

5-1-2010

## The Secret World of Child Sex Tourism: Evidentiary and Procedural Hurdles of the PROTECT Act

Mark Orndorf

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>



Part of the [International Law Commons](#)

---

### Recommended Citation

Orndorf, Mark (2010) "The Secret World of Child Sex Tourism: Evidentiary and Procedural Hurdles of the PROTECT Act," *Penn State International Law Review*: Vol. 28: No. 4, Article 8.  
Available at: <http://elibrary.law.psu.edu/psilr/vol28/iss4/8>

This Comment is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

# The Secret World of Child Sex Tourism: Evidentiary and Procedural Hurdles of the PROTECT Act

Mark Orndorf\*

## I. INTRODUCTION

Cambodia is an exotic vacation destination with unspoiled tropical beaches, magnificent temples, ancient cities—and a thriving underground child sex tourism industry.<sup>1</sup> Travelers wishing to enhance their journeys abroad with new sexual encounters may participate in organized “sex tours” for which they receive an itinerary that includes stops at restaurants and bars serving as fronts for child prostitution brothels.<sup>2</sup> Behind these doors, children as young as five years old are sold to “sex tourists” as slaves for sex.<sup>3</sup> Virgins can be purchased at a premium, but a handful of cash will buy a night with three “experienced” young girls.<sup>4</sup> For these “sex tourists” paying for sex with a male or female child is like “going to McDonald’s; most people are looking for a

---

\* J.D. 2010, The Pennsylvania State University Dickinson School of Law.

1. While sex tourism may refer to a variety of commercial sexual activities, this Note deals only with child sex tourism and tourists who engage in sexual relations with minors. The phenomenon of sex tourism with adults is a distinct topic that is not addressed herein except as it relates to child sex tourism. Distinguishing between sex tourism and child sex tourism is important, as the laws of individual nations and multinational treaties vary greatly depending on the intention of the tourist. Kyle Cutts, Comment, *A Modicum of Recovery: How Child Sex Tourism Constitutes Slavery Under the Alien Tort Claims Act*, 58 CASE W. RES. 277, 281 (2007).

2. See generally Brittany Bacon, *Stolen Innocence: Inside the Shady World of Child Sex Tourism*, ABC NEWS, <http://i.abcnews.com/TheLaw/Story?id=3385318&page=1> (last visited November 6, 2008) (discussing the ease in which child sex tourists can gain access to children abroad); *Children for Sale: Dateline Goes Under Cover With a Human Rights Group to Expose Sex Trafficking in Cambodia*, MSNBC, <http://www.msnbc.msn.com/id/4038249/> (last visited Feb. 8, 2008) [hereinafter *Children for Sale*] (explaining that local restaurants and cafés often house child prostitutes).

3. See *Children for Sale*, *supra* note 2.

4. *Id.*

quick, cheap meal. It's satisfying, it's greasy, and then [they] get the hell out of there."<sup>5</sup>

Cambodia is not alone in grappling with the sexual exploitation of children through prostitution.<sup>6</sup> Today, child sex tourism is a multibillion-dollar industry that has permeated nearly every region in the world.<sup>7</sup> Worldwide, hundreds of thousands of children are forced into a life of prostitution with virtually no repercussions for the foreign travelers who exploit them.<sup>8</sup> Although the global child-sex trade has gained international attention and deserved outrage,<sup>9</sup> child prostitution remains daunting and intractable.<sup>10</sup>

In response to calls for improved laws to address child sex tourism, the United States has enacted a series of laws that make it illegal to travel to a foreign country with the intent to engage in sex with children, the foremost being the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act").<sup>11</sup> Arrests by Immigration and Customs Enforcement are becoming more common; however, convictions under this law are still extremely rare.<sup>12</sup> According to the U.S. House of Representatives Committee on the Judiciary, "[s]ex tourists often escape prosecution" because of factors "ranging from ineffective law enforcement, lack of resources, corruption, and immature legal systems."<sup>13</sup>

5. Hanh Diep, Student Article, *We Pay—The Economic Manipulation of International and Domestic Laws to Sustain Sex Trafficking*, 2 LOY. U. CHI. INT'L L. REV. 309, 309 (2005) (quoting JULIE BINDEL & LIZ KELLY, A CRITICAL EXAMINATION OF RESPONSES TO PROSTITUTION IN FOUR COUNTRIES: VICTORIA, AUSTRALIA; IRELAND; THE NETHERLANDS; AND SWEDEN 10 (2001), <http://www.nswp.org/pdf/BINDEL-CRITICAL.PDF>).

6. Child sex tourism is especially prevalent in Asia, and Central and South America. See EVA J. KLAIN, PROSTITUTION OF CHILDREN AND CHILD SEX TOURISM: AN ANALYSIS OF DOMESTIC AND INTERNATIONAL RESPONSES 32 (1999), available at <http://www.sexcriminals.com/library/info-1078.html>.

7. See Vitit Muntarbhorn, *International Perspectives and Child Prostitution in Asia*, in FORCED LABOR: THE PROSTITUTION OF CHILDREN 9 (U.S. DEP'T OF LABOR, 1996).

8. See, e.g., LAURA BARNITZ, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: YOUTH INVOLVED IN PROSTITUTION, PORNOGRAPHY AND SEX TRAFFICKING 3-4 (2000).

9. In an interview with Chris Hansen from Dateline, Secretary of State Colin Powell described the sexual exploitation of children as "the worst kind of human exploitation imaginable" and a "sin against humanity." *Children for Sale*, *supra* note 2.

10. See Muntarbhorn, *supra* note 7, at 9.

11. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 17 Stat. 650 (codified as amended at 18 U.S.C. § 2423 (2000)).

12. See Sarah K. Andrews, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 J. CRIM. L. & CRIMINOLOGY 415, 416-17 (2004) (noting the difficulty in securing convictions under the PROTECT Act).

13. H.R. REP. NO. 107-525, at 3 (2002).

In addition, prosecuting child sex tourists under the PROTECT Act for illicit acts occurring in foreign countries presents a number of procedural and evidentiary hurdles that are difficult to overcome.<sup>14</sup> This Comment examines these challenges and proposes viable solutions to these problems. Part II of this Comment provides an overview of child sex tourism and its impact on the child victim.<sup>15</sup> Part III highlights current domestic and international efforts to combat child sex tourism, focusing primarily on the PROTECT Act.<sup>16</sup> Part IV examines the effectiveness of the PROTECT Act through an examination of its evidentiary and procedural hurdles.<sup>17</sup> Finally, Part V concludes with practical recommendations to increase the success of the anti-child sex tourism legislation both domestically and abroad.<sup>18</sup>

## II. UNDERSTANDING THE STORY BEHIND CHILD SEX TOURISM

The commercial sexual exploitation of children through sex tourism has emerged as a global phenomenon of disquieting proportions.<sup>19</sup> The United Nations defines child sex tourism as “tourism organized with the primary purpose of facilitating the effecting of a commercial-sexual relationship with a child.”<sup>20</sup> Additionally, child sex tourism may include the opportunistic use of prostituted children in regions while traveling for business or for other purposes.<sup>21</sup> Child sex tourists enjoy a relatively low risk of prosecution despite the fact that child sex tourism violates both national and international laws.<sup>22</sup>

### A. *The Origins of Child Sex Tourism*

Child sex tourism is a consequence of globalization and the ease with which people can now move around the world.<sup>23</sup> The expansion of

---

14. See Vickie F. Li, *Child Sex Tourism To Thailand: The Role of the U.S. as a Consumer Country*, 4 PAC. RIM L. & POL'Y J. 505, 526 (1995) (discussing the difficulties in proving illicit sexual conduct in a foreign country).

15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Part IV.

18. See *infra* Part V.

19. Muntarbhorn, *supra* note 7, at 9.

20. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Hum. Rts., *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, ¶ 35, U.N. Doc. E/CN.4/1996/100 (1996) [hereinafter *Report of the Special Rapporteur*]. Sex tourism has become so common that the New Oxford Dictionary added the phrase “sex tourism” to its publication in 1998. See Andrews, *supra* note 12, at 418.

21. KLAIN, *supra* note 6, at 32.

22. Eric Thomas Berkman, *Responses to the International Child Sex Tourism Trade*, 19 B.C. INT'L & COMP. L. REV. 397, 402 (1996).

