CHILD SEXUAL EXPLOITATION IN CANADA AND SRI LANKA: RIGHTS, LAW AND POLICY

By

Desana Natalie Kerenza Fernando, LL.B. (Hons.)

A Thesis
Submitted to the Faculty of Graduate Studies
In Partial Fulfillment of the Requirements for the Degree of

Master of Laws

Faculty of Law
University of Manitoba
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Abstract

This thesis presents an overview of the legal responses to the sexual exploitation of children in Canada and Sri Lanka. It examines the nature and extent of the child sex trade, its national and international, social and legal dimensions. It defines child sexual exploitation and considers the reasons why children enter the sex trade, the characteristics of children who get involved in prostitution, characteristics of offenders, and why they choose to have sex with children. It discusses in detail the problems faced by Sri Lanka in trying to combat child prostitution, and evaluates the legal framework in Canada in search of possible solutions.

This thesis observes that children's special status is recognised today more than ever before, with several international conventions that seek to elevate child protection to the level of human rights. States have willingly ratified these conventions, but child sexual exploitation continues to exist. It notes that sometimes child sex offenders can escape punishment for their crimes due to weaknesses in the domestic laws of states. In such instances, international law can step in to ensure that the accused is tried under principles of international law.

This thesis also suggests that domestic criminal law and international law are not the only methods of dealing with child prostitution. It explores alternative social service and community based initiatives for addressing the problem, including methods of recovery and re-integration. It concludes that the most effective solution to the problem would be if the domestic criminal law, international law and social service mechanisms can together be utilised to fight child sexual exploitation.

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Introduction

The sexual exploitation of children is a fundamental violation of their rights, yet an estimated one million children worldwide enter the sex trade each year.[1] Child sexual exploitation is an atrocity because it is a corruption of the natural order, where adults are supposed to nurture and protect children, not exploit and take advantage of them. This thesis examines the nature and extent of the child sex trade, its national and international, social and legal dimensions. It discusses in detail the problems faced by Sri Lanka in trying to combat child prostitution, and evaluates the legal framework in Canada in search of possible solutions.

Chapter One of this thesis analyses what is meant by the term 'child rights.' Due to their vulnerable age and mental immaturity, children deserve special protection. It traces children's position in society from Roman times when they had absolutely no rights, to today where the family, community and the state have a duty to protect children. Children's special status is recognised today more than ever before, with several international conventions that seek to elevate child protection to the level of human rights.

Chapter Two defines child sexual exploitation and considers the reasons why children enter the sex trade, the characteristics of children who get involved in prostitution, characteristics of offenders, and why they choose to have sex with children. It discusses the criminal law in Sri Lanka relating to child prostitution and

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[1] At web site http://www.unicef.org

highlights loopholes in the law and weak enforcement mechanisms that perpetuate the problem. It considers how lessons can be learnt from Canada regarding attitudes towards child victims, and the importance of increasing sensitivity towards child witnesses, to facilitate their testimony in criminal proceedings.

However, sometimes child sex offenders can escape punishment for their crimes due to weaknesses in the domestic laws of states. In such instances, international law can step in to ensure that the accused is tried under principles of international law. Chapter Three examines how customary international law and international conventions can be utilised to fight child sexual exploitation. International human rights mechanisms can also be used to investigate human rights abuses arising out of the child sex trade. This chapter then considers extra-territorial jurisdiction, and whether this could be a possible solution.

Finally, Chapter Four looks past the criminal law aspects of this issue and explores the social service and community responses to the child sex trade, including methods of recovery and re-integration. It examines community based rehabilitation programs for customers of juvenile prostitutes, and considers whether these alternative programs and 'john schools' can prevent them from re-offending. Social service organisations can also play a role in assisting child prostitutes leave their trade and re-integrate into society. This chapter examines some Canadian community based programs for juvenile prostitutes, and considers whether these will be permanent and effective methods of helping child prostitutes get off the streets and lead fulfilling lives.

Chapter 1.

Children's Rights

The oldest known fossil footprints of our human ancestors are those of a family leading a child across a mud flat in Africa more than a million years ago. Recognition of children's needs for special care is foremost among those basic understandings about social conduct that we call 'human rights' whose observance protects the dignity and worth of the individual. All rights imply obligations, especially by the powerful towards the powerless.[2]

1.0 Introduction

The concept of children's rights as human rights has come to the forefront in international law in recent years. Due to their vulnerable age and physique, mental immaturity and inability to look after themselves independently; children deserve equal rights and merit special protection. The *United Nations Convention on the Rights of the Child (UNCRC)* was adopted by the General Assembly of the United Nations on 20 November 1989.[3] The Convention promotes children's human rights and rights to protection, and imposes obligations on member states to respect them.

Human rights guaranteed to children include the right to life (*UNCRC* Article 6), the right to a name and nationality (Article 7), the right to freedom of expression and the right to information (Article 13), the right to freedom of thought, conscience and religion (Article 14), the right to freedom of association (Article 15), the right to protection from physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (Article 19), the right of

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[2] Anonymous, in Maureen Seneviratne (ed.), *Some Expert Legal Analyses: The Sexual Exploitation of Children in Sri Lanka* (Colombo: the *PEACE* Campaign, 1996), p. 6.

access to health care services (Article 24), the right to education (Article 28), the right to rest and leisure, to engage in play and recreational activities (Article 31), the right to be protected from economic exploitation (Article 32), and the right to protection from torture or other cruel, inhuman or degrading treatment or punishment (Article 37). The trend towards recognising the special status of children can be seen by the fact that the *UNCRC* is the most widely ratified convention in the world today.[4]

This chapter examines the concept of children's rights and its implications for child protection. It traces the history of children's rights and notes how children have been granted more status and recognition over time. International conventions too have played an important role in persuading states to increase child protection strategies. Finally this chapter examines how international documents can be enforced in the domestic laws of states, and the problems encountered in the implementation of these international instruments.

1.1 The Nature of Rights

1.1.1 What is a 'Right'?

Susan Wolfson has some interesting views on what is meant by the term 'Child Rights.' She explains that without rights there would be no moral 'bottom line' to resolve conflicts, to protect people's vital interests, or to ensure that their status as unique individuals with dignity and worth are recognised. It is always good to have a minimum standard as a yardstick when guaranteeing rights. Another truth is that people

[3] Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989; entry into force 2 September 1990; at web site http://www.unhchr.ch

always quietly tolerate injurious or degrading treatment they receive until they know that there is a legal redress to combat the problem. Once they are aware of their rights, they are empowered to fight abuse. This is particularly true with regard to children. They will not be able to fight the abuse they face until they are aware of their rights.[5]

Of course, before people become aware of their rights, it is first important to define more precisely what a right is. According to Joel Feinberg, a right is a valid claim. What makes a claim valid is the justification of a peculiar and narrow kind, namely justification within a system of rules.[6] Feinberg also explains that the only beings that can have rights are those that can have interests. The two are intertwined. He explains that things like rocks and shrimp do not have rights because they do not have any interests. His reasons for adopting this principle are:

> (1) because a right holder must be capable of being represented and it is impossible to represent a being that has no interests, and
> (2) because a right holder must be capable of being a beneficiary in his own person, and a being without interests is a being that is incapable of being harmed or benefited, having no good or 'sake' of its own.[7]

Thus this interest principle can be used to separate those that can count as right holders from those who cannot.

With regard to child rights, Wolfson points out that if we define who a right holder is by examining whether they also have interests, then children do fall into this

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[4] All United Nations member states except the United States have now ratified the *UNCRC*. The most recent ratification was Somalia's, which took place on 13 May 2002.
[5] Susan A. Wolfson, "Children's Rights: The Theoretical Underpinning of the 'Best Interests of the Child", in Michael Freeman and Philip Veerman (eds.), *The Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers, 1992), p. 10.
[6] Joel Feinberg, *Social Philosophy* (New Jersey: Prentice-Hall Inc., 1973), p. 58.
[7] Joel Feinberg, "The Rights of Animals and Unborn Generations", in W.T Blackstone (ed.), *Philosophy and Environmental Crisis* (Athens, Georgia: University of Georgia Press, 1974), p. 51.

category. She states that when we question who has rights, and what they are entitled to, the first thing we consider is that each individual has the capacity to enjoy these rights, even if the level where rights can be enjoyed, and by whom, varies across the scale. Thus, which specific rights they have would be decided according to where they fall along the continuum, rather than by some extraneous, irrelevant or artificially imposed criterion.[8] This theory of the connection between rights and interests is important because we can use it for the protection of children. When we prove that children are right holders, then their interests are entitled to be protected.

How should we view children's rights? Are children the same as adults, with some minor differences, or different from adults, requiring special protection? Are parents and children individuals with separate interests or is there a combination of interests? Goldstein, Solnit and Freud support the conservative 'family as a haven' ideology. They take the view that the state's role is essentially to uphold parental autonomy.[9] They emphasise that one of the foremost rights of a child is the right to a family. They believe that once a child is in the care of the parent, the state should not intervene. The parental role is supreme and the state role essentially one of distant support. However, I think this view point has serious flaws because it gives the parents supreme rights. Thus in the event of child abuse, the state would find it difficult to impose child protection measures. This in no way means that the child's family automatically has absolute control or that the state cannot intervene.

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[8] Wolfson, *supra* note 5, p. 23.
[9] J. Goldstein, A.J. Solnit, and Anna Freud, *Beyond the Best Interests of the Child* (New York: The Free Press, 1980)

Anne McGillivray has examined the role played by the state in protecting children's rights, a constant tussle between public and private realms. Family has traditionally fallen into the private realm. Family privacy is strengthened by 'non-interventionist' decisions upholding the right of parents to dictate the educational, disciplinary and religious choices of their children. They firmly believe that freedom from state intervention is the only way to strengthen the family, and that a strong family is the cure to social ills. Historically the state formally placed children under the control of their parents, justifying this in the public interest to ensure that children posed no threat to society. This was accomplished by backing parental power. State regulation of parental conduct was only enforced in 'serious' cases. It is only in these situations that private became public.[10]

Feminist and youth movements of the 1960s and 70s created an atmosphere of self-help and citizen action in which family violence could be addressed. This suggested that children should be treated on a juridicially equal footing with others. But McGillivray quite rightly indicates that few are prepared to concede that children should be treated exactly like adults. She notes that childhood is a condition which varies according to social convenience and social conscience. The factor that must be considered is whether the laws satisfy the broader requirements of justice. Children's rights movements are run by adults. Adults define children's rights.[11]

According to Savitri Goonesekere, the concept of child rights that has been accepted internationally today does not go so far as to reject the concept of pre-emptive

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[10] Anne McGillivray, "Reconstructing Child Abuse: Western Definition and Non-Western Experience", in Michael Freeman and Philip Veerman (eds.), *The Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff, 1992), p. 213.

adult rights and duties with regard to children. It rather seeks to balance the perspective of child rights with a perception of adult responsibilities, rights and duties that diminish and alter with the evolving capacities of the child as he or she grows from childhood to maturity. Thus as the child matures and becomes more independent, adult responsibilities towards the children in question undergo a change.[12]

Over a period of time, the courts in several countries have begun viewing themselves as *parens patriae,* or a superior parent, acting in the child's best interest. While almost all countries in the world now have a fundamental rights chapter in their national constitutions, most do not specifically mention protection of children. However, it can be presumed that these protections extend to children. Many constitutions, like that of Sri Lanka, have affirmative action policies that seek to redress historical injustices against women and children.

1.1.2 Natural Law and Legal Positivism

Natural law has its origins in the moral and ethical dimensions of human experience. According to Lloyd, the essence of natural law may be said to lie in the constant assertion that there are objective moral principles which depend on the nature of the universe and which can be discovered by reason.[13] Whereas natural lawyers in their reasoning claim that 'is' can lead to 'ought', legal positivists argue that there is a demarcation between the two, and that moral propositions cannot be derived from

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[11] *Ibid.*, p. 217.
[12] Savitri Goonesekere, *Children, Law and Justice: A South Asian Perspective* (New Delhi: Sage Publications, 1998), p. 23.
[13] M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet and Maxwell, 1996, 6th ed.), p. 80.

propositions of fact. But natural lawyers maintain that the truth of particular rules of natural law can always be demonstrated by reason. Davies and Holdcroft state that the common theme at the centre of most natural law theories is that there exists in nature a rational order. This order furnishes value statements which are universal and eternal.[14]

Natural law asserts that there is a necessary connection between law and morals, and that laws should be just and fair. This school believes that knowledge gained through reason is superior to knowledge gained through sensory perception. These philosophers state that this higher law supersedes ordinary law, and this would always prevail in the case of a conflict in order to maintain justice. D'Entreves noted that natural law is "part of the unrelenting quest of man to rise above the letter of the law to the realm of the spirit."[15]

The classical doctrine of natural law identifies certain characteristics common to this school of thinking. First, it is universal and immutable, available at all times and in all places for those whose job it is to enact laws. Secondly, it is a 'higher law,' superior to positive laws made by political authorities. It determines whether ordinary laws are morally binding on subjects. And thirdly, it is discoverable by reason.[16] Aristotle and Plato endorsed this view. Plato in his work *The Republic* questioned the meaning of justice and concluded that ultimate justice is discoverable through reason. The Greeks strongly believed that there are certain universal higher standards which can be discovered by man through the exercise of reason.

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[14] Howard Davies and David Holdcroft, *Jurisprudence: Text and Commentary* (London: Butterworths, 1991), p. 149.
[15] Freeman, *Lloyd's Introduction, supra* note 13, p. 90.
[16] J.W. Harris, *Legal Philosophies* (London: Butterworths, 1980, 1st ed.), p. 7.

During the Middle Ages, St. Thomas Aquinas emerged as a natural lawyer who tried to harmonise the teachings of the ancient Greeks with the Roman Catholic Church. Aquinas felt that in the event of a conflict between natural law and positive law, the former must undeniably prevail over the latter. The conscience of every human being would require him as a matter of absolute necessity to accord priority to his perception of natural law. According to Aquinas, natural law was not merely an ideal or an aspiration; but on the contrary, a precise and comprehensive yardstick whereby the validity of a positive law could be determined. He also said that if the human law is at variance with the natural law, it is no longer legal, but a corruption of the law. Therefore, if secular rulers pass laws which are unjust, their subjects are not bound to obey them.[17] Aquinas emphasised that natural law furnishes principles rather than rules for detailed application. Reason becomes the foundation for all human institutions.

Whereas for early natural lawyers, their theory of a higher law was closely connected with God as a higher being from whom the law emanated, this reasoning underwent a change during the seventeenth century. Natural lawyers such as Grotius came to the realisation that natural law was not logically dependent on the existence of a superior being. Grotius concluded that natural law would hold good even if there was no God.[18] Thus, even if God and nature did not dictate natural law, its principles would still hold true because they are demonstrated by reason.

However, the traditional natural law doctrine began to lose popularity because philosophers thought it could be manipulated in almost any situation to suit individual

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[17] *Ibid.*, p. 9.
[18] Freeman, *Lloyd's Introduction, supra* note 13, at p. 83.

preferences. What is considered morally justifiable could vary from age to age. For example, even though the Greeks followed natural law, they accepted slavery as a morally justifiable institution. To them slavery did not contravene natural law.[19] But today slavery is considered a violation of natural law. For this reason, Alf Ross attacks natural law and declares that "like a harlot it is at the disposal of everyone."[20]

But after the Second World War, natural law re-emerged. This was because the world realised that even though positive law flourished during times of peace, when it came to periods of turmoil, it could not regulate people's conduct. During the Nuremberg Trials, when Nazi leaders were put on trial by the allied powers for atrocities committed during the war, their defence was that their actions were in accordance with the positive laws that were operating in Germany at the time. But the Nuremberg Tribunal realised that accepting positive law – the law enacted by rulers – without questioning the moral content of such laws, is dangerous. Therefore the Tribunal rejected this defence. They declared that there are instances when national law must be subordinate to the ethical and moral values embedded in the international legal order. In order to preserve human life and what is good in society, natural law must always prevail over laws which threaten humanity. As a result of the revival of natural law thinking, the *Universal Declaration on Human Rights*,[21] the *UN Convention on the Rights of the Child*[22] and several other human rights instruments were enacted. They try to lay down certain higher standards by which human conduct can be judged.

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[19] *Ibid.*
[20] Davies and Holdcroft, *supra* note 14, p. 168.
[21] Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948; at web site http://www.un.org/rights
[22] *Supra* note 3.

Because of the revival in natural law thinking, a man can no longer declare that he followed a certain law merely because it was the positive law in operation at the time, even though he was fully aware that it was morally and ethically unjustifiable. Reason and his own conscience should guide him in understanding that certain acts are wrong. In the Sri Lankan case of Wijesuriya v The State,[23] a Lieutenant obeyed the orders of his superior officer and killed a suspected militant, even though he knew there was no solid evidence against her and she had not been subjected to a fair trial. The court declared: "A soldier is bound to obey only orders that are not manifestly and obviously illegal. If he obeys such orders, the law will presume that he did so with knowledge of its illegality." Thus we see that this higher law calls upon man to exercise his sense of reason in determining what law he should follow. When man is faced with a situation where he knows a law is manifestly illegal, he should instead follow the higher norm and reach a decision by exercising his sense of reason.

With the revival of natural law thinking, Lon Fuller's ideas came to the forefront. Lloyd says: "To Fuller, the most fundamental tenet of natural law is an affirmation of the role of reason in legal ordering."[24] Some of Fuller's debates revolve around Germany during Hitler's era. He says those laws were retroactive, secretive and they were used for a wrong purpose. He says there was a complete failure in legality because the procedure in making them was wrong.

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[23] 77 New Law Reports (NLR) 25.
[24] Freeman, *Lloyd's Introduction, supra* note 13, p. 115.

Whereas Fuller was a natural lawyer, H.L.A Hart was a positivist, and their different views are seen in the Hart-Fuller debate.[25] Their attitudes are revealed in their responses to a case decided by a German post-war court in 1949. In this case, a German woman was convicted because she betrayed her husband and had him sentenced to death for having criticised Hitler. She pleaded that her action was legal because her behaviour was in accordance with the valid positive law at the time. But the court found her guilty because the statute was contrary to the sound conscience and sense of justice of decent human beings. In terms of positive law, the woman committed no crime. But the court said the statute was illegal because it did not conform to moral standards. Fuller agreed with the attitude of the court.[26] He attacked positivism, saying that a legal system should have certain characteristics if it is to command the fidelity of right thinking people. A system of governance that lacks the inner morality of law does not constitute a proper law.

Natural law has made enormous contributions to legal philosophy. It can guard against dictatorial legal regimes that apply positive law, in which they completely reject ethical and moral concepts. Examples of this are the laws of Hitler and apartheid in South Africa. Natural law has highlighted deficiencies in existing laws that are inhumane and unjust, for example in the area of superior orders. It has helped greatly in the area of law reform, ensuring that laws are amended to be in keeping with justice and fairness. Human rights law has developed as a result of natural law, where the rights of people are guaranteed and enshrined in human rights instruments and in the

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[25] *Ibid.*, p. 393.
[26] *Ibid.*, p. 396.

constitutions of various countries. Natural law ultimately includes a moral element in the law – the acceptance of a higher law guided by conscience and reason – because this is an indispensable factor in the continued existence and function of the law.

Natural law does have its drawbacks. At times the content of natural law is vague and uncertain. It is also difficult to enforce such a law because it is not a law that is in operation and capable of being implemented. Instead it speaks of a higher standard that could be achieved: what 'ought' to be the law. But even in the face of these drawbacks, it plays a vital role in the world today because it sets standards as to how society could be improved as a result of adopting higher laws.

In the past a primary role of natural law was its evaluative function. It acted as a type of moral barometer to examine whether positive laws could be considered valid. But today its function is so much more than this, encouraging us to strive for excellence. It motivates us to enact laws that can be admired and obeyed at the same time. Natural law is considered an ideal or standard by which we gauge laws and therefore the main purpose of natural law today is its role in law reform. According to standards set by natural law, defective laws can be amended to make them conform to higher moral laws.

Throughout the history of natural law, we see that it is not a mere pretentious name for moral rules. Instead, natural law has always been considered a higher system of law whose truth was self-evident or could be demonstrated by reason. Traditional natural law linked what ought to be the law with the higher law that emanated from

God. But today, even if one denies the presence of a higher being, natural law is still considered a higher system of law that can be demonstrated by reason.

In the area of child rights, I believe that natural law plays a pivotal role. It takes a significant place in law reform, as it draws our attention to what ought to be the law and it makes us consider what we should aspire to, when drafting laws in this area. The *U.N Convention on the Rights of the Child (UNCRC)*[27] is an example of natural law. It is a guideline for countries which ratify the convention, to ensure that their domestic laws are in conformity with the principles laid down.

The preamble of the *UNCRC* gives us the spirit of the convention, highlighting that children, due to their vulnerability and innocence, are entitled to special care and assistance. Article 3 of the *UNCRC*[28] says that in making decisions regarding children, legislative, administrative and judicial bodies should ensure that the best interest of the child should be the primary concern. Article 19 is another example of natural law in operation. It declares that state parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment while in the care of parents, legal guardians or any other person who has the care of the child. This too emphasises what ought to be the law.

Sri Lanka has a Draft Constitution which has not yet come into effect. It reflects natural law as it indicates a higher law which we must aspire to, but it does not have any enforceable validity yet. Article 27(13) of Sri Lanka's present constitution protects

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[27] *Supra* note 3.
[28] *Ibid.*

children's rights through the *Directive Principles of State Policy*.[29] These principles are included in the constitution so that the legislature can be guided by them when drafting laws. However, the directive principles are not legally binding. In contrast, the Draft Constitution elevates child rights to a fundamental right, which can be protected by the courts. Article 22 of the Draft Constitution states "Every child has the right to be protected from maltreatment, neglect, abuse or degradation."[30] This highlights natural law's place in law reform in the area of children and the law.

In contrast, legal positivists accept the law as it is, regardless of its shortcomings. The positivist school emerged as a reaction to natural law, which was seen as vague and not supported by scientific knowledge. It existed only in the minds of people. But on the other hand, positivism is definite and it has no uncertainties as it is posited. With regard to the area of children and the law, legal positivism would be the present law, no matter how obnoxious or bad.

According to Wolfgang Friedman, the most fundamental philosophical assumption of legal positivism is the separation between the law as it is and the law as it ought to be.[31] He quotes Austin's definition of law as: "A rule laid down for the guidance of an intelligent being by an intelligent being having power over him." He cites J.C. Gray's point of view that the law of a state is not an ideal, but something which actually exists. It is not that which ought to be, but that which already is.

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[29] Certified on 31 August 1978. (Colombo: Government Publications Bureau, 1978.)
[30] Presented to Parliament on 24 October 1997. Printed in the *Sunday Observer* newspaper of 2 November 1997, Colombo, Sri Lanka.
[31] Wolfgang Friedman, *Legal Theory* (New York: Columbia University Press, 1967, 5th ed.), p. 258.

In Sri Lanka, the statutes that are in operation at present indicate legal positivism. The *Children and Young Persons Ordinance*[32] covers offences with regard to child victims and child offenders. The *Penal Code (Amendment) Act*[33] lists a series of offences, the punishment of which are supposed to serve as a deterrent to the exploitation of children. It includes special provisions for the protection of children from abuse. It deals with cruelty to children, sexual exploitation of children, trafficking and sale of children for sexual purposes, protection against obscene publications and incest. This is the positive law.

1.2 The Status of Children in European History

1.2.1 Roman Law and After

In classical Roman law, children did not have any recognised legal status, and were given the same place in society as slaves and animals. In Roman law, all persons were either *sui juris* or *alieni juris*. Those who were *sui juris* lived independently of anyone else's power. Persons *alieni juris* were in the power of others (*e.g.*, slaves were in the power of their masters and children were in the power of the *paterfamilias*). Roman private law was based on the concept that each family had a head: the eldest living male ancestor. In his *potestas* were all his descendants. The term *'paterfamilias'* applied to every male who was *sui juris*. Those under the *potestas* of the *paterfamilias* were under his authority for life. He had supreme authority in all domestic matters. The *paterfamilias* had complete and unlimited rights over his children throughout their

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[32] No. 48 of 1939. (Colombo: Government Publications Bureau, 1939.)
[33] No. 22 of 1995. (Colombo: Government Publications Bureau, 1995.) The *Penal Code Amendment Act* is discussed in detail in Chapter Two of this thesis.

infancy and adulthood, even to the extent of determining whether they live or die. He had the right to contract on their behalf, to give them away in marriage, to banish them and even to sell them.[34]

The idea of *paterfamilias* is one which seemed to be a concept particular to Rome. In the second century A.D., Gaius boasted that "nowhere else had a father such power over his children as exercised by a Roman *paterfamilias*."[35] Thus in early Roman law, children had very little control over any aspect of their lives. In fact, there was little distinction between a slave and a son *(filiusfamilias)* at that time.

Since there were so many similarities between the *filiusfamilias* and the slave, it is primarily important to note the position of slaves in early Rome. The Roman slave was considered to be both a thing and a person. He could be owned and therefore was a *res* (thing). But he was a human being and thus also a person, because 'personality' implied a being capable of legal rights and duties. Just like the relationship between a son and his *paterfamilias*, slaves were completely in the power of their masters. This implied absolute disability, personal and proprietary. Even though the slave was a thing, he was subject to *potestas*. In effect, the law was the same for children as it was for slaves. Slavery was an institution of the *jus gentium* by which one man was made the property of another, contrary to nature. When we examine the status of a *filiusfamilias* in early Roman law, we see that this definition also applied to him. The *filiusfamilias* could be considered as a person with little or no rights in early Roman law.

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[34] R.W. Lee, *The Elements of Roman Law* (London: Sweet and Maxwell, 1956, 4th ed.), p. 60.

According to the *jus civile*, the *paterfamilias* had the power to inflict punishment and violence even unto death *(jus vitae necisque)* to his slaves and children alike.[36] He had the right to let his child die of starvation or freeze to death. During the Catilinarian conspiracy of 63 B.C., Fulvius, the son of a senator, joined the conspirators. His father had him brought back and put to death.[37]

The *paterfamilias* had complete control over the person as well as the property of those in his *potestas*. Like the slave, he had the right to all acquisitions of any kind belonging to the child. All property acquired by children went to the *paterfamilias* in early Roman law. They could own absolutely nothing of their own. Even when the *filiusfamilias* grew up and the *paterfamilias* gave him cattle to manage for his own benefit, they were only *de facto* the property of the *filiusfamilias* and remained *de jure* the property of the *paterfamilias*. Even though sons and slaves alike could contract and control property, the *paterfamilias* still owned it.

In the early days of absolute *potestas*, the *paterfamilias* could force a marriage upon a descendant and just as freely effect a divorce. At this period of time, a son had such little status that his consent to his own marriage was unnecessary. He would be compelled to marry. Likewise, if children wanted to marry by choice and could not get the consent of the *paterfamilias*, then the marriage could not take place.

Even though the concept of *patria potestas* survived throughout the history of Roman law, the power of the *paterfamilias* over his *filiusfamilias* gradually diminished. By 560 A.D, a series of statutes eventually forbade him to do things which had earlier

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[35] *Ibid.*, p. 61.
[36] *Ibid.*

come naturally in his position over those in his *potestas*. As the power of the *paterfamilias* decreased, the position of the *filiusfamilias* increased.[38]

Early Roman-Dutch law based on Roman law similarly accorded a low status to married women and children. They were categorised with mentally deficient or insane persons, as legally incompetent.[39] Fathers exercised complete authority and children were perceived as the personal custodial property of their parents, or as family assets.[40]

Savitri Goonesekere traces the history of the status of the child in other societies and finds similar attitudes toward children. French and Anglo-American law reflected this view for a time. In English North America, certain statutes reflected a view of children as evil or dangerous, such as the Stubborn Child Law of 1646.[41] Under English law women and children were under the authority of their husbands and fathers. Blackstone explained that the wife's identity was merged with her husband under the law, so much so that it suspended her very being or legal existence. The husband and wife were one person, and that person was the husband.[42] The father and not the mother had supreme power over all his minor children.

Giving children such a low legal and social status had an impact on public policy regarding their treatment. Children were considered the property and the responsibility of the father. In both England and the United States, legislation on the prevention of cruelty to animals preceded (and inspired) legislation on the prevention of

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[37] *Ibid.*
[38] *Ibid.*, p. 65.
[39] H.R. Hahlo, *Law of Husband and Wife* (Cape Town: Juta and Co, 1985.)
[40] Michael Freeman, *The Rights and Wrongs of Children* (London: Frances Pinter Publishers, 1983), p. 15.
[41] Goonesekere, *supra* note 12, p. 21.
[42] W. Blackstone, *Commentaries on the Laws of England* (London: A Strahan, 1825), p. 441.

cruelty to children.[43] The first case of apprehension of an abused child was brought before the courts on the basis that the child victim was an animal.[44]

1.2.2 Child Abuse: Constructs

Anne McGillivray examines the Formalist Rule of Law approach to child abuse. According to this model, law makes no distinction between persons: age is as irrelevant as gender, class or race. The same law applies to everyone, irrespective of age or status. Formalism suggests that children's rights should be examined from the point of view of equality. Child abuse would constitute a derogation from the right to equality. However, the laws of children's rights and child abuse expose inherent contradictions: adults are the sources of both protection and injury for children. The abusers are adults, and the protection agencies are also run by adults.[45]

McGillivray agrees that children are better off in a family environment with their biological parents. Yet ownership constructs – where parental power is justified to the extent that it is implied that the parents 'own' the children – may obscure and even encourage abuse. She then examines historical constructs of child abuse. First is the *Moral Construct*. In the eighteenth and early nineteenth centuries, the offence of child abuse did not exist in the formal law. The moral crusades for child welfare began to emerge in the 1870s. Cruelty to Children could be an offence, but only under animal protection laws. She cites the New York Mary Ellen case,[46] where the court held that

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[43] Freeman, *The Rights and Wrongs of Children, supra* note 40, p. 15.
[44] The Mary Ellen case, discussed below. At web site http://www.cpswatch.com/reports/maryellen
[45] McGillivray, "Reconstructing Child Abuse", *supra* note 10, p. 213.
[46] At web site http://www.cpswatch.com/reports/maryellen

an abused child houseworker could be judicially protected only under animal protection laws.

