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Article

**\*175** Taking a Vacation from the Law? Extraterritorial Criminal Jurisdiction and Section 7(4.1) of the Criminal Code

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*Canada's extraterritorial child sex offences in section 7(4.1) of the Criminal Code are under-enforced, and have faced legal uncertainty, since coming into force in 1997. However, the recent decision of the B.C. Supreme Court in R. v. Klassen (2008) and the Supreme Court of Canada in R. v. Hape (2007) have opened the door for a more proactive approach to the investigation and prosecution of Canadian child sex offenders abroad.*

*Canada's international treaty obligations in the widely adopted UN Convention on the Rights of the Child and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as numerous international declarations and extensive state practice, support the necessary aspects of nationality-based extraterritorial jurisdiction over crimes involving the sexual abuse and exploitation of children. This article concludes by arguing for a more aggressive use of section 7(4.1) to combat the impunity of Canadian child sex offenders abroad.*

**\*176** I. Introduction

In the decade following the adoption of Canada's extraterritorial child sex crime provisions in section 7(4.1) of the *Criminal Code*, only a single conviction was entered. [FN1] Donald Bakker became the first accused to be charged under Canada's extraterritorial child sex crime legislation in July 2004. His defence counsel was widely quoted in the media arguing that the provisions were unconstitutional because they violated the sovereignty of the country where the alleged offence took place. [FN2] While Bakker eventually pleaded guilty in 2005, [FN3] the spectre of a constitutional challenge to the law has lurked in the background, and has not been rigorously analyzed in legal literature. The potential chilling effect of this uncertainty on police investigators, prosecutors and child protection advocates should not be underestimated.

Canada's poor record in holding its travelling child sex offenders accountable has been increasingly criticized by foreign governments and nongovernmental organizations (NGOs). For example, in June 2008, the U.S. Department of State *Trafficking in Persons* (TIP) report criticized Canada's progress in addressing child sex crimes committed by its nationals abroad and recommended that Canada "increase efforts to investigate and prosecute, as appropriate, Canadians suspected of committing child sex tourism crimes abroad." [FN4] In October 2008, the *Report of the Canada-U.S. Consultation in \*177 Preparation for World Congress III against Sexual Exploitation of Children and Adolescents* found "the lack of enforcement of the law against child sex tourism is the most glaring law enforcement gap" [FN5] in Canada's response to child sexual exploitation.

Consequently, the decision of the B.C. Supreme Court in *R. v. Klassen*, [FN6] released on December 19, 2008, is a landmark ruling because it provides the first explicit judicial affirmation of the validity of Canada's extraterritorial child sex crime provisions under both Canadian constitutional law and international law. Klassen was charged with 35 counts brought under section 7(4.1) of the *Criminal Code* for conduct that allegedly took place in the Kingdom of Cambodia, Republic of Colombia, and the Republic of the Philippines. Justice A.F. Cullen dismissed the application brought by defence counsel for Klassen, seeking “a declaration that section 7(4.1) of the *Criminal Code* is *ultra vires* the Parliament of Canada; or in the alternative, that it is of no force and effect pursuant to section 52(1) of the *Constitution Act, 1982*.” [FN7] Justice Cullen's reasons holding that Parliament has authority to enact extraterritorial criminal legislation applicable to Canadian citizens and permanent residents for the offences subject to section 7(4.1) of the *Criminal Code* are authoritatively written and should be followed in other jurisdictions.

The *Klassen* decision opens the door to more proactive enforcement of section 7(4.1) by Canadian law enforcement authorities, based on relevant multilateral and bilateral treaties between Canada and relevant foreign states, exercised within the framework set out by the Supreme Court of Canada in *R. v. Hape*. [FN8] This article provides a more thorough justification for the finding of Justice Cullen in *Klassen* that nationality-based adjudicative jurisdiction for crimes involving the sexual abuse and exploitation of children is a principle of conventional and customary international law. Before delving into these topics, it is necessary to first identify the applicable principles of extraterritorial criminal jurisdiction under international law, as interpreted in recent Canadian jurisprudence.

