recent International Efforts to End Commercial Sexual Exploitation of Children" (Fall, 2003) 31 Denv. J. Int'l L. & Pol'y 579 at 583, online: Westlaw.

[11] K.D. Breckenridge, *supra* note 9 at 411.

[12] *Ibid*, at 412.

tourist agencies which promote commercially organized sex tours. In addition, the internet provides unlimited opportunities for pedophile tourists to share information on where to find underage prostitutes, and to provide one another with encouragement and advice.[13] Another type of offender consists of individuals who abuse Canadian children when both the offender and the child are outside Canadian territory.

Canada's Extraterritorial Legislation

The application of Canadian criminal law is limited statutorily to those offences committed in Canada by s. 6(2) of the *Criminal Code,* unless the jurisdiction is extended by federal law.[14] In 1997, Canada passed legislation under Bill C-27 that extraterritorially extended the *Criminal Code* to enable the prosecution of citizens and permanent residents for a number of sexual crimes committed against children in foreign jurisdictions. Prior to 1997 Canada had not asserted any such jurisdiction over any sexual offences, but has always asserted jurisdiction on a nationality basis for other serious offences, such as torture, hijacking and offences related to aircraft, and terrorism offences.[15]

However, the *Criminal Code* amendments enacted in 1997 came under heavy criticism because a request from another country's government or an overseas consular officer was required before Canada would initiate proceedings.[16] In the first attempted prosecution under this law, a teacher escaped prosecution after he allegedly sexually assaulted a 17 year old student while on a school trip in Costa Rica. The Costa Rican government would not request prosecution, as the offence with which the accused was charged was not against the law in Costa

[13] D. Edelson, *supra* note 6 at 487.
[14] *Criminal Code* (R.S. 1985, c. C-46)

[15] *Ibid*, ss. 269.1, s. 7(1) to 7(3) and Part II.1, respectively.

[16] D. Edelson, *supra* note 6 at 516.

Rica because of the victim's age.[17] This requirement of a foreign government's consent was later dropped under Bill C-51 for Canada's new ET legislation in 1999.[18]

Under Canada's current ET legislation, it is an offence to either engage in crimes related to child prostitution or other forms of child exploitation while abroad. Section 7(4.1) of the *Criminal Code* deems a number of sexual exploitation offences to have been committed in Canada when the offence is committed in another jurisdiction, including sexual interference (s. 151), sexual exploitation (s. 153) and making, distributing, selling or possessing child pornography.[19] Additionally, an offence recently added to the *Criminal* Code [section 212(4)] prohibits an individual to "obtain for consideration, or communicate with anyone for the purpose of obtaining for consideration" the sexual services of someone under the age of 18 years."[20] Therefore, Canada's sex tourism legislation targets offenders in both the commercial and non-commercial contexts of child sexual abuse and exploitation.

The Upcoming Challenge to Canada's ET Legislation: The Bakker Case

Donald Bakker of Vancouver is the first person to face charges under Canada's sex tourism legislation. Following his arrest for sex crimes against women on Vancouver's lower east side, Bakker currently faces an additional sixteen counts under Canada's child sex tourism legislation for offences involving children overseas.[21] The extraterritorial charges Bakker faces include solicitation of the sexual services of a child under the age of 18, sexual interference and

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[17] M. Jiminez, "Child Sex Tourism Law Fails First Test" in *National Post* (August 9, 2000) reproduced online: Casa Alianza <http://www2.casa-alianza.org/EN/lmn/docs/20000810.00430.htm> (website unavailable as of November 10, 2004).

[18] Department of Foreign Affairs and International Trade, *Child Sex Tourism Fact Sheet*, online: <http://www.voyage.gc.ca/main/pubs/child_fact-en.asp> (last modified: 20 January 2003).

[19] *Criminal Code*, *supra* note 14.

[20] *Ibid.* Section 212(4) is an indictable offence which carries a maximum sentence of five years imprisonment.

[21] Canadian Broadcasting Corporation, *Sex Tourism Law Faces First Test*, (7 September, 2004), online at CBC <http://vancouver.cbc.ca/regional/servlet/View?filename=bc_bakker20040907> (last visited: 20

possession of child pornography.[22]

Various media sources indicate that Bakker's lawyer intends to challenge the constitutional validity of Canada's ET legislation on the basis that Canada has no jurisdiction over Bakker's alleged sexual crimes overseas.[23] His lawyer argues that the legislation violates the accused's Charter rights, and contends that prosecuting offences which occur in sovereign nations outside Canada violates 'basic principles' of international law.[24]

Issues

The *Bakker* case raises 2 important questions which will be examined in the following analysis: (1) Does the prescription of Canadian jurisdiction to acts of Canadian nationals who commit the specified offences in s. 7(4.1) of Canada's *Criminal Code* violate principles of jurisdiction under international law? and (2) On a higher level, does international law support the placement of crimes involving child sexual abuse and exploitation under universal jurisdiction, or under the additional principles of *erga omnes* and *jus cogens*? Lastly, potential deficiencies in Canada's child sex tourism legislation are briefly examined.

Issue #1

Issues surrounding criminal jurisdiction in Canadian courts have typically arisen in the context of Canadian citizens who commit crimes which have trans-national elements - in other words, where different aspects of the alleged offence occurred in different jurisdictions.[25] The

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November 2004).

[22] J. Wells, *Canada's offshore child sex law faces its first test,* (29 August, 2004), online at <http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_PrintFriendly&c=Article&cid=1093731010235&call_pageid=968332188492> (last visited: 15 November 2004).

[23] The basic premise of the challenge to the legislation has been summarized from news articles. Due to a court-ordered publication ban, a transcript of the preliminary inquiry is not currently available.

[24] Canadian Broadcasting Corporation, *supra* note 21.