Second is the *Scientific Construct* which emerged at the beginning of the twentieth century. Professional social workers began to staff child protection agencies. Child abuse was reconstructed as neglect, and abusive parents were no longer considered as brutes or criminals, but were to be pitied, as poverty and unemployment excused their behaviour. Third is the *Ecological Construct* to child abuse. Professional social workers became active in child protection, and child abuse was reconstructed as a complex problem requiring a complex of responses.[47]

Fourth is the *Political Construct*, where the focus is on sexual abuse. McGillivray explains that sexual abuse as constructed in the late 1970s and 80s is a highly gendered issue. The aggressor is male, the child victim is mostly female, and the abuser is usually a familiar figure rather than a stranger. Another trend in the *Political Cónstruct* is that today children are coming out with disclosures of sexual abuse, and the public now believes them, unlike in the past. In addition, today the protection policy is shifting towards the direct and immediate interests of the child victim.[48] McGillivray thus argues that child maltreatment is a concept that varies with time, place, circumstance and political convenience.

[47] McGillivray, "Reconstructing Child Abuse", *supra* note 10, p. 213.
[48] *Ibid.*

1.3 Children's Rights in International law

1.3.1 From Declaration to Convention

The early part of the last century reflected a growing international concern for the protection of women and children. International instruments such as the *Convention for the Suppression of the Traffic in Women and Children* of 1921,[49] and the *Slavery Convention* of 1926,[50] set important international standards against exploitative practices that impacted on the lives of women and children.

The idea of a formal document of children's rights dates back to the 1920s. The founder of the Save the Children movement, Eglantyne Jebb, believed that the obligation to protect children was not the responsibility of parents alone, but also of the wider community.[51] She drafted the five points of the first *Declaration on the Rights of the Child* in 1923, and the League of Nations (predecessor to the United Nations) adopted it in 1924.

The *Universal Declaration of Human Rights (UDHR)*[52] was adopted in 1948 as a reaction to the human rights violations that occurred during the Second World War. Its preamble refers to a "recognition of the inherent dignity and equal and inalienable rights of all members of the human family." Article 3 of the *UDHR* states that "Everyone has the right to life, liberty, and security of the person."[53] This no doubt includes children. Article 4 says that no one shall be held in slavery or servitude, which is prohibited in all its forms. And Article 5 prohibits torture and cruel, inhuman or

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[49] 30 September 1921; entry into force 15 June 1922; at web site http://www.un.org/Depts/Treaty
[50] 25 September 1926; at web site http://www.unhchr.ch
[51] Save the Children Alliance, *Children's Rights: Reality or Rhetoric?* (London: International Save the Children Alliance, 1999), p. 13.
[52] *Supra* note 21.

degrading treatment or punishment. Child prostitution can be considered as a form of slavery and cruel, inhuman, degrading treatment and punishment. Article 23 refers to the fact that everyone has the right to just and favourable working conditions. The protection of children is covered by all these provisions in the *UDHR*. Article 25(2) emphasises this fact by stating that childhood is entitled to special care and assistance.[54]

However, it was felt that there should be a separate instrument exclusively for the protection of children, which would specifically address their needs. In 1959, the United Nations adopted a revised version of Eglantyne Jebb's original *Declaration on the Rights of the Child*.[55] This was the first international instrument that focused on children as persons entitled to rights in their own capacity. It had several principles emphasising necessary safeguards and care. Unfortunately however, the *Declaration* did not have the influence that was expected of it. It did not have the 'teeth' that an international convention would normally possess, where state parties are bound by the provisions of the treaty. It was a statement of principles rather than a document by which governments could be held accountable for their actions.

In the thirty year period between the *Declaration on the Rights of the Child*,[56] and the *Convention on the Rights of the Child*,[57] there were few international human rights instruments available to improve the status of children in law. The *International*

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[53] *Ibid.*
[54] *Ibid.*
[55] Proclaimed by the General Assembly Resolution 1386 (XIV) of 20 November 1959; at web site http://www.unhchr.ch
[56] *Ibid.*
[57] *Supra* note 3.

Covenant on Civil and Political Rights (ICCPR) of 1966[58] and the *International Covenant on Economic Social and Cultural Rights (ICESCR)* of 1966[59] did incorporate protections of human rights that extended to children, and were binding in international law on states that ratified these instruments. However these covenants did not specifically recognise the special place of children in society, and there was an urgent need for an international instrument that would recognise this.

The *UNCRC*[60] was drafted because there was a need to document all the child protection provisions in one comprehensive treaty. The drafters of the *UNCRC* were appointed by the United Nations High Commission on Human Rights and comprised of government delegates and representatives of the United Nations and specialised agencies such as the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Labour Organisation (ILO), the United Nations Children's Fund (UNICEF) and the World Health Organisation (WHO). There were also a number of non-governmental organisations that participated.[61]

The drafting of the *UNCRC* began in 1979, the International Year of the Child. On 26 January 1990, the convention was opened for signature, and sixty one countries signed it on the first day. This is a record first-day response. The *UNCRC* entered into force only seven months later on 2 September 1990.[62] Fifty-seven more countries

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[58] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A of 16 December 1966; entry into force 23 March 1976. U.N Doc. A/6316. (1966); at web site http://www.hrweb.org/legal/cpr

[59] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A of 16 December 1966; entry into force 3 January 1976. U.N Doc. A/6316. (1966); at web site http://www.hrweb.org/legal/escr

[60] *Supra* note 3.

[61] At web site http://www.unhchr.ch

[62] *Ibid.*

ratified the convention by the end of 1990. By 1996, 185 countries had ratified: a number that is unprecedented in the field of human rights.[63]

At present there are 192 parties to the Convention, including India, the Philippines, Sri Lanka and Thailand; all of which have high numbers of child prostitutes. When ratifying the convention, India made the following reservation:

> While fully subscribing to the objectives and purposes of the convention, realising that certain rights of the child, namely those pertaining to the economic, social and cultural rights *can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation*; recognising that the child has to be protected from exploitation of all forms including economic exploitation; noting that for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that *it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India* - the Government of India undertakes to take measures to progressively implement the provisions of Article 32, particularly paragraph 2 (a), in accordance with its national legislation and relevant international instruments to which it is a State Party. [Emphasis added.][64]

Canada signed the *UNCRC* on 28 May 1990, and ratified it on 13 December 1991. However, the United States did not sign until 16 February 1995, and they have not yet ratified the convention. The most recent ratification was Somalia's, which took place on 13 May 2002.

Article 43(2) of the *UNCRC* provides for the appointment of members of the Committee on Rights of the Child. It says that they should have a "high moral standing

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[63] *Ibid.*
[64] *Ibid.*

and recognised competence in the field of children's rights."[65] Each state nominates one person from among its own nationals, and then a secret ballot is held. Article 19 deals specifically with sexual exploitation and sexual abuse. It states that protective measures such as social programs should be established to support the child along with other forms of prevention; and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment.

The preamble to the *UNCRC* contains the spirit of the convention and proclaims that children are entitled to special care and assistance. It explains that because children are physically and mentally immature, they need special safeguards and care, including appropriate legal protection, before as well as after birth. The preamble also recognises that for children to develop fully and harmoniously, they need to grow up in a family environment: in an atmosphere of happiness, love and understanding. And because the family is the fundamental group in society, it should be given protection and assistance. And finally the preamble emphasises the importance of international co-operation in order to improve the living conditions of children in every country, particularly in the developing countries.[66]

The principle that the 'best interests of the child' should be paramount in any issues concerning children is the thread that we see running throughout the *UNCRC*. The convention emphasises that whenever states pass legislation affecting children, or when judges make decisions on issues affecting children even as third parties, they must

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[65] *Supra* note 3.
[66] *Ibid.*

consider the issue from the angle of what would be best for the child. Article 3(1) of the *UNCRC* provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[67]

The courts now use the 'best interests of the child' standard in determining their judgments. Susan A. Wolfson comments that today the 'best interests of the child' has become the international standard for practices concerning children.[68]

It is vital that children's rights are specially protected. No society can afford to ignore the status of children in society, because the welfare of the entire community, its growth and development depends on the health and well-being of its children. Child protection must be implemented at the domestic as well as the international level, as international treaties are binding on the states that ratify them.[69] By doing so, the states undertake obligations under the treaty to bring their national laws into conformity with the provisions in the treaty.

Anne McGillivray writes that law has the power to expose private abuses, habitual injustices and atrocities, and can be an instrument for social change by confirming desired norms through exposure of undesirable conduct. [70] The *UNCRC* is an attempt to search for common ground in the treatment and protection of children. She quotes from the convention, that parties should take appropriate legislative,

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[67] *Ibid.*
[68] Wolfson, *supra* note 5, p. 7.
[69] This principle is elaborated and discussed further at p. 36 below.
[70] McGillivray, "Reconstructing Child Abuse", *supra* note 10, p. 213.

administrative and social measures to protect the child from all forms of abuse.[71] I agree with her that the goal of raising healthy children to fully functional adulthood is universal. The *UNCRC* can be instrumental in making this a reality everywhere.

Of course the *UNCRC*[72] has not come this far without a certain amount of criticism. The most common criticism is that it lays an idealised standard of child protection which is difficult to define and which 'lacks teeth.' Yet another criticism can be directed at the language used in the convention: the *UNCRC* rarely asserts a right in an absolute manner. Only a few articles in the convention adopt the words 'ensuring a right.' In most instances the *UNCRC* either 'respects' or 'recognises' a right, which indicates a lower level of protection than guaranteeing a right.

Another important point that has emerged from the *UNCRC* is the recognition of child rights as part of human rights. Previously human rights were perceived as part of the adult world. But the *UNCRC* incorporates most of the rights guaranteed in the *ICCPR*[73] and the *ICESCR*,[74] with the focus on children. World leaders have also recognised the link between child protection and human rights. At the Stockholm Conference on 'Realising Child Rights' in 1989, Prime Minister Ingvar Carlsson of Sweden stated: "Children are not only children – they are human beings like all of us. And like the rest of us, they shall have their rights."[75]

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[71] *Ibid.*
[72] *Supra* note 3.
[73] *Supra* note 58.
[74] *Supra* note 59.
[75] Radda Barnen Conference Report, *Making Reality of Children's Rights* (Sweden: Radda Barnen, 1989), p. 23.

1.3.2 After the Convention on the Rights of the Child: Recent International Documents

1.3.2.1 The Stockholm Declaration[76]

This is an international document aimed at combatting the sexual exploitation of children by calling on governments to give high priority and dedicate more financial and human resources to solving the problem. The *Stockholm Declaration* calls for action from states, society, and national, regional and international organisations to help prevent the commercial sexual exploitation of children.[77] It encourages states to promote stronger co-operation among all sectors of society; to strengthen the role of families in protecting children from sexual exploitation; to penalise offenders; to review, revise, enforce and promote relevant laws, policies, programmes and practices; to develop methods to prevent, protect, recover and reintegrate children vulnerable to exploitation; and to try to involve more children in the fight against their sexual exploitation.[78]

The Stockholm Conference also produced an *Agenda for Action* which called on governments to put together national plans of action with indicators, goals and a time frame to reduce the number of children who are sexually exploited each year, as well as to implement and monitor ways of measuring progress at all levels while collecting and sharing data. All 122 governments who attended the conference adopted the *Stockholm Declaration* and committed to creating national plans of action by the year 2000. However, only fifty of these countries have drafted national plans of action to date.

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[76] Drafted at the First World Congress against the Commercial Sexual Exploitation of Children, held in Stockholm, Sweden in 1996; at web site http://www.unhchr.ch

In its preamble the *Stockholm Declaration* says that every day more and more children around the world are subjected to sexual exploitation and sexual abuse; and that concerted action is needed at the local, national, regional and international levels to bring an end to the phenomena. It also recognises that every child is entitled to full protection from all forms of sexual exploitation and sexual abuse. States are required to protect the child from sexual exploitation and sexual abuse and promote physical and psychological recovery and social reintegration of the child victim.[79]

The preamble also emphasises that poverty cannot be used as a justification for the commercial sexual exploitation of children, even though it contributes to an environment which may lead to such exploitation. Other reasons for entering the sex trade include economic disparities, inequitable socio-economic structures, dysfunctional families, lack of education, urban-rural migration, gender discrimination and trafficking of children.[80]

It notes that criminal networks take part in procuring and channelling vulnerable children towards commercial sexual exploitation. These criminal elements service the demand in the sex market created by customers, who seek unlawful sexual gratification with children. A wide range of individuals and groups at all levels of society contribute to the exploitative practice. This includes intermediaries, family members, service providers and customers.

The commercial sexual exploitation of children can result in serious, life-long, life threatening consequences for the physical, psychological, spiritual, moral and social

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[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*

development of children, including the threat of early pregnancy, maternal mortality, injury and sexually transmitted diseases, including HIV and AIDS. Their right to enjoy childhood and to lead a productive, rewarding and dignified life is damaged.

The *Stockholm Declaration* calls upon all states to give high priority to action against the commercial sexual exploitation of children, and to promote stronger co-operation between states and all sectors of society to prevent children from entering the sex trade. It also calls upon the states to criminalise the commercial sexual exploitation of children, and to condemn and penalise all offenders involved, whether local or foreign, while ensuring that the child victims of this practice are not penalised.[81]

It urges states to create a climate through education, social mobilisation, and developmental activities to ensure that parents and others legally responsible for children are able to fulfill their rights, duties and responsibilities to protect children from commercial sexual exploitation. It also requests states to enhance the role of people's participation including that of children, in preventing and eliminating the commercial sexual exploitation of children.

As mentioned above, 122 countries adopted the *Agenda for Action* drafted at the Stockholm Conference. Under the topic of *prevention*, Article 3 of the *Agenda for Action* declares that states should improve access and provide relevant health services, education, training and a supportive environment to families and children vulnerable to commercial sexual exploitation, including those who are displaced, homeless, refugees, stateless, unregistered, in detention and/or in state institutions. They should also initiate

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[80] *Ibid.*
[81] *Ibid.*

media and information campaigns to raise awareness and educate members of the public about child rights and the illegality and harmful impact of the commercial sexual exploitation of children.[82]

Member states should also strengthen and implement national social and economic policies and programs to assist children vulnerable to commercial sexual exploitation; families and communities in resisting acts that lead to the commercial sexual exploitation of children, with special attention to family abuse, and to promoting the value of children as human beings rather than commodities; and reduce poverty by promoting gainful employment, income generation and other supports.[83]

Under the topic of *protection*, Article 4 of the *Agenda for Action* urges state parties to develop or strengthen and implement national laws to establish the criminal responsibility of service providers, customers and intermediaries in child prostitution, child trafficking, and other unlawful sexual activity, and to develop or strengthen national laws, policies and programs that protect child victims of commercial sexual exploitation from being penalised as criminals, to ensure that they have full access to child-friendly personnel and support services in all sectors, and particularly in the legal, social and health fields.

In the case of sex tourism, states should develop or strengthen laws to criminalise the acts of nationals of the countries of origin when committed against children in the countries of destination (extra-territorial criminal laws); to promote extradition and other arrangements to ensure that a person who exploits a child for

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[82] *Ibid.*
[83] At web site http://www.focalpointngo.org

sexual purposes in another country (the destination country) is prosecuted either in the country of origin or the destination country; to create safe havens for children escaping from commercial sexual exploitation and protect those who provide assistance to child victims of commercial sexual exploitation from intimidation and harassment.[84]

This type of *Agenda for Action* is deeply needed today, if all areas of society are to come together to fight child sexual exploitation. This need was highlighted at the Stockholm Conference by Hon. Lloyd Axworthy when he said, "The act of forcing a child into prostitution is no less heinous than the sniper in war who fixes the sights of his rifle on a child playing in the street and coldly squeezes the trigger...".[85]

1.3.2.2 The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography[86]

This is the most recent document on child protection. It was adopted and opened for signature, ratification and accession by the U.N General Assembly on 25 May 2000. It entered into force on 18 January 2002.[87] The *Optional Protocol* was designed to be a complementary treaty to the *UNCRC*. Negotiated over a number of years with governments, experts and non-governmental organisations, the *Optional Protocol to the UNCRC* seeks to raise the standards in protecting children from all forms of sexual exploitation and abuse. The *Protocol* has been signed by eighty-nine

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[84] *Ibid.*
[85] Host Committee for the World Congress against Commercial Sexual Exploitation of Children, *Report of the World Congress against Commercial Sexual Exploitation of Children: Statements by Heads of Delegation*. August 1996, p. 35; at web site http://www.unhchr.ch
[86] Adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000; entry into force 18 January 2002; at web site http://www.unhchr.ch/html/menu2/dopchild

countries and ratified by sixteen. These include: Andorra, Bangladesh, Cuba, Democratic Republic of Congo, Iceland, Kazakhstan, Morocco, Norway, Panama, Qatar, Romania, Sierra Leone, Spain, Uganda, the Vatican and Vietnam.[88]

The *Optional Protocol* calls for governments to take tangible steps to ensure that adults involved in the exploitation of children are punished. It also urges governments to take decisive action when their nationals take part in the abuse of children abroad. Countries are encouraged to co-operate to ensure the protection of children trafficked across borders. The *Protocol* stipulates the need to protect particularly vulnerable groups of children and to further protect the rights of child victims, especially those who are witnesses in court proceedings. It also calls on state parties to ensure that children who have been sexually trafficked, exploited or sexually abused receive services designed to allow for their full social reintegration, as well as their physical and psychological recovery.[89]

Article 3 directs state parties to establish penal sanctions for abusers. Article 4 allows states to take jurisdiction over child sexual abuse taking place on their territory or by their nationals. According to Article 5, the offences are 'deemed to be included as extraditable offences in any extradition treaty existing between state parties' as well as any to be concluded between them. This *Protocol* is also to be considered as a legal basis for extradition if the state parties do not have a treaty. Article 6 calls upon state parties to give each other the greatest measure of assistance with investigations, in criminal or extradition proceedings.

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[87] *Ibid.*
[88] *Ibid.*
[89] At web site http://www.unicef.org

Article 8 says that states are to adopt appropriate measures to protect the child victims, including their special needs as witnesses, and the need to protect the persons and organisations that are involved in helping the victims. In Article 9 the states are told to use various prevention methods, such as education programs and prohibition of material advertising the offences. Article 10 calls upon the states to co-operate internationally to address the root causes of the child sex trade, such as poverty and underdevelopment. They are asked to provide financial, technical, or other assistance where they are in a position to do so.[90]

1.3.3 Implementing the Convention on the Rights of the Child in Domestic Law

The *UNCRC*[91] and other conventions can only be truly effective if they are incorporated into domestic law. The *Declaration and Statement of Goals* at the World Summit on Children[92] in 1990 focused on this issue, as otherwise these conventions would be mere paper statements. Let us now examine how international conventions are adopted into the domestic legislation of countries. The *Vienna Convention on the Law of Treaties*[93] distinguishes a state party's obligation under a particular treaty, according to whether that state has signed, ratified or acceded to the treaty. Thus a state's obligations under the treaty would vary according to this.

Many countries such as Sri Lanka, India and Bangladesh have *'Directive Principles of State Policy'* incorporated in their national constitutions. *Directive*

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[90] *Supra* note 86.
[91] *Supra* note 3.
[92] At web site http://www.ibfan.org/english/resource
[93] 23 May 1969; at web site http://www.un.org/law/ilc/texts/treaties

Principles reflect the spirit of the constitution. The legislature must respect them in making laws and similarly the judiciary must respect them in interpreting laws. These principles often refer to the states' obligations under the conventions to which they are parties. Even though the *Directive Principles* in these national constitutions are not legally binding, it is accepted that all the laws and guarantees entrenched in the constitutions should be interpreted in light of the *Directive Principles*. Article 27(15) of the Sri Lankan constitution refers to the country's undertaking to foster respect for international law and treaty obligations. It declares:

> The State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order, and shall endeavour to foster respect for international law and treaty obligations in dealings among nations.[94]

Article 4 of the *UNCRC* highlights the need for states to examine their laws and bring them into conformity with the convention. It declares:

> State parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present convention. With regard to economic, social and cultural rights, state parties shall undertake such measures to the maximum extent of their available resources and where needed, within the framework of international co-operation.[95]

Since the law of children's rights in many countries depends to a great extent on the principles laid out in the *UNCRC*,[96] the implementation of international law at the local level becomes vital in this area. Principles enshrined in international law become domestic law and thus effective within a country by a process of reception into domestic

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[94] The Constitution of the Democratic Socialist Republic of Sri Lanka; certified and entered into force on 31 August 1978. (Colombo: Government Publications Bureau, 1978.)
[95] *Supra* note 3.
[96] *Ibid.*

municipal law. Customs and treaties can be enforced in the domestic sphere of a country either by way of the monist approach or the dualist approach.

According to the monist view, international law and domestic municipal law form one system. Therefore rules of international law are automatically incorporated into the municipal law. If there is an inconsistency between a principle of international law and municipal law, the rule of international law prevails. This is the approach taken in countries like Germany, Holland and France. Thus according to the monist system, international treaty law becomes part of municipal or domestic law by immediate reception, so that a treaty becomes automatically binding on domestic courts. The monist system therefore recognises the supremacy of international law over domestic law.[97]

Sri Lanka, like Canada, the United Kingdom and the United States, follows the dualist approach, holding that international law and domestic municipal law are two separate systems. According to this view, international law can be applied by domestic municipal courts only if it is expressly transformed into the domestic municipal system through parliamentary legislation. In the event of an inconsistency, the domestic municipal law prevails. Thus a domestic court is only bound by a treaty or convention if the state concerned enacts conforming legislation to its treaty obligations and there is a transformation of the international treaty into domestic law.[98]

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[97] I.A. Shearer, *Starke's International Law* (Toronto: Butterworths, 1994, 11th ed.), p. 64.
[98] *Ibid.*

The implementation of the *UNCRC*[99] therefore has strong implications for countries that follow the dualist system of adopting treaties. The *UNCRC* declares that state parties should make the child's interests a primary consideration at all times. But countries adopting the dualist approach cannot do this unless this principle is already recognised in their domestic law. Thus, all state parties to the convention should bring their domestic laws in line with the principles laid out in the convention. The act of transforming international treaties into domestic legislation is crucial if the *UNCRC*[100] is to have any impact on countries following the dualist system.

1.3.4 Canada and Sri Lanka

1.3.4.1 Implementation

The courts in Canada have followed the principles laid down in the *UNCRC* when making their judgments. Baker v. Canada (Minister of Citizenship and Immigration)[101] is an example of the *UNCRC* being applied in domestic cases. The Supreme Court in this case referred to the preamble of the *UNCRC* when making its decision. The court declared: "Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society." The best interests of the child principle was applied in this case. Canadian courts have also used the *UNCRC* in their judgments as a sword to establish rights guaranteed in the *Canadian*

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[99] *Supra* note 3.
[100] *Ibid.*
[101] [1999] 2 S.C.R 817.

Charter;[102] as a shield to defend the constitutionality of present laws;[103] and to boost the common law.[104]

In Sri Lanka there is a growing awareness of the importance of child protection. The violation of children's rights has become a serious problem in South Asia. Child labour and child prostitution flourish due to rampant poverty. Since most of the countries in South Asia share common issues, it is important that there is regional consensus in remedying this problem. Like Europe, Africa and the Americas, South Asia has a regional body which meets regularly in an effort to exchange ideas on pressing issues. The organisation is known as the South Asian Association for Regional Co-operation (SAARC). With regard to child rights, the *UNCRC*[105] encourages regional co-operation in this area, as the countries in one region could share their experiences with each other, and develop strategies to work out solutions.

The countries that belong to the SAARC Association are Sri Lanka, India, Pakistan, Bangladesh, Nepal, the Maldives and Bhutan. An annual conference is held in one of the seven countries of the region. In addition to other regional matters of concern, the organisation has dealt with child protection issues at many of the conferences. Each country in the region is required to furnish annual country reports about their current child protection policies. Thus the SAARC Association has had a positive impact on improving child protection in the South Asian region.

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[102] See Francis v. Canada (Minister of Citizenship and Immigration) [1999] O.J No. 3853; and Sahota v. Canada (Minister of Citizenship and Immigration) (1994) 80 F.T.R 241.
[103] See P(D) v. S(C) [1993] 4 S.C.R 141 at 180; Young v. Young [1993] 4 S.C.R 3 at 75; and R v. L [1993] 4 S.C.R 419 at 465.
[104] See Gordon v. Gordon [1996] 2 S.C.R 27 at 76.
[105] *Supra* note 3.

Because Sri Lanka follows the dualist approach of incorporating an international treaty into domestic law, if an Act of Parliament is inconsistent with an international law principle, the Act of Parliament prevails. Sri Lanka's position echoes the approach in the English case of Chung Chi Cheung v. The King,[106] in which Lord Atkin for the court wrote: "International law has no validity except in so far as its principles are accepted and adopted by our own domestic law. There is no existing law that imposes its rules upon our courts...".

Sri Lanka's 1978 Constitution in its *Directive Principles of State Policy* follows this dualist approach in a similar manner to the United Kingdom. As quoted above, Article 27(15) declares that the state shall endeavour to foster respect for international law.[107] Unlike the monist approach, it does not demand that domestic legislation conform to international law principles. But even though the constitution reflects a dualist approach, Eric Jensen observes that the presumption underlying Sri Lanka's practice is that Parliament does not intend to legislate contrary to principles of international law and that Acts of Parliament must be interpreted in a manner that complies with international law.[108]

Another advantage of having a provision in the *Directive Principles of State Policy* which accords respect for international law is that the law courts of a particular country can then interpret the constitutionally guaranteed laws in light of the *Directive Principles*. The courts in India have been particularly progressive in this area. The

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[106] [1939] Appeal Court (AC) 160.
[107] *Supra* note 94.
[108] Eric Jensen, *Introduction to International Law in Sri Lanka* (Colombo: Law and Society Trust, 1994), p. 72.

Indian judiciary have used their constitution to motivate the central government to introduce legislation in conformity with treaty obligations.

An early case in India however does not follow this thinking. In Civil Rights Vigilance Committee, College of Law, Bangalore v. Union of India[109] the Supreme Court of India held that even though *Directive Principles of State Policy* are fundamental to governance, they are still not enforceable. Therefore they declared that the courts cannot compel parliament to make laws to implement obligations India had entered into under international treaties. But today the Indian judiciary has taken a very different approach. The Supreme Court of India now uses the provisions in the *Directive Principles* to give directions to the government to enact legislation in areas where they have accepted international obligations.

Sri Lanka's 1948 constitution laid down the idea that a treaty does not become part of municipal law unless it is expressly incorporated through an Act of Parliament. However, the 1972 and 1978 constitutions do not expressly set out a treaty making process. The 1978 constitution does not expressly empower the President or Parliament to enter into treaties other than bilateral investment treaties. According to Article 157, treaties essential for the development of the national economy shall be passed by a two-thirds majority in parliament.[110] It is strange that other than this, the 1978 constitution does not provide for any treaty-making procedures. Article 33(f) suggests that the President has the authority to enter into treaties, even though Jensen says that the

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[109] All India Reports (AIR) 1983 Kant 85.
[110] *Supra* note 94.

practice in Sri Lanka seems to be that treaties are incorporated into the municipal law only as far as they are enabled to be so incorporated by Acts of Parliament.[111]

Sri Lanka's application of treaty-based international law in its municipal courts was seen in Leelawathie v. Minister of Defence and External Affairs.[112] In this case the plaintiff was a woman who had Indian citizenship, but when she married a Sri Lankan she applied for citizenship in Sri Lanka. When her application was refused, she went to court declaring that such a refusal was a violation of the *Universal Declaration of Human Rights*[113] to which Sri Lanka is a signatory. Sansoni C.J, however, held that the *Declaration* had no binding force as it was not a legal instrument and it formed no part of the municipal law of the country.

An example of an international treaty being expressly incorporated into the domestic law of Sri Lanka is the *International Covenant on Civil and Political Rights (ICCPR).*[114] Sri Lanka has ratified this convention, and certain provisions from it have also been expressly incorporated into its Bill of Rights: of equality, liberty, freedom of movement, freedom against discrimination, etc.

The Sri Lankan courts have also referred to international treaties in some Fundamental Rights cases. Abasin Banda v. Sub Inspector of Police, Hanguranketha[115] was a case brought under Article 11 of the Constitution: freedom from torture. The

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[111] Jensen, *supra* note 108, p. 72.
[112] 68 New Law Reports (NLR) 487.
[113] *Supra* note 21.
[114] *Supra* note 58.
[115] [1982] 1 Sri Lanka Reports (SLR) 76.

court defined torture by looking at the *International Convention against Torture*,[116] which Sri Lanka has ratified. Mariadas v. The Attorney General[117] was a case of arbitrary arrest brought under Article 13(1) of the Constitution. The Supreme Court commented that this right to liberty is recognised in the *International Covenant of Civil and Political Rights*.[118] Both these cases were decided according to the domestic law of Sri Lanka, but the courts also drew a connection with international law.

Sri Lanka's incorporation of an international treaty being applied in the municipal courts is also highlighted in Sepala Ekanayake v. The Attorney General.[119] The accused in this case was guilty of the offence of hijacking an Alitalia passenger aircraft in June 1982, on an international flight between New Delhi and Bangkok. Ekanayake was a Sri Lankan citizen, but his wife and son were Italian citizens. He threatened to blow up the airplane unless he was paid the ransom he asked for and was reunited with his wife and son. When this incident occurred, Sri Lanka had already ratified the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*,[120] the *Convention for the Suppression of the Unlawful Seizure of Aircraft*,[121] and the *Convention for the Suppression of the Unlawful Acts Against the Safety of Civil Aviation*.[122] But unfortunately Sri Lanka had failed to pass enabling legislation to

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[116] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. (1984.) General Assembly Resolution 39/46. U.N Doc. A/39/51; entry into force 26 June 1987; at web site http://www.hrweb.org/legal/cat
[117] [1984] 2 SLR 192.
[118] *Supra* note 58.
[119] [1987] 1 SLR 107.
[120] Signed at Tokyo on 14 September 1963; at web site http://www.undcp.org/terrorism_convention_aircraft
[121] Signed at the Hague on 16 December 1970; at web site http://www.undcp.org/terrorism_convention_aircraft_seizure
[122] Entered into force 26 January 1973; at web site http://www.undcp.org/terrorism_convention_civil_aviation

incorporate these treaties into the domestic law of the land, as is required according to the dualist approach.