23. JEREMY SEABROOK, NO HIDING PLACE: CHILD SEX TOURISM AND THE ROLE OF EXTRATERRITORIAL LEGISLATION xi (2000) [hereinafter SEABROOK, NO HIDING].

business and vacation travel has made international tourism one of the largest and most lucrative industries in the world.<sup>24</sup> As tourists eagerly travel to foreign lands to encounter new terrains and cultures, economically developing countries have embraced the expansion of the international tourism industry within their borders as a much-needed source of income.<sup>25</sup> However, among the vast number of people traveling to the Third World, some travelers visit for reasons less honorable than the pleasure of traveling.<sup>26</sup> Consequently, the exponential rise in the popularity of the international travel industry has fueled the growth of an underground child-sex trade.<sup>27</sup>

Some observers attribute the root of the child-sex tourism industry to the presence of the United States military in Thailand, the Philippines, and Taiwan during the Vietnam War.<sup>28</sup> While stationed in these countries, thousands of United States servicemen visited local bars and massage parlors frequented by underage prostitutes.<sup>29</sup> After the war, the governments of Thailand, the Philippines, and Taiwan initiated national campaigns to promote international tourism, and they utilized the sex trade infrastructure as part of that promotion.<sup>30</sup> As the demand for child prostitution spread, other countries used the same niche to boost their own tourism industries, often turning a “blind eye” to the dangers of child sex tourism because of the income it produced.<sup>31</sup> Today, many countries in Latin America, Africa, and Eastern Europe have all established their own child sex tourism industries.<sup>32</sup>

Countries associated with high levels of child sex tourism generally lack stable economies, have extremely high unemployment rates, suffer

---

24. *Id.*

25. See *Comprehending Child Sex Tourism*, CAPTIVE DAUGHTERS, Jan. 23, 2008, <http://www.captive daughters.org/demand.htm> [hereinafter *Captive Daughters*].

26. SEABROOK, *NO HIDING*, *supra* note 23, at xi. In the mid-1990s, about six million people visited Thailand annually. *Id.* Of these travelers, over two-thirds were single males. *Id.*

27. See *id.* According to a 1998 report by the International Labour Organization (“ILO”), the money generated by sex tourism accounts for between two and fourteen percent of the Gross Domestic Product of Indonesia, Malaysia, the Philippines, and Thailand. See Jonathan Todres, *Prosecuting Sex Tour Operators in U.S. Courts in an Effort to Reduce the Sexual Exploitation of Children Globally*, 9 B.U. PUB. INT. L.J. 1, 2-3 (1999). This has translated into an estimated \$1.2 to \$3.3 billion boost to Indonesia’s economy each year. *Id.* In Thailand, one of the most popular destinations for sex tourists worldwide, it is estimated that prostitution accounts for at least two-thirds of the \$33 to \$44 billion brought in annually by Thai “underground businesses.” *Id.*

28. KLAIN, *supra* note 6, at 36.

29. Karene Jullien, *The Recent Efforts to End Commercial Sexual Exploitation of Children*, 31 DENV. J. INT’L L. & POL’Y 579, 585 (2003).

30. *Id.*

31. *Id.* See also H.R. REP. No. 107-525, at 2 (2002).

32. Jullien, *supra* note 29, at 585.

from extreme poverty,<sup>33</sup> experience great disparities between the rich and the poor, and have a large underage population.<sup>34</sup> In addition, the lack of political will and the high level of corruption among foreign government and law enforcement officials undermines efforts to enact stronger laws and harsher punishments for perpetrators of child sex crimes.<sup>35</sup> A report published in August 2000 by the humanitarian organization World Vision—Cambodia indicates that many high-ranking government officers were involved in child sex tourism and even “support[ed] the activities” of child sex traffickers.<sup>36</sup> Such political corruption contributes greatly to the vulnerability of an environment already predisposed to the child sexual exploitation.<sup>37</sup> Even when sex tourists, pimps, and traffickers are caught, they can often bribe their way out of custody.<sup>38</sup>

### *B. Child Sex Tourism Today*

The modern child sex tourism industry is a lucrative multi-billion dollar industry that is both highly organized and aggressively marketed.<sup>39</sup> The industry differs in its degree of sophistication, ranging from what may be described as “casual,” when travelers arrange for their own sexual services, to all-inclusive “sex tours.”<sup>40</sup> As of 1999, over twenty-five companies in the United States were known to offer and arrange sex tours in the form of package deals to either Southeast Asia or other

---

33. Some advocates claim poverty cannot be used as an explanation for the child sex trade. See Muntarhorn, *supra* note 7, at 11. These advocates argue that while poverty may contribute to an environment leading to the sexual exploitation of children, many poor societies do not have a high incident of prostitution of children. *Id.* Therefore, poverty alone cannot explain the occurrence of child sex tourism. *Id.* Rather, these advocates believe that family dysfunction and a cultural acceptance of prostitution are more significant factors contributing to the sexual exploitation of children. *Id.*

34. See World Vision, Child Sex Tourism: Frequently Asked Questions (Jan. 10, 2009), <http://www.worldvision.org/content.nsf/learn/globalissues-stp-faqs> (describing many of the causes of child sex tourism).

35. Susan Song, *Global Child Sex Tourism: Children as Tourist Attractions*, YOUTH ADVOCATE PROGRAM INT’L, at 2, <http://www.yapi.org/rpchildsextourism.pdf> (last visited Nov. 2, 2008).

36. THE PROTECTION PROJECT, A HUMAN RIGHTS REPORT ON TRAFFICKING OF PERSONS, ESPECIALLY WOMEN AND CHILDREN 98 (Mar. 2002), available at [http://www.no-trafficking.org/content/web/05reading\\_rooms/Cambodia/cambodia\\_hr\\_report\\_on\\_trafficking.pdf](http://www.no-trafficking.org/content/web/05reading_rooms/Cambodia/cambodia_hr_report_on_trafficking.pdf).

37. *Id.*

38. Song, *supra* note 35, at 2.

39. See BARNITZ, *supra* note 8, at 4 (noting that the businesses of sexual exploitation are more organized and openly marketed than they used to be).

40. CHRIS RYAN & MICHAEL C. HALL, SEX TOURISM: MARGINAL PEOPLE AND LIMINALITIES xi (2001).

popular destinations.<sup>41</sup> These tours include round trip airfare, accommodations, ground transportation, a local guide, and thinly-veiled promises to facilitate sexual encounters with local children.<sup>42</sup>

Generally, sex tour operators are very careful to avoid being caught explicitly advertising their access to children.<sup>43</sup> However, euphemistic phrases, such as “fresh young ladies” and “beautiful, unspoiled girls” are often used to communicate to customers that underage girls are available for sex.<sup>44</sup> One particular sex tour operator, Allan Gaynor, guaranteed that his customers will “never sleep alone on this tour,” and could potentially have sex with a different *girl* every day, “two if you can handle it.”<sup>45</sup>

In addition, the range of information available to sex tourists has grown in recent years, particularly with the growth of the Internet.<sup>46</sup> A quick internet search on any web browser will pull up numerous pornographic accounts written by experienced sex tourists and operators, which includes specific information such as how to access a child abroad and how much to spend.<sup>47</sup> According to Sowmia Nair, a Department of Justice Agent, one particular website even promised nights of sex “with two young Thai girls for the price of a tank of gas.”<sup>48</sup> These websites, along with many sex tourism guides,<sup>49</sup> turn a child’s

---

41. Captive Daughters, *supra* note 25. Thailand, Brazil, Sri Lanka, Dominican Republic, Cambodia, and Costa Rica are among the most popular sex tourist destinations. See KLAIR, *supra* note 6, at 32.

42. See Captive Daughters, *supra* note 25. One of the more well-known sex tour agencies was Philippine Adventure Tours (PAT), of Ventura, California, which specialized in sex tours to the Philippines. *Id.* The individual cost was \$1,645 for a package that provided round trip airfare, hotel, and guided tours to bars where one could purchase sex from prostitutes working in the bars as entertainers. *Id.* The cost of prostitution was approximately 750 pesos (U.S. \$24). *Id.* The tour guide assists the tourist in negotiating the sexual transaction with the manager of the prostitute-entertainer. *Id.*

43. See *id.*

44. BARNITZ, *supra* note 8, at 5.

45. Allan Gaynor was the owner of PAT. Captive Daughters, *supra* note 25. He routinely used his website to attract potential clients and deceive the public as to the illegal activities of PAT. *Id.* His April 1998 website used such words as “girl, lover, topless, breast, nudity, sex, and arrange,” which indicates to sex tourists that girls/women are for sale for sex. *Id.* The words were designed to blend in with the blue background of the site and became visible only when website-users “dragged” the mouse cursor through the background. *Id.* On February 24, 1999, on KABC-Los Angeles, Mr. Gaynor announced that he was bowing to public pressure and discontinuing Philippine Adventure Tours. *Id.*

46. RYAN & HALL, *supra* note 40, at xi.

47. See *id.*

48. Bacon, *supra* note 2 (quoting the Department of Justice). The website advertising this “deal” has been shut down. *Id.*