[25] An example of a crime with trans-national aspects is *R. v. Libman* [1985] S.C.J. No. 56 (S.C.C.), online: QL (SCJ), where the issue was whether the accused could be prosecuted for a fraudulent telephone sales scheme that operated from Canada but directed the calls at U.S. residents.

problem of child sex tourism presents a different challenge, as in these cases the sexual offence occurs entirely within the territory of a tourist's destination country which has its own legislation and law enforcement mechanisms for prosecuting such offenders. The consequences of the offence have no impact on other members of Canadian society, save for those situations where an offender brings back photographic evidence of his crimes to Canada (in which case the person could be charged with possession or importation of child pornography under the *Criminal Code*).[26]

While there is absolutely no question that the worldwide prostitution and sexual exploitation of children is abhorrent, one basis for challenging Canada's child sex tourism legislation is that it exceeds Canada's criminal law jurisdiction. However, the nationality principle of jurisdiction and the international commitments to end child sexual exploitation provide stronger support for upholding the legislation. Further support can be found for extraterritorial child sex tourism legislation when one examines the legal justifications for upholding similar legislation in other jurisdictions, most notably the United States.

The Territorial Principle

There are a number of bases under which states exercise prescriptive jurisdiction over their nationals, but the territorial principle is the most common basis for jurisdiction. The Permanent Court of International Justice in *The S.S. Lotus* case appeared to give a broad discretion to states to extend their laws extraterritorially:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of the courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[27]

[26] s. 163.1, *Criminal Code, supra* note 14.

[27] (1927), P.C.I.J., Ser. A, No. 10, p. 19 as cited in *R. v. Cook* [1998] S.C.J. No. 68 (S.C.C.) online: QL

Despite the appearance of giving wide discretion to states to apply their laws to any person extraterritorially, the obligation of states not to interfere in another state's domestic affairs remains, and "scholars have not generally supported the virtually unfettered discretional approach to prescriptive jurisdiction seemingly advocated by the Court in *The S.S. Lotus*."[28] Currently, international law requires some "genuine link" between the state and a person or event before a state can extend its prescriptive jurisdiction to that person or event.[29]

The Current Canadian Approach to Criminal Law Jurisdiction - The "Real and Substantial Connection" Test

La Forest J., writing for the Supreme Court of Canada in *R. v. Libman* affirmed the territorial principle as the "primary basis" of criminal jurisdiction, and established the "real and substantial connection" test for determining whether a criminal offence should be subject to the jurisdiction of a Canadian court. After extensively reviewing Canadian and English cases, La Forest recognized that the law has evolved to permit states to assert jurisdiction over acts committed in another state when those acts are connected to the furtherance of a criminal offence in Canada:

> As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well known in public and private international law.[30]

Subsequent to *Libman*, the "real and substantial connection" test has been reaffirmed and applied in numerous cases, in both the civil and criminal context.[31] Factors to take into account when

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(SCJ) at para. 131.

[28] J. Currie, *Public International Law*, (Canada: Irwin Law Inc., 2001) at 298.

[29] Ibid at p. 299.

[30] *R. v. Libman, supra* note 25 at para. 74.

[31] For example, see *R. v. Cook* [1998] S.C.J. No. 68 (S.C.C.), online: QL (SCJ) at para. 133; and *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*

applying the test were summarized by Beliveau J. writing for the Quebec Superior Court in *R. v. Ouellette*:

> …the notion of a "real and substantial link" constitutes a test of varying content which is assessed in relation to the circumstances and, in particular, the importance of the elements of the offence linked to Canada, the relevant facts which arose in Canada and the harmful consequences which were caused, or which could have been caused, in Canada. [translation][32]

When considering the above factors, a court must also determine whether, by asserting jurisdiction over the offence, Canada will offend international comity, taking into account the importance of the universal principle of not letting crime go unpunished.[33]

Canada's Child Sex Tourism Legislation Violates the Territorial Principle of Jurisdiction

Although Canada's government has the statutory power to extraterritorially extend the jurisdiction of an offence, it presumably does not give the government a 'blank check' to extend criminal jurisdiction to any offence in Canada to acts of Canadian citizens abroad. Upon establishing the 'real and substantial connection' test in *Libman*, La Forest J. observed: "The outer limits of the test may, however, well be coterminous with the requirements of international comity."[34] Although Parliament is not presumed to legislate in violation of international comity or principles of international law[35], Canada's child sex tourism legislation requires careful scrutiny, as the provision violates the territorial principle of criminal jurisdiction - the primary basis for criminal jurisdiction in Canada.

With the exception of the child sex tourism provision, nearly all of the *Criminal Code* offences that extend jurisdiction extraterritorially would appear to meet the common-law 'real

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[2004] S.C.J. No. 44 (S.C.C.), online: QL (SCJ) at para. 60.

[32] *R. v. Ouellette* (1998), 126 C.C.C. (3d) 219 (Que. Sup. Ct.), online: QL (CJ) at para. 26.

[33] *Ibid.*

[34] *R. v. Libman, supra* note 25 at para. 76.

[35] *Daniels v. White and The Queen*, [1968] S.C.R. 517, at p. 541, cited in *R. v. Libman, supra* note 27 at para. 129.

and substantial connection test' set out by LaForest J. in *Libman.* The key distinction between the child sex tourism provision and the other extraterritorial provisions in the *Criminal Code* is that some element of the offence, beyond the Canadian citizenship of the offender, is required to have been committed in Canada, in at least one of the following ways:

First, the *Criminal Code* contains extraterritorial offences where some element of the criminal transaction may have been committed inside of Canada but the offence has harmful consequences outside of Canada. Examples of such offences include: possession in Canada of credit card obtained by crime outside Canada [s. 342], possession in Canada of goods obtained by crime outside Canada [s. 354], bringing into Canada property obtained by crime [s. 357], and conspiracy to commit murder outside Canada [s. 465(4)].[36] In each of the aforementioned offences, possession of property obtained unlawfully remains an offence regardless of the jurisdiction where the property was obtained; similarly, the conspiracy to commit murder exists in Canada regardless of the jurisdiction in which the potential victim resides.