Therefore in order to convict the accused of the offence of hijacking, it was necessary to pass retrospective legislation to make hijacking an offence in the domestic law. But according to Article 13(6) of Sri Lanka's Constitution, retrospective criminal legislation is unconstitutional. However there is an important exception:

> Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time *when it was committed, was criminal according to the general principles of law recognized by the community of nations.* [Emphasis added.][123]

Parliament had not passed enabling legislation to give effect to the treaties. Instead, they were able to prove that hijacking was a crime under customary international law. Therefore they could follow its principles even though they had not passed enabling legislation. In this manner, the accused was then convicted of the offence of hijacking.

Thus custom and treaties play a very significant role in international law. They are used as suitable mechanisms to curtail the threats posed by the unrestrained authority of states. They also help states to incorporate international principles into their domestic spheres by making use of the specific provisions in local customs and international treaties. They are a rich source of law and international law has developed greatly because of them.

As mentioned above, one weakness of the *UNCRC*[124] is the fact that in countries which follow the dualist approach of adopting treaties, this convention would have to be

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[123] *Supra* note 94.
[124] *Supra* note 3.

specifically incorporated into the municipal law before it can be implemented at the domestic level. However, customary international law recognises that certain international law principles are so vital that they are part of *ius cogens*. By this all nations are bound by these particular laws, irrespective of whether they have ratified the corresponding treaties. Crimes against humanity, slavery, racial discrimination, torture and genocide are all *ius cogens* principles.

The Sepala Ekanayake case[125] is noteworthy in this respect. In this case the Sri Lankan Supreme Court recognised the possibility of considering the act of hijacking a crime under *ius cogens* and customary international law. Therefore the case highlights how domestic incorporation of international law can take place despite the absence of a treaty or domestic legislation. The Supreme Court closely scrutinised Article 13(6) of Sri Lanka's Constitution, which declares that retrospective criminal legislation is unconstitutional.[126] They then interpreted the proviso very broadly. They held that Ekanayake's hijacking attempt amounted to a violation of customary international law. Thus the Supreme Court concluded that since Ekanayake's act of hijacking an aircraft was criminal according to the general principles of law recognised by the community of nations; the retrospective criminal legislation enacted by parliament in this context was legal under the constitution.

Certain international instruments are so vital that they have now been accorded the status of customary international law or *ius cogens*. The *Universal Declaration of*

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[125] [1987] 1 SLR 107.
[126] Quoted on p. 45 above.

Human Rights (UDHR),[127] the *ICCPR*[128] and the *ICESCR*[129] all fall into this category. This indicates that even the *UNCRC*[130] need not be restricted by the limitation of needing to be specifically incorporated into domestic law to have validity in the states in question. Domestic courts, through judicial interpretation can forge a link between the principles laid down in the *UDHR* and the articles of the *UNCRC*. Even though the *UNCRC* is not legally binding, the mechanisms discussed above at the international level can make a significant difference in ensuring that whenever the rights of children are in issue, domestic courts can use the *UNCRC* to interpret their laws and guarantee that the best interest of the child is given priority.

The courts today have an excellent tool in judicial innovation when interpreting the laws, especially in countries that follow the dualist system of law-making. The courts can interpret local laws in light of international treaties to which the particular country is party. In this manner they can ensure that international standards are maintained in domestic laws. A case in point is De Silva v. Chairman, Ceylon Fertilizer Corporation.[131] In this case the Supreme Court had to define what amounted to 'torture or cruel, inhuman and degrading treatment.' They referred to the international standards set out in Article 1 of the *Torture Convention*.[132] They also examined the provisions on torture in the *ICCPR* when reaching their decision. Article 7 of the *ICCPR* declares: "No one shall be subjected to torture or to cruel, inhuman or degrading

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[127] *Supra* note 21.
[128] *Supra* note 58.
[129] *Supra* note 59.
[130] *Supra* note 3.
[131] [1989] 2 SLR 393, at p. 402.
[132] *Supra* note 116.

treatment or punishment."[133] Thus here they used international treaties to interpret a local law. Therefore even with regard to child rights, domestic courts must be encouraged to consider the provisions in the *UNCRC* when deciding a case.

Savitri Gunasekere points out other weaknesses in the *UNCRC*, that prevent its effective implementation in the domestic courts of state parties. She draws attention to the fact that individuals do not have *locus standi* in international law. In the case of a violation of an international convention, only the state representing the individual can approach an international forum. An individual lacks capacity, and therefore has no recourse independently in international law.[134] The *UNCRC* also follows this thinking. The convention does not confer a right on any individual (*i.e.*, a child or any adult representing such child) to seek relief at an international forum for any treaty violations.[135]

The fact that individuals are not subjects of international law has become a big issue in the international scene. To combat this problem, several regional conventions have specific provisions for individuals to approach an international body and to air grievances. For example, the *European Convention on Human Rights* has provision for an individual within a state that is party to the convention to bring their government before the European Commission on Human Rights for a violation of the convention. Article 25 (1) of the *Convention* states:

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[133] *Supra* note 58.
[134] This principle is elaborated and further discussed in Chapter Three of this thesis.
[135] Goonesekere, *supra* note 12, p. 38.

> The Commission may receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this convention.[136]

It is vital that the *UNCRC* includes an individual complaints provision.

Yet another shortcoming of the *UNCRC* is the fact that Article 51(1) of the convention makes provisions for reservations to the treaty. It declares, "The Secretary General of the United Nations shall receive and circulate to all states the text of reservations made by states at the time of ratification or accession."[137] However this is qualified by Article 51(2) which explains, "A reservation incompatible with the object and purpose of the present convention shall not be permitted."[138] This is in keeping with the *Vienna Convention on the Law of Treaties*, which lays down the law on international treaties. Article 19 explains:

> A state may, when ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
> (a) the reservation is prohibited by the treaty,
> (b) the treaty specifies that only specified reservations (which do not include the reservation in question) be made, or
> (c) the reservation is incompatible with the object and purpose of the treaty.[139]

Reservations have been allowed in international treaties so that states will not be deterred from ratifying certain treaties just because they disagree with one or two articles.[140] Thus if a treaty accepts reservations, it will be more appealing to a greater number of states. However, the disadvantage is that this tends to dilute the standards set

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[136] Adopted in Rome on 4 November 1950; at web site http://www.hri.org/docs/ECHR50
[137] *Supra* note 3.
[138] *Ibid.*
[139] *Supra* note 93.
[140] Further discussed in Chapter Three of this thesis.

by the convention. Of course, certain principles set out in the *UNCRC* are so fundamental that if a reservation were allowed for those particular articles, it would destroy the purpose of the convention. For example, Article 3 of the *UNCRC* requires all states parties to undertake a commitment that the best interests of the child will be a primary consideration in all actions concerning the child. Hence a reservation to this article would never be allowed. But a convention would be so much more effective if reservations were not permitted at all.

1.3.4.2 Legal Pluralism

As discussed above, the judiciary can use the *UNCRC*[141] to interpret domestic laws broadly and ensure maximum protection for children. However in Sri Lanka, the courts have a difficult task in interpreting laws because there are many laws that govern only a select section of the population. There are three main indigenous laws of the country. The Kandyan law is a personal law that governs the people who can trace their lineage to the central region of the country. The Muslim law is a personal law that is used by the Islamic people. The Thesawalamai law is a territorial law that pertains to people who live in the northern region of Sri Lanka. In addition to all these indigenous laws, Sri Lanka also has its common law of the land, which is the Roman-Dutch law. The Roman-Dutch law governs Family Law, Land Law, Tort Law, etc. The English law too has made an impact on Sri Lanka's legal system. Criminal Law, Contract Law,

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[141] *Supra* note 3.

Commercial Law, the Law of Evidence and Procedure, and the Law of Trusts and of Succession are governed by the English law.

Sri Lanka was colonised by the Portuguese in the sixteenth century, the Dutch in the eighteenth century and the British in the nineteenth century. The Portuguese were more interested in Sri Lanka's crops for export and in its strategic position in the Indian Ocean for purposes of trading. The Dutch and the British however imposed some of their laws on the colony. They recognised the native laws and customs, unless they perceived certain practices as barbaric and uncivilised, in which cases they were then superceded by the Roman-Dutch law or the English law. Whenever there was a conflict between the indigenous laws and the common law of the land, the governors always allowed the common law to take precedence. Of course another issue was that the judges and magistrates in the courts were Dutch or British. Therefore when they were deciding cases, if they were unsure of the local laws in that situation, they simply applied the laws of their own countries, with which they were familiar.[142]

Since Sri Lanka has many laws, this has led to a situation where there is a conflict of laws in certain circumstances. For example, some of the personal laws have provisions which directly conflict with one or both common laws, and then the courts have a difficult time in trying to determine which law is applicable to which individual. An example is the law with regard to bigamy. Sri Lanka's *Penal Code*[143] declares that bigamy is an offence, and anyone who is convicted of this offence can be imprisoned.

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[142] *Ibid.*

[143] Entered into force in 1883. Colombo: Government Publications Bureau.

In contrast, the Muslim law allows a man to marry up to four wives. Thus the courts need to strike a balance in such situations.

At the beginning of the twentieth century, judges had to deal with a conflict of laws regarding child marriages. At that time both the Muslim law and the Kandyan law recognised the validity of a child marriage, provided the father of the minor consented to the marriage. However the *Penal Code*[144] based on the English common law, specifically declared that sexual intercourse with a minor under the age of twelve would be construed as statutory rape irrespective of consent. This then was a conflict between the laws. The operation of a plural system of laws has thus proved a disadvantage for Sri Lanka, because it has been difficult to strike a balance between the personal laws and the common law. This permeates into the area of children's rights because the common law is always trying to honour its treaty obligations under the *UNCRC*, but sometimes the personal laws may be in direct conflict with the common law.

The existence of a pluralistic legal system can create a myriad of problems when it comes to the government's formulation of state policies. Savitri Goonesekere highlights the impact that pluralism can have on the law of child rights. She explains that the clear international standards articulated in the *UNCRC* become blurred when they get mixed up with the different judicial and other authorities in a pluralistic legal system.[145] The courts have a much more complex task of sifting through the different types of legislation in this situation, rather than if Sri Lanka was governed by a uniform

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[144] *Ibid.*
[145] Goonesekere, *supra* note 12, p. 49.

system of law. Therefore pluralism has had a negative impact in the protection of children in Sri Lanka.

1.4 Conclusion

Obligations towards guaranteeing children rights and recognition have developed greatly since Roman times. International declarations and conventions have elevated child protection to the status of human rights. The *Declaration* and the *Convention on the Rights of the Child* recognise that childhood is an especially vulnerable time and children deserve special care and assistance. However, implementing international conventions into the domestic sphere has become a challenge due to conflicts of law. It is important that all laws concerning children be interpreted in their best interests, ensuring maximum protection to this vulnerable group in society.

Chapter 2.

The Child Sex Trade in Canada, Thailand and Sri Lanka

> *With the birth of every child, there is the birth of new hopes and dreams for the human race. The children of today are the bearers of our future.*[146]

2.0 Introduction

The commercial sexual exploitation of children and young people is a fundamental violation of their rights under the *United Nations Convention on the Rights of the Child (UNCRC).*[147] Sexual exploitation covers a wide range of abusers and different forms of abuse, and varies in the type and degree of impact on the victim. An estimated one million children world-wide enter the multi-billion dollar commercial sex trade every year. These children are often lured with promises of an education or a 'good job.' Children are forced into the sex industry at increasingly younger ages partly as a result of the mistaken belief that younger children are unlikely to be infected with the HIV/AIDS virus.[148] The most vulnerable children are those who are trafficked within and across borders for the purpose of prostitution. These children are often refugees, orphans, abandoned children, child labourers working as domestic servants or children affected by armed conflict.[149]

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[146] Anonymous, in Maureen Seneviratne (ed.), *An Evil Under the Sun: The Sexual Exploitation of Children in Sri Lanka* (Colombo: The PEACE Campaign, 1995), p. 34.
[147] *Supra* note 3.
[148] At web site http://www.unicef.org
[149] *Ibid.*

Firstly it is important to define what exactly is meant by the phrase 'the sexual exploitation and abuse of children.' A child is defined as any person under the age of eighteen.[150] Jane Warburton notes that commercial sexual exploitation is perhaps the most extreme form of sexual abuse.[151] She defines abuse as treatment which causes actual harm, or which places the child at risk of such harm. It includes both ill-treatment and failure to protect: acts of commission and omission.

Sexual abuse covers a range of activities, not just penetrative sex. One study defined it thus:

> Anyone under eighteen years of age is sexually abused when one or more older persons involves the child in any activity for the purpose of their own sexual arousal. This might involve intercourse, touching, exposure of sexual organs, showing pornographic material, or talking about sexual things in an erotic way.[152]

Abuse implies that an adult takes advantage of the power imbalance between child and adult in order to abuse the child. Child sexual abuse is not always synonymous with sexual violence: the abuser does not always use force but may manipulate, coerce and pressure the child to comply.[153] UNICEF defines child sexual abuse as the involvement in sexual activity of a child who is unable to give informed consent for lack of comprehension of the act and its implications, or for which the child is not developmentally prepared to give consent.[154]

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[150] Article 1 of the UNCRC. *Supra* note 3.
[151] Jane Warburton, *Prevention, Protection and Recovery of Children from Commercial Sexual Exploitation,* 2001; at web site http://www.focalpointngo.org
[152] *Secrets that Destroy: Five European Seminars on Child Sexual Abuse and Exploitation* (London: International Save the Children Alliance, 1999.)
[153] *Ibid.*
[154] At web site http://www.unicef.org/programme/cprotection

The phrase 'the commercial sexual exploitation of children' can be defined as the use of a child in sexual activities for remuneration or any other form of consideration. It involves the exploitation of children primarily for financial benefit or other economic profit, in either monetary form or in kind (*e.g.*, food, shelter, and drugs.) The 1996 *Stockholm Declaration against Commercial Sexual Exploitation of Children* defined it thus:

> The commercial sexual exploitation of children is a fundamental violation of children's rights. It comprises sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and violence against children, and amounts to forced labour and a contemporary form of slavery.[155]

K. J. Herrmann states that sexual exploitation is the use of children to meet the sexual needs of adults, without regard for the children's emotional and physical needs. When funds, services, or both are used as payment for this exploitation, whether made either directly to children or indirectly to adults, the practice becomes commercial exploitation of children. Sexual exploitation could occur in the form of child pornography, child prostitution, and child trafficking for sexual purposes: each is intrinsically connected to the others.[156]

The sexual exploitation of children is an international issue. The protection of children is a human rights concern, which brings the international community to the scene. Also, the greater accessibility to children in certain countries because of

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[155] *Supra* note 76.
[156] K.J. Herrmann, "An International Strategy for Intervention into the Commercial Sexual Exploitation of Children", 32.6 (1987) International Journal of Social Work, 523.

abandonment or parental poverty encourages exploiters to cross state borders in order to obtain a supply of these children. By crossing borders, it becomes an international crime, as now two states are involved: the 'sending' country and the 'receiving' country. Thus there are many players involved in this problem.

As highlighted in chapter one, the *Declaration and Agenda for Action of the First World Congress against the Commercial Sexual Exploitation of Children*[157] made it clear that this problem covers many spheres: economic, political, social and legal factors. It needs to be addressed through a wide range of measures at local, national and international levels. Julia O'Connell Davidson writes that those who sexually exploit children do so in a range of different social contexts, for a variety of reasons, and cannot be distinguished by any specific inner quality or personality trait. Their only common characteristic is the fact that they engage in forms of action that constitute child sexual exploitation.[158]

The Oxford English Dictionary defines the term 'exploit' as 'to use or develop fully, especially for profit or advantage ... to take unfair advantage of for financial or other gain'.[159] In the child sex trade the exploiter has an unfair advantage over the exploited, due to the imbalance of social, political, economic, physical, psychological or emotional power between them.[160] Sex exploiters can thus be defined as those who take unfair advantage of some imbalance of power between themselves and a person under the age of eighteen in order to sexually use them for either profit or personal pleasure.

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[157] *Supra* note 76.
[158] Julia O'Connell Davidson, *The Sex Exploiter*, 2001; at web site http://www.focalpointngo.org/yokohama
[159] Helen Liebeck and Elaine Pollard (eds.), *The Oxford English Dictionary* (Oxford: Oxford University Press, 1995, 4th ed.), p. 180.

Because the perpetrator invariably takes advantage of an imbalance of power between himself and the child, there is a clear lack of consent to the sexual act. This sexual exploitation includes interaction between a child and an adult which takes place for the sexual gratification of the adult. However, the term 'sex exploiter' further extends to cover third parties who have no actual sexual contact with children, but profit from facilitating or orchestrating children's sexual contact with another person.[161] Sometimes sexual exploitation may include extreme forms of sexual violence. The exploiter may derive sexual pleasure from performing sadistic acts including torture and murder, or he may seek to profit from the production of pornographic videos of such violence.[162]

The child sex trade can be divided into the formal sector and the informal sector. Within the formal sex industry, sex is sold as if it were a commodity like any other. Here, the exploiter enters into narrow and explicit contracts, with monetary consideration. In the informal sector, the exploiter and exploited often enter into more loosely specified exchanges, within which the exploited may provide a range of services (*e.g.*, perform sexual acts, pose for pornographic photos, clean, cook, shop, converse, etc.,) in exchange for a range of benefits (*e.g.*, a meal, gifts of jewellery or clothing, a place to live, etc.)[163]

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[160] O'Connell Davidson, *supra* note 158.
[161] International Labour Organisation, *Child Labour: Targeting the Intolerable* (Geneva: ILO, 1996.)
[162] *Ibid.*
[163] B. Svensson, *Victims and Perpetrators: On Sexual Abuse and Treatment* (Stockholm: Save the Children Sweden, 2000), p. 48.

2.1 The Child Sex Trade in Canada

Research surveys and working groups in Canada have come up with varying definitions of prostitution. Some surveys define prostitution narrowly as the exchange of sex for money. Others adopt a broader view to include the exchange of sex for any material goods, including food, shelter, or the inclusion in social events.[164] At the National Meeting of Justice and Child Welfare Officials on Children and Youth Involved in Prostitution, it was defined as "the exchange of sexual favours for money or any other material goods, devoid of any emotional attachment."[165] *Statistics Canada* has a wide definition of what amounts to a prostitution-related offence. Such offences include:

> ... a keeper of a bawdy house; someone who is an inmate, found in, or an owner of a bawdy house; someone who is in transport to a bawdy house; someone who is living off of the avails of prostitution of a youth under the age of eighteen years; a parent/ guardian who is procuring sexual activity from a youth under the age of fourteen; a parent/ guardian who is procuring sexual activity from a youth between the ages of fourteen and eighteen; a household owner who permits sexual activity of a youth under the age of fourteen; a household owner who permits sexual activity of youth between the ages of fourteen and eighteen; someone who is procuring, soliciting or enticing illicit sex; someone who communicates for the purpose of sexual activity of a youth under the age of eighteen years; and someone who stops motor vehicles, impedes traffic or people for the purpose of prostitution.[166]

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[164] S. Sturdy, *Prostitution in Canada* At web site http://www.web.mala.bc.ca/crim/Student/Sturdy

[165] Children and Youth Involved in Prostitution: A National Meeting of Justice and Child Welfare Officials (Ottawa: Department of Justice Canada, 2000), chapter 5, p. 2.

[166] Statistics Canada, *Matrix 2199: Youths Charged by Actual Offences, Canada, Provinces, and Territories: Annual Report* (Ottawa: Government of Canada, 1998.)

Getting involved in the sex trade leaves many psychological and physical scars for juvenile prostitutes.[167] Many of them use drugs to blunt their senses and to cope with the nature of their work. Other hazards of the trade include sexually transmitted diseases such as HIV/AIDS, poor nutrition, and having to face violence and beatings from pimps and customers. Young prostitutes also discover that they are often viewed as criminals rather than victims.[168]

2.1.1 Characteristics of Children: Male, Female, Transgendered

A study conducted in Ottawa in 1998 indicated that youth enter prostitution due to a combination of psycho-social and socio-economic factors, including histories of sexual abuse and poor income. These youth are a high-risk group not only due to their sexual practices, but also as a result of their exposure to drugs and violence while on the street.[169] The report suggests that there is a developmental pattern that is typical of youth involved in prostitution: a history of family dysfunction, substance abuse, violence and sexual abuse, which leads youth to run away from home and live on the streets. Street youth who turn to prostitution do so as a means of support while on the streets. The study also found that life-style patterns varied according to the culture of the youth in question. Many of the street youth in Saskatoon identify themselves as Aboriginal, whereas in Ottawa most of them identified themselves as Caucasian. It was

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[167] R. Gemme, N. Payment and L. Malenfant, *Street Prostitution: Assessing the Impact of the Law* (Ottawa: Department of Justice Canada, 1989.)
[168] *Ibid.*
[169] Federal/Provincial/Territorial Working Group on Prostitution, *Report and Recommendations in Respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities* (Ottawa: Department of Justice Canada, 1998), p. 13.

discovered that Aboriginal youth are less likely than Caucasian youth to cut ties with their families after entering street life.[170]

A survey conducted in Canada found that the criminal activity that youth could be involved in increases the longer they stay on the streets. This includes drug use, theft and prostitution. Homeless and runaway youth sometimes exchange sexual services for food, lodging or gifts. Interestingly, the survey also highlights that 'sex for survival' seems to be more of a factor for females than males. When males run away from home, they are often able to stay at the home of an acquaintance for a while, whereas females are frequently forced to trade sex for food, shelter and money.[171] Poverty is a key factor in motivating street children to enter prostitution.

While many young prostitutes are those who are runaways or homeless, there are also those who engage in prostitution even though they live at home. Some of these young prostitutes do not work on the streets; rather, they work at indoor venues such as escort agencies, massage parlours or brothels. Many youth who become involved in prostitution had a history of childhood sexual abuse. A 1984 survey of prostitutes in Montreal found that forty-five per cent had been victims of incest before entering the sex trade.[172]

When analysing the characteristics of those who enter the child sex trade, it is often difficult to determine the age at which youth enter prostitution. Some start

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[170] *Ibid.*
[171] Youth Services Bureau, *Ottawa Street Prostitutes: A Survey* (Ottawa: Department of Justice Canada, 1991.)
[172] Chris Badgley and Loretta Young, "Juvenile Prostitution and Child Sexual Abuse: A Controlled Study." 6.1 (1987) Canadian Journal of Community Mental Health.

prostituting even at the age of six years. In Canada the average age of entry into prostitution is estimated between fourteen and 15.5 years. A survey of street prostitutes in Montreal noted that one-third of the seventy-five prostitutes interviewed had entered the sex trade before the age of eighteen.[173]

One of the difficulties encountered when attempting to develop a profile of youth involved in prostitution is that it is almost impossible to determine the number of youth who are involved in the sex trade. One reason for this relates to the different ages that are used when referring to youth involved in prostitution. The Badgley Committee defined juvenile prostitutes as those under twenty years.[174] The Fraser Committee defined it as those under eighteen years.[175] This lack of consensus makes it difficult to determine exactly who falls into the category of juvenile prostitutes. The *Criminal Code of Canada* views juvenile prostitutes as those under eighteen years. Section 212(4) seeks to protect them from sexual exploitation:

> Every person who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.[176]

Certain surveys attempt to estimate youth involvement in prostitution by considering how many of them have been arrested under Section 213 of the *Canadian*

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[173] *Ibid.*
[174] Committee on Sexual Offences Against Children and Youth, *Sexual Offences Against Children* (Ottawa: Department of Supply and Services Canada, 1984.)
[175] John Lowman and Laura Fraser, *Street Prostitution: Assessing the Impact of the Law* (Ottawa: Department of Supply and Services Canada, 1989.)
[176] At web site http://www.canada.justice.gc.ca

Criminal Code, which refers to communicating for the purpose of prostitution. Section 213(1) says:

> Every person who in a public place or in any place open to public view:
> (a) stops or attempts to stop any motor vehicle,
> (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
> (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
> for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable by summary conviction.[177]

Between the years 1986 and 1990, ten to fifteen per cent of prostitutes arrested under Section 213 of the *Criminal Code* were under eighteen years old.[178] Thus the Federal/ Provincial/ Territorial Working Group on Prostitution estimates that roughly the same percentage of prostitutes on the streets are youth.[179] A survey of seventy-five youth prostitutes conducted in Victoria, British Columbia found that seventy-seven per cent of the seventy-five youth interviewed revealed that they had been picked up by the police at some point in their lives. Of those that had been picked up, most were either simply taken home (forty-seven per cent), lectured about the dangers of the sex trade (forty-three per cent), or taken to a shelter, social worker or a clinic. Only fifteen per cent of these seventy-five youth reported being arrested under Section 213 of the *Criminal Code*.[180] These results reflect that the police in Canada are more likely to

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[177] *Ibid.*
[178] Federal/Provincial/Territorial Working Group on Prostitution, *supra* note 169, p. 16.
[179] *Ibid.*
[180] Research Subgroup of the Committee for Sexually Exploited Youth in the CRD, *A Consultation with 75 Sexually Exploited Youth in the Capital Regional District (CRD) of British Columbia* (Province of British Columbia: Ministry of Social Services, 1997.)

view youth prostitutes as victims rather than as offenders, and would try other methods rather than arrest to get them off the streets.

Another point which emerged from the Working Group Report is that when people refer to youth involved in prostitution, they usually mean the prostitutes themselves. However, it should be noted that youth under eighteen years are also involved in other aspects of prostitution. Sometimes they become involved in recruiting and pimping other youth, although the general idea of a pimp is someone who is older and more controlling.[181] When developing a profile of the juvenile prostitute, it is vital to understand why they enter and remain in the sex trade. I will analyse this below under three areas: females, males and transgendered individuals.

In Canada the average age for female youth to become involved in prostitution is between fourteen and seventeen years.[182] However, this varies according to geographical location, as the average age in the west is lower than in the east. The report of the National Meeting of Justice and Child Welfare Officials also noted that in Canada seventy to eighty per cent of women who work as prostitutes enter the trade before eighteen years. Many juvenile female prostitutes enter the trade because they have dropped out of school and do not have any skills to engage in any other type of work. Thus they turn to prostitution due to economic need.[183]

Whether living at home or on the street, most female youth involved in prostitution are attached to an adult who acts as their pimp and who takes a portion of

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[181] Federal/Provincial/Territorial Working Group on Prostitution, *supra* note 169, p. 17.
[182] Children and Youth Involved in Prostitution, *supra* note 165, chapter 5, p. 4.
[183] The Alliance of Five Research Centres on Violence, *Violence Prevention and the Girl Child: Final Report* (Ottawa: Department of Justice, 1999), p. 8.

their earnings. Pimps often use the fact that many of these girls are addicted to drugs as a method of controlling them. By supplying them with the drugs they crave, they keep the girls dependent on them. Young female prostitutes are much more likely than the average woman to face violence or be murdered, most often by their pimp or a john. They also have a higher likelihood of their murders going unsolved compared to average women.[184]

With regard to male prostitution, at the National Meeting of Justice and Child Welfare Officials, it was reported that much less research is conducted in the area of male prostitution in comparison to female prostitution.[185] The primary focus of both research and police action has been on female youth. A survey of prostitutes found on average that the age of males entering the trade was 15.6 years, which is a year younger than females.[186] There are various opinions as to why males enter prostitution. The most common opinion is that males become involved in prostitution as part of their 'coming out' as homosexuals.[187] However in a recent study, many young males reported that they turned to this life when they informed their parents of their sexual orientation and were immediately thrown out of their homes. Having no place to go and no income to depend on, they turned to prostitution as a means of supporting themselves. Just like females, childhood sexual abuse is often a factor for males entering the sex trade. Eleven per cent of the homeless male youth interviewed in this

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[184] *Ibid.*
[185] Children and Youth Involved in Prostitution, *supra* note 165, chapter 5, p. 2.
[186] Lowman and Fraser, *supra* note 175.
[187] T. Caputo, R. Weiler and K. Kelly, *The Runaways and Street Youth Project: The Ottawa Case Study and the Saskatoon Case Study.* (Ottawa: Ministry of Supply and Services Canada, 1994.)

study reported that they left home because of parental abuse. Seven per cent reported that they had been kicked out of their homes.[188] Like female prostitutes, male prostitutes become involved in escort agencies. One difference between male and female prostitutes is that the majority of male prostitutes work on their own and are not associated with a pimp. Thus they escape a lot of the pimp-induced violence experienced by females. However, they are often subjected to hate-motivated violence based on their sexual orientation, known as 'gay bashing.'[189]

Transgendered individuals can be described as those who exhibit cross-gender, *i.e.*, bi-sexual behaviour, feelings and identity. Many of these youth are rejected by their families or are the victims of hate crimes, rape, persecution and discrimination in employment and housing. They are ostracised by society because of their appearances and lifestyles. Thus often due to loss of support and income, transgendered individuals drift towards life on the street, with prostitution becoming one of the few means for them to support themselves.[190] Transgendered individuals often come from backgrounds of parental abuse and leave home in adolescence. The majority get involved in prostitution, theft and drugs to survive on the street.[191]

At the National Meeting of Justice and Welfare Officials, it was noted that almost all the research that Canada depends on concerning transgendered youth comes from the United States. Very little information exists on transgendered youth involved in prostitution in Canada. Statistics Canada does not specifically collect data on youth

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[188] *Ibid.*
[189] The Alliance of Five Research Centres on Violence, *supra* note 183, p. 8.
[190] C. Beatty, *Transgendered Sex Workers: Interim Report of the San Francisco Task Force on Prostitution* (Los Angeles: Amazon Press, 1993), p. 2.
[191] *Ibid.*

charged with prostitution who are transgendered.[192] One recent American study noted that transgendered youth involved in prostitution had higher rates of self-injury (suicide and mutilation of their genitals), higher rates of substance abuse (alcohol, cocaine and heroin), higher incidence of HIV/AIDS, and a higher occurrence of violence than average prostitutes.[193] Most of the violence faced by transgendered youth is not reported due to shame and social stigma. All prostitutes have a fear of reaching out for help, but this is more so among those who are transgendered.