49. The following sex travel guides are available on amazon.com: JOE DIAMOND, AROUND THE WORLD IN EIGHTY LAYS: ADVENTURES IN SEX TOURISM (2009); BRETT

body into a commodity as purchasable as groceries.<sup>50</sup> As a result, sex tourists can quickly learn everything they need to know about having sex with a child abroad before even setting foot on foreign soil.<sup>51</sup>

### C. *The Sex Tourists*

The child sex tourism industry is fueled by an increasing demand from foreigners from wealthy nations.<sup>52</sup> For these vacationers, paying for sex with a male or female child in their destination country is an integral part of the travel experience.<sup>53</sup> As author Julia O'Connell Davidson has noted, "[S]ex is widely understood to be part of the tourist experience, and whether with other tourists, through local 'holiday romances,' or with sex workers, many people expect to have more sex whilst on vacation."<sup>54</sup> While this opinion may overvalue the role sex plays in the tourism industry, it is certainly the reality for sex tourists seeking risky, and oftentimes, stereotyped, exotic sexual experiences.<sup>55</sup>

Generally, the majority of sex tourists are adult males from industrialized countries.<sup>56</sup> Exact figures of the number of active sex tourists are difficult to obtain due to the nature of their conduct.<sup>57</sup> However, an examination of the arrest/detention records of popular travel destinations in Southeast Asia and Latin America reveals that a

---

TATE, *THE HEDONIST: WORLD TRAVEL GUIDE* (2005); NAES DRAW, *WORLD SEX TRAVEL GUIDE: THE ADVENTUROUS MAN'S GUIDE TO SEX TOURISM* (Kindle ed., 2008); RIO DE JANEIRO, *LUSTY TRAVELER: THE COMPLETE SEX TOURISM GUIDE OF EROTIC VACATIONS FOR MEN* (2008); STEVEN YANG, *BUTTERFLY: AN EROTIC ODYSSEY—THAILAND, CAMBODIA, PHILIPPINES* (2005). It should be noted, however, that based on the titles alone, it cannot be determined whether they explicitly encourage child sex tourism.

50. Bacon, *supra* note 2 (describing the purchase of a child's body as a "commodity" made easier by the Internet).

51. RYAN & HALL, *supra* note 40, at xi.

52. See, e.g., SEABROOK, *NO HIDING*, *supra* note 23, at ix.

53. Andrews, *supra* note 12, at 20.

54. JULIA O'CONNELL DAVIDSON, *CHILDREN IN THE GLOBAL SEX TRADE* 125 (2005). Julia O'Connell Davidson is a Professor of Sociology at the University of Nottingham. She has written a number of publications concerning the tourism-related sex trade in developing countries, including Thailand, Cuba, Costa Rica, Venezuela, India, and South Africa. See The University of Nottingham, Julia O'Connell Davidson, [http://www.nottingham.ac.uk/sociology/people/index.php?id=ODAwODI1&page\\_var=personal](http://www.nottingham.ac.uk/sociology/people/index.php?id=ODAwODI1&page_var=personal) (last visited Feb. 9, 2009).

55. See JEREMY SEABROOK, *TRAVELS IN THE SKIN TRADE: TOURISM AND THE SEX INDUSTRY 2* (2d ed. 2001) (discussing that sex tourists often travel across the world searching for sexual experiences which are not available to them at home).

56. RYAN & HALL, *supra* note 40, at xii. Although child sex tourism is usually seen in terms of male clients for female sex workers, the reverse has also been recorded. See *id.*; see also SEABROOK, *NO HIDING*, *supra* note 23, at 125.

57. BARNITZ, *supra* note 8, at 18.



significant percentage of child sex tourists are from the United States.<sup>58</sup> Other major "source countries" include Germany, the United Kingdom, Australia, France, and Japan.<sup>59</sup> Though the majority of sex tourists come from the aforementioned regions, tourists from nearly every country in the world finance the sex industry and fuel the demand for children.<sup>60</sup>

It is difficult to generalize the typical sex tourist. They have no distinguishing physical features, patterns of social behavior, or particular mannerisms.<sup>61</sup> Sex tourists come from all walks of life.<sup>62</sup> The ages of sex tourists normally range from the twenties to late sixties.<sup>63</sup> They may be married or single, heterosexual or homosexual, and vary from unskilled low-income workers to the extremely affluent.<sup>64</sup>

Many of these tourists feel that their sexual exploitations abroad are completely acceptable, as developing nations are more open and less sexually inhibited.<sup>65</sup> Others seek to persuade themselves that in another country, normal social and moral restraints can be discarded, along with the belief that one will not be held responsible for his or her behavior.<sup>66</sup> Still others rationalize their behavior by believing that they are helping these children financially.<sup>67</sup> For example, a sixty-five-year-old retired schoolteacher from Orlando, Florida, stated that he was "helping" the young girls financially, during his three-month sex tour through Latin

---

58. ECPAT, an international non-governmental agency dedicated to the elimination of child prostitution, pornography, and the trafficking of children for sexual purposes worldwide, collected data on 240 foreigners who sexually abused children in Asian countries and were arrested, imprisoned, deported, or acquitted. Twenty-five percent of the reported abusers came from the United States, followed by Germany (16%), the United Kingdom (13%), Australia (12%), France and Japan (7% each). See KLAIN, *supra* note 6, at 32 (quoting *The Paedo File*, ECPAT NEWSLETTER (ECPAT International, Bangkok Thailand), Aug. 1996, at 4-5).

59. See KLAIN, *supra* note 6, at 32.

60. *Id.*

61. See BARNITZ, *supra* note 8, at 8.

62. See SEABROOK, NO HIDING, *supra* note 23, at 104.

63. See KLAIN, *supra* note 6, at 32. Of the 240 foreigners studied by ECPAT, 33% of these child sex tourists were between the ages of forty and fifty, 24% between the ages of fifty and sixty, 18% between the ages of thirty and forty, 15% between the ages of sixty and seventy, 7% between the ages of twenty and thirty, and 3% were older than seventy. *Id.*

64. SEABROOK, NO HIDING, *supra* note 23, at 104.

65. See Julia O'Connell Davidson, *Sex Tourism and Child Prostitution*, in TOURISM AND SEX: CULTURE, COMMERCE AND COERCION 62 (Stephen Cliff & Simon Carters eds., 2000) (quoting a sex tourist visiting the Dominican Republic whom remarked that "sex is the natural thing in [the Dominican Republic]. . . . They're like animals. That's the only way I can explain it to you. By the time a girl is 10 years old, she's had more experience than, well, an American woman or an Irish woman won't ever have that much experience in her whole life. . . . Girls learn it's the way to keep a man happy. . . . [I]t's natural to them.").

66. See Captive Daughters, *supra* note 25.

67. SEABROOK, NO HIDING, *supra* note 24, at 104.

America.<sup>68</sup> He further remarked, “If they don’t have sex with me, they may not have enough food. If someone has a problem with me doing this, let UNICEF feed them. I’ve never paid more than \$20 to these young women, and that allows them to eat for a week.”<sup>69</sup>

Child sex tourists can be separated into three distinct categories: (1) situational child sex tourists; (2) preferential child sex tourists; and (3) pedophiles.<sup>70</sup> All three are criminals in the United States and abroad.<sup>71</sup> Situational, or opportunistic, offenders are indiscriminate sex tourists who will have sexual relations with a child if the opportunity presents itself, but do not necessarily seek out such partners.<sup>72</sup> Generally, such offenders do not have an exclusive sexual inclination for children.<sup>73</sup> Situational offenders most often abuse children by way of experimentation during a business trip or vacation getaway.<sup>74</sup> Situational child sex tourists represent the majority of all child sex tourists, while preferential sex tourists and pedophiles are a minority.<sup>75</sup>

Preferential child sex tourists display an active sexual preference for children and travel abroad with the primary intent of seeking out minors for sexual contact.<sup>76</sup> Preferential child sex tourists are generally in search of pubescent<sup>77</sup> or adolescent children.<sup>78</sup> Among preferential abusers are those suffering from a specifically defined psychiatric disorder known as pedophilia.<sup>79</sup> Pedophilia is a term generally used to describe an adult’s sexual preference for young, prepubescent children.<sup>80</sup> Often, pedophiles may not show any preference for the gender of children and do not view sexual contact with children as harmful.<sup>81</sup> In addition, while situational sex tourists may be deterred from exploiting

---

68. Jose Lambiet, *A Sexual Marketplace in Florida’s Backyard: Young Victims Traded For Cash, Trinkets*, SUN-SENTINEL, May 17, 1998, at FOREIGN 1A (quoting an anonymous sex tourist from an interview in a ramshackle casino in downtown Tegucigalpa, Florida).

69. *Id.*

70. ECPAT, *Combating Child Sex Tourism: Questions & Answers*, <http://www.ecpat.net/El/book.asp?id=28> (last visited Nov. 2, 2008) [hereinafter ECPAT].

71. *See id.*; *see also* 18 U.S.C. § 2423 (2009).