Another category of offences within the *Criminal Code* are those crimes which may have been committed outside of Canada but have harmful consequences in Canada, or are a threat to Canadian safety or security. Offences which fall under this category include offences committed on Canadian aircraft [s. 7(1)], hijacking and offences relating to aircraft where the accused is found in Canada [s. 7(2)], offences in relation to certificate of citizenship [s. 58], and conspiracy outside Canada to commit an offence inside Canada [s. 465(4)].[37] In each of these offences, the harmful consequences to Canadian citizens is clear and requires the extension of criminal jurisdiction for the protection of Canadian society.

At first glance, Canada's sex tourism provision contained in s. 7(4.1) violates the 'real

[36] *Criminal Code, supra* note 14.
[37] *Ibid.*

and substantial connection' test established in *Libman.* Although the provision deems the enumerated sexual offences to have been committed in Canada, the provision has the effect of prosecuting a Canadian citizen or permanent resident in a Canadian court for a criminal offence committed wholly within the jurisdiction of another sovereign state. Nationality of the offender is the only requirement to confer jurisdiction on Canadian courts under s. 7(4.1). Unlike the other *Criminal Code* offences which extraterritorially extend Canada's jurisdiction, a Canadian sexual offender in another jurisdiction does not commit any element of the offence within Canada, and the consequences of the offence remain entirely within another jurisdiction.

Before Canada's child sex tourism provision was enacted, a Canadian court found that nationality did not constitute a significant link to Canadian territory as a basis for prosecuting a sexual offender. In the 1997 case of *R. v. O.B.*,[38] a grandfather was convicted at trial of sexually assaulting his 13-year old granddaughter in a vehicle during a trip to the United States. The sexual assault occurred entirely outside Canada's borders. The Ontario Court of Appeal unanimously overturned the conviction. Justice Abella (as she then was), writing for the court, applied the "real and substantial link" inquiry and determined that:

> There must be more than Canadian residence or vehicular ownership; there must be a significant link between Canada and the formulation, initiation, or commission of the offence. There is no such link here with respect to any part of the offence.[39]

Therefore, prior to the enactment of s. 7(4.1), courts undoubtedly refused to convict offenders without a significant link between Canadian territory and the commission of the offence, even where the victim was of the same nationality.

Before enacting the original child sex tourism provision in 1997, the Canadian government also recognized the limitations of extending Canada's criminal law jurisdiction by

[38] *R. v. O.B.* [1997] O.J. No. 1850 (Ont. C.A.), online: QL (CJ).

requiring the consent of the government where the offence was committed before criminal proceedings could be initiated. A motion to amend the legislation by dropping the consent requirement ultimately failed. During parliamentary debates during the motion to drop the consent requirement, Canada's obligation to respect the territorial principle was recognized as an essential requirement for the ability of Canada to exercise its jurisdiction extraterritorially.[40] An additional concern was that investigations and evidence gathering by Canadian law enforcement would be hindered if the country in which the offence occurred did not have an interest in consenting to the prosecution of the accused.[41]

Therefore, Canada's legislative and judicial history has long favoured the sanctity of the territorial principle and the "real and substantial connection test" established by the Supreme Court in *Libman* as the basis for limiting the extension of Canada's criminal law only to those offences which occurred in whole or in part within Canada's border. The government's subsequent hesitation in extending jurisdiction to offences committed wholly within another state's jurisdiction was perhaps understandable. However, from 1997 onward, Canada's child sex tourism legislation proved to be a dismal failure due to the restrictive requirement of consent from another country's government. Not a single individual was prosecuted successfully.

Why Canada's Child Sex Tourism Legislation Accords with International Law

The Canadian government's past concerns over safeguarding the principle of sovereignty have become outdated and inappropriate due to the sheer global magnitude of child sexual exploitation and the continuing urgency with which the problem continues to grow. While the "real and substantial" connection test is a well-established principle of Canadian law which

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[39] *Ibid* at para. 12.

[40] *House of Commons Debates* (7 April 1997) at 1805, online: Hansard <http://www.parl.gc.ca/english/hansard/150_97-04-07/150GO2E.html> (last modified: 3 February 1997).

[41] *Ibid.*

should not be cast aside, the worldwide recognition of the seriousness of the sexual exploitation of children and the international efforts launched to combat the problem have placed child sexual exploitation outside the realm of ordinary criminal offences. One academic observes that the world's legal systems are continually confronting the serious problem of child sexual exploitation through extraterritorial legislation:

> …domestic legislation in the most advanced legal systems increasingly supports the application of certain norms to foreign situations because of the importance of the interest involved. A case in point is that of criminal legislation applicable to sexual abuses committed abroad against foreign minors within the worldwide network of sex tourism and child prostitution…[42]

There are three grounds which support upholding Canada's child sex tourism legislation: 1) the international treaties which Canada has ratified or has become a signatory to, 2) the recognition of the nationality principle as a valid basis for extending prescriptive jurisdiction, and 3) the inability or unwillingness of other countries to prosecute cases of child sexual exploitation.

1) *International Commitments to Prevent and Punish Child Sex Tourism*

UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child [CRC] was adopted by the UN in 1989 and is the first legally binding international agreement that explicitly protects children from sexual abuse and exploitation.[43] The CRC has been ratified by 191 countries including Canada.[44] State obligations regarding the sexual exploitation of children are outlined in article 34 of the Convention. Article 34 reads:

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[42] F. Francioni, "International Law as a Common Language for National Courts" (2001) 36 Tex. Int'l L.J. 587 at 597, online: Westlaw.

[43] E.T. Berkman, *supra* note 6 at 401.

[44] D. Edelson, *supra* note 6 at 501.