2.1.2 Characteristics of Offenders

Now that we have examined the character traits of juvenile prostitutes who are victims of the sex trade, let us consider the offenders. The majority of offenders are male. The National Meeting of Justice and Welfare Officials defined offenders as:

1. Clients/ customers who pay for sex ('johns').
2. Those who live off the avails of prostitution: pimps, madams (women owners of brothels and bawdy houses), massage parlour owners and managers, and escort agency owners and managers.
3. 'Big sisters': those already involved in prostitution who influence younger children to join the trade.[194]

A recent survey in Canada revealed that today male clients seek increasingly younger children, some as young as eleven years.[195] 'Customers' include schoolboys,

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[192] Children and Youth Involved in Prostitution, *supra* note 165, chapter 5, p. 6.
[193] Beatty, *supra* note 190, p. 1-4.

grandfathers, police officers, lawyers, politicians, civil servants, businessmen and labourers. Many of these men are married, and some are in their seventies. There are many programs in Canada that endeavour to help rehabilitate sex offenders. One of these is 'john schools' where offenders are required to attend programs to educate them about the detrimental effects of their behaviour.[196] Another program which is controversial but is still used in Canada, is the 'shame the johns' campaign where offenders' anonymity is removed and their identity is publicised.[197]

Pimps, another type of offender, are those who control and manage female prostitutes. They are usually males. They provide clients with a steady supply of female prostitutes. (As mentioned above, most male prostitutes operate on their own and do not have a pimp.) Very often, a pimp is a female prostitute's boyfriend. Pimps frequently beat the female prostitutes.[198] In Canada the recent trend has been for the police to target pimps and johns instead of the juvenile prostitutes themselves, in order to solve the problem of child prostitution.[199] They realise that the root cause of this problem is the men who purchase, or who recruit and control juvenile sex workers. They believe that if the demand is reduced, then the supply will decrease.

With regard to female offenders, very little research has been conducted in this area in Canada. One study claims that there have been no cases where a woman has been found offering to buy sexual services from children.[200] Similarly, there is a lack of

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[194] Children and Youth Involved in Prostitution, *supra* note 165, chapter 5, p. 7.
[195] *Ibid.*
[196] Elaborated and discussed further in Chapter Four of this thesis.
[197] *Ibid.*
[198] Sturdy, *supra* note 164.
[199] Lowman and Fraser, *supra* note 175.
[200] *Ibid.*

information on madams or other females involved in controlling or managing those engaged in prostitution.

2.1.3 Canadian Criminal Law

The Department of Justice Canada recently published a consultation paper entitled "Child Victims and the Criminal Justice System." In it they highlight the fact that in recent years, there has been a growing awareness of the scope and extent of child abuse and exploitation.[201] In 1984, the Committee on Sexual Offences Against Children and Youth (the Badgley Committee) released its report on the application of the *Criminal Code*[202] and the *Canada Evidence Act*.[203] They specifically noted "the special needs of children who, by reason of their age and level of maturity, need the care and guidance of others in order to develop into healthy, responsible adults."[204]

The Department of Justice consultation paper highlights the fact that the most severe and long-lasting damage to children caused by sexual abuse may involve psychological rather than observable physical injury. Thus the law should more effectively recognise emotional harm or severe psychological harm.[205] The problem here is that emotional harm resulting from sexual abuse is often difficult to prove, since its consequences may not become apparent until long after the crime occurred.

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[201] Department of Justice Canada, *Child Victims and the Criminal Justice System* (Ottawa: Department of Justice Canada, November 1999), p. 1.
[202] At web site http://www.canada.justice.gc.ca
[203] At web site http://www.laws.justice.gc/en
[204] *Sexual Offences Against Children* Report of the Committee on Sexual Offences against Children and Youth. Appointed by the Ministry of Justice and the Attorney General of Canada. (Ottawa: Canadian Government and Publishing Centre, 1984.)
[205] *Child Victims and the Criminal Justice System, supra* note 201, p. 7.

Canadian law has also sought to protect child victims by further strengthening the principles of sentencing. An example of this is Section 161 of the *Criminal Code*.[206] According to this section, the court is given the power to make an order of prohibition preventing an offender who has been found guilty of a sexual offence against a child from having contact with children, or being placed in a job where he would be in a position of trust or authority over children. This prohibition may last for life. This is a good measure, as its primary focus is the protection of children.

One way that the Canadian law has been improved is to increase sensitivity to child witnesses, to facilitate their testimony in criminal proceedings. At present when children testify in court, they are permitted to have support persons present.[207] They are also allowed to testify outside the courtroom, and in-camera evidence is an acceptable method of testimony in cases where the child is a witness. Further, an accused person is prohibited from cross-examining a child. The purpose of all these measures is so that the child will not be afraid or 'freeze' during proceedings. The Department of Justice Consultation Paper recognises the importance of these measures. It notes that because offences against children are often committed in private, and because there are seldom any witnesses other than the child, the outcome of many trials depend exclusively on the court's assessment of the child's credibility, and the ability of the child to provide as full and as accurate an account as possible.[208]

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[206] *Supra* note 202.
[207] Section 486(2.1) and Section 715.1 of the *Criminal Code of Canada,* at web site http://www.canada.justice.gc.ca
[208] *Child Victims and the Criminal Justice System supra* note 201, p. 14.

Subsection 486(2.1) of the *Criminal Code of Canada*[209] allows a complainant or any witness under eighteen years to testify from outside the courtroom or behind a screen, or utilise any other method that prevents him or her from seeing the accused. This prevents the child from being intimidated or adversely affected by the accused's presence in the courtroom during the testimony. When this is employed, the court can receive the most reliable evidence from the witness, as he or she will not be inhibited by external factors. Videotaped statements made by child witnesses are covered in Section 715.1 of the *Criminal Code*.[210] This method of testifying is less stressful for the child, and hence it would be more reliable as evidence.

There is room for improvement in this area. One limitation is the presumption that children under fourteen are not competent to testify. In each individual case, a *voir dire* must be held to determine whether the child is competent to testify. In 1984, the Badgley Committee called for change.[211] They said there should be no special rules on the legal competency of children to give evidence in court, and that their evidence should be received and considered in a similar manner to that of adults. They said the courts should recognise that every child is competent to testify in court and that the child's evidence is admissible.

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[209] *Supra* note 202.
[210] *Ibid.*

2.1.4 Canadian Provincial Law: The Example of Alberta

In February 1999, Alberta passed the *Protective Confinement of Children Involved in Prostitution Act.*[212] (*PCHIP* Act.) (I will explain later why it was declared unconstitutional and struck down in June 2000.) The *PCHIP* Act specifically concentrates on children in prostitution. Section 1(2) emphasises that the focus of the Act is on children in prostitution. It explains that "a child is in need of protection if the child is engaged in prostitution or attempting to engage in prostitution."[213] In contrast, other related legislation covers adult prostitutes or other child delinquents. This Act recognises that children are the victims, not the offenders. The pimps are considered the offenders.

Section 2(9) of the *PCHIP* Act[214] gives police or social workers the right to enter premises without a warrant and apprehend any child, if they have reasonable and probable grounds to believe that the child's life or safety is seriously and imminently endangered because the child is engaging or attempting to engage in prostitution. It also provides that children can be held in a protective confinement facility for seventy-two hours while being assessed. There is no provision in the Act which declares that each detained child should be notified of a right to counsel. While this measure is controversial, it has its pros as well as cons. One advantage is that the children are given an opportunity to think things through when they are off the streets in a safe place. The disadvantage is that when they are released, they have nowhere to go but back to their pimps. They are inevitably beaten for allowing themselves to be caught.

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[211] *Sexual Offences Against Children, supra* note 204.
[212] At web site http://www.walnet.org/csis/reports/ab-prostitutionact

The *PCHIP* Act was declared unconstitutional in June 2000. In the case of Her Majesty the Queen v. K.B and M.J[215] the Provincial Court of Alberta held that the *PCHIP* Act violated *Canadian Charter*[216] protected rights, such as the right to have an adequate judicial review process for apprehensions, detentions and warrantless searches. K.B and M.J, the applicants, both seventeen year old females, were apprehended by Calgary police officers under the provisions of the *PCHIP* Act. They were taken to a protective safe house and questioned about activities related to prostitution. They were detained there for two days, before appearing before the Provincial Court of Alberta. During this time, they were not offered the right to legal counsel. K.B and M.J brought this case before the Provincial Court of Alberta for a ruling that the *PCHIP* Act is *ultra vires* the province of Alberta and is also a violation of Sections 7, 8, 9, and 10 of the *Canadian Charter of Rights and Freedoms.*[217] (Hereinafter referred to as the '*Charter.*')

The Provincial Court of Alberta in this case held that the *PCHIP* Act violated Section 7 of the *Canadian Charter of Rights and Freedoms.* Section 7 of the *Charter* states "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[218] The court said that Section 7 of the *Charter* is violated because many children who are apprehended and confined under the Act are never provided the

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[213] *Ibid.*
[214] *Ibid.*
[215] 2000 ABPC 113.
[216] *Canadian Charter on Rights and Freedoms;* at web site http://canada.justice.gc.ca/Loireg/charte/const_en.html
[217] *Ibid.*
[218] *Ibid.*

opportunity to answer the allegations that are made against them. This has resulted in deprivation of liberty.[219]

The court also examined Section 2(11) of the Act. It makes provision for a police officer or a director who has reasonable or probable grounds to believe that a child may be found in a particular place or premises, to enter that place or those premises and search for the child without an order and by force if necessary. Under this section, a warrantless search can take place which is not subject to judicial review. The court considered this provision in light of the purpose of the *PCHIP* Act, set out in Section 1(2) of the Act, defining a child as being in need of protection if she is engaged in prostitution or attempting to engage in prostitution. In her analysis Jordan J states, "This definition is the foundation for all other provisions in the Act."[220] Such warrantless searches are authorised if the police officer or director believes that a child's life or safety is seriously and imminently endangered because the child is engaging in or is attempting to engage in prostitution. But after considering all this, the court still held that this provision violates Section 8 of the *Charter* because Section 8 declares, "Everyone has the right to be secure against unreasonable search or seizure."[221]

The court held that the Act also violates Section 9 of the *Charter*, which states, "Everyone has the right not to be arbitrarily detained or imprisoned."[222] The *PCHIP* Act is unconstitutional because children are subject to apprehension and confinement without the opportunity to have this action judicially scrutinised. The court also held

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[219] *Supra* note 215, paragraph 48.
[220] *Ibid.*, paragraph 76.

that the *PCHIP* Act violates Section 10(b) of the *Canadian Charter*,. which states "Everyone has the right on arrest or detention to retain and instruct counsel without delay, and to be informed of that right."[223] But the *PCHIP* Act does not mandate the right to counsel for a child who has been apprehended, detained, confined or subject to assessment, which is unconstitutional. For all these reasons, the court held that the *PCHIP* Act is *ultra vires* provincial powers and offends the *Canadian Charter*.

Even though the Act was struck down, the court did emphasise the importance of eliminating child prostitution. Jordan J explained:

> There are however, valid reasons for trying to eliminate prostitution in which children are involved which are not based on morality. Prostitution is a dangerous enterprise; female participants, whether children or adult, are subject to serious harm or even death at the hands of both pimps and johns. Alcoholism and drug addiction are widespread within the trade. The risk of sexually transmitted disease is so high as to be a significant public health risk.[224]

Whereas the *PCHIP* Act eventually failed on constitutional grounds, I will examine how two other provinces have enacted constitutional legislation to deal with children in need of protection which can be applied to child prostitutes. Manitoba has the *Child and Family Services Act*[225] and British Columbia has the *Secure Care Act*.[226] While the *PCHIP* Act specifically focuses on children in prostitution, these Acts are of a more general nature. Manitoba's *Child and Family Services Act* in Section 17 states "A child in need of protection is a child whose life, health or emotional well-being is

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[221] *Supra* note 216.
[222] *Ibid.*
[223] *Ibid.*
[224] *Supra* note 215.
[225] Continuing Consolidation of the Statutes of Manitoba. Vol. 2, Chapter 80.
[226] Bill No. 25 of 2000. Statutes of British Columbia, Chapter 28. (Victoria: Queen Printers for British Columbia, 2000.)

endangered."[227] This could include child prostitution, but it can only be implied. British Columbia's *Secure Care Act* in Section 2(1) states that its focus is:

> To provide, when other less intrusive means are unavailable or inadequate, a means of assessing and assisting children who have an emotional or behavioural condition that presents high risk of serious harm or injury to themselves and are unable or unwilling to take steps to reduce the risk ... these conditions may include severe substance misuse or addiction or the sexual exploitation of a child.[228]

The B.C Act specifically encompasses child prostitution.

Whereas the *PCHIP* Act does not provide for the child to be advised of the right to retain counsel, both the *Manitoba Child and Family Services Act*[229] and *the B.C Secure Care Act*[230] specifically incorporate this right. Such provincial statutes, though not as specific as the *PCHIP* Act regarding child prostitutes, can be used for this purpose as well.

Canada has various programs to help prostitutes get off the street, and turn their lives around. Some provide alternatives to a jail sentence. Prostitutes now have the option of attending a Prostitution Diversion Camp rather than going to court. Jane Ursel writes about what she discovered when she spent a few days at such a camp, with a group of prostitutes who were trying to change their way of life.[231] She says that all of them had very different experiences and backgrounds, but she was also struck by some common themes that ran through all their lives:

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[227] *Supra* note 225.
[228] *Supra* note 226.
[229] *Supra* note 225.
[230] *Supra* note 226.
[231] Jane Ursel, "Resolve Newsletter", 1.3 (Nov 1999), p. 6.

> All of them had been abused as children. Everyone had turned to prostitution, initially as a way to get control of their lives. They weren't looking to be victims ... they were looking to escape their victimization. The escape varied – to escape an abusive home, to escape painful memories, to escape the poverty that kept them dependent.[232]

Ursel goes on to say that the bitter irony was that the escape became the trap, the search to escape victimisation led to greater vulnerability, and the search for independence led to dependence: upon their pimp, the street and drugs.[233]

2.2 The Child Sex Trade in Asia

Child sex tourism has become a thriving business in Asia and many other parts of the world. Paedophiles from consumer nations go especially to Asia in search of child prostitutes. Others also do so, in the mistaken belief that if they have sex with young children, their chances of contracting sexually transmitted diseases are lessened or that their own sexually transmitted disease may be cured. The Children's Rights Organisation ECPAT (End Child Prostitution, Child Pornography and Trafficking for Sexual Purposes) estimates that there are approximately one million child prostitutes in Asia.[234] But there are no accurate statistics. Most countries where the child sex industry flourishes have laws that criminalise this offence, but the enforcement mechanisms are very weak.

Generally, there are four parties involved in the child sex trade: the perpetrator, vendor, facilitator and child. The perpetrator is most often a male who has a preference for sex with a child as opposed to sex with an adult. The vendor is the procurer or

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[232] *Ibid.*
[233] *Ibid.*

pimp. He is the person who contracts between the perpetrator and the child. It is he who keeps the lion's share of the profits and denies the child a fair proportion of the income earned. The facilitator is the person who originally introduces the child to the vendor. He is the recruiter, and in some instances could even be the parent of the child. Lastly, we have the child, who is the most affected of all the parties involved in the trade. According to Berkman, "children are dependent upon adults and the state for protection of their rights, but when such protection breaks down, they become easy targets for such exploitation."[235] Most child prostitutes in Asia enter the trade due to economic hardship. They take to the streets to support themselves or their families. Often they try to survive on the streets doing legitimate jobs, such as street vending, but take to prostitution when they cannot support themselves in these occupations. Other children have been sold by parents to pay off a debt or when they have other children to feed, and cannot provide for their family. At such times, they would welcome any income into their family, no matter how it was earned. Others take to the streets to escape abuse that may be occurring in their homes, as in Canada.

According to Berkman, Thailand has the world's highest number of child prostitutes.[236] A Thai child prostitute serves an average of three customers a day, six or seven days a week, every week of the year. This constant abuse has devastating effects on the children's psychological and physical health. The children live in constant fear of their pimps and their customers, afraid of the harm that could occur if they disobey orders. They are afraid of being beaten by the pimps, and they are afraid of any violent

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[234] Eric Thomas Berkman, "Responses to the International Child Sex Tourism Trade" (1996) Boston College International and Comparative Law Review.
[235] *Ibid.*

acts by their clients. They are afraid of being caught by the police. They have very low self-esteem and they are often depressed. They face constant hopelessness and have suicidal tendencies.

In other ways too, they face great danger. They are at very high risk of contracting sexually transmitted diseases such as HIV/AIDS. It has been estimated that to date about fifty per cent of underage exploited children have the AIDS virus.[237] They are also poorly fed and sheltered. When they do get ill, their pimps often do not bother to take them for medical treatment. In order to come to terms with their lifestyle, they often take drugs to cope with the horrors they face on a daily basis.[238]

Thailand, the Philippines and Sri Lanka are openly advertised in tourist magazines as places which have an abundance of child prostitutes. Perpetrators know that there is little risk of legal consequences. If they do get caught, it is a simple thing to bribe a police officer to drop the charges. In addition, there is a lack of political will to enforce existing laws. The governments in these poor countries are often more interested in the foreign income generated by these sex offenders, than in protecting children from prostitution.

For example in Thailand, the law states that brothel customers caught engaging in sex with a child under fifteen years of age are subject to prison for six years and a fine of 120,000 baht (4800 U.S dollars). If the prostitute is between fifteen and eighteen years old, then the penalty is three years in prison and 60,000 baht (2400 U.S

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[236] *Ibid.*
[237] Abigail Schmelz, *AIDS Fear Fuels Demand for Sex with Children.* (UN, Reuters North American Wire: 28 August 1996.)
[238] Berkman, *supra* note 234.

dollars).[239] In Sri Lanka, intercourse with a child is considered statutory rape, irrespective of whether the child has consented or not. Section 363(e) of the *Penal Code Amendment Act* of 1995 states, "A man is said to commit rape, who has sexual intercourse with a woman with or without her consent when she is under sixteen years of age."[240]

2.3 The Child Sex Trade in Thailand

Thailand has an estimated 200,000 to 800,000 child prostitutes.[241] The root causes of child prostitution in Thailand are poverty, few job opportunities, family disintegration and domestic violence. The family structure in Thai culture also contributes to the growing number of child prostitutes. Thai culture assumes that parents have 'ownership' rights over their children. Thus when parents get into debt or need money, they find a solution to their financial problems by selling their children into prostitution.

Children below sixteen years make up forty per cent of the total number of prostitutes in Thailand. Research has indicated that due to economic factors, parents have become accomplices in the sexual use of their children. In Thailand in 1989 sixty-three per cent of girls under sixteen were brought to prostitution by their own parents, twenty-one per cent were brought by neighbours or friends and sixteen per cent were

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[239] From the article, "Thailand Considers Targeting Clients of Child Sex Trade," Agence France Presse: 13 July 1994.
[240] *Penal Code (Amendment) Act* No. 22 of 1995 (Colombo: Government Publications Bureau.)
[241] Patricia D. Levan, "Curtailing Thailand's Child Prostitution Through an International Conscience," (1994) 9 American University Journal of International Law and Policy 869.

brought by agents.[242] Child prostitution has now become a 'way of life' in several rural Thai villages. Children are no longer only exploited to support themselves and their families: some villages depend on child prostitution to fill a 'common public fund' to finance village schools and equipment.

When brothel owners in Thailand recruit new children to work in their brothels, they focus on families in need of money, often advancing them a loan in exchange for their children.[243] ECPAT has discovered that the amount of money the brothel owners pay for the girls depends upon the age, virginity and beauty of the girls.[244] Sometimes, instead of receiving money in exchange for their children, parents receive material goods such as homes and land. At other times, children in Thailand are not sold into the trade by their parents, but rather they are lured into it by recruiters. Children who live in remote villages are promised marriage and jobs as entertainers and dancers, if they decide to leave their villages and go to the city with the recruiter. Once they are away from their homes and at the mercy of the recruiter, he forces them into prostitution.[245]

Prostitution flourished in Thailand and Taiwan in the 1960s, during the Vietnam War. In 1967, the U.S government and the Thai government signed a treaty which allowed U.S soldiers stationed in Vietnam to visit Thailand on 'Rest and Recreation' (R & R) leave. Prostitution thus became a very lucrative business as the U.S forces were able to pay far more than the women would have earned in any other job. After the war, Thailand had become so dependent on this income that the Thai government merged

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[242] *Ibid.*
[243] Vandana Rastogi, "Preserving Children's Rights: The Challenges of Eradicating Child Sexual Exploitation in Thailand and India" (1998) 22 Suffolk Transnational Law Review 259.
[244] ECPAT Country Reports; at web site http://www.rb.se/ecpat/country.htm
[245] Levan, *supra* note 241.

prostitution with tourism when creating the International Tourist Industry. Today tour operators subtly use the sex industry in their advertisements, enticing foreigners to visit Thailand.

Thus various types of tourists started flocking to Thailand, including those whose tastes extend to the young. In this manner, the child sex industry also began to develop. Today it is estimated that child prostitution brings in 1.8 to 2.2 billion U.S dollars to Thailand each year.[246] At present Thailand is facing an enormous problem with regard to the AIDS epidemic. Until 1988, the Thai government was reluctant to publicise the problem, for fear that it would hinder the tourist industry. But now with tourists from all over the world flocking to Thailand, the AIDS problem has developed into a global one.[247]

Thailand has many laws prohibiting child prostitution, but they suffer from weak enforcement. The *Prohibition of Prostitution Act*[248] prohibits all forms of prostitution in Thailand. The Act holds all parties involved in the trade criminally liable, but it contains an exemption for customers even if they are caught in the act of seducing a child. This is an alarming weakness in this particular law. The *Statutory Rape Law*[249] differs in that it holds customers liable as well. Sexual intercourse with a girl under the age of fifteen years is considered statutory rape, irrespective of whether she consents or not. A person found guilty of statutory rape is liable to be imprisoned for a term of seven to twenty years.

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[246] *Ibid.*
[247] *Ibid.*
[248] At web site http://www..asem.org/Documents/Thailand
[249] At web site http://www.thailandlaw.com

The *Entertainment Place Act* of 1966[250] deals with the rehabilitation of child prostitutes after their conviction. It states that after child prostitutes serve their term, they can enter a reform house for rehabilitation. Both Thai officials and child prostitutes consider the program ineffective, as they go back to their old lifestyle after completing the program.

To date, Thailand's best effort to eradicate child sexual exploitation has been the *Prostitution Prevention and Suppression (Amendment) Act* of 1996.[251] The Act expressly eliminates child sexual exploitation by placing child prostitutes under government custody. It also punishes offenders who exploit children under fifteen years by fining them 16,000 to 48,000 U.S dollars and two to six years imprisonment. However, the downside of the *Prostitution Prevention and Suppression (Amendment) Act* is that it has pushed child prostitution underground. The trade still flourishes, but it has become harder to reach the offenders. According to Kim Gooi, the consequences of this Act have been that brothels have started disguising themselves as coffee shops, restaurants, snack bars and karaoke bars.[252] Even if the government closes the brothels, the sex industry will continue elsewhere.

Patricia Levan writes that Thailand needs more permanent and long term remedies to deal with the problem of child prostitution.[253] In the past, the Thai government has launched periodic and isolated campaigns to end child prostitution. She emphasises that instead of these sporadic crackdowns, the Thai government must

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[250] At web site http://www.sexwork.com/Thailand/legal
[251] At web site http://www.asem.org/documents/Thailand/ChildrensRights
[252] Kim Gooi, "Thailand's Sex Industry Booms with the Economy" Deutsche Presse-Agentur, 17 December 1996.
[253] Levan, *supra* note 241, paragraph 908.

do more to guarantee consistent and forceful application of these laws. Levan highlights the fact that in Thailand, law enforcement officials are poorly paid for their work, and therefore they are wide open to the temptation of accepting bribes.[254] She suggests that monetary incentives may provide a way to neutralise the effects of bribes, so that the police can do their work properly. Thus any realistic solution to this problem must include a budget large enough to enable the government to pay law enforcement officials reasonable salaries.

One of Thailand's foremost problems in solving the problem of child prostitution is the lack of funds to invest in enforcement mechanisms. Japan recently donated 34,000 U.S dollars to help fight child prostitution in Thailand.[255] Other countries should follow suit as the impacts of this problem are global. They owe a duty to their own citizens, due to the transnational aspects of child prostitution. For example, foreign participants in Thailand's sex trade could lead to an international AIDS epidemic.

Yet another solution to the problem of child prostitution is to go to the heart of the matter and examine why parents sell their children into this trade. As discussed above, the main motivation is money, because poverty drives them into prostitution. So if the government is able to provide jobs in rural areas, families will have a steady income, and they won't feel the need to sell their children into prostitution to obtain the money needed for the family to survive. Yet another thing the Thai government can do is provide scholarships for children, so that they can then obtain an education.

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[254] *Ibid.*, paragraph 909.
[255] *Ibid.*

Gooi writes that Thailand has already taken a step in the right direction with the "Women of Tomorrow" project, which gives girls training and jobs in order to make them marketable in the employment arena.[256] The project teaches girls the necessary skills for textiles, gem cutting, and nursing assistantships, which allow them to earn up to 200 U.S dollars a month. This type of project is an excellent means of eradicating child prostitution, because these programs provide children with numerous opportunities and alternatives to engage in different trades. Most importantly, it helps them to take control of their lives.

2.4 The Child Sex Trade in Sri Lanka

Child prostitution thrives on tourism in Sri Lanka. The unrestricted growth of tourism tends to encourage the prostitution of children in certain sections of society. One official estimate calculates that at present Sri Lanka has 30,000 child prostitutes.[257] The number is the third highest in the world, after Thailand and the Philippines. As noted earlier, child prostitutes are highly sought after as sexual partners for paedophiles and in the mistaken belief that the risk of contracting sexually transmitted diseases is minimal. An article in a Belgian magazine describes Sri Lanka as a "privileged destination for lovers of young boys."[258] It says that unlike Thailand and Philippines, there are no bars or red light areas in Sri Lanka, but a well organised network. Paedophiles come to Sri Lanka knowing that they face little risk of being caught and a small penalty if they are. Desmond Fernando, P.C., stated in 1994 that:

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[256] Gooi, *supra* note 252.
[257] Seneviratne, *An Evil under the Sun, supra* note 146, p. 83.

> Exploiting our children for the purpose of sex is one of the major problems associated with tourism. We should be more alive to the fact that Sri Lanka is advertised as a paradise for those whose sexual tastes extend to young children. It is very rare that someone is caught and brought to book. The punishment for this crime should be a deterrent to prevent other tourists from coming here and indulging in the same activity.[259]

Another reason why child abuse is still rampant is because victims do not know how to remedy their situation. There is a lack of awareness as to how to overcome the problem. Thus due to ignorance of redress, many cases go unreported. Awareness could be created through the media and special programs conducted in areas where paedophiles generally operate. I now turn to the legal situation with respect to child sexual exploitation in Sri Lanka.

2.4.1 Constitutional Law and the Convention on the Rights of the Child

The 1978 Constitution of Sri Lanka envisages the child as a person entitled to civic rights and the right to share in the resources of the community. In the *Directive Principles of State Policy* contained in the Constitution, Article 27(13) declares:

> The State shall promote with special care the interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination.[260]

Thus the Constitution gives the child, like the adult, important fundamental rights in respect of equality before the law, gender equality, freedom from torture and degrading treatment, freedom of speech, conscience and religion, as well as cultural rights.

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[258] "Spartacus" Magazine – The International Gay Guide, 1995/96 (24th Edition). Highlighted in a report by Tim Bond, *Boy Prostitution in Sri Lanka* (Lausanne: Terres Des Hommes, 1980)
[259] Seneviratne, *An Evil under the Sun, supra* note 146, p. 104.

In 1991 when Sri Lanka ratified and accepted commitments under *the United Nations Convention on the Rights of the Child (UNCRC)*,[261] it provided laws and policies that recognise these rights. In the following year Sri Lanka drafted the *Children's Charter* which sets out to ensure the protection of these rights. The preamble of the *Children's Charter* declares:

> Whereas it is internationally accepted that the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before and after birth; and whereas Sri Lanka has ratified and accepted commitments under the *United Nations Convention on the Rights of the Child*; shall therefore provide for laws and policies that recognise these rights.[262]

The *Children's Charter* incorporates the standards of the *UNCRC*[263] into the Sri Lankan context. However, the charter is not a legal instrument. It stands only as a policy guideline on children's rights. But the jurisdiction of the charter has been used to set up a committee of experts entrusted with the task of monitoring the implementation of its policies on children's rights.

Thus Sri Lanka has joined 192 other countries in committing themselves to ensure that all children have the right to develop physically and mentally to their full potential, to express their opinions freely, and to be protected against all forms of abuse and exploitation. Even though Sri Lanka has ratified the *UNCRC*[264] and issued a statement of rights, this does not mean that the problem of child abuse in Sri Lanka has

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[260] *Supra* note 94.
[261] *Supra* note 3.
[262] The *Children's Charter* came into force in 1991 (Colombo: Government Publications Bureau, 1991.)
[263] *Supra* note 3.
[264] *Ibid.*

in any way been solved.[265] Statements are not enough. If rights are recognised, then they must be enforceable, and enforcement has turned out to be very difficult in the area of children's rights.