72. SEABROOK, NO HIDING, *supra* note 23, at x.

73. *Id.*

74. ECPAT, *supra* note 70.

75. *Id.*

76. SEABROOK, NO HIDING, *supra* note 23, at x.

77. The National Library of Medicine’s online medical dictionary defines “pubescent” as “arriving at or having reached puberty.” MEDLINE PLUS, <http://www.nlm.nih.gov/medlineplus/plusdictionary.html>.

78. SEABROOK, NO HIDING, *supra* note 23, at x.

79. ECPAT, *supra* note 70.

80. *Id.*

81. *Id.*

children by campaigns against child sex tourism, preferential tourists will likely pursue their objectives in spite of the obstacles in their paths.<sup>82</sup>

#### *D. The Victims*

Each year, over a million children are exploited by the global commercial sex trade.<sup>83</sup> These children are often held in virtual slavery and trafficked across country borders to satisfy demand in the most popular sex-tourism destinations.<sup>84</sup> They “see little of life before they see the very worst of life—an underground of brutality and lonely fear.”<sup>85</sup>

Children rarely enter into prostitution by free will.<sup>86</sup> Generally, conditions such as severe poverty, family dysfunction, lack of employment opportunities, homelessness, and cultural traditions push children into the sex industry.<sup>87</sup> Sadly, in many cases, children are knowingly sold into prostitution by their parents in return for financial support.<sup>88</sup> Other children may be coerced or lured into the sex industry based on false promises of recruiters claiming to offer legitimate

82. SEABROOK, NO HIDING, *supra* note 23, at x.

83. U.S. Dep’t of State, Office to Monitor and Combat Trafficking in Persons, The Facts About Child Sex Tourism (Aug. 19, 2005), *available at* <http://www.state.gov/g/tip/rls/fs/2005/51351.html>. Due to the covert nature of the child sex tourism industry, it is difficult to estimate the exact number of children abused as a result of child sex tourism. World Vision estimates that two million children are abused in the global sex trade, which would include child sex tourism. World Vision, *supra* note 34.

84. *Report of the Special Rapporteur*, *supra* note 20, ¶ 35 (stating that many children are forced into the sex trade under “conditions that are indistinguishable from slavery”).

85. President George W. Bush, Address Before the U.N. General Assembly (Sept. 2003). The children quoted below can speak best as to the cruelty of the child sex tourism industry.

I found myself dancing at a club at the age of eleven. . . . I have had different kinds of customers, foreigners and Filipinos. I tried suicide but it didn’t work so I turned to drugs. I don’t know about tomorrow. I want to die before my next birthday.

Poppy, from the Philippines (quoted by BARNITZ, *supra* note 8, at 1). “I was so small. They gave me hormone injections so that I’d grow breasts faster. These injections hurt so, so much. When I tried to struggle, the madame beat me on the chest with a metal kitchen spoon.” Maya, from Nepal (quoted by BARNITZ, *supra* note 8, at 2).

86. See SEABROOK, NO HIDING, *supra* note 23, at 105 (noting that in the majority of victims studied, most were driven into prostitution against their will by “circumstances” and the belief that they were “powerless and without rights”).

87. KLAIN, *supra* note 6, at 36.

88. *Id.*; see also Margaret 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?*, 18 FORDHAM INT’L L.J. 1852, 1870 (noting that while poverty is the main factor behind the entrance of children into the sex trade industry, some parents knowingly part with their children for reasons beyond a desperate need for money, such as a desire to procure modern luxury items).

employment for the child.<sup>89</sup> Abandoned, afraid, and abused, these children lose all bonds of trust and often will turn to addictive, mind-altering drugs for their only source of comfort as they succumb to a life of emotional, psychological, and physical entrapment.<sup>90</sup>

Regardless of the circumstances surrounding the entrance of a child into the sex trade, a childhood spent in prostitution will have devastating consequences for the child.<sup>91</sup> The sexually exploited child is a constant target for rape, assault, torture, abuse, and murder by the adults that control her or by the people that use her.<sup>92</sup> In addition, these children are poorly fed, inadequately sheltered, and suffer from severe malnutrition.<sup>93</sup> Therefore, it is not surprising that many children in the sex trade experience long-lasting physical and psychological trauma, disease, drug addiction, social ostracism, and possibly death.<sup>94</sup>

Another serious issue that arises in cases of child prostitution is the incident of sexually transmitted diseases in children.<sup>95</sup> Many child sex offenders are motivated by the belief that it is "safer" to have sex with a child; however, children are much more susceptible to HIV/AIDS and other forms of sexually transmitted diseases than adults.<sup>96</sup> Children have a greater risk of contracting infections because their body tissue is more fragile than that of adults.<sup>97</sup> In addition, child prostitutes are less likely to be in a position to enforce safe sexual practices with unwilling adults.<sup>98</sup> Such misinformation as to the vulnerability of children to STDs has perilous implications not only for the child but for the global AIDS epidemic as well.<sup>99</sup>

---

89. See *Children for Sale*, *supra* note 2. One 14-year-old from Vietnam, who was recently freed from a brothel, stated that when she was walking home from school one day, she was approached by a woman offering work in a café. *Id.* However, in reality, the café was a brothel. The girl stated that she thought she was there "to serve coffee, not to be a prostitute." *Id.* She tried to run away, but was captured and forced into a room for three days, where she was beaten, starved, and raped. *Id.*

90. Song, *supra* note 35, at 3.

91. BARNITZ, *supra* note 8, at 10-11.

92. *Id.* at 11.

93. Berkman, *supra* note 22, at 402.

94. World Congress Against Commercial Sexual Exploitation of Children, Stockholm, Swed., Aug. 27-31, 1996, *Draft Declaration and Agenda for Action*, at 2 [hereinafter World Congress].

95. Song, *supra* note 35, at 3.

96. *Id.*

97. Andrews, *supra* note 12, at 423.

98. *Id.* at 423-24.

99. BARNITZ, *supra* note 8, at 10-11. The United Nations estimates that more than 50% of new HIV infections worldwide are occurring in people between the ages of fifteen to twenty-four, and 10% of infections are being transmitted to children under the age of fifteen. *Id.*

E. *The "Meeting"*

The conventional view of the process by which a child is exploited begins with the arrival of an eager traveler at a tourism destination.<sup>100</sup> Upon arrival, the traveler obtains information about brothels where child prostitutes can be found.<sup>101</sup> This information can be gathered through a number of sources, ranging from taxi drivers, to the pimps and poor children lurking at the neighborhood bar.<sup>102</sup> The traveler then purchases sexual contact with a child and exploits him or her in the brothel itself or a participating hotel.<sup>103</sup>

The nature of the exploitation between a sex tourist and a child may be influenced by a number of factors, including the venue for exploitation, the presence and type of facilitator, the length of the offender's stay, and the accommodation situation of the tourist.<sup>104</sup> For instance, the offender may be a long-term visitor of the destination country who has the time to engage in a long grooming process with a child or children that he or she intends to exploit.<sup>105</sup> Such offenders may entice children to engage in sexual relations through "luxury goods" like video games and sneakers.<sup>106</sup> In addition, child sex offenders may rent or own property in the destination country, thereby providing themselves with ready access to a venue in which to exploit children.<sup>107</sup> As public condemnation of sex tourism grows, such a situation has become increasingly common, because it reduces the risk of being detected by hotel staff, other tourists, or local law enforcement.<sup>108</sup>

---

100. See ECPAT, *supra* note 70.

101. *Id.*

102. Bacon, *supra* note 2.

103. See ECPAT, *supra* note 70.

104. See *id.*

105. See *id.*

106. Bacon, *supra* note 2.

107. There is a debate as to whether long-term foreign residents who sexually exploit children can be classified as a child sex tourist and prosecuted under the PROTECT Act. See ECPAT, *supra* note 70. Those against such classifications argue that the word "tourist" implies that the offending individual passes through the destination country only briefly. *Id.* However, ECPAT International chooses to include such residents under the umbrella-term "child sex tourist," as the "intent of the travel involves a change of socio-economic, cultural and political environments, which reduces the individual's usual external inhibitors and in this way facilitates the sexual exploitation of children." *Id.*

108. See *id.*

### III. THE CRIMINALIZATION OF CHILD SEX TOURISM

#### A. *Early Domestic Efforts to Curb Child Sex Tourism*

Over the past decade, the United States has publicly recognized the severity of the problem of child sexual exploitation and has enacted progressively more stringent laws to prosecute those who victimize children.<sup>109</sup> In 1994, President Clinton signed into law the Violent Crime Control Law Enforcement Act of 1994, better known as the Crime Bill.<sup>110</sup> This legislation included a provision known as the Child Sexual Abuse Prevention Act, which marked the beginning of laws creating a criminal offense for traveling abroad for the purpose of engaging in sex with a minor.<sup>111</sup> In June 2002, the U.S. House of Representatives expanded the application of the law and passed the Sex Tourism Prohibition Improvement Act of 2002.<sup>112</sup> This bill laid the foundation for the dramatic shift in the burden of proof requirements later codified in the PROTECT Act.<sup>113</sup>

In addition, in December 2002, the United States became the forty-second country to ratify the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography.<sup>114</sup> Adopted by the United Nations

---

109. See, e.g., U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 1 (June 2008), available at <http://www.state.gov/documents/organization/105501.pdf>. For earlier versions of the Trafficking in Persons Report, see the U.S. Dep't of State website, at <http://www.state.gov/g/tip/rls/tiprpt/>.