## \*178 II. Principles of Extraterritorial Criminal Jurisdiction

Jurisdiction describes the limits of legal competence of a state or regulatory authority to make, apply, and enforce rules of conduct upon persons. [FN9] In *R. v. Hape*, the Supreme Court of Canada defined jurisdiction as “a state's power to exercise authority over individuals, conduct and events, and to discharge public functions that affect them.” [FN10] Determining the strength of a state's exercise of jurisdiction under international law requires that the form of jurisdiction be clearly identified (i.e. prescriptive, enforcement, or adjudicative) along with the ground(s) on which jurisdiction is claimed (i.e. territoriality, nationality, passive personality, protective, and/or universality). The interaction of these different grounds of jurisdiction and the three forms of jurisdiction determines the validity and strength of a given claim of jurisdiction.

### A. Forms of Criminal Jurisdiction

Consistent with international law, Canadian law recognizes three forms of state jurisdiction: prescriptive, enforcement and adjudicative jurisdiction. [FN11] These forms of jurisdiction relate to different phases of the criminal justice process: from enacting a criminal offence; to executive, administrative, or police action to enforce it in a specific case; and finally, to holding a judicial proceeding to adjudicate on the outcome of a specific criminal charge against a specific accused. The exercise of these forms of jurisdiction beyond Canadian territory raises different issues, owing to the principles of sovereign equality and non-intervention. [FN12]

Prescriptive jurisdiction (also called legislative or substantive jurisdiction) refers to the state's ability to make laws applicable to subject matter outside the state's territory. [FN13] The prescriptive jurisdiction of a state “is virtually unlimited by international law, save only that it may have specific international obligations limiting its competence.” [FN14] Extraterritorial legislation rarely causes conflicts unless it requires the compli-

ance of another state. [FN15] As such, the extent of its ability to give effect to its prescriptive jurisdiction is practically limited by the rules and principles governing enforcement jurisdiction.

Enforcement jurisdiction (also called investigative jurisdiction) is “the power to use coercive means to ensure that rules are followed, commands \*179 are executed, or entitlements are upheld.” [FN16] Conduct falling within the rubric of enforcement jurisdiction by judicial and non-judicial actors may include: interviewing witnesses, issuing search and arrest warrants, court orders for production of documents and attendance of witnesses, executing searches and seizures, detaining and arresting individuals, imposition of fines or imprisonment, and other activities to “use the resources of government to induce or compel compliance with its law.” [FN17] In practice, it may be difficult to distinguish between reasonable and unwarranted intrusions of a foreign state in pursuit of enforcement jurisdiction. [FN18] The Supreme Court of Canada views enforcement jurisdiction as the most contentious form. [FN19] *Hape* provides that enforcement jurisdiction is permissible if it is either based on the consent of the territorial state, [FN20] or based on a “permissive rule derived from international custom or from a convention”. [FN21]

The *Third Restatement of Foreign Relations Law of the United States* distinguishes between enforcement jurisdiction that is exercised within the state's own territory and such jurisdiction exercised in the territory of a foreign state: while the latter requires the consent of the foreign state, [FN22] the former does not. Instead, enforcement activities carried out within the state's own territory are valid if the following three conditions are satisfied:

- (a) the law being enforced is within the state's jurisdiction to prescribe;
- (b) when enforcement is through the courts, the state has jurisdiction to adjudicate with respect to the person who is the target of enforcement; and
- (c) the procedures of investigation, arrest, adjudication, and punishment are consistent with the state's obligations under the law of international human rights. [FN23]

Adjudicative jurisdiction (also called judicial jurisdiction) “is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force,” [FN24] or “the ability of a state's courts to adjudicate cases with foreign elements.” [FN25] Canadian courts generally apply the “real and substantial link” test where two or more states have a legal claim to jurisdiction,\*180 consistent with the principle of international comity. [FN26] The Supreme Court of Canada has taken the view that “comity is not necessarily offended where a state's courts assume jurisdiction over a dispute that occurred abroad (extraterritorial adjudicative jurisdiction), provided that the enforcement measures are carried out within the state's own territory.” [FN27]

## **B. Grounds for Asserting Criminal Jurisdiction**

Under international law, criminal jurisdiction may be asserted based on one or more of the following recognized grounds: territoriality, nationality, passive personality, protective, and/or universality. These grounds were set out in 1935 in the Harvard Research of International Law's “Draft Convention on Jurisdiction with Respect to Crime,” [FN28] and were the intellectual basis for inclusion in the American Law Institute's *Second and Third Restatement of the Foreign Relations Law of the United States*. [FN29]

Territoriality-based jurisdiction over events taking place within a state's territory and over individuals and property within that territory is the primary basis of jurisdiction under both Canadian and international law. [FN30] A state may have territorial jurisdiction where any element of the offence took place in that state.