2.4.2 Statutory Framework

In Sri Lanka the reason why child abuse is rampant is not due to lack of legislation. The laws are there but the problem lies in the fact that they are not being enforced. This is the main reform that needs to take place in order to solve the problem. Speaking on enforcing the law in the area of child abuse, Savitri Goonesekere says:

> Though Sri Lanka has ratified most U.N. Conventions in this area and there have been legislative concerns and recent constitutional guarantees for protecting children, these operate as mere policy statements due to the absence of an adequate machinery for law enforcement. Although there is legislation regarding the exploitation of children, such legislation has proved ineffective to touch the problem even marginally.[266]

The *Children and Young Persons Ordinance*[267] and the *Penal Code (Amendment) Act*[268] are major elements in the statutory framework for dealing with child abuse in Sri Lanka. The *Children and Young Persons Ordinance* covers both child victims and child offenders, while the *Penal Code* lists a series of offences, the punishment of which are supposed to serve as a deterrent to the exploitation of children. The *Penal Code (Amendment)* is a great improvement in comparison to the Principal

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[265] Various forms of child abuse are referred in the *Penal Code* of Sri Lanka. Among them are child pornography (Section 286A), cruelty to children (Section 308A), trafficking of children (Section 360A), the sexual exploitation of children (Section 360B) and incest (Section 364A).
[266] Keynote address at the *Child Prostitution Symposium*, July 1992. The speech appears on page 18 of the Symposium Report published by *PEACE* and the Department of Probation and Child Care Services.
[267] Act No. 48 of 1939 (Colombo: Government Publications Bureau.)
[268] *Supra* note 240.

Enactment of the *Penal Code*, because it includes special provisions for the protection of children from abuse. The sections deal with cruelty to children, sexual exploitation of children, trafficking and sale of children for sexual purposes, protection against obscene publications and incest.[269]

A child's right of growth and his right to be protected by the family and the state against adult exploitation is clearly violated by child prostitution. Article 34 of the *UNCRC* seeks to protect the child from all forms of sexual exploitation and abuse, including prostitution and pornography. It declares:

> State parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, state parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
> (a) The inducement or co-ercion 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.[270]

Many of the statutory provisions in Sri Lanka that govern the protection and welfare of children continue to be obsolete. But thanks to Article 34 of the *UNCRC* and the strenuous lobbying by activists, the *Penal Code* was amended in 1995 and some of the offences regarding child sexual exploitation were modified and elaborated. Section 360(B)(1)(d) and (f) declares:

> Whoever takes advantage of his influence over, or his relationship to a child to procure such child for sexual intercourse or any form of sexual abuse, and whoever gives monetary consideration to a child with intent to procure such child for sexual intercourse or any form of sexual abuse,

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[269] *Ibid.*
[270] *Supra* note 3.

> commits the offence of sexual exploitation of children and shall on conviction be punished with imprisonment for a term not less than five years and not exceeding twenty years, and may also be punished with a fine.[271]

Sections 360(A) and (C) specifies the offences of trafficking and sale of child prostitutes for sexual purposes. Section 360(A)(2) states:

> Whoever procures or attempts to procure any person under sixteen years of age to leave Sri Lanka (whether with or without the consent of that person) with a view for illicit sexual intercourse with any person outside Sri Lanka; or removes or attempts to remove from Sri Lanka any such person for the said purpose; commits the offence of procuration and shall on conviction be punished with imprisonment for a term not less than two years and not exceeding ten years and may also be punished with a fine.[272]

Section 360(C)(1)(a) declares:

> Whoever engages in the act of buying or selling or bartering of any person for money or for any other consideration, commits the offence of trafficking; and shall on conviction be punished with imprisonment for a term not less than two years and not exceeding twenty years, and may also be punished with a fine. Where such offence is committed in respect of a child, he shall be punished with imprisonment for a term not less than five years and not exceeding twenty years, and may also be punished with a fine.[273]

Thus Sri Lanka's *Penal Code Amendment*[274] now provides more severe penalties for offences concerning children. The *Penal Code Amendment* has modified many existing provisions. For example, the provisions regarding the offence of rape have been widened. Regarding the punishment for rape, Section 13 of the Amendment repeals Section 364 of the Principal Enactment and declares that the jail sentence for

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[271] *Supra* note 240.
[272] *Ibid.*

rape should be at least seven years. This is the first time a minimum sentence has been imposed for rape in Sri Lanka's criminal law. The Amendment also lists new acts which constitute offences, such as incest and sexual abuse.

In addition to the conviction of the offender, Section 13 of the *Penal Code Amendment* includes a provision whereby the offender can be ordered to pay compensation to the victim. This is the first instance in which the criminal law of Sri Lanka has ordered compensation to the victim. In the recent highly publicised Baumann case[275] which was tried in Geneva, the court convicted the accused of sexual offences he committed in Sri Lanka. But they also held that the victim should be awarded compensation. This case recognises the social aspects intertwined in cases of child abuse.

Arun Tampoe, an eminent lawyer who works closely with PEACE (Protecting the Environment and Children Everywhere) and ECPAT (End Child Prostitution, Child Pornography and Trafficking for Sexual Purposes), believes that the present laws are adequate to combat paedophilia in Sri Lanka.[276] According to him, the biggest problem at present is weak law enforcement.

2.4.3 The Courts and Enforcement

To combat child sex tourism in Sri Lanka, it is important that convicted tourists are deported to prevent further offences from being committed. The existing provisions

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[273] *Ibid.*
[274] *Ibid.*
[275] At web site http://www.ibrc.org/tribunal_processor
[276] Arun Tampoe, "Reform of the Sri Lankan Legal System and the Laws Relating to Children." 29.6 (1995) *Social Justice*, p. 19.

of the *Immigrants and Emigrants Act*[277] to deport foreigners from Sri Lanka and to declare a particular foreigner a prohibited visitor; should be utilised to combat child prostitution. In reality, deportations are rarely carried out. It is of vital importance that these sex offenders should be blacklisted, so that re-entry into Sri Lanka is banned. Steps should also be taken to make it illegal for any tourist to entertain or employ any child inside the premises of a hotel, guest house or house rented by him.

With regard to the role of the Magistrate's Courts in cases of child abuse, it is vital that the attitudes of the judges to this type of case must change. Judges often do not consider the gravity of the offence of child abuse. By their lax attitudes, they send a clear message to child sex offenders that they can get away with these crimes. In 1994 a French national was convicted of unnatural offences. It was shocking to discover that the magistrate imposed only a fine of Rs.1,500 and a two year suspended jail sentence on him. In this particular case, the accused was a self-confessed paedophile and should have received a sentence of approximately ten years.[278] Further, it seems pointless to impose suspended sentences on foreigners, because of the likelihood that they will leave the country after a trial. There is no way a record can be maintained of all the offences they commit in other countries. In most other cases, the defendants are acquitted if their lawyers find a loophole in the law, which is quite often the case.

In the 1986 case of Piyasena v. The Attorney General,[279] a young girl was gang-raped by four men repeatedly over a period of days. The men were found guilty of the crime. The court gave each of them a very lenient reduced sentence of two years

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[277] Act No. 18 of 1982 (Colombo: Government Publications Bureau.)
[278] [1994] 2 Sri Lanka Reports (SLR) 86.

because of the fact that they were first time offenders. At that time, Section 364 of the *Penal Code* stated that for the offence of rape the minimum sentence is two years and the maximum sentence is ten years.[280] Thus the court could have given a much stiffer penalty. When judges give this type of sentence to the offenders, once again justice is denied. Offences of this nature deserve severe punishment aimed at deterring the offender and others.

The 1995 *Amendment to the Penal Code* rectified this problem of sentencing with regard to rape. Section 364 now reads:

> Whoever commits rape shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with a fine, and shall in addition be ordered to pay compensation of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to such person.[281]

In January 1997, a Sri Lankan court sentenced a Swiss citizen and known paedophile, Armin Heinrich Pfaffhauser, to two years in prison on charges of committing an unnatural offence for having sex with two boys.[282] The case marked the first time a foreign national was convicted for sexually abusing children in Sri Lanka. Unfortunately the case commenced before the 1995 Amendment to Sri Lanka's *Penal Code* came into effect. Under the Amendment, all pimps and their clients face a minimum of ten years in jail for the sexual exploitation of children.[283] (The punishment

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[279] [1986] 2 SLR 388.
[280] *Supra* note 142.
[281] *Supra* note 240.
[282] [1997] 1 SLR 213.
[283] Section 19 of the 1995 *Amendment to the Penal Code*. *Supra* note 240.

was then a mere two year jail sentence.) The *Penal Code Amendment* also raised the minimum age of sexual consent to eighteen years for boys and sixteen years for girls.[284]

The courts should be an important forum for the protection of children at risk and a potential resource for all children who seek to enforce their rights. Unfortunately in Sri Lanka, the courts have a tendency to impose lenient sentences in cases of child abuse, as seen in the judgment cited above. To combat this, the 1995 *Amendment to the Penal Code*[285] set out mandatory minimum punishments for certain offences. By this judicial discretion has been restricted, to prevent judges from giving sentences that are too lenient. Judges should be sympathetic to the victims. The law must lean towards the side of the child. These children are already victims and should not be further traumatised by coming up before an unsympathetic bench.

2.4.4 Problems of Proof and Evidence

Another problem which needs to be remedied is the fact that it is often difficult to obtain proof in cases of paedophilia. Even the victim is usually unwilling to give evidence. It is very difficult to bring offenders to book unless the child co-operates. The whole experience is traumatic for children and measures should be taken to record the child's evidence in private. Unfortunately Sri Lanka's criminal procedure law does not provide for children's evidence to be recorded *in camera*.

In certain cases, a conviction cannot be passed on the evidence of a child alone. It has to be corroborated by evidence from other witnesses to the crime. (Most often in

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[284] *Ibid.*
[285] *Ibid.*

reality, this is impossible as child abuse offences are committed covertly). The *Evidence Ordinance*[286] does not adequately provide comprehensive provisions where children are concerned. The *Evidence Ordinance* is now almost a hundred years old and the laws are antiquated. The relevant provisions need to be reformed, in order to ensure justice. Children's evidence should be given more weight in court.

Trafficking and sale of children for sexual purposes is addressed in Article 35 of the UNCRC which declares:

> State parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.[287]

In the Sri Lankan *Penal Code*, these activities are banned in Section 360A and 360C[288] via the 1995 *Amendment*. The minimum sentence for this is a two year prison term. This is far too lenient a punishment for people who initiate children into this trade. The laws should be much more severe. In this context, several cases have come into the open recently of orphanage managers exploiting their authoritative positions and supplying paedophiles with inmates in the orphanage. A recent case was at the Vijitha Children's Home Beruwela, in Western Sri Lanka,[289] where eleven girls were supplied to tourists and sexually abused. As a result of this in January 1997 the Government decided to close down thirty illegal orphanages to prevent this kind of abuse from continuing. It is vital that all orphanages should be properly supervised by the Department of Social Services. At present it is not mandatory that all orphanages be

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[286] Act No. 33 of 1908 (Colombo: Government Publications Bureau.)
[287] *Supra* note 3.
[288] These provisions are quoted on p. 90 above.
[289] *The Sunday Times*, Colombo, Sri Lanka. 13 January 1997, p. 1.

registered. Therefore the Department of Social Services has no control over the unregistered ones.

Child pornography is another area of child abuse which flourishes in Sri Lanka. The offence is found in Section 286A of the *Penal Code* which declares:

> Any person who hires, employs, assists, persuades, uses, induces or coerces, any child to appear or perform in any obscene or indecent exhibition or show; or to pose or model for any indecent photograph or film; or who sells, distributes, or otherwise publishes; or who has in his possession any such photograph or film; commits the offence of obscene publication and exhibition relating to children and shall on conviction be punished with imprisonment for a term not less than two years and not exceeding ten years, and may also be punished with a fine.[290]

The laws relating to child pornography are adequate. The police can use them to stop this problem but very often, although they know exactly what is taking place, their low salaries make them easy targets for bribes.

In November 2000, in Sri Lanka's toughest-ever punishment for child molestation, a school teacher and a menial worker were each sentenced to thirty-four years in prison for drugging and molesting three children.[291] The two men had abused sixteen children aged twelve and thirteen. The abuse was planned meticulously, over a long period of time. The men first enticed the children at their school canteen by giving them sweets laced with heroin, and cigarettes. Once the children were addicted to drugs, the men abused them and arranged for them to meet foreign paedophiles. Video cassettes produced in court showed the children with foreign nationals from Germany, Australia and Sweden.

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[290] *Supra* note 240.

But even after experiencing this, only three of the sixteen child victims were willing to testify in court. This displays the fear and intimidation many children have when faced with the prospect of giving evidence in open court. But nevertheless, the prosecution had enough evidence to secure a conviction. In addition to the thirty-four year jail term, the men were also fined Rs. 20,000 (250 U.S dollars) and ordered to pay Rs. 60,000 (750 U.S dollars) to each of the victims. This is a very progressive judgment, and it serves as a good form of deterrence for people involved in the sex trade in Sri Lanka; as now they know that the laws are becoming more strict and finding a loophole in the law is going to be more difficult.

2.4.5 Domestic Mechanisms that Could Remedy Human Rights Violations Arising out of Sri Lanka's Child Sex Trade

2.4.5.1 The Fundamental Rights Jurisdiction of the Supreme Court

- Article 17 of the Sri Lankan Constitution states:

> Every person shall be entitled to petition the Supreme Court in respect of the infringement or imminent infringement, by executive or administrative action of a fundamental right to which he is entitled.[292]

Article 126(1) of the Constitution gives the Supreme Court the jurisdiction to try such cases. It declares:

> The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right recognised in this Constitution.[293]

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[291] CNN news report. 11 November 2000; at web site http://www.cnn.com/ASIANOW/south/11/11/srilanka.crime.ap/index.html
[292] *Supra* note 94.
[293] *Ibid.*

Article 126(4) of the Constitution gives the Supreme Court the power to grant relief or make decisions that are just and equitable. They have made declaratory judgments making certain executive and administrative acts null and void. They have awarded compensation where the victims have suffered physical and mental anguish. They sometimes impose individual responsibility. There is also provision for other relevant directions, which paves the way for granting new and innovative types of relief.

Even though the Supreme Court of Sri Lanka sometimes adopts a cautious approach to the fundamental rights guaranteed in the Constitution, the fundamental rights jurisdiction of the Supreme Court is a good mechanism that can be utilised to challenge the problem of child prostitution in Sri Lanka. However it is a very formal mechanism, and most people may not have the knowledge or the resources to approach the court. In addition to this, another limitation in utilising the fundamental rights jurisdiction of the Supreme Court is that Article 126(2) of the Constitution[294] declares that an application must be lodged in the Supreme Court within one month of the infringement of the fundamental right, which gives the victim very little time to begin the process.

Yet another drawback is that the jurisdiction of the Supreme Court extends only to the fundamental rights enshrined in the Constitution. It lacks jurisdiction with regard to the wider context of human rights guaranteed under international instruments which Sri Lanka has ratified. Therefore even though petitioning the Supreme Court is effective, it has many limitations.

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[294] *Ibid.*

2.4.5.2 The Human Rights Commission

Sri Lanka's Human Rights Commission (HRC) was established by Act No. 21 of 1996[295] as an alternative to the judicial method of remedying human rights abuses. It is a more informal mechanism, and could be effective in granting a remedy to the problem of child prostitution in Sri Lanka. Section 10 of the Act gives the HRC several powers and functions, such as dispute resolution through adjudication or mediation, raising human rights awareness and education, conducting documentation and research, advising government on human rights matters and setting human rights standards. It has the power to examine legislation and suggest law reform to ensure that such legislation is in line with human rights standards. The HRC also has the power to make recommendations to the government regarding the signing of international treaties. It can monitor the welfare of persons detained by judicial order or otherwise.

The Supreme Court can refer any matter arising from it to the HRC, and the HRC should take all necessary steps in that regard. The HRC plays a 'Public Defender' role, in that it has the power to intervene in any matter relating to the infringement or imminent infringement of a fundamental right, pending before any court. Section 14 of the Act gives the HRC the power to begin investigations on its own initiative. This indicates its autonomy and independence. Section 14 also gives the HRC a much wider concept of *locus standi* than the Supreme Court, because it even allows complaints brought by another person on behalf of the aggrieved party.

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[295] Colombo: Government Publications Bureau, 1996.

If a person wishes to lodge a complaint about a case of child prostitution, he has fewer barriers in approaching the HRC than the Supreme Court. The approach to *locus standi* is broader here and the one-month time limit of the Supreme Court does not operate. Since the HRC has very wide powers and functions, it could be an effective human rights mechanism. However, there is still room for improvement. Section 10 of the Act gives the HRC the power to investigate fundamental rights abuses. But these are limited only to those found in the Constitution. It should be amended to include all human rights: even those which are not specifically enshrined in the Sri Lankan Constitution although they are universally recognised. The HRC could effectively deal with the problem of child prostitution in Sri Lanka. In conducting the investigations, they must always strive to be impartial and independent, because only then can the HRC be truly effective.

2.4.5.3 The Office of the Ombudsman

Article 156 of the Constitution makes provision for the appointment of the Parliamentary Commissioner for Administration (The Ombudsman). It declares:

> Parliament shall by law provide for the establishment of the office of the Parliamentary Commissioner for Administration (Ombudsman) charged with the duty of investigating and reporting upon complaints or allegations of the infringement of fundamental rights and other injustices, in accordance with and subject to the provisions of such law.[296]

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[296] *Supra* note 94.

Deepika Udagama states that the Ombudsman was intended to be an informal, easily accessible avenue of redress against fundamental rights violations.[297] The institution of the Ombudsman is effective in remedying injustices, because it is usually comparatively easy for the victims of violations to access the Ombudsman. Even a simple letter detailing the injustices can start an investigation. But unfortunately Act No. 17 of 1981 did away with this accessibility by decreeing that all complaints should be filed through a Member of Parliament.[298] Fortunately Act No. 26 of 1994 amended this provision, once again making it possible for the public to access the Ombudsman directly.[299]

Section 17(2) of the 1994 Act declares that after conducting his investigation, if the Ombudsman finds that there has been an infringement of a fundamental right, he should report it to the institution concerned and propose recommendations to rectify the situation.[300] The violator must then comply with the Ombudsman's recommendations. Udagama states that even though the Ombudsman has jurisdiction with regard to fundamental rights, the most common petitions the Ombudsman deals with are other injustices, such as problems relating to land acquisition and cases of delayed payment of compensation.[301] The public needs to be made aware that they could also bring complaints of fundamental rights violations to the Ombudsman. The institution of the Ombudsman can effectively deal with the problem of child prostitution in Sri Lanka because it is an informal office and easily accessible to the public. Further, because the

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[297] Deepika Udagama, "A Case Study of the Office of the Ombudsman," in *Sri Lanka: State of Human Rights, 1997.* (Colombo: Law and Society Trust,1997), p. 113.
[298] Colombo: Government Publications Bureau, 1981.
[299] Colombo: Government Publications Bureau, 1994.
[300] *Ibid.*
[301] Udagama, *supra* note 297, p. 125.

office is an independent one, this ensures that all investigations conducted will be impartial and fair.

2.5 Recommendations

2.5.1 Canada

The Department of Justice Canada Consultation Paper makes the following recommendations to improve the principles of sentencing in Canadian child abuse cases:

- To specifically emphasise the importance of denunciation and deterrence of crimes against children
- To provided the courts with additional tools to require longer term supervision of offenders
- To recognise the frequency and seriousness of child abuse in the home and at the hands of parents and caretakers
- To recognise that in cases involving child abuse, it is not unusual for the offender to be 'of previous good character' or to lack a prior criminal record. Thus the courts should place less emphasis on these factors when sentencing such offenders.
- To emphasise to the courts that when they are sentencing offenders of child sexual abuse, they should consider the emotional and psychological damage caused to the children.[302]

2.5.2 Thailand

- The *Prohibition of Prostitution Act*[303] should be amended so that criminal liability covers not only pimps, but customers as well.
- To date, the Thai government has undertaken only periodic and isolated campaigns to fight child prostitution. They need to invest in more long term and continuous programs.
- More jobs should be provided in rural areas, so that parents need not resort to selling their children due to economic hardship.
- Law enforcement mechanisms should be improved. The Thai government should pay the police force more reasonable salaries, so that their temptation to accept bribes from pimps and johns is reduced.
- Often even if child prostitutes want to leave the trade, they are unable to do so as they have no other training and know no skills. Their only option is to return to the streets. Better rehabilitation programs and life skills training should be made available for child prostitutes, so that they will be able to build a life for themselves outside the sex trade.

2.5.3 Sri Lanka

2.5.3.1 Investigative Procedures

- Need for police to be properly trained on how to identify and record/preserve evidence, especially medical and technical evidence.

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[302] *Child Victims and the Criminal Justice System, supra* note 201, p. 11.
[303] *Supra* note 248. .

- Need for supervision by the Attorney General's Department to see that prosecutions are launched without delay.
- Need to avoid unnecessary trauma to the child and need to maintain privacy during questioning. The authorities could consider the possibility of video-taping a child's statement during investigation so as to minimise questioning at trial. Children rarely speak in court due to fear. This method of questioning is conducted often in Canada, Australia, U.S.A and U.K.
- Need to exercise discretion and not to institute criminal proceedings against juveniles who, though technically offenders, are in reality victims.
- Need for the burden of proof to be on the adult (when a child is found in the company of an adult to whom he bears no close family relationship) to prove that the relationship is innocent. Under the present law of Sri Lanka, the authorities can only act when there is evidence of a wrongful act - by which time the physical and psychological damage to the child would have already occurred.

2.5.3.2 Legal Procedures

- Need to minimise law's delays by making day-to-day hearings mandatory in cases involving juveniles (whether as victim or accused).
- If the above is not acceptable, then at least separate days should be set aside in all Magistrate's Courts and High Courts for the hearing of juveniles.
- Need for privacy of the juvenile to be maintained to the maximum possible.
- Need for State Counsel to be available to watch the interest of any child who is not adequately represented by a suitable adult.

- Need for severe punishment for offensive behaviour, as present penalties do not seem to be an effective deterrent.

2.6 Conclusion

In this chapter I have highlighted social and legal problems faced by Canada, Thailand and Sri Lanka in the area of child sexual exploitation, and suggested ways in which children can be protected from exploitation. Child rights are an integral part of human rights. They include the right to survival, to healthy development and to protection from abuse. But children's lives cannot be put on hold while adult society mulls over its obligations towards them. The time to act is now, before more children lose their childhood.

Chapter 3.

International Efforts to Combat Child Sexual Exploitation

> *By the time the United Nations Convention on the Rights of the Child was drafted, it had become a landmark at the end of the Cold War – the first international legal instrument adopted by consensus, bridging two political blocs, bridging the North and the South, bridging civil rights and freedoms with economic, social and cultural rights, bridging state accountability with the active involvement of civil society.*
>
> *- Marta Santos Pais*[304]

3.0 Introduction

It is imperative that the sexual exploitation of children be strongly portrayed as a human rights issue. This is highlighted in the *Optional Protocol to the Convention on the Rights of the Child Concerning the Elimination of Sexual Exploitation and Trafficking of Children.* Article 1 declares: "State parties recognise that crimes of sexual exploitation of, or trafficking in, children represent crimes against humanity."[305]

Today the protection of children from sexual exploitation has become *erga omnes* obligations for states, which means that all states have an obligation to see its enforcement. The sexual exploitation of children is now considered to be in the same category as war crimes such as torture, genocide and enslavement.[306] Furthermore, with the *Optional Protocol to the Convention on the Rights of the Child Concerning the*

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[304] Marta Santos Pais, "Children's Rights and Wrongs." Paper given at the Conference on Children's Rights and Wrongs, Nicosia, November 1998, in *Children's Rights: Reality or Rhetoric?* (London: International Save the Children Alliance), p. 15.
[305] *Supra* note 86.
[306] Roger J.R. Levesque, *Sexual Abuse of Children: A Human Rights Perspective* (Bloomington: Indiana University Press, 1999), p. 6.

Elimination of Sexual Exploitation and Trafficking of Children,[307] the attention given to these crimes has intensified. It is now treated as a delict *jure gentium* by which all state parties are entitled to try and punish all offenders in their own courts. Thus no case should be able to slip away untried. Under Article 2(a) of the above mentioned convention, state parties agree to give effect in their national legislation to the principle of universal criminal jurisdiction concerning sex crimes against children.[308]

In order to promote children's rights, countries must work together to fight child sexual exploitation by implementing international programs that protect children. If countries enter into bilateral and multilateral treaties prohibiting child sexual exploitation, this would make it difficult for any would-be offender to exploit children in any country, because together the states could close in on them by using the treaties they entered into. States can hold each other accountable in this respect. The first thing that must be ensured is the universal ratification of the *United Nations Convention on the Rights of the Child (UNCRC.)*[309] The *UNCRC* imposes an obligation on members to prevent child sexual exploitation, to protect children from all forms of exploitation, and educate families and make them aware that they cannot depend on the prostitution of their children in order for the family to survive.[310]

International law offers one instrument that prohibits child exploitation in a general sense. This is the 1976 *International Covenant on Economic, Social and Cultural Rights. (ICESCR).*[311] Article 10(3) declares:

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[307] *Supra* note 86.
[308] *Ibid.*
[309] *Supra* note 3.
[310] At web site http://www.unicef.org/newsline/sexploit
[311] *Supra* note 59.

> Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law.[312]

Even though this Article prohibits the exploitation of children, it is weak in that the type of exploitation is not clearly defined, and the Article makes no specific reference to the sexual exploitation of children.

One of the most fundamental principles of international law is that every state is sovereign and equal to other states. All sovereign states have complete jurisdiction over their territories, and this includes the land, territorial sea and airspace over their territory. But sovereignty does not give the states unrestrained authority in all circumstances. If particular acts of states lead to international repercussions, then such acts no longer fall within the domestic jurisdiction of a state. Even in the area of children's rights there are international mechanisms that can be utilised to fight this problem if domestic mechanisms are lacking.

3.1 Fetters on Unrestrained Sovereignty

3.1.1 Restrictions Imposed by the Statute of the International Court of Justice

According to Article 38(1) of the *Statute of the International Court of Justice (ICJ)*, the sources of international law are as follows:

- International conventions
- International custom, as evidence of a general practice accepted as law
- General principles of law

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[312] *Ibid.*

- Judicial decisions and teachings of the most highly qualified publicists.[313]

I will now examine the important position held by international custom and international conventions in governing international law. As seen above in Article 38(1)(b) of the *Statute of the International Court of Justice*, custom is accepted as a source of law. The existence of customary rules in international law can also be inferred from the practice and behaviour of states.

An international custom is one which has:

(i) a general practice of states, and

(ii) the practice should be accepted as law *(opinio juris)*.

If both criteria are met, then the custom is binding on all states, even if they do not consent to a particular custom. For a custom to be considered as one, its duration, consistency, repetition and the generality of a particular practice should all be taken into account.

The duration of state practice need not be very long, provided that it has a constant and uniform usage, as laid down in the Asylum Case[314] and further elaborated in the North Sea Continental Shelf Cases.[315] A customary rule could therefore be proven by a series of usages. Furthermore, even though a custom need not be universal, there should be evidence of its general usage for it to be accepted as a custom. Once the existence of a specified usage has been established, it is important to consider how the state views its behaviour. If the state feels it is legally bound to follow a particular

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[313] *Statute of the International Court of Justice*, signed on 26 June 1945 in San Francisco and came into force on 24 October 1945; at web site http://www.un.org/Overview/Statute/contents

practice, this factor turns the usage into a custom, which then becomes binding on all states.[316] Protection against genocide has now become so vital that it is recognised as a principle of customary international law. If the protection of children too can receive this same level of protection, then all states are bound by this rule in all circumstances.

The unrestrained authority of states can also be restricted through treaties or conventions. Their application is referred to in Article 38(1)(a) of the *Statute of the International Court of Justice.*[317] Article 2 of the 1969 *Vienna Convention on the Law of Treaties* defines a treaty as an international agreement between states, which is in written form and governed by international law.[318] When a state ratifies a treaty, it agrees to be bound by certain obligations. This is the principle of *Pacta Sunt Servanda:* treaties are binding and must be followed in good faith. It is a principle of customary international law codified in the *Vienna Convention.*

Treaties are a more direct and formal method of law-making than custom. The *Vienna Convention on the Law of Treaties*[319] discusses the creation of a treaty. According to Article 9, consent is vital. The text of an agreement is approved at an international conference if two-thirds of the states vote for it. Article 12 of the *Vienna Convention* declares that certain treaties provide for the fact that a state can consent to a treaty by signature alone, where the treaty provides that the signature would have this

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[314] International Court of Justice (ICJ) Reports 1950, p. 266.
[315] ICJ Reports 1969, p. 3.
[316] I. A. Shearer, *Starke's International Law* (London: Butterworths, 1994, 11th ed.), p. 36.
[317] *Supra* note 313.
[318] *Supra* note 93.
[319] *Ibid.*

effect. Article 14 of the *Vienna Convention* says that the usual practice is that only when a state ratifies the treaty does it become binding upon them.[320]

Treaties can be divided into law-making treaties which have universal relevance, and treaty-contracts which apply to a small number of states. Parties that do not ratify a particular treaty are not bound by its terms. But where treaties codify a customary international law practice, then even states that have not ratified it are bound by its provisions. In the North Sea Continental Shelf Cases,[321] the *International Court of Justice* accepted that a provision of a treaty, coupled with *opinio juris*, could lead to a custom which binds all states. But the provision should be fundamentally of a norm-creating character.