110. 18 U.C.S. § 2423(b) (2000).

111. *Id.* The language reads:

Travel with the Intent to Engage in Sexual Act with a Juvenile: A person who travels in interstate commerce, or conspires to do so, or a U.S. citizen or an alien admitted for permanent residence in the U. S. who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States, shall be fined under this title, imprisoned not more than 15 years or both.

112. The Sex Tourism Prohibition Improvement Act of 2002 was approved by a vote of 418-8. See Final Votes for Rollcall 259 (June 26, 2002), <http://clerk.house.gov/cgi-bin/vote.asp?year=2002&rollnumber=259>. The Act was not passed by the Senate during the 107th Congress.

113. Certain provisions included in this bill became law in April 2003, when President George W. Bush signed the PROTECT Act. See H.R. Rep. No. 107-525, at 2 (2002).

114. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; see also U.S. Dep't of State, U.S. Joins U.N. Protocol to Prevent Child Trafficking, Exploitation-Protocol Devoted to Protection of Children's Human Rights (Dec. 24, 2008), available at <http://www.america.gov/st/washfile-english/2002/December/20021224113424cporter@pd.state.gov0.1011011.html>.

General Assembly in 2000, the Optional Protocol seeks to protect children from commercial sexual exploitation by providing a framework for the criminalization of the actions of child sex abuses on a global level.<sup>115</sup>

### B. *The PROTECT Act*

As a response to mounting pressure from child welfare agencies and human rights groups, the United States under the Bush administration passed the PROTECT Act and re-affirmed its commitment to ending the sexual exploitation of children.<sup>116</sup> Enacted in April of 2003, the PROTECT Act imposes criminal liability on any United States citizen who travels to a foreign country with the intent to engage in, or who actually engages in, any illicit sexual conduct with a person in a foreign country.<sup>117</sup> The Act defines "illicit sexual conduct" as "a sexual act . . . with a person under 18 years of age . . . or . . . any commercial sex act . . . with a person under 18 years of age" and proscribes a maximum penalty of thirty years in prison.<sup>118</sup>

The PROTECT Act also modifies the burden of proof requirements that existed under the previous legislation.<sup>119</sup> While the Child Sexual Abuse Protection required prosecutors to prove the intent of the accused, under the PROTECT Act, the government may now establish an offender's culpability by proving that the accused either: (1) traveled with the intent to engage in sexual conduct with a minor;<sup>120</sup> (2) actually

115. U.S. Dep't of State, U.S. Joins U.N. Protocol to Prevent Child Trafficking, Exploitation- Protocol Devoted to Protection of Children's Human Rights (Dec. 24, 2008), <http://www.america.gov/st/washfile-english/2002/December/20021224113424cporter@pd.state.gov0.1011011.html>.

116. U.S. Dep't of Justice, Fact Sheet: PROTECT Act (April 30, 2003), [http://www.usdoj.gov/opa/pr/2003/April/03\\_ag\\_266.htm](http://www.usdoj.gov/opa/pr/2003/April/03_ag_266.htm).

117. 18 U.S.C. § 2423(c) (2003).

118. 18 U.S.C. § 2423(f). "Sexual Act" is defined as including

(A) contact between the penis and the vulva or the penis and the anus, . . . , however slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. 18 U.S.C. § 2246. The term "commercial sex act" is defined as including "any sex act, on account of which anything of value is given to or received by any person."

18 U.S.C. § 1591.

119. 18 U.S.C. § 2423.

120. 18 U.S.C. § 2423(b).

engaged in sexual conduct with a minor in a foreign country;<sup>121</sup> or (3) otherwise attempted to violate the law.<sup>122</sup> In addition, the PROTECT Act contains a “Two Strikes and You’re Out” provision that imposes a mandatory life sentence on persons twice convicted of federal sex offenses against a minor.<sup>123</sup>

#### 1. Prosecution Under Subsection 2423(b)

The PROTECT Act allows for prosecution based solely on evidence of intent to travel to another country for the purpose of engaging in sexual conduct with a minor under subsection 2423(b).<sup>124</sup> Therefore, courts may convict child sex tourists without any evidence that sexual misconduct actually occurred.<sup>125</sup> In proving their case, prosecutors may obtain and rely upon evidence available within U.S. borders, thereby removing the difficult task of collecting evidence overseas.<sup>126</sup> For example, federal investigators arrested John W. Seljan in Los Angeles as he attempted to board a plane to Manila.<sup>127</sup> Officers had intercepted sexually suggestive letters Mr. Seljan sent to Filipino girls indicating his intent to have sex with two underage girls.<sup>128</sup> At the time of his arrest, officers found a book of child pornography, sexual aids, chocolate, foreign currency, and fifty-two photographs of Mr. Seljan engaged in sex acts with Filipino children in his luggage.<sup>129</sup> The court found the requisite level of intent based on this evidence.<sup>130</sup> As a result, Mr. Seljan was convicted and sentenced to twenty-years in prison for violating the PROTECT Act.<sup>131</sup>

#### 2. Prosecution Under Subsection 2423(c)

Under subsection 2423(c) of the PROTECT Act, any individual who actually engages in sex with a minor overseas may be prosecuted, regardless of whether he or she traveled with the intent of having sex

---

121. 18 U.S.C. § 2423(c).

122. 18 U.S.C. § 2423(e).

123. Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18 U.S.C.).

124. *See, e.g.*, 18 U.S.C. § 2423.

125. *See id.*

126. *See, e.g., id.*

127. *See* Nick Madigan, *Man, 86, Convicted Under New Law Against Americans Who Go Abroad to Molest Minors*, N.Y. TIMES, Nov. 20, 2004, at A1.

128. *United States v. Seljan*, 547 F.3d 993 (2008).

129. *Id.* at 993-98. When arrested, Mr. Seljan admitted that he had been taking at least three trips a year to Southeast Asia for twenty years. His main aim, he said, was to “educate” small children, some not yet ten years old, sexually. Madigan, *supra* note 119.

130. *Seljan*, 547 F.3d at 993.

131. *Id.*



with a minor.<sup>132</sup> This statute was designed to help combat and convict “opportunistic offenders” or those who do not intend to engage in sex with a minor overseas, but find themselves presented with the opportunity to do so.<sup>133</sup>

The U.S. government secured its first conviction under subsection 2423(c) of the PROTECT act against Michael Lewis Clark, a 69 year old veteran from Seattle, Washington.<sup>134</sup> Clark was indicted on charges of engaging in illicit sexual conduct with two Cambodian boys, ages ten and thirteen.<sup>135</sup> Clark reportedly admitted upon arrest that he had been engaging in such acts with children in Cambodia for several years and that he normally paid them two dollars for each act.<sup>136</sup> He estimated that he had been involved in sexual activity with approximately forty to fifty children since he began traveling to Cambodia in 1996.<sup>137</sup> In March 2004, Clark pled guilty to the charges but reserved the right to challenge the legality of the statute.<sup>138</sup> The United States Court of Appeals for the Ninth Circuit upheld the constitutionality of the statute, ruling that the application of subsection 2423(c) to Clark’s extraterritorial conduct did not violate the Due Process Clause.<sup>139</sup> Clark was sentenced to nearly eleven years (ninety-seven months) imprisonment and five years of supervised release.<sup>140</sup>

---

132. 18 U.S.C. § 2423(c).

133. *See generally id.* (making it no longer necessary for prosecutors to prove the accused traveled abroad with the “intent” to have sex with a minor).

134. *See United States v. Clark*, 435 F.3d 1100, 1104 (2006).

135. James Brook, *Cambodia Battles Pedophiles by Deporting Them*, N.Y. TIMES, Jan. 23, 2004. The record shows that Clark admitted to instructing “John Doe 1,” the ten year old, to “stick his index finger into Clark’s anus while ‘John Doe 2,’ the thirteen year old, masturbated Clark until he ejaculated on John Doe 2’s chest.” Amy Messigian, *Love’s Labour’s Lost: Michael Lewis Clark’s Constitutional Challenge of 18 U.S.C. 2423(c)*, 43 AM. CRIM. L. REV. 1241, 1242 (referencing Brief for Appellee at 3, *United States v. Clark*, No. 04-30249 (9th Cir. 2006), 2006 WL 172074).