[FN31] However, territoriality-based jurisdiction “is not an absolute principle of international law and by no means coincides with territorial sovereignty.” [FN32]

All of the other grounds of asserting jurisdiction, when operating alone or in combination are “extraterritorial,” meaning the “operation of laws upon persons or rights existing beyond the territorial limits of the state enacting such laws.” [FN33] Extraterritorial laws are valid under international law, limited by the responsibility of states to refrain from unduly infringing the sovereignty of each other. [FN34] *The S. S. Lotus* established that there is no restriction on the exercise of jurisdiction by a state unless the claimant can show that it exists as a principle of international law. [FN35]

\*181 Nationality (also called active personality) is a basis of jurisdiction where a state asserts jurisdiction over the conduct of their nationals, [FN36] without regard to where the conduct took place. This principle is employed more routinely by civilian jurisdictions, as opposed to common law jurisdictions, owing largely to historical reasons. [FN37] While favouring a territorial basis of jurisdiction, [FN38] the Supreme Court of Canada has recognized that nationality is a valid basis for asserting jurisdiction, [FN39] and that it “may operate concurrently with the territorial jurisdiction of the foreign state.” [FN40] Nationality-based extraterritorial criminal jurisdiction has been justified on several grounds by American jurists:

- (1) the national owes allegiance to his or her state no matter where he or she is located;
- (2) states have certain responsibilities to one another for the conduct of their nationals; and
- (3) each state has an interest in the well-being of its nationals while they are abroad. [FN41]

The acceptance of territoriality and nationality as legitimate jurisdictional grounds is rooted in two classical aspects of the nation-state: a defined territory and a permanent population. Owing to the possibility of concurrent jurisdiction, it has been argued that nationality should only be claimed as a basis of jurisdiction for the most serious crimes. [FN42]

Passive personality is more controversial as it allows a state to assume jurisdiction over an act that harmed one of its nationals abroad. [FN43] Claims of mistreatment of a country's nationals by foreign state actors have been made \*182 on a direct basis to the offending state, but are claims for compensation and not an exercise of criminal jurisdiction. [FN44]

Protective jurisdiction is a claim by a state based on “acts committed abroad that are prejudicial to its security, territorial integrity and political independence.” [FN45] This basis supports criminal jurisdiction over acts such as treason, espionage and counterfeiting state currency.

Universal jurisdiction applies to acts that are deemed to be offensive to the international community at large. [FN46] Under international customary law any state may prosecute any individual for these crimes regardless of where they were committed or the offender's nationality. [FN47] The Supreme Court of Canada has been cautious in its exercise of universal jurisdiction, as demonstrated in *R. v. Finta*, [FN48] in which the Court emphasized that its jurisdiction under section 7(3.71) of the *Criminal Code*, for charges of crimes against humanity and war crimes, was based on the unique circumstances of international armed conflict that tied war crimes to international norms, thus permitting universal jurisdiction. [FN49]

Each of these jurisdictional grounds may be claimed on their own by a state, or in combination with others grounds. Jurisdiction is not an “on/off” switch. It is not the case that one state has jurisdiction to the exclusion of

all others, unless it alone holds all the grounds. Instead, jurisdictional claims should be thought of as varying in degrees of intensity. Concurrent jurisdiction is possible, and increasingly likely, in the case of transnational criminality involving the illicit movement of offenders, victims, weapons and drugs.

### C. Relationship Between Grounds and Forms of Criminal Jurisdiction

In *Hape*, Justice LeBel discussed the implications of relying on different grounds of asserting jurisdiction and the three forms of jurisdiction, discussed above. With respect to territoriality-based jurisdiction, “a state has plenary authority to exercise prescriptive, enforcement and adjudicative jurisdiction over matters arising and people residing within its borders, and this authority is limited only by the dictates of customary and conventional international law.” [FN50]

\*183 Nationality-based claims of jurisdiction may present difficulties for enforcement jurisdiction, but not with respect to prescriptive or adjudicative jurisdiction, according to the majority in *Hape*:

The nationality principle is not necessarily problematic as a justification for asserting prescriptive or adjudicative jurisdiction in order to attach domestic consequences to events that occurred abroad, but it does give rise to difficulties in respect of the extraterritorial exercise of enforcement jurisdiction. Under international law, a state may regulate and adjudicate regarding actions committed by its nationals in other countries, provided enforcement of the rules takes place when those nationals are within the state's borders. When a state's nationals are physically located in the territory of another state, its authority over them is strictly limited. [FN51]

This is consistent with the *Third Restatement of Foreign Relations Law of the United States*, which recognizes the general validity of nationality-based extraterritorial prescriptive jurisdiction, [FN52] as well as the reasonableness of nationality-based adjudicative jurisdiction in criminal matters. [FN53] The activities of nationals abroad may be regulated by their home state, whether they are living abroad or merely visiting. [FN54]

There are good reasons why nationality-based claims of jurisdiction raise few concerns with respect to prescriptive and adjudicative jurisdiction. States that exercise nationality-based extraterritorial criminal jurisdiction over certain offences impose legal obligations on their citizens and permanent residents wherever they travel. These legal obligations are imposed solely on the nationals of those states, and do not apply to the nationals of other countries. In contrast, passive personality asserts the rights of a state's nationals abroad, imposing obligations on foreign nationals in a foreign state. Furthermore, both protective jurisdiction and universal jurisdiction similarly operate to impose obligations on foreign nationals in a foreign state. Thus, nationality-based claims of jurisdiction are less intrusive than other forms of extraterritorial jurisdiction.

Universal jurisdiction raises potential concerns with respect to enforcement jurisdiction. Crimes of universal jurisdiction such as genocide, crimes against humanity and war crimes committed outside of Canada [FN55] are recognized by Justice LeBel to “exemplify valid extraterritorial prescriptive jurisdiction, and any trial for such offences would constitute a legitimate exercise of extraterritorial adjudicative jurisdiction. But, importantly, they do not authorize Canada to enforce the prohibitions in a foreign state's territory by \*184 arresting the offenders there.” [FN56] While states may have reached a consensus that an offence is a universal crime, they may favour different enforcement approaches. Thus, even where a crime has been recognized as one of universal jurisdiction, enforcement jurisdiction remains an issue.

The previous section has identified the applicable principles of extraterritorial criminal jurisdiction under in-

ternational law, as interpreted in recent Canadian jurisprudence. The following sections will provide a supplemental analysis of the intersection of these forms and grounds with section 7(4.1) of the *Criminal Code*.

### III. Prescriptive Jurisdiction & Section 7(4.1) of the *Code*

Section 7(4.1) of the *Criminal Code* came into force on May 26, 1997, [FN57] establishing nationality-based extraterritorial jurisdiction over listed sexual offences against children as follows:

Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 151, 152, 153, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 173 or subsection 212(4) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

The threshold issue is whether section 7(4.1) of the *Criminal Code* is a permissible exercise of prescriptive jurisdiction. The decision in *Klassen* authoritatively provides an affirmative response to this question. As noted in *Klassen* and recently reaffirmed by the Supreme Court of Canada, Parliament “has full power to make laws having extraterritorial operation” by virtue of section 3 of the *Statute of Westminster*. [FN58] The Privy Council previously held that under the *British North America Act 1867*, Parliament had the full capacity to legislate extraterritorially, even if it contravened international law. [FN59] Compliance of legislation with international law is a principle of statutory interpretation, absent an explicit intention to depart from international law. [FN60]

\*185 Section 7(4.1) constitutes an explicit intention by Parliament to exercise its well-established extraterritorial prescriptive jurisdiction authority to the listed sexual offences against children committed by Canadian nationals. Parliament adopted section 7(4.1) for the express purpose to “fulfill Canada’s commitments under the United Nations *Convention on the Rights of the Child* and the 1996 World Congress Against Commercial Sexual Exploitation of Children”. [FN61] Michael Hirst recognizes in his authoritative text on extraterritoriality in English criminal law that “international treaty obligations now represent by far the most common reason for the creation of new exceptions to the territoriality principle ... It also comes from the changing face of crime and from the threat posed by new forms of crime.” [FN62]