Let us now examine specific instances where customary international law and treaties have restrained the sovereignty of states. Principles against genocide are a rule of customary international law. Even though states are sovereign, they can never authorise the killing of people because this is a crime against humanity. Apartheid – racial segregation – too is not accepted by customary international law. These fall into practices of *jus cogens:* they cannot be derogated from under any circumstances. These two customary international law principles have now been codified respectively in the *Genocide Convention* of 1948[322] and the *International Convention on the Suppression and Punishment of the Crime of Apartheid* of 1973.[323]

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[320] *Ibid.*
[321] ICJ Reports 1969, p. 3.
[322] Adopted by General Assembly Resolution 260 A (III) on 9 December 1948; entry into force 12 January 1951; at web site http://www.hrweb.org/legal/genocide
[323] Adopted and opened for signature and ratification by general Assembly Resolution 3068 (XXX) of 30 November 1973; entry into force 18 July 1976; at web site http://www.unhchr.ch/html/menu3

There has been doubt whether the United Nations General Assembly's Resolutions are binding. The accepted idea is that, if it gives rise to a new customary international law practice, then that practice is binding. In contrast, according to Article 25 of the *United Nations Charter*, the decisions of the Security Council are binding on all states. It declares: "The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[324]

The International Court of Justice is also governed by a statute. But because the decisions of the Court have no *stare decisis*, it is not as effective in curtailing the unrestrained authority of states as it could have been had its decisions been binding on later cases. Article 59 of the *Statute of the International Court of Justice* declares: "The decision of the Court has no binding force except between the parties in respect of that particular case."[325] If *stare decisis* was allowed, the ICJ could be more effective in fettering unlimited sovereignty. But even with this limited provision, it has managed to curtail unrestrained authority in certain instances. In the case of the Legal Consequences of States of the Continued Presence of South Africa in Namibia,[326] South Africa refused to give up the control it had over Namibia. The Court held that South Africa's presence in Namibia was illegal and that it must withdraw from Namibia. Therefore this was a situation where there was a restriction on South Africa's sovereignty.

Unlike municipal law, in international law there is a lack of a uniform legislature, executive and judiciary as fixed organs of governance. Therefore it is

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[324] *Charter of the United Nations,* signed on 26 June 1945 in San Francisco and came into force on 24 October 1945; at web site http://www.un.org/aboutun/charter

important that all states are made aware of certain rules so that they can co-exist peacefully. Every state has certain fundamental rights. One of them is independence. Every state should be independent and free from the domination of other states. Independence implies the idea of non-intervention: each state has a duty not to get involved in the internal affairs of another sovereign state and a duty to respect the sovereignty of other states. According to Article 2(7) of the *UN Charter*, even the United Nations is bound by this principle of non-intervention. It says: "Nothing in this present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[327]

This duty of non-intervention was addressed in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States.* It declared: "No state or group of states has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state".[328] Thus the principle of non-intervention is found in a treaty and it restricts the authority of states that are parties to it. This proves that treaties are a suitable mechanism to curtail the threats posed by the unrestrained authority of states. This was emphasised by the International Court of Justice in the Corfu Channel Case,[329] where they said that each independent state must respect the territorial sovereignty of other states. Hence, it is illegal for a state to exercise control over other states.

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[325] *Supra* note 313.
[326] ICJ Reports 1971, p. 16.
[327] *Supra* note 324.
[328] General Assembly Resolution 2625 (XXV) of 24 October 1970; at web site http://www.un.org/Depts/dpa/ead
[329] ICJ Reports 1949, p. 4.

The element of equality of states is also reflected in a treaty and therefore is binding on states. The 1970 *Declaration on Principles of International Law* says: "All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature."[330]

3.1.2 Reservations to Treaties

Article 2 of the *Vienna Convention on the Law of Treaties* declares: "Reservations are a unilateral statement made by a state where it opts to modify or exclude some legal provisions of a treaty in its application to that state."[331] Where a state is satisfied with the treaty but unhappy with a provision, it may refuse to be bound by that provision. States are allowed to make reservations to treaties because of the rules of state sovereignty. They can decide what they want to be bound by. However, Article 19 of the *Vienna Convention* declares that a reservation may not be made in the following instances:

- Where reservations are specifically prohibited by the treaty;
- Where the treaty provides that only certain reservations may be made, and these do not include the reservation in question; and
- Where the reservation is not compatible with the object and purpose of the treaty.[332]

[330] *Supra* note 328.
[331] *Supra* note 93.
[332] *Ibid.*

The Reservations to the Genocide Convention case[333] was about the fact that the *Genocide Convention*[334] contained no clause permitting reservations to the treaty. But some parties to the convention wanted to have reservations about the compulsory jurisdiction of the International Court of Justice (ICJ). The ICJ had to determine whether this was acceptable. They said a reservation must always be compatible with the object and purpose of a treaty.

With regard to child rights, the *UNCRC* permits reservations to the treaty. However Article 51 of the convention says: "A reservation incompatible with the object and purpose of the present convention shall not be permitted."[335]

3.1.3 International Human Rights

Malcolm Shaw notes that certain human rights now fall into the category of customary international law in the light of state practice.[336] Some of these are the prohibition of torture, genocide and slavery, and the principle of non-discrimination. These are binding on all states in all circumstances. The prohibition of genocide has been codified in *The Convention on the Prevention and Punishment of the Crime of Genocide*.[337] The principle against discrimination is found in *The International Convention on the Elimination of All Forms of Racial Discrimination*.[338] And torture is prohibited according to *The Convention Against Torture and Other Cruel, Inhuman or*

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[333] ICJ Reports 1951, p.15.
[334] *Supra* note 322.
[335] *Supra* note 3.
[336] Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 1998, 4th ed.), p. 780.
[337] *Supra* note 322.
[338] Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965; entry into force 4 January 1969; at web site http://www.unhchr.ch/html/menu3/b/d_icerd

Degrading Treatment or Punishment.[339] States should not deviate from these principles as they are international customs.

There are other treaties which are only binding on the states that have ratified them. Some of these are the *U.N Convention on the Rights of the Child,*[340] the *International Covenant on Economic, Social and Cultural Rights,*[341] and the *International Covenant on Civil and Political Rights.*[342] Therefore, we see human rights law in both customary international law and in treaties.

Since treaties need expressed consent, and since customary international law does not, some writers believe that treaties are superior to custom. But other writers argue that custom is superior because it has a binding effect even if states do not consent to it. Both of them have their advantages. Custom is important because it incorporates fundamental international law principles which need to be observed, even without ratification. On the other hand, although treaties need to be ratified, they set out principles clearly and without ambiguity. Therefore, both custom and treaty can be used as suitable mechanisms to protect human rights and children's rights.

3.2 International Mechanisms that Could Remedy Human Rights Violations

The International Bill of Human Rights consists of the *Universal Declaration of Human Rights (UDHR),*[343] *the International Covenant on Economic, Social and*

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[339] *Supra* note 116.
[340] *Supra* note 3.
[341] *Supra* note 59.
[342] *Supra* note 58.
[343] *Supra* note 21.

Cultural Rights (ICESCR),[344] the *International Covenant on Civil and Political Rights (ICCPR)*,[345] and the two Optional Protocols to the *ICCPR*.

In responding to Human Rights violations, the mechanisms available at the national level must first be exhausted before resorting to international mechanisms. Under this heading, I will analyse the U.N Charter based mechanisms and treaty based mechanisms.

3.2.1 U.N Charter Based Mechanisms

These mechanisms have been set up under the auspices of the *UN Charter*.[346] Among its other powers, an important function of the UN High Commission on Human Rights (hereinafter referred to as "The Commission") is its role in developing effective procedures for responding to human rights violations.[347] During its early years, the Commission's focus was primarily on standard setting and the drafting of international human rights instruments. But in 1966, as a result of a General Assembly request to examine ways and means to put a stop to human rights violations, the Commission began to tackle specific violation issues.[348] These developments resulted in the *1503 Procedure*,[349] the *1235 Procedure*[350] and the *Thematic Procedures*.[351]

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[344] *Supra* note 59.
[345] *Supra* note 58.
[346] *Supra* note 324.
[347] Philip Alston, *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992), p. 126.
[348] *Ibid.*, p. 144.
[349] United Nations Economic and Social Council (ECOSOC) Resolution 1503 (XLVIII) (1970).
[350] United Nations Economic and Social Council (ECOSOC) Resolution 1235 (XLII) (1967).
[351] Henry J. Steiner and Philip Alston, *International Human Rights in Context* (Oxford: Oxford University Press, 2002, 2nd ed.), p. 612.

3.2.1.1 The Confidential Consideration of a Situation under the1503 Procedure[352]

This is a confidential procedure which gives non-governmental organisations, individuals, etc., the right to petition the UN in order to seek redress for human rights violations. By this, the Commission could identify situations involving a consistent pattern of gross and reliably attested violations of Human Rights.[353] Each year 300,000 complaints are received by way of the *1503 Procedure*, which reflects people's faith in it. Between 1972 and 1999, seventy-five countries have been subject to scrutiny under the *1503 Procedure*. Of these, twenty were in Africa, twenty three in Asia and the Middle East, fifteen in Latin America, twelve in eastern Europe and five in Western Europe.[354]

The *1503 Procedure* involves several stages in processing complaints. Firstly, the Communications Working Group of the UN Sub-Commission on the Promotion and Protection of Human Rights examines the complaints that have been received. Complaints can be rejected if they are anonymous, lack clear evidence, if domestic mechanisms have not been exhausted, if a "consistent pattern" is not established, or if the violations are not "gross". After the Working Group has identified countries where violations occur, the second stage is where the Sub-Commission examines these reports and decides whether to send the reports of the violations to the Commission. At this point, the Government concerned is invited to defend itself before the Commission. The third stage involves the Commission itself establishing a Working Group to look

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[352] *Supra* note 349.
[353] Steiner and Alston, *International Human Rights in Context, supra* note 351.
[354] At web site http://www.unhchr.ch/html/menu2/8/stat.1.htm

into the situation. And fourthly, the Commission considers all relevant material at its annual sessions. The Commission then has several ways to deal with the violations:

(a) The case can be kept "under review" for a time;

(b) The Commission can send an envoy to seek further information and report back;

(c) It can appoint an *ad hoc* committee to conduct a confidential investigation; or

(d) It can go public and transfer the case to the *1235 Procedure*.[355]

In the absence of a decision to go public, the entire *1503 Procedure* is absolutely confidential. But one of the main criticisms against this mechansim is that it is very time-consuming. Complaints have to go through several channels before being taken up, at which point violations could have reached disastrous proportions. Alston, quoting the NGO observer David Weissbrodt, notes: "The *1503 Procedure* is painfully slow, complex, secret and vulnerable to political influence at many junctures."[356] But in spite of this, it could be an effective mechanism for dealing with the problem of child prostitution in Sri Lanka and elsewhere.

3.2.1.2 Public Debate under the 1235 Procedure[357]

According to this procedure, the UN Commission on Human Rights is able to hold an annual public debate, focusing on gross violations of human rights. In this way, the Commission can investigate and apply pressure on states that are violating human rights. When complaints are made, first the Sub-Commission on the Promotion and

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[355] Alston, *The United Nations and Human Rights*, *supra* note 347, p. 147.
[356] *Ibid.*, p. 153.
[357] *Supra* note 350.

Protection of Human Rights examines all communications, to identify consistent patterns of violations. Secondly, the Commission examines any situations referred to it; and thirdly, the Commission reports the findings and recommendations to the U.N Economic and Social Council.[358]

With regard to violations occurring in each country; at the end of the public debate:

- The Commission makes a declaration or resolution of the human rights standards discussed with regard to each country;
- A resolution fails if it does not carry enough votes and in this situation, the Chairman makes a statement urging the Government in question to take action with regard to the violations; or
- If the situation is very serious, the Commission can appoint country specific Rapporteurs to monitor the situation and report back to the Commission.

To date, eighteen countries[359] have been subject to the public debate under *the 1235 Procedure.*[360] It can be effective in dealing with the problem of child prostitution in Sri Lanka because it is a very public procedure. When human rights violations in specific countries are brought before the Commission, it should be so embarrassing that the relevant governments are kept on their toes. In this situation, Sri Lanka can be

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[358] Alston, *The United Nations and Human Rights, supra* note 347, p. 156.
[359] The countries that have been scrutinised are Afghanistan, Bosnia and Herzegovina, Burundi, Congo, Croatia, Cuba, Cyprus, East Timor, Equatorial Guinea, Federal Republic of Yugoslavia, Iran, Iraq, Israel, Kosovo, Myanmar, Rwanda, Sierra Leone and Sudan.
[360] Steiner and Alston, *International Human Rights in Context, supra* note 351, p. 619.

galvanised into action at the domestic level, because of pressures from the international arena.

3.2.1.3 The Thematic Procedures

Under this procedure, the Commission designates a 'thematic' rapporteur or working group to consider violations anywhere relating to a specific theme.[361] Working Groups and Special Rapporteurs established under *Thematic Procedures* can investigate the problem of child prostitution and help solve it. Since each group works in a specific human rights field, it is able to apply its specialised knowledge to that particular field, unlike the procedures of *1503* and *1235*. According to Alston, unlike other UN efforts to monitor human rights violations, the thematic procedures have much more flexibility. They are able to obtain information from a wider network of sources; and on-site visits to countries where violations take place provide unrivalled opportunities for collection of information.[362]

When a working group begins an investigation, it requests the Government concerned to provide information with regard to the alleged violation. This is designed to pressure the Government to ensure that no further harm occurs to the individuals being victimised. By the "prompt intervention" procedure, the working group's chairman sends a cable to the Minister of Foreign Affairs of the country concerned, requesting that immediate steps be taken to protect all the rights of those involved in

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[361] *Ibid.*, p. 641.
[362] Alston, *The United Nations and Human Rights, supra* note 347, p. 177.

trying to stop the human rights violations.[363] Another way in which the working groups and thematic rapporteurs can apply pressure on Governments is through their annual reports to the Commission.

3.2.2 Treaty Based Mechanisms

These mechanisms are specifically set up under a Human Rights Treaty. When they are established by a treaty, they can be closely supervised.

3.2.2.1 The Human Rights Committee (HRC)

This mechanism is regulated by two treaties: *The International Covenant on Civil and Political Rights (ICCPR)*[364] and the *Optional Protocol to the ICCPR*.[365] The HRC can be an effective mechanism for dealing with child prostitution in Sri Lanka. Article 28 of the *ICCPR* provides for establishment of the HRC. It says that the committee shall consist of eighteen members, who are nationals of state parties to the covenant and who are persons of high moral character and recognised competence in the field of human rights.

According to Article 40 of the *ICCPR*,[366] state parties to the Covenant must submit reports to the HRC on the measures they have adopted which give effect to the rights recognised under the Covenant, and on the progress made in the enjoyment of

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[363] *Ibid.*, p. 179.
[364] *Supra* note 58.
[365] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A of 16 December 1966; entry into force 23 March 1976. U.N Doc. A/6316. (1966); at web site http://www.hrweb.org/legal/cpr/op
[366] *Supra* note 58.

those rights. The HRC then studies and makes comments on these reports. This is to ensure that the state of human rights in these countries is in keeping with the *ICCPR*. Article 41 of the *ICCPR* makes provision for a system of inter-state complaints, if another state party is not fulfilling its obligations under the Covenant. Thus, if another country which is party to the *ICCPR* feels that Sri Lanka is not adhering to some of its obligations under the treaty, they can make a complaint to the HRC. However, Article 41 specifies that the committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in this matter.

Dominic McGoldrick emphasises that the HRC is not a court of law and does not pass judgments. Instead, it has much wider functions: investigative, inquisitorial, supervisory, etc.[367] It ensures that state parties to the *ICCPR* fulfil their obligations under the Covenant. Thus for cases of human rights violations, there is an expansive network of both national and international mechanisms to ensure that violations are curtailed.

3.3 International Legal Personality

Legal personality is essential in international law. Without it, entities cannot sue and be sued in the international arena. They must be recognised as legal persons before courts. Traditional principles follow a narrow view as to who can be considered subjects under international law. This is also reflected in Article 34(1) of the *Statute of*

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[367] Dominic McGoldrick, *The Human Rights Committee* (New York: Oxford University Press, 1994), p. 55.

the International Court of Justice, which declares: "Only states may be parties before this Court."[368] But today the approach has widened, and other entities are recognised as legal persons, including individuals, international organisations, and multi-national corporations. International legal personality means participation coupled with acceptance at the international level. The relevant entities must have the status, competence and capacity to be recognised as legal persons.

The Reparations Case[369] examined whether the United Nations (UN) has international legal personality. The ICJ looked at the *UN Charter*[370] to determine this. Article 1(1) of the *Charter* declares that the purpose of the UN is to maintain international peace and security. The court also interpreted Articles 104 and 105 of the *Charter*. Article 104 says:

> The organisation shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.[371]

And Article 105 (1) declares:

> The organisation shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes.[372]

Thus in the Reparations case,[373] the ICJ examined the duties, powers and functions of the UN and concluded that the organisation does need international legal personality to

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[368] *Supra* note 313.
[369] ICJ Reports 1949, p.174.
[370] *Supra* note 324.
[371] *Ibid.*
[372] *Ibid.*
[373] *Supra* note 369.

carry out its functions. This shows that international law has widened in the area of subjects of international law, to accommodate the U.N itself.

3.3.1 Individuals as Subjects of International Law

With regard to individuals, traditional principles of international law dictate that individuals are not subjects of international law. The *International Court of Justice* was established after World War II, but unfortunately its jurisdiction does not extend to individual crimes. As mentioned above, Article 34 of the *ICJ Statute*[374] clearly says that only states may be parties before the court. But the late twentieth century has seen remarkable changes in this area of the law. With the development of international human rights, individuals are now considered subjects of international law.

The *Optional Protocol to the International Covenant on Civil and Political Rights*[375] also departs from tradition. According to Article 1, an individual can petition the Human Rights Committee if a state party to the *Protocol* has violated a civil or political right of the individual in question. But he must first have exhausted all local remedies before lodging his complaint. Therefore, if a state which is a party to the *Optional Protocol* arbitrarily restricts certain human rights, then an individual who is subject to the jurisdiction of that state can petition the Human Rights Committee (HRC). The *Optional Protocol* is a step forward in international law, because it recognises individuals as legal persons. And not only can an aggrieved party petition the HRC: even a close relative of a victim can do so.

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[374] *Supra* note 313. .
[375] *Supra* note 365.

In the Nottebohm Case,[376] the ICJ recognised that individuals have legal personality. They held that an individual could petition the *International Court of Justice* (ICJ) through his state. But there must be a genuine link between the individual and the state. International law also recognises individual criminal responsibility for certain crimes like piracy and other offences that incur universal jurisdiction of states. At the Nuremberg Trials,[377] the military tribunal said there is individual criminal responsibility for war crimes, crimes against humanity and crimes against peace. The tribunal declared: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[378] The *Genocide Convention*[379] also recognises this.

More recently, the *Rome Statute of the International Criminal Court*[380] in Article 25 recognises individual criminal responsibility for war crimes, genocide, crimes against humanity and the crime of aggression. This is the first time individual criminal responsibility has been given recognition by a permanent international court. The Yugoslav and Rwandan War Crimes Tribunals also held individuals liable for certain war crimes. The *ad hoc* tribunal for the former Yugoslavia imposed individual liability in The Prosecutor v. Tadic.[381] And in the Jean Paul Akayesu case,[382] the Rwandan

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[376] ICJ Reports 1955, p.4.
[377] At web site http://www.yale.edu.avalon/imt
[378] D.J. Harris, *Cases and Materials on International Law* (London: Sweet and Maxwell, 1998, 5th ed.), p. 742.
[379] *Supra* note 322.
[380] Drafted on 10 November 1998; U.N Doc. A/CONF. 183/9; at web site http://www.un.org/law/icc/statute
[381] Case no. IT-94-1-AR72; at web site http://www.icrc.org/icrceng/ncf
[382] Case no. ICTR-96-4-T; at web site http://www.diplomatiejudiciaire.com/UK/Tpiruk/Akayesu

Tribunal applied individual criminal responsibility when they held that the defendant was held individually responsible for genocide, crimes against humanity and war crimes.

This recognition of individual criminal responsibility is an example of how the twentieth century has witnessed remarkable changes in the manner in which the international community responds to events around the world. Traditional principles have been superseded to ensure that individuals cannot get away with the heinous crimes they commit. This indicates that the focus is on justice and not on blindly following tradition. The fact that individuals today are recognised as having legal personality in international law indicates that the types of offences that can be tried by international tribunals are widening, so that even people who are guilty of sexually exploiting children can be tried according to principles of international law.

3.4 Establishment of the International Criminal Court

The world around us has many scars which remind us that man's capacity for evil knows no limits. It is to remedy this unfortunate situation that the *Rome Statute of the International Criminal Court* (hereinafter referred to as the ICC) was drafted in 1998.[383] The preamble which contains the spirit of the statute, highlights the fact that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity. It affirms that

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[383] *Supra* note 380.

the most serious crimes must not go unpunished. The *ICC Statute* offers specific provisions that can be utilised to fight the sexual exploitation of children.

An important feature of the ICC is how it acts as a restriction on state sovereignty: it can interfere in acts under the domestic jurisdiction of a state if the acts are offences under the *ICC Statute*. In the last few years *ad hoc* tribunals have been set up to try crimes of genocide committed in Rwanda and Bosnia. In November 1998, the War Crimes Tribunal at The Hague convicted some Bosnian Serbs for atrocities committed against Bosnian Muslims. But these tribunals are temporary: a permanent international criminal court will be more effective in remedying human rights abuses.

The need for this was realised when it came time to trying accused war criminals after the Second World War. Because there was no permanent international criminal court, the Security Council of the UN set up *ad hoc* tribunals for this purpose. The Nuremberg and Tokyo Tribunals convicted many people of war crimes and crimes against humanity. More recently, the Security Council revived this process when it set up tribunals for the former Yugoslavia and Rwanda. But it must be borne in mind that these *ad hoc* tribunals are founded upon the insecure base of Security Council Resolutions. This means that they could be established only if all five permanent members of the Security Council agree to it. According to Article 27(3) of the *UN Charter*,[384] such decisions must be made by an affirmative vote of nine members, including the concurring votes of the permanent members. Thus if even one permanent member votes against such a proposal, an *ad hoc* tribunal cannot be set up. In contrast the ICC, because it does not depend on the Security Council, would be permanent and

[384] *Supra* note 324.

therefore more stable. President Clerides of Cyprus emphasised this when he said: "The existence of an International Criminal Court as a permanent institution would provide objectivity and continuity."[385]

Because there has been no permanent international criminal court, in the past the states themselves have undertaken to punish violators for war crimes. Due to the principle of Universal Jurisdiction, any state could have the jurisdiction over such crimes. But this has always been unsatisfactory because national machinery is being utilised to punish international crimes. This has sometimes led to chaos, due to the lack of a uniform method of conducting such trials. This can clearly be seen in the Lockerbie case.[386] Here Libya did not want to extradite the accused criminals to the USA, in the fear that if convicted, the USA would impose the death penalty. In contrast, the ICC will be able to fill this jurisdictional vacuum. A permanent international criminal court based on certain standard rules can send out a clear message that crimes against humanity will no longer go unpunished.

3.4.1 Jurisdiction of the ICC

Article 1 of the *ICC Statute* emphasises that the Court would complement domestic legal mechanisms and would not conflict with them. According to Article 4, the Court has international legal personality so that it can perform its functions

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[385] In an address at the Commonwealth Heads of Government meeting, October 1993; at web site http://www.hrweb.org/legal
[386] ICJ Reports 1992, p. 3.

effectively. Articles 5 to 8 define the crimes over which the ICC has jurisdiction. They are genocide, crimes against humanity, war crimes and aggression.[387]

Article 5 of the *ICC Statute*[388] defines the crime of genocide in broad terms to ensure that violators are prosecuted. It says genocide amounts to acts committed with the intention of destroying a national, ethnic, racial or religious group. It includes killing them, causing serious bodily or mental harm, preventing births within the group and forcibly transferring children from the group. This is similar to definitions of genocide in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*,[389] and also of the *Statute of the International Criminal Tribunal for the former Yugoslavia*.[390]

Crimes against humanity are defined in Article 6 of the *ICC Statute*[391] and include murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution, enforced disappearances and apartheid. These crimes have been given wide definitions, so as to encompass many areas. The *Statute* also indicates its sensitivity to crimes against women. It prohibits persecution on the grounds of gender. "Enslavement" includes the trafficking of women and children. When the statute was being drafted, many women's groups pushed for a broad definition of sexual violence, in the context of the grave cases of sexual abuse that took place recently in Bosnia. As a result of this and for the first time ever, rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation are classified as crimes against humanity,

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[387] *Supra* note 380.
[388] *Ibid.*
[389] *Supra* note 322.
[390] Adopted on 25 May 1993; at web site http://www.un.org/icty/basic/statut/statute
[391] *Supra* note 380.

indicating that changes are occurring in the international arena. If the commercial sexual exploitation of children can be interpreted as a crime against humanity, then the ICC will have jurisdiction in this area as well.

With regard to war crimes, Article 8 of the *ICC Statute* defines these as breaches of the *Geneva Conventions*[392] and violations of the laws and customs of war. These include wilful killing, torture and inhuman treatment, extensive destruction of property, taking of hostages, intentionally attacking civilians and protected persons, employing poisonous gases as a method of warfare, using weapons which cause unnecessary suffering, or using civilians as human shields. The conscription of children under fifteen years as soldiers is also considered a war crime. Sexual violence such as rape, sexual slavery and forced pregnancy fall into this category as well. Article 8C speaks of crimes that are not of an international nature. (Internal warfare and civil wars.) If there are serious violations of common Article 3 of the *Geneva Conventions*,[393] then these violations amount to war crimes.

The *ICC Statute*[394] also gives the ICC jurisdiction over the crime of aggression. This has not been defined in the *ICC Statute*,[395] but a General Assembly Resolution describes it thus: "A war of aggression is a crime against international peace. An aggression gives rise to international responsibility."[396] Perhaps a definition of

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[392] Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War; entry into force 21 October 1950; at web site http://www.irtc.org/instruments/intlhumanlaw
[393] *Ibid.*
[394] *Supra* note 380.
[395] *Ibid.*
[396] The crime of aggression is defined in Article 5(2) of the UN General Assembly Resolution 3314 (XXIX) of 1974 (19th Session); at web site http://www.un.org/law

aggression will be included in the *Statute* later under Articles 121 and 123, which provide for amendments to the *Statute*.

The broad definitions given to crimes listed under Article 5 seeks to ensure that violators of such crimes are brought to justice. Thus, with the establishment of the ICC the focus has shifted from merely following traditional principles, to instead ensuring that justice is done. The crime of child sexual exploitation should be specifically listed in the *ICC Statute*. In seven years' time (from 12 July 1999), when the Review Conference meets to consider amendments to the *Statute* under Article 123, the list of crimes can be expanded. Until such time, the ICC can be given the role of interpreting whether individuals involved in child prostitution can be liable under the category of crimes against humanity.

According to Article 12, only states that have ratified the *Statute* are subject to the jurisdiction of the Court. The Court can exercise jurisdiction if the crime was committed in the locality of a state party or if the accused is a national of a state party. Unfortunately, the proposal to give the Court automatic and wider jurisdiction failed. With the "opting in" approach of Article 12, a state which is not a party to the *Statute* can opt to accept the Court's jurisdiction regarding certain crimes. This is dangerous because it can be used for the convenience of a particular state whenever they perceive a disadvantage. Similarly, Article 124 is dangerous. After becoming a party to the *Statute*, a state may declare that it does not accept the jurisdiction of the Court for seven years after its entry into force, with regard to war crimes committed on its territory or by its nationals. This sends a message that there are several loopholes in the *Statute* which can be taken advantage of. These should be amended at the Review Conference.

Thus although the ICC has heralded a new age in international law, it can still be made more effective.

3.4.2 Defences in the ICC

Even though the twentieth century has seen the development of individual liability, this does not mean the accused is without a defence. To be held liable, the defendant should have had *actus reus* as well as *mens rea.* If there is an absence of *mens rea,* this proves the accused had no intention to commit the crime. In this manner, he can be excluded from liability if he suffered a mental illness at the point of the commission of the crime, if he was intoxicated, or if he was acting in self-defence or under duress. The *ICC Statute*[397] refers to this in Article 30. These provisions assure the accused that the law is fair and excuses certain conduct in exceptional situations.

Mistake of Fact was recognised in the Hans case,[398] where the accused was charged with carrying out unlawful executions. He was acquitted because he thought they were routine judicial executions. In the Peleus case,[399] the British Military Court at Hamburg applied Mistake of Law as a defence. The court said the accused could not be held liable if he was not aware of the illegality of his acts. The defence of Duress is an accepted defence if the accused committed a crime because he feared for his life and had no alternative action. But the harm caused by the accused should not be out of

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[397] *Supra* note 380.
[398] Norway, Court of Appeal, 1947. 14 International Legal Recorder (ILR) 305.
[399] British Military Court, Hamburg, 1945. 13 International Legal Recorder (ILR) 248

proportion to the harm he was threatened with. Duress was accepted as a defence in USA v. Flick.[400]

3.4.3 Immunity from Jurisdiction

Traditional principles of international law accept sovereign and diplomatic immunity. By this, a head of state or a member of a diplomatic mission of a particular country is immune from jurisdiction in the municipal courts of another country. According to the maxim of *par in parem non habet imperium*, an equal cannot exercise authority over an equal. Historically, immunity granted to a sovereign of another state was considered to be absolute, irrespective of the nature of the act in question. It is also linked to the idea that a state has a duty of non-intervention over another state. The nineteenth century case of Schooner Exchange v. McFaddon[401] reflects this idea. Here, the U.S. Supreme Court declared that the jurisdiction of a state within its own territory was exclusive and absolute; but it did not encompass foreign sovereigns.

The traditional approach to sovereign immunity can also be seen in the case of Underhill v. Hernandez.[402] The court said: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." The purpose of sovereign immunity is to give leaders the freedom to exercise their duties without being constantly wary of potential suits against them. But the danger here

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[400] Nuremberg, 1947. 6 Nuremberg Military Tribunal (NMT) 1201
[401] (1812) 7 Cranch Reports 116.
[402] (1897) 169 U.S.456.

is that sovereign immunity could be used as a shield, to allow a sovereign to get away with committing heinous crimes.