136. *See Clark*, 435 F.3d at 1104.

137. *See id.*

138. *Id.*

139. Clark challenged 18 U.S.C. § 2423(c) on two main grounds: 1) that the statute was not a proper exercise of extraterritorial jurisdiction, and 2) that the statute was not reasonable under international law. *Id.* at 1104, 1113. In rejecting the first of these grounds, the court held that the extraterritorial application of § 2423(c) to Clark’s conduct was proper based on the “nationality principle,” which permits a country to apply its statutes to extraterritorial acts of its own nationals. *Id.* at 1114-15. In rejecting the second ground, the court reasoned that based on Clark’s U.S. citizenship, application of § 2423(c) to his extra-territorial conduct was neither “arbitrary nor fundamentally unfair.” *Id.* at 1121.

140. *US Targets Child Sex Offenders*, NEWS24.COM, [http://www.news24.com/News24/World/News/0,6119,2-10-1462\\_1869860,00.html](http://www.news24.com/News24/World/News/0,6119,2-10-1462_1869860,00.html) (last visited Feb. 9, 2009).

## IV. EVIDENTIARY AND PROCEDURAL HURDLES OF THE PROTECT ACT

Prosecuting opportunistic sex offenders under 18 U.S.C § 2423(c) raises a number of evidentiary and procedural issues because it requires the complex task of gathering evidence in a foreign country.<sup>141</sup> Obtaining the evidence necessary to secure a conviction can be extremely difficult due to distance, language and cultural barriers, and the amount of time that may have transpired since the commission of the crime.<sup>142</sup> Consequently, the transnational aspect of child sex tourism enforcement hinders the prosecution of many U.S. sex offenders and significantly impacts the effectiveness of the PROTECT Act.<sup>143</sup>

A. *Child Victim Testimony*

One of the largest obstacles in the investigation of child sex tourism crimes is obtaining the prostituted child's testimony and ensuring its admissibility in United States federal courts.<sup>144</sup> Once a child becomes the victim of commercial sexual exploitation, the local law enforcement officers of that country often become the actors on which prosecutors primarily depend to identify these children, remove them, and participate in collecting evidence for the prosecution of their exploiters.<sup>145</sup> Unfortunately, these officers are not always sensitive to the plight of prostituted children, and often victims are afraid to go to the police for help.<sup>146</sup> Furthermore, in many countries, children know that they may be charged with prostitution if they come forward.<sup>147</sup> Such charges carry heavy prison sentences.<sup>148</sup> In other areas, foreign enforcement officials excuse the commercial exploitation of children as a necessity of local peacekeeping, and those children that do seek help are often ignored.<sup>149</sup>

---

141. Li, *supra* note 14, at 524-25.

142. *Id.* at 525.

143. *Id.*

144. See U.S. DEP'T OF JUSTICE, G8 EXPERIENCE IN THE IMPLEMENTATION OF EXTRATERRITORIAL JURISDICTION FOR SEX CRIMES AGAINST CHILDREN 4 (2007), available at <http://www.bmj.bund.de/files/-/2319/Extraterritorial%20jurisdiction.pdf> [hereinafter DEP'T OF JUSTICE].

145. BARNITZ, *supra* note 8, at 24.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 24-25. General acceptance of child prostitution was displayed by Ranong's police chief in 1993. *Id.* Thai police under the orders of Bangkok cracked down on brothels in Ranong, arresting forty Burmese girls under the age of eighteen. *Id.* The girls had been trafficked into Thailand to serve the Burmese fishermen. *Id.* When interviewed, the town's police chief stated, "[I]t is normal that there is a prostitution problem. . . . I have been flexible in allowing Myanmar [Burmese] prostitutes to work here. . . . If we do not allow brothels in Ranong, the Myanmar fishermen will commit crimes and mischief here." *Id.*

However, even with the cooperation from foreign law enforcement officials, identifying and finding child victims is difficult.<sup>150</sup> Locating victims becomes exponentially more difficult as time passes between the commission of the crime and the criminal proceedings.<sup>151</sup> This is largely due to both the sheer volume of child prostitutes in popular destination countries and their unstable lifestyles.<sup>152</sup> Moreover, available victims willing to testify are likely to suffer from diminished recollection and an inability to identify the perpetrator as a result of the large number of customers they service.<sup>153</sup>

The United States government can overcome the difficulties in locating victims and securing quality testimony by establishing stronger relationships with Non-Governmental Organizations ("NGOs").<sup>154</sup> In addition to providing an invaluable source of investigative leads, NGOs frequently provide credible reports of child sex tourism crimes.<sup>155</sup> Often their familiarity with the victim population and local areas eases foreign and domestic law enforcement contacts and interviews.<sup>156</sup> Moreover, NGOs frequently house and provide support services to victims during the interim, thereby maintaining witness availability.<sup>157</sup>

### 1. Admissibility of Testimony

Once a child victim is identified, found, and deemed able to produce quality testimony, prosecutors face a number of challenges in admitting the testimony into evidence.<sup>158</sup> The admissibility of the child's testimony will largely depend on how the proceeding judge will apply the Federal Rules of Evidence and the Confrontation Clause of the Constitution.<sup>159</sup> Under the Federal Rules of Evidence, the hearsay rule generally requires a witness to testify under oath, in person at trial, and subject to cross-examination for their testimony to be admissible.<sup>160</sup> Any

---

150. See DEP'T OF JUSTICE, *supra* note 144, at 4.

151. *Id.*

152. *Id.*

153. Li, *supra* note 14, at 525.

154. See DEP'T OF JUSTICE, *supra* note 144, at 3-4. Leading NGOs working towards the elimination of the commercial sexual exploitation of children include: ECPAT International, Amnesty International, Anti-Slavery International, and Human Rights Watch. For a general analysis on the role of NGOs, see SEABROOK, NO HIDING, *supra* note 23, at 111-12.

155. See SEABROOK, NO HIDING, *supra* note 23, at 106, 131; see also DEP'T OF JUSTICE, *supra* note 144, at 3.

156. See SEABROOK, NO HIDING, *supra* note 23, at 131-32.

157. DEP'T OF JUSTICE, *supra* note 144, at 3-4.

158. See Li, *supra* note 14, at 525.

159. *Id.* at 526.

160. See U.S. CONST. amend. XI; FED. R. EVID. 801-805; 2 MCCORMICK ON EVIDENCE § 245, at 125 (Kenneth S. Broun ed., 5th ed. 2006) [hereinafter MCCORMICK].

out-of-court statements offered as evidence to prove the truth of the matter asserted will be excluded.<sup>161</sup> Therefore, hearsay statements are presumed to be inadmissible in court unless there is an exception prescribed by the Federal Rules of Evidence or by Congress.<sup>162</sup> However, many situations in which hearsay exceptions are granted involve an apparent conflict with the Confrontation Clause of the Constitution. The Sixth Amendment states that a criminal defendant “shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>163</sup> Read literally, exemptions and exceptions to the hearsay exclusion rule would be unconstitutional, because they allow statements by absent “unconfronted” witnesses to be introduced at criminal trials.<sup>164</sup> As a matter of constitutional law, however, the Supreme Court has held that hearsay falling under one of the exceptions may still be admissible despite the Confrontation Clause.<sup>165</sup>

Transporting the prostituted child to the United States in order to testify in court would undoubtedly satisfy the requirements set forth in the Federal Rules of Evidence and the Constitution.<sup>166</sup> However, arranging for the live testimony of a foreign child in a United States court is tactically and practically difficult.<sup>167</sup> In addition to the obvious expense of bringing a foreign child to the United States, the stress of traveling to a culturally unfamiliar country, coping with a foreign language, and enduring court proceedings may traumatize the child.<sup>168</sup> Consequently, the child’s testimony most often needs to be presented in court through alternative means.

---

161. FED. R. EVID. 801(c). “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” *Id.*

162. FED. R. EVID. 802. “Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” *Id.*

163. U.S. CONST. amend. VI.

164. MCCORMICK, *supra* note 160, § 252, at 157-58.

165. *See, e.g.,* Mattox v. United States, 146 U.S. 140, 151 (1892) (holding that the use of a declarant’s dying declaration did not abridge the constitutional rights of the criminal defendant against whom it was introduced); White v. Illinois, 502 U.S. 346, 352-54 (1992) (holding that there was no constitutional bar to the use of excited utterances and statements for the purpose of medical treatment against a criminal defendant, without regard to the availability of the declarant); Bourjaily v. United States, 483 U.S. 171, 182-83 (1987) (finding that the exception for co-conspirator statements was constitutional even when the traditional requirements of independent corroboration of the conspiracy did not apply).