> States Parties undertake to protect the child from *all forms of sexual exploitation and sexual abuse*. For these purposes states Parties shall in particular take all appropriate national, bilateral, and multilateral measures to prevent:
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> (a) the inducement or coercion of a child to engage in any unlawful sexual activity;
>
> (b) the exploitative use of children in prostitution or other unlawful sexual practices;
>
> (c) the exploitative use of children in pornographic performances and materials.[45] [emphasis added]

Other key provisions in the CRC include article 19, which requires countries to pass laws against the sexual exploitation of children, including laws to prevent parents from indenturing their children into the sex industry. Articles 19 and 39 require governments to establish appropriate social programs for rescuing child victims of sexual exploitation and aid in their rehabilitation.[46]

World Congress against the Commercial Sexual Exploitation of Children

In 1996, delegates from 122 countries including Canada assembled at the World Congress against the Commercial Sexual Exploitation of Children in Stockholm, Sweden. The Congress resulted in the establishment of a *Declaration and Agenda for Action*, which was signed by all 122 nations in attendance. By signing the *Agenda*, countries committed themselves to develop laws against the sexual exploitation of children, including extraterritorial legislation. All states were called upon to:

> Criminalize the commercial sexual exploitation of children, as well as other forms of sexual exploitation of children, and condemn and penalize all those offenders involved, whether local or foreign, while ensuring that the child victims of this practice are not penalized.[47]

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[45] CRC, *supra* note 2.

[46] *Ibid.*

[47] World Congress against Commercial Sexual Exploitation of Children, *Declaration and Agenda for*

In 2001, the same countries reaffirmed their commitment to fight child sexual exploitation at a second World Congress in Yokohama, Japan.[48]

However, the preamble of the *Agenda* indicates that its function was to form a 'global partnership' between governments, non-governmental organizations and 'other concerned organizations and individuals worldwide.'[49] The language of the preamble suggests that the purpose of the *Agenda* was to call attention to the issue of sexual exploitation while fostering an international spirit of co-operation. Therefore, the *Agenda* appears to have been created as a document of international consensus rather than a legally binding instrument of international law.

UN Optional Protocol to the Convention on the Rights of the Child

The *Optional Protocol* to the CRC entered into force in January 2002 and has been ratified by 67 countries as of November 2003.[50] The preamble express "deep concern" over the practice of sex tourism, with the recognition that children are especially vulnerable. Article 1, the key provision to the *Option Protocol*, reads:

> Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally[51] or on an individual or organized basis:

Action, (Stockholm, Sweden), online: CSEC World Congress <http://www.csecworldcongress.org> (Last modified: 27 July 2002).

[48] *The Yokohama Global Commitment* (Yokohama, Japan), online: CSEC World Congress <http://www.csecworldcongress.org> (Last modified: 27 July 2002).

[49] *Declaration and Agenda for Action, supra* note 47.

[50] *UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 25 May 2000, A/RES/54/263 (entered into force 18 January 2002), online: Committee on the Rights of the Child <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm> (last visited: 2 December 2004).

[51] Presumably, "transnationally" does not refer to the nationality of the offender, but to instances where different elements of the offence may have been committed in different jurisdictions, thereby mandating the exercise of a state's jurisdiction over the offender based on the territorial principle.

(a) In the context of sale of children as defined in article 2:

(i) Offering, delivering or accepting, by whatever means, a child for the purpose of:

a. Sexual exploitation of the child; …

(b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2;

(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.

The key provision authorizing extraterritorial legislation permits state parties to "take such measures as may be necessary" to establish jurisdiction over the above offences, where the alleged offender is a national or habitual resident of that state, or where the victim is a national of that state.[52]

Canada remains a signatory to the *Optional Protocol*, and has yet to ratify it. However, by becoming a signatory, Canada has expressed its intent to be bound to the treaty. Notably, the *Optional Protocol* does not mandate states to establish extraterritorial legislation. For the popular tourist destination countries where child prostitution flourishes, mandating extraterritorial application of their own prescriptive jurisdiction would be nonsensical and unworkable . However, the failure of Canada and other developed nations to establish extraterritorial legislation would be contrary to the treaty's purpose of preventing child sex tourism and other forms of child sexual exploitation.

The number of countries that have either signed or ratified the aforementioned agreements demonstrates the commitment put forth by Canada and other nations to tackle the wide scale sexual exploitation of children, child prostitution and child pornography in a spirit of cooperation. Under Article 34 of the *Convention on the Rights of the Child* (*supra*), Canada is

[52] Article 4(2), *supra* note 50.

legally bound to protect all children from all forms of sexual exploitation and abuse; Article 34 in no way restricts the legal obligation to the children of one's own state. The obligation of states to take bilateral and multilateral measures in achieving the protection of children also supports the contention that all of the world's children must be protected from Canadian sexual offenders. Finally, Article 4(2) of the *Optional Protocol* (*supra*) confers legal authority on states to enact extraterritorial legislation when the either the perpetrator or the victim is a national of that state.

Offending International Relations?

In regards to the upcoming legal challenge to Canada's sex tourism legislation, Donald Bakker's lawyer claims that Canada's extraterritorial legislation poses a threat to international relations and postulates how upset Canada's government would be if Saudi Arabia decided to prosecute a Saudi Arabian woman for not wearing her headdress here in Canada.[53] However, such an absurd analogy fails to recognize that far from offending international relations, enacting extraterritorial legislation to prevent the sexual exploitation of children is in accordance with Canada's legal obligations under existing international treaties and commitments. The refusal of a woman to wear her religious symbol while outside her country of nationality does not result in a fundamental violation of another person's rights and is not a matter of international concern.