The traditional principles with regard to immunity from jurisdiction have undergone change in the twentieth century. In the recent Pinochet case,[403] the House of Lords held that the accused, a former head of state of Chile, was not entitled to immunity from suit for the horrific crimes committed while in office. This decision of the House of Lords, stripping political leaders of sovereign immunity is indeed a vast change from traditional principles. It sends a clear message to all leaders that they cannot escape liability if they abuse their powers.

Immunity from suit is also not recognised by the *Genocide Convention* of 1948.[404] Article 4 says: "Persons committing genocide ... shall be punished whether they are constitutionally responsible rulers or public officials or private individuals." It recognises that no matter what position a person holds, if they are guilty of genocide there can be no immunity. The *ICC Statute*[405] adopts a similar position. Article 27 prohibits sovereign and diplomatic immunity for crimes under the statute. Thus it is wrong for persons to use their official position to shield themselves from liability for such grave crimes.

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[403] Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet; at web site http://www.reports.guardian.co.uk/sp/reports/pinochet/judgments
[404] *Supra* note 322.
[405] *Supra* note 380. .

3.4.4 Reservations to the ICC

As explained above, Article 2 of the *Vienna Convention on the Law of Treaties*[406] defines a reservation to a treaty as one which a state makes to modify or exclude the legal effects of certain aspects of the treaty with regard to that state. However, the *ICC Statute*[407] prohibits reservations to the *Statute* in Article 120. States do not have the option of picking and choosing which aspects of the *Statute* they wish to be bound by.

3.4.5 The Appointment of Judges to the ICC

Article 36(3)(a) of the *ICC Statute*[408] declares: "The judges shall be chosen from among persons of high moral character, impartiality and integrity." This ensures that trials will be fair at all times. No two judges may be nationals of the same state. Article 40 speaks of how important it is that judges should be independent in the performance of their functions. Because the ICC is an international court, it can deliver more unbiased judgments. Professor B.V.A. Roling observed this when he wrote: "For the very reason that war crimes are violations of the laws of war, that is of international law, an international judge should try international offences. He is the best qualified."[409] Antonio Cassese is of the same opinion. He says: "International judges may ... be in a better position to be more impartial and unbiased than judges who have

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[406] *Supra* note 93.
[407] *Supra* note 380.
[408] *Ibid.*
[409] B.V.A. Roling, "The Law of War and the National Jurisdiction since 1945", in *The Hague Academy of International Law, Collected Courses*, 1960-II, (Leyden: A.W. Sijthoff, 1961), p. 354.

been caught up in the milieu which is the subject of the trials."[410] He cites as an example the failure of the Leipzig Trials of 1921, where the judges were under enormous pressure when they tried their own countrymen for war crimes. Cassese explains that national courts are more subject to political manipulations than international tribunals. "By contrast, international judges have no national, ethnic or political axe to grind."

Furthermore, international judges have the advantage of being not so emotionally involved in a case. According to Hans Kelsen, "The punishment of war crimes by an international tribunal ... would certainly meet with much less resistance since it would hurt national feelings much less."[411] He also says that internationalisation of the whole process makes the punishment more uniform. If war criminals were tried in various national courts, the penalties could vary greatly. Thus it is a good development that the judiciary of the ICC is truly international in nature.

The *Statute* says that judges should have established competence in criminal law and international law. Article 36(8) refers to the fact that there should be a fair representation of female judges as well. This provision is also seen in the new South African Constitution. It reflects the twenty-first century trend towards gender equality. The *Statute* particularly emphasises the need to include judges with legal expertise in issues of violence against women and children. This shows its sensitivity to the delicate nature of such offences.

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[410] Antonio Cassese, "Reflections on International Criminal Justice," 1998 Modern Law Review 7.
[411] Hans Kelsen, *Peace through Law* (Chapel Hill: University of North Carolina Press, 1944), p. 115.

3.4.6 The Rights of Suspects

Even though the ICC deals with horrendous crimes, the accused still has certain rights at all stages of an inquiry. This is connected to the Presumption of Innocence, guaranteed in Article 66 of the *Statute*, which states that a person is innocent until proven guilty. In fact, Article 22 specifies that if there is ambiguity regarding the definition of a crime, it should be interpreted in favour of the person being investigated. Article 55 says that during an investigation, a person shall not be compelled to incriminate himself or herself. They should also not be subject to duress or threats. They should not be deprived of their liberty unless there is a reasonable suspicion against them. They have the right to be informed of the charges against them, the right to remain silent and the right to legal assistance. The *Statute* always seeks to ensure that the rights of all persons are guaranteed and upheld. This would be true also for those who are accused of sexually exploiting children.

Article 63 emphasises the importance of the accused being present during the trial. This ensures that arbitrary conduct is not allowed. Article 67 says that the accused has a right to a fair hearing conducted impartially. Even when it comes to dealing with the accused, the *ICC Statute*[412] ensures that international human rights standards are not violated.

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[412] *Supra* note 380.

3.4.7 Protection of Victims and Witnesses

Article 68 of the *Statute*[413] highlights the importance of protecting victims and witnesses during the trial. This is important because of the highly sensitive nature of the offences in question. It declares: "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses". It allows special protection where the crime involves sexual violence or violence against children. As an exception to the principle of public hearings, the Court may conduct any part of the trial *in camera*, to protect such victims.

The *Statute* demonstrates its sensitivity to the trauma experienced by witnesses. Article 43 makes provision for the setting up of a Victims and Witnesses Unit, which would provide protection, security and counselling for witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. For these reasons too the ICC is a positive development in international law. It is not only concerned with bringing violators to justice, but it is also involved in assisting victims to overcome their trauma. This aspect of the ICC is vital in fighting child sexual exploitation.

3.4.8 Penalties and Sentencing

Once the Court convicts an accused person, it may sentence him or her to life imprisonment, imprisonment for a specified number of years, forfeiture of proceeds, property and assets obtained by criminal conduct, and fines. But no matter how grave

the crime in question is, Article 77 does not make provision for imposition of the death penalty. This is because it must be in accordance with Article 1 of the *Second Optional Protocol to the International Covenant on Civil and Political Rights*,[414] which prohibits the death penalty as a form of punishment. Even in this situation, the *ICC Statute*[415] seeks to keep in line with international human rights norms.

Article 110 allows appeals against the judgment or sentence. An appeal could be brought based on a procedural error, an error of fact or an error of law. This is unlike the International Court of Justice, which does not allow appeals. But allowing appeals is important because it acknowledges that even judges sometimes make mistakes.

3.4.9 Let Justice Prevail

It is true that it is difficult for victims of sexual exploitation to get over the pain of their abuse. However if they see their abusers brought to justice it is easier for them to deal with it and get on with their lives. When justice is done, they feel a sense of closure in their lives. Antonio Cassese speaks of the importance of justice. If justice is not done, the victims feel cheated. He says: "The memory always lingers and - if nothing is done to remedy the injustice – festers."[416] He observes that justice dissipates the call for revenge, and lessens much of the bitterness victims may feel, because when the Court imposes the punishment the victims receive their retribution. Therefore the

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[413] *Ibid.*
[414] *Supra* note 365.
[415] *Supra* note 380.
[416] Cassese, *supra* note 410, p. 10.

ICC provides that, even if the sexual exploitation of children occurs in other countries, offenders can still be tried by an international court.

Establishment of the ICC will guarantee justice for crimes that often do not fall within the domestic legislation of states. Speaking on this matter, the U.N. Secretary General, Kofi Annan, said: "There can be no global justice unless the worst of crimes – crimes against humanity – are subject to the law. The establishment of an International Criminal Court will ensure that humanity's response will be swift and will be just."[417] He went on to explain that the overriding interest must be that of the victims and the international community as a whole. The court must be an instrument of justice. Its purpose is to protect the weak against the strong. Thus its creation indicates how the international community should respond to events around the world. When we examine the *ICC Statute*, we see that traditional principles of international law have indeed undergone a vast change. This brings to mind an ancient Roman law maxim, *Hominem causa omne jus constitutum:* all law is created for the benefit of human beings. The ICC can definitely be utilised to fight child sexual exploitation.

3.5 Other International Efforts to Combat the Sexual Exploitation of Children

As mentioned in Chapter One of this thesis, even though the *UNCRC*[418] is not a legally binding document, by ratifying the convention, state parties undertake to carry out certain obligations in their home countries. According to Article 34 of the

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[417] At the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 1998; at web site http://www.un.org/law/icc
[418] *Supra* note 3.

UNCRC,[419] parties undertake to protect the child from all forms of sexual exploitation and abuse. They agree to take all appropriate measures to promote physical and psychological recovery and social re-integration of the child victim.

Article 43 of the *UNCRC*[420] makes provision for ten independent experts to oversee that the terms of the convention are implemented in the various countries. Unfortunately this committee lacks authority to receive petitions from other states or individuals regarding the abuse that could be occurring in a member state. Its powers are of a passive advisory capacity, so it is not a very powerful solution in combating the sexual exploitation of children.

One viable solution to the problem could be the extra-territorial jurisdiction of states over child sex tourists. As Vandana Rastogi argues, since most sex tourists return to their home countries before trial begins, extra-territorial legislation will ensure that the accused stands trial for his crimes, no matter where he may be.[421] It is vital therefore that governments develop their extra-territorial laws and undertake the strict supervision of travel agencies in order to ensure that they do not flaunt their country as a paradise for child sex tourists.

Today some countries have provisions to try in their own countries, their nationals who commit offences abroad. One country that has implemented this is Sweden. Recently, a Swedish court convicted one of its nationals of molesting a child in a Thai beach resort. Even though the crime took place outside Sweden, the Swedish court said it had jurisdiction to try this man under the principle of extra-territoriality.

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[419] *Ibid.*
[420] *Ibid.*

This can be an effective method of ensuring that such criminals do not escape prosecution. Chapter 2 of the Swedish *Penal Code* deals specifically with prosecuting Swedish nationals who commit crimes abroad.[422] However, in order for this provision to be effective, Sweden has to depend to a great extent on the country where the crime occurred. That country needs to assist Sweden by gathering sufficient evidence against the suspect. If this aspect is lacking, then the power of Sweden's extra-territorial jurisdiction is weak.

Australia also has extra-territorial jurisdiction over its citizens who commit crimes abroad by the *Crimes (Child Sex Tourism) Amendment Act* of 1994.[423] Section 50BA of the Act declares that a person must not, while outside Australia, engage in sexual intercourse with a person who is under sixteen years. A violation of this provision carries a penalty of seventeen years in prison. Australia has also circumvented some of the problems facing Sweden, with regard to the gathering of evidence. The Act allows the court to authorise a witness to give evidence by video-link if the witness is outside Australia, when it would cause considerable expense and inconvenience to have the witness present to testify in court. It also makes provision for the witness to give evidence in this manner if it would cause the witness psychological harm and distress to face the accused by giving evidence in court. This protects witnesses who are intimidated by the accused's presence in court. Germany is yet another country which now recognises the extra-territorial jurisdiction of its courts. In 1993, Germany passed a law that provides for up to ten years of imprisonment for any

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[421] *Supra* note 243, p. 259.
[422] At web site http://www.loc.gov/law/guide/sweden

German national engaging in sexual activity with a child under the age of fourteen, irrespective of where the act occurs.

The U.S. too has taken steps in this area. In 1994, the U.S passed the *Violent Crime Control and Law Enforcement Act.*[424] This Act makes it illegal for anyone to travel or conspire to travel outside the U.S for the purpose of engaging in sexual activity with minors. Thus, the actual act *(actus reus)* need not occur for a person to be prosecuted. If it can be proved that the accused intends to engage in this activity, this is sufficient for a conviction. *Mens rea* alone is enough.

Even though today a few countries have extra-territorial jurisdiction over their nationals when they commit crimes abroad, many countries have no such legislation yet. However, even though these countries have not enacted specific legislation in this area, they can still try their nationals under various principles of international law. Under the *Nationality Principle,*[425] a state may exercise jurisdiction over one of its nationals for crimes committed elsewhere, simply on the basis that the perpetrator is a national of the prosecuting state.

Under the *Effects Doctrine,*[426] a state may apply its law to acts occurring outside its territory, but having substantial effect in its territory. Examples of this are child pornography. Sometimes child pornographic photographs and videos may be produced outside the territory of a particular country, but the effects of it are experienced in the

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[423] Act No. 105 of 1994; at web site http://www.scaletext.law.gov.au/html/comact
[424] At web site http://www.lawresearch.com/v2/statute/statfed
[425] Hugh M. Kindred, Karin Mickelson, Rene Provost, Ted L. McDorman, Armand L.C de Mestral, Linda C. Reif, Sharon A. Williams, *International Law Chiefly as Interpreted and Applied in Canada* (Toronto: Emond Montgomery Publications Ltd., 2000, 6th ed.), p. 517.

country where these materials are being distributed. Yet another international law principle is the *Universality Principle*,[427] which recognises that some crimes are so universally condemned that perpetrators are enemies to the entire world community.

There is also the *Territorial Principle*,[428] which recognises that the state where the crime was committed has jurisdiction with regard to that offence. For example, if a national of another country was caught sexually exploiting a child in Sri Lanka, then the Sri Lankan courts would have jurisdiction under this principle. Finally there is the *Passive Personality Principle*,[429] according to which foreigners can be punished for acts committed abroad which are harmful to the nationals of that particular country.

3.6 Conclusion

The domestic mechanisms of states are not the only methods of fighting the sexual exploitation of children. There are several international mechanisms too that can be utilised. Under the *ICCPR*[430] states could lodge complaints with the Human Rights Committee, and there are many other treaty based and UN charter based procedures that can be utilised. The widening of the concept of *locus standi* in international law has meant that individuals can be tried for crimes in international law. All this indicates that perpetrators will receive their just punishment, and they can no longer rely on loopholes in the domestic laws of different states to escape their crimes.

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[426] *Ibid.*, p. 519.
[427] *Ibid.*, p. 519.
[428] *Ibid.*, p. 516.
[429] *Ibid.*, p. 517.
[430] *Supra* note 58.

Chapter 4.

Alternative Methods of Dealing with Child Prostitution

"You must work – we must all work – to make the world worthy of its children."

- *Pablo Casals*[431]

4.0 Introduction

In recent years children's rights have been given more recognition than ever before, but problems remain. Roger Levesque uses the phrase 'socially toxic environments', to refer to conditions for children such as violence, poor nutrition, lack of appropriate medical care, child labour regimes, no access to schools, persistent poverty, and the problem of the sexual exploitation of children.[432] Protection from sexual maltreatment is now considered a fundamental human right. The right to protection from sexual maltreatment was one of the earliest recognised international children's rights, in existence even before the United Nations was founded.[433] But policy makers who place a priority on this are faced with an uphill task in trying to combat this problem.

Chapter Two of this thesis examined how the criminal laws in various countries can be utilised to fight child prostitution. But criminal law is only one mechanism. Another method is through social service organisations and the programs they offer to

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[431] At web site http://www.community.childcarecoalition.org/qualityreport/oct2001
[432] Levesque, *supra* note 306, p. 1.
[433] Nora V. Demleitner, "Forced Prostitution: Naming an International Offence" (1994) 18 Fordham International Law Journal 163.

assist child prostitutes to leave their trade and re-integrate into society. This has been recognised at recent international conferences on the sexual exploitation of children.

4.1 International Conferences on the Child Sex Trade

4.1.1 The First World Congress on the Commercial Sexual Exploitation of Children

This was held in August 1996 in Stockholm, Sweden.[434] It was organised by ECPAT (End Child Prostitution, Child Pornography and Trafficking for sexual purposes), UNICEF and the NGO Group on the Rights of the Child. 122 countries were represented at this conference and they adopted an *Agenda for Action* against three areas of commercial sexual exploitation: the prostitution of children, child pornography and trafficking of children for sexual purposes.[435]

The delegates at the conference declared the importance of adopting a non-punitive approach to child victims of commercial sexual exploitation in keeping with the rights of the child, taking particular care that judicial procedures against their abusers do not aggravate the trauma already experienced by the child. The response of the system must be coupled with legal aid assistance where appropriate, and provision of judicial remedies to the child victims. After everything these children have already gone through, they should be viewed as victims and certainly not as offenders.

In Article 5(b) of the *Stockholm Declaration*,[436] state parties agree to provide social, medical, psychological counselling and other support to child victims of commercial sexual exploitation, paying particular attention to those with sexually

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[434] *Supra* note 76.

[435] The *Stockholm Declaration* is discussed in detail in Chapter One of this thesis. This chapter focuses only on the recovery and re-integration aspects of the *Declaration*.

transmitted diseases, including HIV/AIDS. They agree to undertake gender-sensitive training of medical personnel, teachers, social workers, non-governmental organisations and others working to help child victims of commercial sexual exploitation.

Article 5(d) of the *Stockholm Declaration*[437] says that member states should take effective action to prevent and remove societal stigmatisation of child victims; and facilitate the recovery and reintegration of child victims in communities and families. Isolating child victims would only increase their fear of society. Article 5(e) requires that states provide alternative means of livelihood with adequate support services to child victims, so as to prevent further commercial sexual exploitation. In addition, states should adopt not only legal sanctions against the perpetrators of sexual crimes against children, but also socio-medical and psychological measures to create behavioural changes on the part of the perpetrators. (One example is 'John School' discussed below.)

Article 6(a) of the *Stockholm Declaration*[438] recognises the importance of child participation in the recovery process. States should promote the participation of children, including child victims, young people, peers and others who are potential helpers of children, so that they are able to express their views and to take action to prevent and protect children from commercial sexual exploitation and to assist child victims to be reintegrated into society. They should also identify or establish networks of children and young people as advocates of child rights, and include children

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[436] *Supra* note 76.
[437] *Ibid.*
[438] *Ibid.*

according to their evolving capacity, in developing and implementing government and other programmes concerning them.[439]

After the Stockholm Conference, many international organisations stepped in to ensure that the provisions of the *Declaration* were not ignored. One such organisation is ECPAT (End Child Prostitution, Child Pornography and Trafficking for Sexual Purposes), a global network of organisations in more than fifty countries fighting the commercial sexual exploitation of children.[440] ECPAT was founded in 1990 in Thailand primarily to seek a solution to the problem of children entering prostitution because of sex tourism. Originally ECPAT was named End Child Prostitution in Asian Tourism, and its goal was to eradicate the sexual abuse of children in Asia by foreigners.[441] But after the 1996 Stockholm Conference, ECPAT was recognised as an international organisation. It expanded its mandate to include not only child prostitution in Asian tourism, but also all child sexual exploitation everywhere.[442]

The first International ECPAT Assembly was held in Bangkok, Thailand in September 1999 and was entitled, "Building ECPAT Together." ECPAT's report "A Step Forward" was launched at this conference. This was the third report on National Action Plans (agreed to in the *Agenda for Action* adopted by the 122 countries at the 1996 World Congress in Sweden.) These National Action Plans are vital as they identify what actions are needed in each country. At present forty countries have drafted national plans.[443]

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[439] *Ibid.*
[440] At web site http://www.beyondborders.org/ecpat
[441] *Ibid.*
[442] *Ibid.*
[443] *Ibid*

4.1.2 The Second World Congress on the Commercial Sexual Exploitation of Children

As mentioned above, the First World Conference on the Sexual Exploitation of Children was held in Stockholm in 1996. In December 2001, a follow up conference was held in Yokohama, Japan, so that the nations could meet and review their progress since the Stockholm Conference. The Yokohama Conference provided an opportunity to review the issues that were yet unresolved, and to initiate practical recommendations for further action. The Yokohama Conference focused on four main areas:

- a review of progress in implementing the *Stockholm Agenda for Action*;
- enhanced political commitment to implementing the *Agenda for Action* and strengthened follow-up;
- identification of major problem areas or gaps in the protection of children from sexual exploitation;
- the sharing of expertise and good practices.[444]

The text of the Yokohama Global Commitment 2001 was adopted in consensus. Delegates at the Conference were representatives from governments, intergovernmental organisations, non-governmental organisations, the private sector, and members of civil society from around the world. They reaffirmed the protection and promotion of the rights of the child to be protected from all forms of sexual exploitation. The delegates acknowledged that since the Stockholm Conference, states had ensured a greater emphasis on the rights of the child in their national legislation. There was also an increased mobilisation of governments, local authorities and the non-governmental organisations to promote and protect the rights of the child and to empower children and

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[444] At web site http://www.focalpointngo.org/yokohama

their families to safeguard their future. States had also adopted various policies, laws, and programs, to ensure that children are able to grow up in safety and dignity.[445]

There was enhanced actions against child prostitution, child pornography and trafficking of children for sexual purposes, including national and international agendas, strategies or plans of action to protect children from sexual exploitation, and new laws to criminalise this phenomenon, including provisions with extra-territorial effect.

In the period between the Stockholm and Yokohama Conferences, states had also endeavoured to promote more effective implementation of policies, laws and gender-sensitive programmes to prevent and address the phenomenon of sexual exploitation of children, including information campaigns to raise awareness, better educational access for children, social support measures for families and children to counter poverty, and prosecution of those who exploit children. Furthermore they have provided for the provision of child-sensitive facilities such as telephone help-lines, shelters, and judicial and administrative procedures to prevent violations of the rights of the child and to provide effective remedies. States have also got the private sector involved in protecting children from sexual exploitation: such as workers' and employers' organisations, members of the travel and tourism industry, the communications industry, and other businesses.[446]

While noting that a great deal had been achieved in the five years since the Stockholm Conference, the Yokohama Congress adopted a global commitment to further emphasise the rights of the child to protection from commercial sexual

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[445] *Ibid.*
[446] *Ibid.*

exploitation. The delegates recommitted themselves to the *Declaration and Agenda for Action* of the First World Congress: in particular to developing national agendas, strategies or plans of action.

The global commitment addresses root causes that put children at risk of exploitation, such as poverty, inequality, discrimination, persecution, violence, armed conflicts, HIV/AIDS, dysfunctional families, the demand factor, criminality, and violations of the rights of the child. This can be achieved through educational access for children, anti-poverty programmes, social support measures, public awareness-raising, physical and psychological recovery and social reintegration of child victims; and action to criminalise the commercial sexual exploitation of children in all its forms, while not criminalising or penalising the child victims.[447] The Yokohama Congress recommended that child sexual exploitation could be combated through regional and national agendas, strategies and plans of action. In a nutshell, the Congress stressed that the sexual exploitation of children must not be tolerated under any circumstances.

4.1.3 *Out from the Shadows: First International Summit of Sexually Exploited Youth*

When it comes to finding solutions to the child sex trade, former child prostitutes themselves can come up with good ideas, drawing on their own experiences. *Out from the Shadows: First International Summit of Sexually Exploited Youth* was a conference held in Victoria, British Columbia in March 1998 for this very purpose. Fifty-five participants who had been former sexually exploited children or youth from

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[447] *Ibid.*

all across the Americas drafted and presented a *Declaration and Agenda for Action* to representatives from governments and international non-governmental organisations.[448] The youth present were able to speak of their experiences, and through the re-living of their memories of exploitation, they were able to come up with recommendations that can be used to prevent more children from being similarly exploited.

The participants stressed that the *Declaration and Agenda for Action* of this summit must be implemented in its entirety because without all the pieces in place, children and youth all over the world would continue to suffer from sexual exploitation. Some of the key points of the *Declaration* are highlighted below.

> We declare:
> - that the term 'child or youth prostitute' should no longer be used. These children are victims of sexual exploitation, and any language referring to them should reflect this belief.
> - that the commercial sexual exploitation of children and youth is a form of child abuse and slavery.
> - that all children and youth have the right to be protected from all forms of abuse, exploitation and the threat of abuse.
> - that the issue of child and youth sexual exploitation must be a global priority and nations must not only hold their neighbours accountable but also themselves.
> - that governments are obligated to create laws which reflect the principle of zero tolerance of all forms of abuse and exploitation of children and youth."[449]

In the *Agenda for Action* the delegates of this summit emphasised that education is vital in the struggle against the sexual exploitation of children and youth. They also stated that the laws of all countries should protect them as sexually exploited children and youth and should no longer punish them as criminals. The *Agenda for Action*

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[448] Children and Youth Involved in Prostitution, *supra* note 165, chapter 1, p. 1.
[449] At web site http://www.sen.parl.gc.ca/pearson/summit

recommends that programs should be implemented so that children and youth can be educated about the risks of the sex trade, and that they should be made aware of health and safety issues.

It also recommends that, when programs are implemented to help sexually exploited children or youth, it is helpful to employ people who have already been through these experiences themselves. Thus they can be involved in staffing hotlines, outreach programs, crisis counselling, peer mentoring and peer counselling. When sexually exploited youth connect with each other, this speeds up the healing process.[450]

The *Agenda for Action* emphasises that all governments must take responsibility for establishing twenty-four hour help lines to help those in crisis. With regard to legislative action, it recommends that legislation must be passed for the prosecution of all those who buy, sell, facilitate or profit from the sexual exploitation of youth, whether directly or indirectly. Severe penalties must be imposed on all those who profit from the child sex trade. It is also important that the legislative process must protect the child and youth from further exploitation and trauma. With regard to healing and recovery, the *Agenda* states that decriminalisation of children and youth who have been exploited sexually is crucial to both the recovery process and their ability to reconnect with society.[451]

And finally, public attitudes need to be transformed. Laws should reflect the belief that the sexual exploitation of children and youth is abuse. Governments must take on the responsibility of ensuring that sexually exploited children and youth are not

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[450] *Ibid.*
[451] *Ibid.*

prosecuted, but rather protected. They also should be obligated to provide bi-annual reports detailing their progress and efforts to eliminate the commercial sexual exploitation of children. And on the global level, an international multi-disciplinary monitoring committee must be structured which includes the participation and views of sexually exploited youth.[452]

The recommendations that emerged from the *Out from the Shadows* summit are excellent. This is the first international summit where former child sex trade workers themselves have voiced their views. And having the unique distinction of coming from that very lifestyle, they are aware of what areas need to be improved. Governments should therefore pay attention to the *Declaration and Agenda for Action* that was ratified at this summit.

4.2 Canadian Domestic Law: Child Sexual Exploitation and the Age of Consent

As mentioned above, ECPAT was recognised as an international organisation after the Stockholm Conference. The Canadian organisation "Beyond Borders" was officially affiliated to ECPAT International at the International ECPAT Conference held in Bangkok in 1999.[453] Roz Prober, a community activist and founder of Beyond Borders emphasised that the sexual exploitation of children is perpetuated because of supply and demand.[454] She explained that after the 1996 Stockholm Conference, the

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[452] *Ibid.*
[453] *Supra* note 440.
[454] Founder and Director of *Beyond Borders*. Interviewed by this author in Winnipeg, Manitoba on 14 January 2002.

work of ECPAT was focused on the supply aspect of child sexual exploitation, and how the supply of children into the sex trade could be halted.

Prober went on to explain that today however the focus has shifted. The world now recognises that to curtail child prostitution, potential as well as actual offenders must be deterred. Thus, unlike after the Stockholm Conference, after the Yokohama Conference in December 2001 the focus of ECPAT has shifted from the supply to the demand aspect of the child sex trade. ECPAT's plan for the next five years is to find methods to deter offending before children are preyed upon.

Prober believes that one method by which potential offenders can be denied access to children is by raising the age of sexual consent. At present the age of consent in Canada for sexual activity is fourteen years, but ECPAT is trying to get it raised to eighteen years. According to her, the low age of consent sends a message on how we protect our children. Older people can prey upon their vulnerability and innocence. She believes there is a definite link between the low age of consent and the problem of child sexual exploitation.

In support, she pointed to the case of R v. Sharpe[455] where the Supreme Court of Canada made certain exemptions as to what constitutes possession of child pornography. One of the exemptions states that a person is permitted to possess child pornographic pictures for his own personal use as long as he doesn't distribute them, and as long as the material does not portray children below the age of fourteen. She believes that this is not satisfactory as it leaves children who are over fourteen years vulnerable. It also conflicts with Article 1 of the *United Nations Convention on the*

[455] Her Majesty the Queen v. John Robin Sharpe 2001 SCR 2.

Rights of the Child (UNCRC)[456] where a 'child' is defined as every human being below the age of eighteen years.

Prober emphasises that the law needs to be changed, as otherwise Canadian society receives a mixed message. If the age of consent remains at fourteen years, then it appears that children over fourteen years are vulnerable to exploitation. If the age is raised, she suggests, it will greatly reduce such exploitation. According to her, if there is no demand then there will be no supply. Canada has committed internationally by agreeing to set up a national plan. Prober believes there must be a uniform standard of eighteen years to consent to sexual activity, in keeping with the definition of the child in the *UNCRC*.[457] All countries including Canada should work to make this a reality.

While it is true that raising the age of sexual consent may prevent children over fourteen from being exploited, it cannot be denied that taking a step such as this would give rise to many complications. It must be remembered that there is a distinction between child sexual exploitation and consent. All sexual activity entered into by a fourteen year old does not necessarily constitute exploitation. A fourteen year old cannot be defined as someone who is entirely lacking in rational autonomy with regard to sexual expression. Similarly, the sex exploiter cannot be simply defined as 'any individual who has sex with a child', as this would deny the right of sexual self-expression to everyone aged below eighteen.[458] If the age of consent is raised to eighteen, then it would be illegal for a seventeen year old to consent to a sexual relationship with a nineteen year old girl or boyfriend. It would also mean that when

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[456] *Supra* note 3.
[457] *Ibid.*

two fifteen year olds enter into a sexual relationship based on mutual attraction, each would simultaneously become a child sex exploiter and a sexually exploited child.[459]

Any definition of the 'sex exploiter' must be sensitive to the fact that those under the age of eighteen are in some circumstances capable of giving meaningful consent to a sexual relationship. Thus raising the age of consent would give rise to many complexities. Raising the age of consent is only one way of dealing with the demand_aspect of child sexual exploitation. There are other less complicated methods of tackling this problem, as highlighted later in this chapter.