166. *See* Li, *supra* note 14, at 526.

167. *Id.*

168. *Id.*

a. Live Broadcast Via Satellite

The most ideal method of introducing the child's testimony would be arranging a live broadcast link via satellite between the courtroom and the destination country where the child resides.<sup>169</sup> Enabling such testimony would allow the jury to observe the child's manner and give the defense an opportunity to audio-visually confront and cross-examine the child.<sup>170</sup> Using televised proceedings would also serve to minimize the trauma on the child victim that would result from traveling abroad to testify.<sup>171</sup> However, some critics have found this method to be both costly and inconsistent with some states' fair practice procedures.<sup>172</sup> Nonetheless, Australia, a leader in addressing child sex tourism-related evidentiary issues, successfully implemented this technology and curbed the state's prosecution expenditures.<sup>173</sup> Australian courts allow the use of foreign child witness testimony via video link if witness reliability is threatened by unreasonable expense, inconvenience, psychological harm, or intimidation.<sup>174</sup>

---

169. See DEP'T OF JUSTICE, *supra* note 144, at 4-5.

170. See Li, *supra* note 14, at 526.

171. DEP'T OF JUSTICE, *supra* note 144, at 5.

172. See Li, *supra* note 14, at 526.

173. See *id.*

174. 50EA of the Australian Crimes Amendment Act specifically provides for video link:

In a proceeding for an offense against this Part, the court may direct a witness give evidence by video link if: a) the witness will give the evidence from outside Australia; and b) the witness is not a defendant in the proceeding; and c) the facilities required by section 50EC are available or can reasonably be made available; and d) the court is satisfied that attendance of the witness at the court to give the evidence would: (i) cause unreasonable expense or inconvenience; or (ii) cause the witness psychological harm or unreasonable distress; or (iii) cause the witness to become so intimidated or distressed that his her responsibility as a witness would be significantly reduced; and e) the court is satisfied that it is consistent with the interests of justice that the evidence be taken by video link.

Crimes (Child Sex Tourism) Amendment Act, 1994, § 50EA(a)-(e)(Austl.). Australia has enacted what is arguably the most comprehensive extra-territorial child sex tourism law. However, a major Australian newspaper reported in July 2002 that "legislation enacted in 1994 to combat sex crimes against minors by Australian tourists is failing to stem the tide of [Australian sex tourism] and that Australian law enforcement agencies have largely given up on the problem." Mark Baker, *Innocents for Sale*, SYDNEY MORNING HERALD, July 13, 2002, at 29. As of 2002, there had been only twelve prosecutions under the sex tourism law, nine of which led to convictions. Mark Baker, *Australians Feeding Asia's Child Sex Trade*, THE AGE (Melbourne), July 13, 2002, at 1.

b. Excited Utterance, Medical Testimony, and “Catch-all” Exceptions

While any out-of-court statements made by the child victim will likely be considered hearsay, such testimony may be admitted under a hearsay exception provided by the Federal Rules of Evidence.<sup>175</sup> Three hearsay exceptions may be applied to allow the admissibility of child victim testimony in child sex tourism cases: excited utterances, medical testimony, and the “catch-all” exception.<sup>176</sup> If the court finds that the hearsay testimony falls under one these federal exceptions, then the child-victim’s testimony may be admitted against the offender.<sup>177</sup>

An excited utterance is a statement made by a person in response to a startling or shocking event or condition.<sup>178</sup> Under FRE 803(2), such statements may be admitted as evidence if spontaneously made by the person while they are still under the stress of excitement from the event or condition.<sup>179</sup> The underlying rationale of this exception is that where the event is so startling that the declarant’s reflective capacity is eliminated, the statement is unlikely to be motivated by self-interest or otherwise insincere.<sup>180</sup> While the exception generally does not apply if too much time passes between the event and the statement, the modern trend is to liberally interpret the allowable period of time between the event and the statement in child abuse cases.<sup>181</sup>

In addition, hearsay statements made by a patient to medical personnel for the purposes of medical diagnosis or treatment are admissible under FRE 803(4).<sup>182</sup> The exception’s coverage applies to

---

175. FED. R. EVID. 802.

176. Li, *supra* note 14, at 528.

177. See FED. R. EVID. 802.

178. FED. R. EVID. 803(2). “Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition.” An example of this exception applied is as follows: Maya, after being brutally raped by a sex tourist, reports the incident to a local NGO office. While still under the stress of the event, Maya identifies the perpetrator and describes the illicit conduct to an employee. At trial, a prosecutor may call the employee as a witness, who testifies about the contents of Maya’s statements.

179. *Id.*

180. MCCORMICK, *supra* note 160, § 272, at 255.

181. *Id.* at § 272.1, at 263-64; see also *United States v. Hefferon*, 314 F.3d 211, 222-23 (5th Cir. 2002) (holding child victim’s statements made to family one to two hours after event admissible); *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980) (finding lapse of one hour does not preclude the admissibility of the statement); *State v. Smith*, 337 S.E.2d 833, 841-43 (N.C. 1985) (concluding two to three days admissible, so long as child still exhibits stress of event); *State v. Logue*, 372 N.W.2d 151, 159 (S.D. 1985) (ruling statements to mother made one day after event admissible).

182. FED. R. EVID. 803(4). “Statements made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof

statements of past and present medical history and descriptions of what caused the patient's problem, as long as the information is reasonably pertinent to diagnosis or treatment.<sup>183</sup> The reliability of statements made for the purpose of medical treatment rests on the belief that the declarant will not fabricate under these circumstances because the effectiveness of the treatment depends on the accuracy of the statement.<sup>184</sup> While the exception does not generally apply to statements regarding fault, courts have extended the scope of the exception to include the identity of the perpetrator in child sexual abuse cases.<sup>185</sup> Such statements are often admitted on the theory that the perpetrator's identity is pertinent to the treatment of an abused child.<sup>186</sup>

Moreover, a residual or "catch-all" exception may allow the admission of the child's testimony if a judge finds that the hearsay statement falls outside the coverage of the enumerated exceptions.<sup>187</sup> To comply with this rule's requirements, the child's testimony must be sufficiently trustworthy, more probative on the point for which it is offered than any other evidence reasonably obtainable, and its admission must serve the interests of justice.<sup>188</sup> While the catch-all exception is generally only to be used in "exceptional circumstances,"<sup>189</sup> courts have

---

insofar as reasonably pertinent to diagnosis or treatment." *Id.* An example of this exception applied is as follows: Poppy is injured while engaging in illicit conduct with a sex tourist. A few days later, she visits a local hospital. She describes the sexual conduct to the doctor for the purpose of medical diagnosis, identifying the perpetrator. The doctor may testify about the contents of Poppy's statements.

183. MCCORMICK, *supra* note 160, § 277, at 284-85.

184. *Id.*

185. *See* United States v. Renville, 779 F.2d 430, 436-39 (8th Cir. 1985); United States v. George, 960 F.2d 97, 99-100 (9th Cir. 1992); State v. Robinson, 735 P.2d 801, 810 (Ariz. 1987); Hawkins v. State, 72 S.W.3d 493, 495-98 (Ark. 2002); Edwards v. Commonwealth, 833 S.W.2d 842, 844-45 (Ky. 1992).

186. MCCORMICK, *supra* note 160, § 278, at 290.

187. *See* FED. R. EVID. 807.

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

*Id.*

188. *Id.*

189. *See* MCCORMICK, *supra* note 160, § 324, at 404; *see also* Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 505 F.Supp. 1190, 1276 (1980) (stating that Congress intended that the catchall exception be used in exceptional and unanticipated situations which are not covered by the specific exceptions).

employed the exception most extensively in admitting statements by child witnesses in sexual abuse cases.<sup>190</sup>

c. Video Deposition

In addition to testimony based on excited utterances and statements from medical treatment, a child victim's statements may be admitted in the form of a videotaped deposition.<sup>191</sup> A videotaped deposition offers the judge and jury an opportunity to observe the child's demeanor.<sup>192</sup> Additionally, videotaping helps to preserve the quality of the child's testimony.<sup>193</sup> A videotaped deposition will also maintain the victim's statements in the event that he or she becomes inaccessible or exhibits a lesser recollection of key details.<sup>194</sup>

However, despite its benefits, a videotaped deposition is still subject to the rules of hearsay.<sup>195</sup> No exceptions in the Federal Rules of Evidence specifically permit the use of video depositions. Nonetheless, Congress has passed a federal statute permitting a child victim's testimony to be taken by a two-way closed circuit television or through a pre-trial deposition.<sup>196</sup> This statute allows such evidence if the court determines that the child cannot testify in open court because of fear, emotional trauma, or some infirmity.<sup>197</sup>

However, the use of a videotaped deposition may abridge the constitutional rights of the defendant against whom it is introduced.<sup>198</sup> The 2004 decision in *Crawford v. Washington*<sup>199</sup> established that where an out-of-court statement is testimonial in nature, its admission will be blocked by the Confrontation Clause, unless the declarant is made available for cross-examination either at trial or at the time the

---

190. MCCORMICK, *supra* note 160, § 324, at 411. In applying the exception in child abuse cases, courts often emphasize factors such as "the spontaneity and consistency of the statement, the general proposition that young children do not invent allegations of the type involved, the unusualness of explicit sexual knowledge by a young child, or use of childish terminology to describe sex." *Id.*

191. *See* Li, *supra* note 14, at 529; *see also* DEP'T OF JUSTICE, *supra* note 144, at 4-5.