2) *The Nationality Principle*

The nationality principle, in which a person's nationality provides the connection between a state and a person, has also been generally recognized as a valid basis for the prescription of a state's jurisdiction to a person outside the state's borders.[54] Although less commonly utilized than the territorial principle, the nationality principle is nevertheless

[53] J. Wells, *supra* note 22.
[54] J. Currie, *supra* note 28 at 303.

recognized in international relations.[55] An accused cannot be prosecuted on the basis of nationality unless and until he returns to his national jurisdiction (except for those states which allow conviction *in absentia*).[56]

Canada's Recognition of the Nationality Principle

The Supreme Court of Canada in *Cook* acknowledged territoriality as the most common basis of jurisdiction, but in obiter recognized the validity of the nationality principle: "…international law also permits states to evoke the nationality of the person subject to the domestic law as a valid basis of jurisdictional authority."[57] In addition to Canada's child sex tourism provisions, the *Criminal Code* recognizes nationality as a valid basis of jurisdiction for only the most serious offences: treason, torture, war crimes and crimes against humanity.[58] By enacting extraterritorial legislation against the enumerated sexual offences in s. 7(4.1) , Canada has equated the devastating physical and psychological consequences of child sexual abuse and exploitation with the most serious crimes known to humanity.[59]

American Child Sex Tourism Legislation

The United States first enacted legislation in an attempt to curb child sex tourism in 1994. For a successful conviction, the legislation required evidence that the traveller's intent to engage

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[55] O. Schachter, *International Law in Theory and Practice*. Boston: M. Nijhoff Publishers, 1991 at 254, cited in *R. v. Cook* [1998] 2 S.C.R. 597 (S.C.C.), online: QL (SCJ) at para. 28.

[56] E. Shorts and C. de Than, *International Criminal Law and Human Rights* (1st edition) (London, Sweet & Maxwell, 2003) at 2-005.

[57] *R. v. Cook*, *supra* note 27 at para. 28.

[58] *Criminal Code*, *supra* note 14, ss. 46 (treason), 7(3.7) (torture), and 7(3.71) to 7(3.77) (war crimes and crimes against humanity).

[59] Child victims within the sex tourism industry face irreparable physical and psychological harm - many are physically beaten and are at high risk for contracting HIV and other sexually transmitted diseases. Various forms of lifelong psychological damage are immeasurable. (K.D. Breckenridge, *supra* note 9 at 412).

in the unlawful activity was formed before he left the U.S.,[60] which essentially acted as the link between the accused and U.S. territory. As in Canada, the U.S. government initially appeared hesitant to prosecute its citizens for sexual offences abroad on the basis of nationality alone. The 1994 legislation's requirement of demonstrating intent before the accused left the U.S. proved to be too burdensome for any successful prosecutions; only two individuals pled guilty under the 1994 legislation.[61]

The restrictive intent requirement was later removed under the new *PROTECT Act* [62] passed in 2003. The new legislation still allows for prosecution based on an individual's intent[63], but in addition a person can be prosecuted for engaging in 'illicit sexual conduct in foreign places.'[64] First, the offence requires that the individual 'travel in foreign commerce,' and secondly, the individual must engage in 'illicit sexual conduct,' defined as: "(1) a sexual act...with a person under 18 years of age...; or (2) any commercial sex act...with a person under 18 years of age."[65] Offenders may be sentenced to a maximum of 30 years *per* sexual act.[66]

The Unsuccessful Challenge to American Child Sex Tourism Legislation

Provisions under the *PROTECT Act* were recently challenged in *United States v. Clark*.[67]

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[60] K.D. Breckenridge, *supra* note 9 at 414.

[61] See *United States v. Bredimus* (2002), 352 F.3d 200; 2003 U.S. App. LEXIS 24033, online: QL (FED)and *United States v. Hersh* (2002), 297 F.3d 1233; 2002 U.S. App. LEXIS 14407, online: QL (FED).

[62] *Prosecutorial Remedies and Tools to End the Exploitation of Children Today (PROTECT) Act*, Pub. L. No. 108-21, 117 Stat. 650 (2003).

[63] On 19 November, 2004, an 86 year-old California man became the first individual found guilty at trial under the new Act, for attempting to travel to the Philippines with the intent to sexually abuse two young girls. John Seljan was arrested at a Los Angeles airport after he attempted to board a flight with child pornography, sexual aids, and nearly 100 pounds of chocolate. Online at CNN: <http://www.cnn.com/2004/LAW/11/19/sex.tourism.ap/index.html> (last visited: 3 December, 2004).

[64] *PROTECT Act*, *supra* note 62, s. 2423(c).

[65] *Ibid*, s. 2423(f).

[66] *Ibid*, subsections 2423(b) to (d).

[67] (2004) 315 F. Supp. 2d 1127; 2004 U.S. Dist. LEXIS 7457, online: QL (FED).

Michael Lewis Clark pled guilty in March 2004 to engaging in illicit sexual conduct with two Cambodian boys, but reserved the right to challenge the constitutionality of the legislation. Clark challenged the *PROTECT Act* on the basis that the statute violated international law principles, arguing that the extraterritorial application of the law was unreasonable.

After examining the valid bases of jurisdiction under international law, the Washington District Court concluded that the law could be applied extraterritorially based on the nationality principle.[68] However, American jurisprudence requires that the extraterritorial application of a law must also be reasonable.[69] To determine reasonableness, U.S. courts employ a test similar to Canada's "real and substantial connection" test enumerated in *Libman*. The American "reasonableness" test incorporates a number of other factors beyond the territorial link of the offence to the regulating state. In assessing reasonableness, American courts examine the following non-exhaustive factors:

> (a) the link of the activity to the territory of the regulating state…
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
> (e) the importance of the regulation to the international political, legal, or economic system;
> (f) the extent to which the regulation is consistent with the traditions of the international system;
> (g) the extent to which another state may have an interest in regulating the activity; and
> (h) the likelihood of conflict with regulation by another state.[70]

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[68] *Ibid*, at p. 10.
[69] *United States v. Vasquez-Velasco* (1993), 15 F.3d 833; 1994 U.S. App. LEXIS 1200, online: QL (FED).
[70] *Ibid*, at p. 11.

Weighing all of the above factors, the court in *Clark* concluded that the extraterritorial application of the *PROTECT Act* was reasonable under international law. The court reasoned that although there existed only a "minimal link" between the behaviour being regulated and U.S. territory, there was a "strong connection" between the United States and the nationality of its citizens who commit the illicit activity.[71] Furthermore, the court recognized that prohibiting the sexual abuse of children is desirable and widely accepted, and there is "very little likelihood of conflict with regulation by other states."[72]

Canada's "Real and Substantial Connection" Test is too Rigid

While the principle of sovereignty should not be eroded to the point that all wrongdoings by Canadian citizens abroad are subjected to Canadian criminal jurisdiction, Canada needs to face the reality that "…the traditional, straitjacket notion of national sovereignty is being eroded by transnational economic forces, global communication, and the increasingly vocal role of non governmental organisations…"[73] Canada's common-law "real and substantial connection" test is too rigid in a world where global travel is easily accessible and a large number of Canada's citizens travel for the specific purpose of engaging in conduct which is strongly condemned by Canadian society.