I next spoke with Bernard Starkman at the Justice Department in Ottawa, who develops criminal law policy regarding children.[460] I asked him what the Justice Department is presently doing to combat the sexual exploitation of children. He said that before the Justice Department decided to present any amendments to the laws before parliament, they were anxious to speak to several consultation groups and agencies that deal with children, to ask them their opinions. So they went across the provinces asking these organisations what they thought about these pressing questions:

- Should there be more child focused offences in the *Criminal Code*?
- Should the law make it easier for children to testify in court?
- When sentencing young offenders, should the sentencing be changed to provide more protection for children?
- Should the age of consent for sexual activity be raised?

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[458] O'Connell Davidson, *supra* note 158.
[459] *Ibid.*
[460] Counsel, Criminal Law Policy Section of the Department of Justice, Ottawa, Canada. Telephone interview conducted on 22 January 2002.

Speaking on this last point, Starkman said that there has been an intense debate as to whether the age of consent should indeed be raised. He explained that when his committee was interviewing the various agencies, they looked at what would be the result if the age was indeed raised, as problems always crop up. Many people believe that at fourteen years children should be independent enough to make up their minds, and that they are competent to realise the consequences of their decision.

He spoke about the recent case of R v. Sharpe,[461] which dealt with the possession of child pornographic pictures. Starkman noted that this is treading on dangerous ground, as with today's information technology it would only take minutes to circulate these types of pictures through the internet. However he believes that if the law pertaining to the age of consent is to be changed, it should be by legislation. The courts should not step into this role, as their function is to interpret the law, not to create it.

Starkman also emphasised that raising the age of consent is only one possible method of combating child prostitution. There are many other tools that can be used, which should not be ignored. He said at present the Justice Department is working on a number of agendas to combat this problem. But especially with regard to legislative changes, this may go forward slowly, because the recommendations need to be placed before parliament for approval.

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[461] *Supra* note 455.

4.3 Domestic Programs: Some Canadian Examples

4.3.1 Alternative Community Methods of Dealing with Offenders

As discussed in Chapter Two of this thesis, the criminal law is one way of dealing with customers of young prostitutes. However, the report of the Working Group on Prostitution indicated that in addition to this, there are community based alternatives that could be effective.[462] These have been undertaken because it was felt that law enforcement alone was not deterring the trade. One objective of this initiative has been to expose offenders by removing their anonymity. The report explained that local newspapers in many Canadian cities have published the names of paedophiles who have been charged. In the United States too, 'Shame the johns campaigns' have resulted in the names of paedophiles being announced on the radio and television. Calgary is now considering following America's initiative in publicising on television the names of paedophiles who have been convicted of these offences.[463]

Other programs that are targeted at the customers of young prostitutes include Prostitution Diversion Programs or 'John Schools.' These are specialised programs designed for men arrested under Section 213 of the *Criminal Code*: Communicating for the purposes of prostitution.[464] These schools have been started in many cities in the United States, the United Kingdom and Canada. Men who are arrested under these offences are 're-educated' about the commercial sex industry, and efforts are made to challenge their attitudes towards prostitution and sexuality. Weitzer cautions that it is

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[462] *Supra* note 169.
[463] *Ibid*, p. 57.

difficult to evaluate the impact of these schools. However he notes that in Los Angeles, only four out of 1400 men attending the John School have re-offended.[465]

In the United States, San Francisco was one of the first cities that started a prostitution diversion program in March 1995. In 1996 Toronto became the first Canadian city to initiate one of these programs, modelled after the San Francisco one.[466] Since then Edmonton, Calgary, Ottawa and Hamilton have launched successful programs. These programs cover many issues including health concerns such as Sexually Transmitted Diseases (STDs), and they also include a psychiatrist who speaks about sex addiction.

Each of the cities mentioned above has different methods of charging a fee for the program. In Toronto and Ottawa the Salvation Army asks for a donation of $ 250. In Edmonton a $ 400 fee is charged for the program. (This amount is reduced but not waived for those who cannot afford the full amount.) And in Hamilton a mandatory fee of $ 250 is collected by the Elizabeth Fry Society. In Toronto the proceeds from the funds collected at the 'john school' is put into an account to fund a 'Streetlight' program for prostitutes. This program assists prostitutes to exit the sex trade and also provides them with life skills training.[467]

These 'john schools' force the participants to face the consequences of their actions. The community and even ex-prostitutes can get involved by helping to organise the programs. Also the money collected from those attending the program is put back into the community, so that it can be used to assist other young prostitutes who

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[464] *Criminal Code of Canada*, at web site http://www.canada.justice.gc.ca
[465] R. Weitzer, *Sex for Sale* (New York: Routledge, 2000.)

are considering quitting their lifestyle. Thus several people benefit from these diversion programs.

According to Hilary Eldridge, good treatment and relapse prevention programs have greatly reduced the number of repeat offences among those convicted of sexual crimes against children. Therapeutic work with sex offenders and counselling have yielded positive results. But she emphasises that good treatment programs for child sex offenders are expensive. In poor and developing nations, there is little opportunity for funding the kind of therapeutic and relapse prevention programs that have been developed in the west.[468]

However it must be understood that even in western cultures, these programs are not made available to all those convicted of sexual crimes against children. Such programs only reach a small section of convicted sex offenders. And of course it must be remembered that convicted sex offenders represent only a small minority of individuals who sexually exploit children. Thus the existing sex offender treatment programs only reach the tip of the iceberg. With increased funding, these programs can reach more people.[469] At present these programs do not exist in prisons, but it will be good if they can be expanded to reach those in prison as well.

Julia O'Connell Davidson explains that it is important to reach potential sex exploiters through preventive programs before they actually commit any offences. When working on creating awareness among potential exploiters, it is often necessary to change certain attitudes about sexuality. For example, today youthful bodies are

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[466] Federal/Provincial/Territorial Working Group on Prostitution, *supra* note 169.
[467] *Ibid*, p. 58.

eroticised while older bodies are devalued when it comes to sex. There is also an assumption that sex ideally involves the interaction between a dominant and a submissive partner.[470]

O'Connell Davidson also states that paedophiles exploit children for different reasons and in different ways. This should be kept in mind when dealing with this problem. Thus the commercial sexual exploitation of children is connected to other human rights issues. It is also connected to problems such as poverty, gender relations, social exclusion, child labour, tourist development, racism, migratory pressures, and AIDS and sexual health.[471] Therefore when governments and policy makers are seeking a remedy to this problem, they must look at the issue in its economic, social and political contexts.

In tackling the problem of rehabilitating sex offenders, it should be remembered that a large number of those who sexually exploit children are themselves members of groups which are vulnerable, marginalised and exploited, such as homosexuals or people who are from a minority group or migrants. Perhaps due to barriers they face everyday, such as language or culture, they may feel more 'in control' if they have sex with a child who they can dominate and who are not on an equal footing.

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[468] Hilary Eldridge, "Patterns of sex offending and strategies for effective assessment and intervention," in C. Itzin (ed.) *Home Truths about Child Sexual Abuse* (London: Routledge, 2000), p. 329.
[469] *Ibid.*
[470] O'Connell Davidson, *supra* note 158.
[471] *Ibid.*

4.3.2 Alternative Community Methods of Dealing with Children Involved in Prostitution

Youth involved in the sex trade are victimised disproportionately compared to other youth: they are more at risk of being robbed, beaten and sexually assaulted by pimps or customers. They are desperately in need of medical services, shelter, substance abuse treatment, crisis counselling and other support. The Federal/ Provincial/ Territorial Working Group on Prostitution discovered that prostitution on the streets is becoming increasingly dangerous. Nearly all the assaults and murders of prostitutes occur while they are working on the streets.[472]

Society should first seek to prevent youth from becoming involved in the sex trade. If they do become involved, services should be offered to reduce the harms associated with the trade. Society should also support methods for youth to exit the trade. For youth involved in prostitution, many feel they have nowhere to turn. Therefore access to health services, counselling, substance abuse treatment, anger management and life-skills training could greatly benefit such youth.[473] At the National Meeting of Justice and Child Welfare Officials in Ottawa in October 2000, the representatives of British Columbia proposed a model of responding to child prostitution by focusing on three broad categories: prevention, immediate supports and exiting.[474]

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[472] Federal/Provincial/Territorial Working Group on Prostitution, *supra* note 169, p. 3.
[473] *Ibid.*, p. 30.

4.3.2.1 Prevention/ Early Intervention Strategies for 'At Risk' Youth

These prevention strategies are designed to guide 'at risk' youth away from entering a life of prostitution. The main focus is to create awareness about the risks of prostitution. Examples of creating awareness can include community action teams for local prevention initiatives; for example, the idea of supporting a Canadian production company to produce a documentary on sexual exploitation, to be televised nationally and then used by provincial prostitution units for training purposes.

It is vital to identify who the 'at risk' youth are, who could step into the sex trade. The Justice and Welfare Officials at this conference agreed that age, alcohol and drug abuse, failure to remain in school and a history of childhood physical and psychological abuse are variables associated with entry into prostitution. It was also noted that Aboriginal youth are particularly at risk of sexual exploitation, especially after leaving the shelter of their home communities.[475]

Examples of prevention strategies include alcohol and drug prevention programs for young people, a specialised police training handbook and a proposal to the federal government to empower Aboriginal communities and organisations in their efforts to prevent sexual exploitation. Counselling and medical treatment may be needed to deal with psychological difficulties associated with physical or sexual abuse or other problems, such as drug or alcohol dependency.

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[474] Children and Youth Involved in Prostitution, *supra* note 165, chapter 4, p. 1.
[475] *Ibid.*

4.3.2.2 Immediate Supports for Youth Involved in Prostitution

The National Meeting of Justice and Welfare Officials identified two categories of Immediate Support: Harm Reduction and Crisis Intervention.[476] The victimisation of youth involved in prostitution is particularly visible in urban downtown areas. The study found that the number of homeless people and those who are addicted to drugs is high in these areas. Prostitution is not always an isolated problem: it is often connected to the drug trade, HIV and violence. The majority of prostitutes are generally poor and alienated, and perhaps through ignorance or feelings of isolation may not access social support services, such as medical clinics, which could help alleviate some of their problems. Perhaps immediate supports to reduce the harm incurred by these prostitutes could take the form of free sterile needle distribution to those who are dependent on drugs and free condom distribution to reduce the risk of sexually transmitted diseases.[477]

The Harm Reduction Strategies are aimed at supporting the young prostitute while still in the sex trade. These strategies target reducing the violence, medical problems, and dangers the sex trade and its associated life can incur. Youth who work the streets are particularly susceptible to physical and sexual assaults. Examples of services offered include safe accommodation and outreach services including street nurses. Many young prostitutes are dependent on drugs such as marijuana, hashish and cocaine to cope with their work. They should be made aware of the options available to them to leave these habits.

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[476] *Ibid.*, chapter 4, p. 3.
[477] *Ibid.*

The Crisis Intervention Strategies differ in that they are specifically for times when a young person involved in prostitution experiences a crisis and needs help for emotional and physical well-being. Examples include detox programs for those involved in drugs and witness support networks for those testifying in court against pimps and johns. These strategies are vital because many youth involved in the sex trade decide to exit after experiencing a traumatic incident in their line of work. Thus they need all the support they can get when they decide to make this move. If they find no assistance, then the temptation for them to return to their dangerous, yet familiar way of life is great. It is vital that the availability of social service supports are communicated to the youth, either through street workers or public service campaigns that could reach the youth.[478]

4.3.2.3 Exiting the Sex Trade

The final category in assisting young prostitutes is by supporting them when they decide to leave the sex trade. These supports help them to move from a crisis into a stable emotional and physical state that helps them to think clearly and make decisions about their future. Many youth prostitutes decide to leave prostitution when they experience a critical event in their lives, such as the death of a significant other through street violence, being arrested, being imprisoned, or being physically harmed by pimps or customers. It is particularly important that services be available in such times of

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[478] Federal/Provincial/Territorial Working Group on Prostitution, *supra* note 169, p. 32.

crisis, as this could be the turning point for most youth.[479] Only when there is adequate support for youth who wish to leave the sex trade, is leaving the street a viable alternative with even the slightest chance of success. Exiting is a slow process which could take months or even years because it requires a complete overhaul of their lifestyle. They need to face their doubts, fears and uncertainties. When exiting, they need counselling, especially if they have a history of alcohol and drug abuse.

The Report found that the majority of prostitutes depend on their pimps for even basic necessities in life. The pimp often tries to isolate the prostitute so that he is the only contact she has, and thus she will be dependent on him for everything.[480] Other longer term exiting strategies are education programmes about the risks associated with prostitution, drug and alcohol abuse programmes, counselling for physical and sexual abuse, treatment for sexually transmitted diseases, employment training, life-skills training, and housing. Therefore they have the support needed to build a completely new life. These measures are vital, or else the prostitute will feel that she has no place to go for help.

For personnel involved in rehabilitation programs that prostitutes attend, it is imperative that they receive the appropriate training as to how they should respond to the people they are assisting, as sometimes prostitutes feel that these workers are being judgmental about their character and lifestyle. One option could be to employ former prostitutes themselves as outreach workers, as they would be able to relate to the doubts and uncertainties faced by those now in the program. Some of the young prostitutes

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[479] Children and Youth Involved in Prostitution, *supra* note 165.
[480] *Ibid.*, chapter 4, p. 4.

may also find it difficult to seek assistance due to cultural and linguistic challenges. (For example, if they are Aboriginal or recent immigrants.) Outreach workers should be aware of all these special circumstances.[481]

Support for these programs should be shared by Canada's provinces and the federal government. The provinces should be responsible for the running of the social service programs, but the federal government plays an important role in providing a sizeable portion of the funding for these programs to get started. The provinces and the federal government need to work closely together in order to make this a success.

One such success story was highlighted in the report of the Federal/ Provincial/ Territorial Working Group on Prostitution. This particular program was cost-shared by the Federal Department of Justice and the 'Option Youth Society' in Vancouver in 1989. The Society started a restaurant as a training facility for former prostitutes who wished to seek employment in the hospitality industry. They were trained and given jobs as cooks, waiters and waitresses. This resulted in the establishment of 'Picasso's Café' in Vancouver, which was able to accommodate 100 customers. This is an example of how such programs could become self-sufficient, while also providing much needed employment to former prostitutes.[482]

4.3.3 Promising Programs for Juvenile Prostitutes in Canada

As mentioned above, criminal law is not the only way of dealing with the child sex trade. Many promising programs have been implemented in Canada which

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[481] Federal/Provincial/Territorial Working Group on Prostitution, *supra* note 169, p. 50.
[482] *Ibid.*

combine child welfare or social services with law enforcement approaches. Some of these are highlighted below.

4.3.3.1 Juvenile Prostitution in Nova Scotia

In 1992, Nova Scotia established a very successful method of dealing with juvenile prostitution by setting up a safe house known as 'Sullivan House.' The Association for the Development of Children's Residential Facilities (ADCRF) discovered that child prostitution was on the increase in Nova Scotia. The girls were generally from disadvantaged backgrounds and lured into working the streets by men who promised them love, freedom from parental controls, drugs, alcohol, money and an exciting time. The majority of the girls were twelve to eighteen years old.[483]

ADCRF discovered that, although most of the girls had joined the life willingly, they could not leave it without serious consequences. Many had become addicted to drugs and alcohol, and had to continue working the streets to ensure a steady supply. They also lived in fear of their pimps and were often beaten by them into submission. The idea of becoming a crown witness against their pimps did not seem like an option, as they were terrified of getting caught by associates of their pimps at the conclusion of the court case.[484]

Thus the Nova Scotia Task Force on Pimps and Prostitutes was set up in the Fall of 1992 through the Department of Justice. It is a group of twelve law enforcement officers. Their main objective is to prosecute pimps and keep their witnesses safe and

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[483] Children and Youth Involved in Prostitution, *supra* note 165, chapter 6, p. 1.
[484] *Ibid.*

available to testify in court. One of their first tasks was to establish a safe house where they could house their crown witnesses safely. Sullivan House became an exit facility for youth prostitutes who agreed to testify against their pimps.

Sullivan House provides a great deal of assistance to the young girls there, rather than merely existing as a 'holding facility' pending trial. The program includes life-skills, detoxification, counselling, education and vocation plans and witness protection. If the young prostitutes sometimes get cold feet about testifying in court, Sullivan House has trained personnel who can talk to them and allay their fears. In all the years that Sullivan House has been in existence there has never been an attack on either its inhabitants or its Youth Care workers. This is reassuring, given the nature of the people they prosecute.[485]

4.3.3.2 Juvenile Prostitution in Quebec

Quebec has established a program for juvenile prostitutes known as *'Passages.'* It is mainly for females aged fourteen to twenty-four who are involved in or who are drifting towards prostitution. *Passages* offers guidance and support to young girls searching for alternatives to working on the streets. *Passages* also has a long term residential facility for these girls. The organisation is involved in preventive work, visiting high schools and community youth centres to create awareness among the youth of the realities of street life.[486]

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[485] *Ibid.*
[486] *Ibid.*, chapter 6, p. 20.

4.3.3.3 Juvenile Prostitution in Toronto

Toronto has set up the 'Streetlight Foundation', to assist anyone who wants to exit street prostitution. It has a peer support team who go out into the streets and meet with those who work the streets. They pass along information about programs and services that are available in the community. The Streetlight Foundation also runs a support program for the families of those who are involved in prostitution.[487]

Children who live on the streets in Toronto can also use Covenant House as a shelter. This community centre is not specifically for children involved in prostitution, but for all homeless and runaway youth. Covenant House began in 1969 and has grown into the largest shelter program for homeless children in the Americas. Today most of the major U.S cities have Covenant House Community Centres. The one in Toronto opened in 1988. Covenant House's mission is 'to serve suffering children of the street, and to protect and safeguard all children ...with absolute respect and unconditional love.'[488]

Covenant House Toronto is Canada's largest youth shelter. It provides help to thousands of homeless and runaway youth from across Canada who find themselves struggling to survive. Most are fleeing domestic violence, neglect or physical and sexual abuse. Since 1988, Covenant House Toronto has assisted more than 50,000 young people.[489] In addition to outreach, health services and crisis shelter, Covenant House offers a variety of services to homeless youth including food, clothing,

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[487] *Ibid.*, chapter 4, p. 18.
[488] At web site http://www.covenanthouse.on.ca
[489] *Ibid.*

education, vocational preparation, drug abuse treatment and prevention programs, legal services, recreation, pastoral care, mother/child programs, transitional living programs, a national crisis telephone hotline, assistance in finding long-term living accommodations and aftercare.

Covenant House has many outreach programs, where staff travel in vans, on bikes and foot to mingle with the youth on the street. They offer food to these children and chat with them on the street or even inside the vans, if the children are willing. Volunteer staff then invite the children to come to the Crisis Centre. It is important that volunteers actually go out on the streets and mingle with the children, so that they can win their trust. It is understandable that these children are very apprehensive, due to their lifestyle on the streets. It is unlikely that they would take the first step and walk into a Crisis Centre on their own initiative, unless they were encouraged to do so.

The Crisis Centre is open twenty-four hours a day, seven days a week. Each night they offer shelter to as many as eighty youth between sixteen and twenty-two.[490] Covenant House has an 'open intake' policy where no child or teenager is turned away, but rather is accepted on a 'no questions asked' basis. Every child is given hot food, a shower, clean clothes and a warm bed. If they need immediate medical attention, it is provided. Children usually stay at the Crisis Centre for about two weeks, but some stay as long as three months.

Covenant House residents get full physical exams shortly after they arrive at the Crisis Centre. For many, it is the first checkup they have had in years. Through its

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[490] *Ibid.*

Community Service Centre the Covenant House Health Services Department also offers health care to children and teenagers in the community at large. The service is aimed at children and adolescents for whom no other medical services are available.

Covenant House is more than just a crisis shelter. While many children have learned how to survive on the streets, they have never picked up the skills they need to become independent adults. In 1986 Covenant House began a transitional program called *'Rights of Passage.*[491] It offers young people aged eighteen to twenty-one shelter for up to eighteen months, and provides them education, employment and counselling services. In addition to this, a volunteer mentor works one-on-one with the youth in the program. *Rights of Passage* offers youth a chance to improve their education, train for a job and enter the workforce.

The residents of this program participate in in-house training programs such as computer and office skills, security, building maintenance, nurses' and teachers' aides, silk screening, and culinary arts. In addition to job skills, they learn how to budget their money and manage their time, how to find and maintain a job, how to find an apartment and how to shop, cook and clean: the tools they need as they make the transition to a place of their own.

As mentioned above, Covenant House has community centres around the world. Last year it provided residential and non-residential services to over 48,000 youth world wide. In North America, approximately 13,000 young people entered Covenant House Crisis Shelters and *Rights of Passage* Programs, and outreach workers assisted nearly 21,000 youth on the street. Covenant House also has a toll free help-line called

[491] *Ibid.*

Nineline (800-999-9999). Last year alone they received nearly 87,000 crisis calls from youth all over North America who were in need of assistance and had nowhere else to turn.[492]

4.3.3.4 Juvenile Prostitution in Winnipeg

One example of action on a local level is Winnipeg's 'New Directions for Children, Youth and Families,' a social service organisation that has several programs for youth involved in prostitution. It was originally known as Children's Home of Winnipeg. As its programs became broader and more diversified, the original name no longer seemed appropriate, and in 1996 the name was changed to the present one.[493] When founded in 1885, it was Western Canada's first shelter for orphaned and neglected children. In its early years, the organisation operated an infants' home, opened a new school, and provided remedial and therapeutic services to children and their parents. In recent years its mandate changed from custodial care to treatment programming and preventive intervention, including programs for emotionally disturbed teenagers and counselling services to families. Today New Directions programs provide help and a new direction in life for those with personal and social problems.[494]

One such program that New Directions has started is known as *Ndaawin*, which is the Aboriginal name for 'Our Home.' This program aims at preventing the sexual exploitation of children and youth. The target group is children aged eight to thirteen

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[492] *Ibid.*
[493] At web site http://www.newdirections.mb.ca

years. The *Ndaawin* program educates them about sexual exploitation and provides support. Approaches used include puppet shows, videos, youth speakers at schools and community centres, and peer and parent support.[495]

Of particular interest is New Directions' program known as Transition, Education, and Resources for Females. (TERF). This is a transition program for girls and transgendered children age fourteen to seventeen, as well as eighteen and above, who have been sexually exploited through prostitution, *i.e.*, if they have received food, shelter, drugs or money in exchange for a sexual act. TERF helps individuals move in a new direction, stabilise their living situation, develop a healthy lifestyle and build the confidence necessary to set goals to return to school or move into the workforce. TERF provides practical assistance such as counselling, support, advocacy and referrals, life-skills training and work experience.[496] It supports participants who need help with the Child and Family Services system or legal matters, housing, health care and breaking a cycle of substance abuse. TERF programs also include more formal learning opportunities, such as English language and computer training, conflict resolution and relationships, health, fitness and nutrition, and resume preparation.

Jane Runner, Program Manager for TERF, described TERF's latest project, in partnership with Save the Children Canada.[497] The proposed project is the building of a ten bed safe house for child and youth prostitutes. At present they are concentrating on trying to raise the required funds of $ 1.5 million to make this project a reality. They

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[494] *Ibid.*
[495] *Ibid.*
[496] *Ibid.*
[497] Program Manager for TERF, at *New Directions for Children, Youth and Families,* interviewed in Winnipeg, Manitoba on 17 January 2002.

envision that the safe house would serve as a transition from the streets for child prostitutes as an emergency shelter which would provide them with basic needs and supports. It would also help children who have been sexually exploited through child prostitution to become aware of their alternatives and assist them in abandoning the child sex trade. The safe house would be specifically for children aged twelve to seventeen years old, and would have short term programs for stays up to one month, and longer term programs for stays up to one year. The children would be provided with life-skills and other training so that, when they leave the safe house, they have ways of earning money other than prostitution.

This proposed safe house stands in stark contrast to what Alberta attempted to do in 1999 through the *Protection of Children Involved in Prostitution Act (PCHIP Act)*.[498] This now obsolete Act[499] decreed that child prostitutes could be taken off the streets and locked up in safe houses against their will for a period of up to three days. The intentions of the Act were good, as it would give children an opportunity to receive proper food and sleep and time to think about their plans for the future. But the Act failed to address such central questions as the lack of programs available to keep children off the streets, such as life-skills training. When children discovered that they really had no alternatives, they returned to the streets and to their pimps, as that seemed the only path to take.

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[498] *Supra* note 212.
[499] This Act failed on constitutional grounds because certain provisions were *ultra vires* the *Canadian Charter of Rights and Freedoms*. Discussed in Chapter Two of this thesis.

4.4 Non-Governmental Roles in Curtailing Child Prostitution

With regard to the child sex tourism industry, other players could also have a role in helping to combat the problem. According to Leheny, the international business community can have a big impact on this problem through the use of 'soft power.' The concept of 'soft power' originates in the ability of one state to influence another state to change its interests, and bring them more in line with their own.[500] This concept can also be used by private business. The international business community can encourage growth in other sectors and actively avoid any destination with a reputation for sex tourism. Therefore, if a particular country encourages the continuation of child sex tourism, the international business community can show its disapproval by refusing to trade with that particular country. This could result in the decline of its economy.

Non-Governmental Organisations that promote the protection of children from sexual exploitation, such as affiliates of ECPAT, can be of assistance too. If they can monitor the activities of travel agencies, then tour groups that advertise and tout certain destinations as a haven for this trade can be identified, prosecuted, and prevented from carrying on business in the future.

Another way of keeping track of child sex offenders is through the International Criminal Police Organisation (Interpol). Interpol could create a database of information on sex tourists and pedophiles, which could be accessed by nations seeking to prosecute offenders. Having a common database that all information is sent to in regards to these

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[500] D. Leheny, "A Political Economy of Asian Sex Tourism," 22.2 (1995) *Annals of Tourism Research* 367.

offences would be extremely useful to the various countries. It could be used to track the movement of offenders: Interpol could inform the appropriate authorities within a state when an offender is abroad, and thus any suspicious activities while they are overseas can be closely monitored.[501]

4.5 Conclusion

The sexual exploitation of children and youth is a multi-faceted, multi-pronged problem, involving many players. Redress and retribution for the crimes committed is often achieved through the criminal law. However when it comes to recovery and re-integration into society, community based alternatives can be an excellent solution to the problem. These alternative methods currently operating in Canada are a promising beginning, so Sri Lanka can learn from these community based methods of dealing with the child sex trade.

Sri Lanka can follow Canada in implementing certain resources and programs for children involved in prostitution, such as free needle distribution to curtail the spread of diseases among substance abusers who share needles. Also, it must be remembered that youth involved in prostitution are extremely reluctant to take the first step in approaching assistance programs. Like Canada, Sri Lanka should organise a network of youth workers on the streets, so that juvenile prostitutes are made aware of assistance programs that are available for them. They will be more enthusiastic about participating in these programs if someone else takes the first step in informing them

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[501] *Ibid.*

about resources that are available. It is also important that personnel who work with these young people undergo training so that they will have the correct attitude in approaching them, and they will not be judgmental towards them. Finally, Sri Lanka should organise life-skills and other training programs for those who wish to exit the trade, so that they can re-integrate into society.

Observations

Today there are several international documents that seek to protect children from sexual exploitation. States have willingly ratified these conventions, but international commitments have not been very effective in the domestic sphere, because child sexual exploitation continues to exist. Even though Sri Lanka has undertaken international obligations to protect children, the problem is far from being solved. The legislature has enacted several laws, but they suffer from weak enforcement. In addition, children involved in prostitution are often treated as offenders when they should be treated as victims. Sri Lanka should follow Canada's example of alleviating the trauma faced by child witnesses in criminal proceedings, by allowing *in camera* evidence and making provision for them to testify from behind a screen, so that they will not be intimidated by the accused's presence in court.

Domestic methods of prosecuting child sex offenders may sometimes fail due to loopholes in the national laws. At such times international law principles can be used to ensure that the offender is brought to justice. Extra-territorial jurisdiction is a recent development in international law, and gives states the right to try an accused person in their country even if the offence was not committed on their territory. This ensures that a sex offender does not escape judgment merely due to the fact that a states does not have the jurisdiction to try him.

Because the sexual exploitation of children is a fundamental violation of their human rights, international human rights mechanisms should be utilised to combat the problem. Specific instances of child sexual exploitation can be brought before the

United Nations High Commission on Human Rights through the *1503* and *1235 procedures*. Working groups can investigate violations under the thematic procedures. The Human Rights Committee can also be petitioned to deal with the problem of child prostitution.

When the International Criminal Court (ICC) is established, it can be a mechanism to convict sex offenders. For this to be realised, it is important that the sexual exploitation of children be interpreted in the category of crimes against humanity, so that the ICC will have jurisdiction to try accused sex offenders. Another positive fact about the ICC is that it recognises individual criminal liability. Traditional principles of international law dictate that individuals do not have legal capacity in the international sphere; but the ICC does not face this limitation as individuals can be brought before the court for violations of the *ICC Statute*. This ensures that justice is not denied.

In conclusion, it is important to note that domestic criminal law and international law are not the only methods of dealing with those involved in child prostitution. As highlighted in Chapter Four, community methods have proved effective in the rehabilitation process. Prostitution Diversion Programs or 'john schools' have been successfully launched in many Canadian cities. Customers of young prostitutes who attend these programs are re-educated about the commercial sex industry, and efforts are made to challenge their attitudes towards prostitution and sexuality.

Many social service programs exist in Canada today to help juvenile prostitutes leave the sex trade. In the past, even if they wished to abandon their life on the streets,

they had nowhere to go for help. But today they have a variety of services to assist them such as educational, vocational and life-skills training, counselling and employment opportunities. They are able to use the skills they acquire to begin a new life off the streets. Sri Lanka should implement programs such as this, so that child prostitutes know they have an alternative means of survival.

The sexual exploitation of children is a cancer eating into our future generations, and steps should be taken to curtail the problem. The most effective solution would be if the domestic criminal law, international law and social service mechanisms can together be utilised to fight child sexual exploitation. Only then can children be free and equal in dignity and rights.

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