It is persuasive, although not necessary, to identify additional public policy reasons supporting section 7(4.1) in terms of prescriptive jurisdiction. States enact extraterritorial criminal legislation for the policy reasons of regulating extraterritorial conduct with a strong connection to the state, to control the “public face” of the state, to avoid lawless territory and to implement international agreements regarding particular offences. [FN63] In *R. v. Terry*, Justice McLachlin (as she then was) noted for a unanimous Court that “States may invoke a jurisdiction to prescribe offences committed elsewhere to deal with *special problems*, such as those provisions of the *Criminal Code*, R.S.C., 1985, c. C-46, pertaining to offences on aircraft (sections 7(1), (2)), and war crimes and other crimes against humanity (section 7(3.71)).” [FN64]

Child sexual abuse and exploitation committed abroad by foreign nationals from developed countries presents a serious problem for the international community. Desperate poverty and endemic corruption in many developing countries leave vulnerable children without the protection of effective local law enforcement. Travelling child sex offenders and so-called child sex tourists take advantage of lax local law enforcement and exploit the vulnerability of their victims. Furthermore, the transient presence of offenders in one state also creates the need for extraterritorial legislation. By the time authorities in the state where the offence took place gather

enough evidence to obtain an arrest warrant, perpetrators have often already fled. Absent extraterritorial legislation, child sex abuse is committed with high levels of impunity in certain countries. [FN65] The UN Special Rapporteur on the \*186 sale of children, child prostitution, and child pornography emphasized the role of developed countries in the sexual exploitation of children:

Poverty relates to the supply side of the problem. It does not explain the huge global demand, with, in many instances, customers from rich countries circumventing their national laws to exploit children in other countries. Sex tourism has spread its illicit wings wide, and pedophiles search for their victims in all parts of the globe. [FN66]

Likewise, as Justice Cullen recognized in *Klassen*:

A failure to assume prescriptive jurisdiction over such offences in the long term diminishes the likelihood that alleged offenders with direct and permanent ties to Canada will be investigated or prosecuted. The reduced opportunity that states with territorial jurisdiction have to identify, investigate or apprehend those who are only transient within their borders inhibits the likelihood of successful investigation or prosecution. *In the absence of extraterritorial legislation, Canada would become a safer harbour for those who engage in the economic or sexual exploitation of children.* [FN67]

Therefore, there is abundant support for the proposition that section 7(4.1) of the *Criminal Code* is a valid exercise of extraterritorial prescriptive jurisdiction to address the special problem of child sexual abuse and exploitation abroad by Canadian nationals.

#### IV. Enforcement Jurisdiction & Section 7(4.1) of the *Code*

While *Klassen* authoritatively held that section 7(4.1) is a valid exercise of nationality-based prescriptive jurisdiction, Justice Cullen was explicit in his reasons in stating that the application brought by the accused did not implicate issues related to enforcement jurisdiction. [FN68] Specifically, he held that section 7(4.1) did not itself purport to establish any extraterritorial powers on the part of Canadian officials to engage in enforcement activities in the territorial state. [FN69] Therefore, section 7(4.1) could not be directly assailed on the grounds that it impugned the principles governing enforcement jurisdiction. This finding is surely correct, given that the effect of section 7(4.1) is simply to extend the territorial ambit of listed offences beyond Canada's \*187 borders—it does not provide for any procedural or evidentiary measures to facilitate the enforcement of these offences, or create any “child sex tourism” offence (i.e. travelling with intent to engage in child sexual abuse or exploitation) as some other jurisdictions have adopted.

However, the following italicized statement by Justice Cullen in *Klassen* is at odds with the principles governing extraterritorial enforcement jurisdiction and should, therefore, not be followed: “What it [section 7(4.1)] does do is seek to control the conduct of Canadian nationals abroad, *but only by the use of enforcement measures in Canada.*” [FN70] Enforcement activities conducted *outside* of Canada with respect to an investigation or prosecution under section 7(4.1) are permissible based on *Hape*, if they are either based on the consent of the territorial state [FN71] or grounded in a “permissive rule derived from international custom or from a convention”. [FN72] It is important to note that extraterritorial enforcement jurisdiction activities will frequently be necessary in section 7(4.1) cases and, as will be discussed, are explicitly authorized in applicable multilateral treaties.