Unquestionably, Canada should preserve the long-standing territoriality principle as the central basis for criminal jurisdiction in Canada. However, other considerations should be relevant to the evaluation of whether Canada should assume extraterritorial jurisdiction over a criminal offence, beyond the minimum requirement that some element of the offence be connected to Canadian territory. In cases where the offender's nationality provides the sole

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[71] *United States v. Clark, supra* note 67 at p. 12.

[72] *Ibid.* Note: Despite recognizing the "wide acceptance" of preventing child sexual abuse, the court curiously failed to mention U.S. obligations under the *Optional Protocol* to the CRC, *supra* note 51, ratified by the U.S. on 23 December 2002.

connection to Canadian territory, Canadian courts should have the ability to assess the prescription of Canada's criminal jurisdiction in the context of reasonableness. The U.S. approach of 'reasonableness' applied in the *Clark* case (*supra*) would support the conclusion that Canada's child sex tourism provisions are also in accordance with international law.

Despite the fact that Canada's child sex tourism legislation provides for jurisdiction solely on the basis of nationality, all of the international conventions discussed earlier demonstrate the worldwide condemnation of the sexual exploitation of children and the practice of sex tourism in particular. The fact that the *Optional Protocol* to the CRC permits state parties to enact extraterritorial legislation to prevent child sexual exploitation demonstrates that such regulation is highly accepted. The desirability of extraterritorial legislation is further supported by the international community's demonstrated acceptance of utilizing such legislation. As of 2001, 32 countries had enacted extraterritorial legislation which allows for the prosecution of offenders who travel abroad to sexually abuse children.[74]

3) *Inability or Unwillingness of Countries to Prosecute Child Sexual Exploitation*

Although the extraterritorial application of child sexual offences is becoming more commonplace, the presence of such legislation does not diminish the obligations of destination countries to provide effective law enforcement and prosecutions within their own domestic legal systems. However, numerous academics have noted the inability or unwillingness of poorer nations to prosecute foreign citizens for sexual offences against their children, which is often due to ineffective law enforcement.[75] While some governments have stepped up legislative measures

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[73] F. Francioni, *supra* note 42 at 598.

[74] ECPAT International, *Child Sex Tourism Action Survey* (April 2001) online: ECPAT <http://www.ecpat.net/eng/Ecpat_inter/Publication/Other/English/Pdf_page/Child_sex_tourism_action.pdf> at 38.

[75] K.D. Breckenridge, *supra* note 9 at 412. Also see E. Bevilacqua, "Child Sex Tourism and Child Prostitution in Asia: What Can be Done to Protect the Rights of Children Abroad Under International Law?" (1999) 5 ILSA J. Int'l & Comp. L. 171 at 174, online: Westlaw.

to combat the sexual exploitation of minors, the reality is that many countries simply lack the needed political and economic stability to implement and enforce new legislation.[76] Sexual offenders who travel for the purpose of exploiting vulnerable children are therefore more likely to choose a destination country where their chances of being apprehended are minimal.

A large driving force behind the phenomenon of child sex tourism is the economic disparity of many tourist destination countries. In Southeast Asia, the number of foreign tourists attracted to the area has increased as a result of economic development policies, with the result that prostitution in the region has burgeoned into a billion-dollar industry.[77] Not surprisingly, such a huge economic windfall creates a disincentive for governments or law enforcement to pursue child sex offenders effectively. Law enforcement officers in developing countries where child sex tourism flourishes are often paid poorly themselves, and have been known to be highly susceptible to bribery.[78] In Thailand for instance, police officers have been known to guard brothels as well as procure children for prostitution.[79]

The demonstrated lack of effective law enforcement and economic incentives from sex tourism further supports the use of the nationality principle as a basis of criminal jurisdiction over child sexual exploitation. Scholar J. Currie affirms that the nationality principle can be a useful doctrine in cases where a state shows no interest in prosecuting a person, or where having the person fall under more than one jurisdiction is preferable in light of the risk that perpetrators of serious crimes will escape beyond the reach of any nation's laws.[80] The high risk that offenders will go unpunished in the countries where many children are victimized by the

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[76] K. Jullien, *supra* note 10 at 592.
[77] K.D. Breckenridge, *supra* note 9 at 410.
[78] M.A. Healy, "Prosecuting Child Sex Tourists at Home: Do Laws in Sweden, Australia and the United States Safeguard the Rights of Children as Mandated by International Law?" (1995) 18 Fordham Int'l L.J. 1852 at 1871, online: Westlaw.
[79] E. Bevilacqua, *supra* note 75 at 174.

prostitution industry provides further support for the offender's home country to assume jurisdiction over the crime. Sexual offenders who are able to return to their own country without fear of punishment should not be given what is essentially a free licence to abuse and exploit children in an underdeveloped society with impunity.

Potential Conflicts Between Legal Systems?

For those accused who are apprehended, fears of potential conflicts between the laws of the offender's home country and the destination country are unwarranted. Whenever a destination country apprehends an accused within its territory, that country's right to charge and prosecute the accused should take precedence, unless that country agrees to extradite the accused to face charges in his own country.[81] Such an approach is ideal in light of the reality that evidence-gathering in foreign countries can prove to be difficult and requires co-operation with foreign law enforcement officials. Canada's Department of Foreign Affairs for instance, acknowledges that the investigation of offences in foreign countries is more complicated and resource-intensive, due to the fact that the victim(s), witnesses and most of the evidence is located in the country where the offence was committed.[82] Weak enforcement of a destination country's laws also reduces the risk of conflicts between legal systems.