192. DEP'T OF JUSTICE, *supra* note 144, at 4-5. A key reason for the Confrontation Clause's preference for live testimony is that only where there is live testimony does the jury have a chance to observe and weigh the demeanor of the witness. *See* MCCORMICK, *supra* note 160, § 252, at 157-59; *see, e.g.*, Barber v. Page, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.").

193. DEP'T OF JUSTICE, *supra* note 144, at 5.

194. *Id.*

195. *See* FED. R. EVID. 801-805.

196. 18 U.S.C. § 3509(b) (1988).

197. *Id.* § 3509(b)(1)(B), (2)(B).

198. Li, *supra* note 14, at 529.

199. *Crawford v. Washington*, 541 U.S. 36 (2004).



declaration is made.<sup>200</sup> This rule applies regardless of the reliability of the statement.<sup>201</sup> Therefore, a child's videotaped testimony will generally only be admissible if the child is subject to cross-examination by the defense.<sup>202</sup> Videotaped depositions taken in the presence of defense attorneys will help ensure the testimony will be admissible at trial.<sup>203</sup>

### B. Physical Evidence

In addition to a child-victim's testimony, prosecutors may introduce a variety of physical evidence to prove a perpetrator engaged in sex with a minor overseas.<sup>204</sup> Relevant evidence can include contraceptives, sexual toys, gifts purchased for the victims, and records from hotels where the sexual conduct occurred.<sup>205</sup> In addition, the production of sexually explicit images of children and the equipment that generates and stores them has become increasingly common, as digital imaging has grown more prominent.<sup>206</sup>

However, obtaining physical evidence from a foreign country presents a host of obstacles.<sup>207</sup> When investigators collect evidence located in a foreign nation, it is essential to observe not only the pertinent state or federal laws, but also the rules and regulations of the foreign country.<sup>208</sup> Attempting to gather evidence without following the necessary procedures may result in the "arrest, detention, deportation, or imprisonment of participants, including American counsel."<sup>209</sup>

200. *Crawford*, 541 U.S. at 68-69. *Crawford* was unclear about how to distinguish between out-of-court statements that were "testimonial" and that were non-testimonial. See MCCORMICK, *supra* note 160, § 252, at 162 (noting that the Court left "for another day" the task of defining testimonial statements). This confusion was largely cleared up by *Davis v. Washington*, in which the Court defined a testimonial statement as one where "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

201. *Crawford*, 541 U.S. at 68-69.

202. In order to be admissible, the child's videotaped testimony must also be given under oath, even in an out-of-court setting. See FED. R. EVID. 603 ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation. . . .").

203. DEP'T OF JUSTICE, *supra* note 144, at 5-6.

204. *Id.*

205. *Id.* at 5. There has been a greater tendency among sex tourists to film or photograph their sexual activities. See *id.*; see also SEABROOK, NO HIDING, *supra* note 24, at 109-10.

206. DEP'T OF JUSTICE, *supra* note 144, at 5; see also SEABROOK, NO HIDING, *supra* note 24, at 109-110 (finding that there has been an increased tendency of sex tourists to record their sexual activities).

207. DEP'T OF JUSTICE, *supra* note 144, at 5-6.

208. *Obtaining Evidence Abroad*, FINDLAW, at 2, <http://library.findlaw.com/1998/Feb/1/130298.pdf> (last visited Feb. 8, 2009).

209. *Id.*

There are two primary ways in which foreign evidence may be obtained for an American case.<sup>210</sup> The first and more traditional method is through the use of a letter rogatory.<sup>211</sup> A letter rogatory is a formal request from a court in one country to the judiciary of a foreign country requesting some form of judicial assistance.<sup>212</sup> However, in using this method, prosecutors must be mindful of the fact that letters rogatory generally take a year or more to process.<sup>213</sup> Additionally, letters rogatory and all accompanying documents must be translated into the official language of the foreign country.<sup>214</sup>

The second, and more practical method, is the use of a Mutual Legal Assistance treaty (“MLAT”) between the United States and the foreign country from which the evidence is sought.<sup>215</sup> A MLAT is an agreement between two countries to facilitate the gathering and exchange of evidence to enforce criminal laws.<sup>216</sup> These treaties contain the power to “summon witnesses, to compel the production of documents and other real evidence, to issue search warrants, and to serve process.”<sup>217</sup> However, the benefits offered by the treaties are only made available to prosecutors.<sup>218</sup> The defense is generally limited to the use of letters rogatory.<sup>219</sup>

In light of the difficulties of securing evidence in a foreign country, it is evident the United States should seek to continue establishing MLATs with developing countries in which the child sex trade flourishes.<sup>220</sup> MLATs have proven to be effective in a variety of international criminal cases and would serve to formalize cooperation in cases of prosecution

---

210. Ask the Expert: Professor Richard Wilson on International Law Concepts for Obtaining Foreign Evidence, <http://obtainingforeignevidence.blogspot.com/2008/07/ask-expert-professor-richard-wilson-on.html> (last visited Feb. 9, 2009) [hereinafter Ask the Expert].

211. *Id.*

212. *Id.* The preparation of letters rogatory is governed by 28 U.S.C. §§ 1781-1782. *Id.* For an in-depth discussion on the preparation of letters rogatory, see U.S. Dep’t of State, Preparation of Letters Rogatory, [http://www.travel.state.gov/law/info/judicial/judicial\\_683.html](http://www.travel.state.gov/law/info/judicial/judicial_683.html) (last visited Feb. 9, 2009) [hereinafter Preparation].

213. Ask the Expert, *supra* note 210 (quoting Preparation, *supra* note 211, ¶ 4).

214. Preparation, *supra* note 212.

215. Ask the Expert, *supra* note 210.

216. See *id.*; see also U.S. Dep’t of State, Mutual Legal Assistance (MLAT) and Other Agreements, [http://travel.state.gov/law/info/judicial/judicial\\_690.html](http://travel.state.gov/law/info/judicial/judicial_690.html) (last visited Feb. 10, 2009). Currently, the Department of State lists sixty-two agreements currently enforced, with several more under negotiation. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. For example, the United States does not yet have MLATs with either Costa Rica or Cambodia. These two countries suffer from extremely high levels of child sex tourism and lack the local law enforcement to respond. Andrews, *supra* note 12, at 449.

of child sex tourists.<sup>221</sup> In addition, the United States should strive to strengthen the relationships with the local law enforcement personnel of countries with which the treaties already exist.<sup>222</sup>

## V. CONCLUSION

The sexual exploitation of children is an insidious form of commercialized violence against the world's most vulnerable citizens.<sup>223</sup> Child sex tourism is a grave violation of children's rights and dignity.<sup>224</sup> It consists of practices that are demeaning, degrading, and dangerous to children.<sup>225</sup> Every child in every part of the world is entitled to a childhood free from sexual exploitation.<sup>226</sup> Yet children continue to be routinely abused by sexual predators willing to travel vast distances to prey on the innocent.<sup>227</sup>

United States citizens are among those who exploit children trapped in the commercial sex trade and fuel the demand for young children.<sup>228</sup> Greater law enforcement efforts have been undertaken in the United States to combat child sex tourism, however, very few convictions have been obtained beyond those for the most appalling and visible offenders.<sup>229</sup> Difficulties in prosecution exist because of the evidentiary and procedural hurdles in obtaining evidence located in a foreign country.<sup>230</sup> Until these issues are adequately addressed and resolved, American sex tourists will continue committing heinous crimes against the world's most vulnerable population.

---

221. *Id.* (quoting 135 CONG. REC. 25, 634-35 (1989) (remarks of Sen. Kerry) (noting effectiveness of MLATs in obtaining bank records, depositions, recordings of telephone conversations, and appearance of witnesses from foreign countries).

222. *Id.*

223. World Congress, *supra* note 94.

224. *See* ECPAT, *supra* note 70.

225. BARNITZ, *supra* note 2, at 3.

226. SEABROOK, NO HIDING, *supra* note 24, at vi.

227. *See* discussion *supra* Part II.

228. *See supra* note 55.

229. *See supra* notes 10-12 and accompanying text.

230. *See* discussion *supra* Part IV.