Furthermore, conflicts of laws between two nations are resolved by the concept of double jeopardy. Once a Canadian accused is convicted or acquitted in a foreign jurisdiction, the Supreme Court has held that the concept of double jeopardy applies between two nations.[83] Therefore, a Canadian charged with a sexual offence under s. 7(4.1) could plead *autrefois acquit*

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[80] J. Currie, *supra* note 28 at 304.

[81] For example, the United States arranged to take jurisdiction over the offences in the *United States v. Clark* case [*supra* note 67] while Clark remained in custody in Cambodia.

[82] Department of Foreign Affairs and International Trade, *Child Sex Tourism Fact Sheet*, online: <http://www.voyage.gc.ca/main/pubs/child_fact-en.asp> (last updated: 20 January 2003).

[83] *R. v. Van Rassel* (1990), [1990] S.C.J. No. 11 (QL: SCJ) at para. 10.

or *autrefois convict* [84] if another jurisdiction has already acquitted or convicted the accused under their own criminal law system. A plea of *autrefois acquit* requires that two conditions be met: (1) the matter must be the same (in whole or in part) and (2) the accused could have been convicted at the first trial of the offence with which he is now charged in Canada.[85] However, if the charges are different in nature, either plea is not available.

Issue #2

In addition to states utilizing nationality as a valid basis of jurisdiction to punish child sexual exploitation, there is support for regulating child sexual abuse and exploitation under the universality principle. In addition, international law supports the contentions that a state's duty to punish child sexual abuse and exploitation (no matter where it occurs) is an *erga omnes* obligation, and the prohibition of such conduct constitutes *jus cogens.*

The Universality Principle

Offences involving child sexual abuse and exploitation were recently judicially recognized as being so heinous a crime, that such offences should fall under the universality principle of international law jurisdiction. The Washington District Court in the *Clark* case explicitly stated that the extraterritorial application of the *PROTECT Act* could be justified under both the nationality and the universality principle:

> …the Court finds that the *sexual abuse of children criminalized by this statute is universally condemned*. The Court therefore finds that Congress may exercise extraterritorial jurisdiction…under *both the nationality principle and the universality principle*.[86] [emphasis added]

Under universal jurisdiction, a state would be permitted to charge and prosecute any individual in its territory who committed an offence that was contrary to that state's domestic

[84] Both pleas are contained in s. 607 of the *Criminal Code*, *supra* note 14.
[85] *R. v. Van Rassel, supra* note 83 at para. 16.
[86] *R. v. Clark, supra* note 67 at p. 9.

laws against child sexual abuse and exploitation, irregardless of where the offence occurred or the nationality of the offender.[87] Placing a crime under universal jurisdiction minimizes the chance that such a serious crime will go unpunished,[88] especially in situations where an offender might flee to a third country to escape prosecution from his own country, or the country where he committed the offence.

Therefore, if a citizen from country A travels to country B, and proceeds to commit a sexual offence against a child in country B, then subsequently flees to country C, country C would be permitted to charge and prosecute the offender if his act constituted an offence in country C. However, various practical difficulties in the collection of evidence would continue to persist with such an approach to jurisdiction. The enforcement of universal jurisdiction would require the highest level of coordination and co-operation amongst multiple law enforcement agencies.[89]

Preventing Child Sexual Exploitation as an Erga Omnes Obligation

Academic Francesco Francioni asserts that in cases of sexual offences involving minors (and other serious offences) committed by a country's nationals abroad, courts should not fail to exercise jurisdiction for a lack of a sufficient connection with the event.[90] In Francioni's view, these sexual crimes offend such basic rights that they should be treated by courts as *erga omnes* obligations, or obligations owed to the international community as a whole.[91] The International Court of Justice has recognized that "basic rights of the human person" are owed *erga omnes*,

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[87] Even though universality was recognized in *Clark*, the U.S. has not yet had the opportunity to apply such jurisdiction in a subsequent case.

[88] J. Currie, *supra* note 28 at 307.

[89] To aid in the collection of evidence, Canada has mutual legal assistance agreements with many countries. In addition, the National Central Bureau of Interpol provides communication services to all Canadian law enforcement officials and can be contacted for assistance related to matters involving child sex tourism 24 hours a day (Department of Foreign Affairs and International Trade, *supra* note 82).

[90] F. Francioni, *supra* note 42 at 597.

which means that all states have the legal status to pursue violations of such rights.[92]

Recognition of the obligation of all states to prosecute offenders who commit acts of sexual abuse and exploitation against children as an *erga omnes* obligation provides additional support for assuming jurisdiction over such offenders under the universality principle. Consequently, all countries would be legally obligated by international law to prosecute a child sexual offender in their territory, or to at least ensure that the offender is captured and extradited to face charges in another jurisdiction.

Child Sexual Exploitation as Jus Cogens

Academic Geraldine Van Bueren argues that specific forms of child sexual exploitation (such as the incarceration of children in brothels) could potentially constitute a breach of *jus cogens*. In other words, the prohibition against this particular form of sexual exploitation represents a 'peremptory' or 'non-derogable' norm of international law that is so fundamental to the international legal order that it cannot be set aside or suspended, even with the express consent of states."[93]

Van Bueren first points out that multiple international treaties, opinio juris and general state practice support the proposition that slavery, slavery-like practices and the slave trade are prohibited under customary international law.[94] Next, Van Bueren finds academic support for the proposition that these international norms prohibiting slavery constitute *jus cogens*, based on their non-derogable status and the consistency in the formulation of the prohibition.[95] Lastly, Van Bueren concludes: "If the prohibition on slavery amounts to *jus cogens*, the argument that

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[91] *Ibid*.
[92] See for example *Barcelona Traction, Light and Power Company Ltd.*, [1970] I.C.J. Rep. 3 at 32, cited in J. Currie, *supra* note 28 at 368.
[93] J. Currie, *supra* note 28 at 82, fn. 49.
[94] G. Van Bueren, *The International Law on the Rights of the Child*, (United States: Kluwer Academic Publishers, 1995) at 278.

the prohibition on institutions and practices similar to slavery also amount to *jus cogens* is very compelling."[96]

The plausibility of Van Bueren's argument depends on whether certain forms of sexual exploitation can be equated to a "slavery-like practice." However, there is support for the proposition that the forced enslavement of children in brothels constitutes a form of modern day slavery. The same could be said for children who are trafficked into the sex industry and remain under the control of their captors, even if they do not end up in a brothel. The contention that the victimization of children by the prostitution industry constitutes a form of slavery accords with views of the international community.[97]

The alarm expressed by the international community is supported by research findings that children sold into the prostitution industry are forced to 'work' until their debts are paid off, which is usually impossible to do because of high interest rates, charges for room and board and other fraudulent expenses.[98] Many children live in constant fear of beatings or starvation if they do not earn enough money.[99] In addition to the physical and psychological abuse, a significant number of children suffer from AIDS or other sexually transmitted diseases which are often left untreated.[100]

Issue #3

The Deficiencies of Canada's Current Child Sex Tourism Provision

Canada's Age of Consent Needs to be Raised

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[95] *Ibid.*
[96] *Ibid.*
[97] The World Congress against the Commercial Sexual Exploitation of Children referred to the commercial sexual exploitation of children as a "contemporary form of slavery." (United Nations, *supra* note 4).
[98] E.T. Berkman, *supra* note 6 at 401.
[99] *Ibid.*
[100] *Ibid.*

Section 7(4.1) contains a number of sexual offences which allow for the prosecution of individuals who sexually abuse and exploit children, whether or not the exploitation occurs in the context of a commercial exchange. However, the age limits of the enumerated offences in s. 7(4.1) need to unified to ensure that minors are protected from all forms of abuse. Currently, Canada's age of consent remains at 14 for the offences of sexual interference and sexual touching,[101] whereas a more recent offence added to the *Criminal Code* allows for prosecution if the offender "obtained for consideration" the sexual services of a person under 18 (whether from the child or a third person).[102] The result appears illogical, in that an individual commits an offence under Canadian law if he attempts to sexually exploit a 15 year old in a foreign jurisdiction through a commercial exchange, but he would not have committed an offence if he had what he believed to be consensual intercourse with that same child without discussion of payment.

Canada needs to raise the age of consent in order to correct this contradiction for the benefit of both Canadian children and children abroad. Raising the age of consent to 18 would aid in the protection of all children under 18 from abuse, whether or not the sexual exploitation occurs in the context of a commercial exchange. Secondly, raising the age of consent to 18 would place Canada in accordance with the UN's definition of a child as a person under the age of 18 years in the *Convention on the Rights of the Child*. Although the CRC does not mandate that countries define children as individuals under 18 years of age, harmonizing the age of consent internationally at the age of 18 would certainly promote consistency between the laws of different countries.[103]

The Lack of Penalties for Sex Tour Promoters

[101] *Criminal Code*, *supra* note 8, ss. 151 and 152.
[102] *Ibid*, s. 212(4).

Twelve of the over 30 countries that have enacted extraterritorial legislation to prosecute child sex tourists have also developed other legal measures against child sex tourism, such as revoking licences for travel agencies who promote sex tours.[104] Although very few tour operators explicitly arrange sex tours, child sex tourism can be facilitated by tour promoters in various ways:

> …there are still various small companies in Europe, Australia, North America and Japan which promote and facilitate sex tourism by identifying resorts where prostitution is widespread; by negotiating deals with local hotels to ensure that their clients will not be charged for bringing 'companions' back to their room for the night; by arranging 24 hour female 'guides' for clients; by providing on the spot 'holiday reps' with an intimate knowledge of prostitution in cities and resorts.[105]

In addition, websites for various sex tour packages are easily accessible on the internet.

Tour promoters can be prosecuted under the extraterritorial legislation enacted in U.S., Germany and Australia, which prohibits the promotion of child sex tours through the imposition of fines or imprisonment.[106] The absence of such legislation is a glaring omission in Canada's child sex tourism provisions. Although it may not deter those individuals who travel with the intent of victimizing underage prostitutes, enabling the prosecution of tour operators would act as a deterrent to soliciting potential buyers in Canada's tourist market.

Conclusion

Thus far, the track record of Canada and other countries in prosecuting offenders who commit sexual crimes against children outside their own country's borders suggests that extraterritorial legislation has been a dismal failure. The primary obstacle to effective

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[103] D. Edelson, *supra* note 6 at 533.
[104] ECPAT International, *supra* note 74 at 38.
[105] ECPAT International, "Tourism and Children in Prostitution" (1996) (Background Paper Prepared for the 1996 World Congress against CSEC), online: CSEC World Congress <http://www.csecworldcongress.org/en/stockholm/ Background/index.htm> (Last modified: 28 July 2002).
[106] *Ibid,* at 4.

extraterritorial legislation originated from a strict adherence to notions of sovereignty. However, such a strict view of sovereignty is unrealistic in today's world where sexual offenders will seek to victimize the most vulnerable children in whichever nation they can find them in. There is no logical reason why a sexual offender should not face condemnation by Canadian law and society just because his child victim was not also Canadian. As LaForest J. has so eloquently stated: "…we should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brother's keepers."[107]

While the presence of extraterritorial legislation will hopefully deter at least some offenders, the enactment of such legislation is by no means an effective remedy in itself. The sexual abuse and exploitation of children involves a complex interplay of social and economic factors which are beyond the scope of a single country's legal system. As one academic recently concluded: "…the first step should be recognition that the problem is far greater than the law of any one country, or than any one country's ability or inability to enforce the law."[108] However, the enactment of extraterritorial legislation demonstrates a recognition by the international community that the sexual exploitation of children is a fundamental violation of human rights.

[107] *R. v. Libman, supra* note 25 at para. 77.
[108] K.D. Breckenridge, *supra* note 9 at 437.