Legal challenges arguing an improper exercise of enforcement jurisdiction in respect to section 7(4.1) would typically be evaluated on a case-by-case basis, since they are dependent on the actual conduct of Canadian authorities and applicable multilateral and bilateral treaties in force between Canada and the relevant territorial

state. Some common enforcement jurisdiction issues that are likely to arise in cases under section 7(4.1) include the following:

- a) What legal authority exists to facilitate investigations outside of Canada into allegations of extraterritorial sexual offences against children, listed in section 7(4.1)?
- b) What standards apply to Canadian law enforcement officials involved in investigations outside of Canada into allegations of sexual offences against children, listed in section 7(4.1)?
- c) What legal authority exists to extradite Canadian nationals for prosecution pursuant to section 7(4.1)?

It is possible to provide some initial guidance to Canadian authorities in addressing these issues by examining applicable case law and relevant treaties between Canada and known destination countries frequented by travelling child sex offenders and “child sex tourists”. A recent report from the Protection Project, an initiative of John Hopkins University, identifies the Philippines, Thailand, Costa Rica, Mexico and Cambodia as “established” child sex tourist destination countries. “Emerging” destination countries \*188 include the Dominican Republic, Honduras, Guatemala, Kenya, Russia, Vietnam and Laos. [FN73] All of these countries and a number of others have been identified as grappling with child sex tourism within their borders in the 2008 TIP Report. These countries span several continents and will be referred to below as “destination countries” for the purposes of addressing the typical extraterritorial enforcement jurisdiction issues noted above: [FN74]

- Latin America and the Caribbean: Argentina, Brazil, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Peru, Venezuela;
- Asia: Cambodia, China, India, Indonesia, Laos, Mongolia, Nepal, Philippines, Thailand, Vietnam;
- Africa: Benin, The Gambia, Kenya, Madagascar, Mauritius, Morocco, Senegal, South Africa, Togo; and
- Europe: Russia.

#### **A. Investigative Activities Outside of Canada**

Evidence into allegations of child sexual offences abroad may be discovered in Canada or in a foreign state. Generally, investigative activities carried out within Canadian territory with respect to extraterritorial charges laid under section 7(4.1) should not raise any enforcement jurisdiction problems. Such evidence is, in fact, common in many cases involving sexual offences against children. This can include statements by the accused to coworkers, friends, or relatives about their crimes. Frequently, child sex offenders who are discovered have taken photographs or video-recordings of their illegal acts. Many child sex tourists videotape their abuse. An American study found that child pornography has been uncovered in 42 percent of cases. [FN75] Indeed, several Canadians have been charged for sex crimes against children based on the discovery of videotapes allegedly documenting their abuse: Donald Bakker, Christopher Paul Neil, and Kenneth Klassen. Such evidence may enable a prosecution to proceed where, for whatever reason, the foreign state is uncooperative. However, law enforcement officials and prosecutors will undoubtedly favour conducting at least some investigative activities in

the territorial state, such as taking a statement from the victim and other potential witnesses, or gathering forensic evidence, where available.

With respect to investigative activities carried out in a foreign state, there are three general approaches for Canada to obtain the consent of a \*189 foreign state to facilitate various enforcement activities. [FN76] First, if Canada has entered into a mutual legal assistance treaty in criminal matters with a foreign state on a bilateral or multilateral basis, then a formal treaty request may be made in accordance with the terms of the relevant treaty. [FN77] In addition to these general mutual legal assistance treaties in criminal matters, some international conventions include mutual legal assistance provisions to enhance cooperation. Second, if such agreements are not in place beforehand, a non-treaty letter of request or non-treaty court-issued request may be made seeking assistance on the basis of international comity; it is within the discretion of the territorial state to accept or decline assistance in such instances. [FN78]

Third, as noted by the Federal Prosecution Service, “mutual assistance does not replace existing means of cooperation, and police-to-police cooperation remains an important mechanism for assistance, particularly where information can be provided without resorting to compulsory measures.” [FN79] For example, police-to-police cooperation was the approach used in *Hape* to enable the RCMP to conduct investigative activities in the Turks and Caicos. The detective superintendent of the Turks and Caicos Police Force, who was in charge of criminal investigations on the Islands, gave consent to the investigative activity. [FN80] While the majority of the Court did not directly address this aspect of the case, Justice Bastarache's concurring opinion adopted a pragmatic approach to assessing police cooperation, stating that “[t]here is obviously consent to the participation of Canadian officers in all cases where they operate in another country.” [FN81] Police-to-police cooperation may be of varying degrees of formality. For example, the Australian Federal Police have entered into Memoranda of Understanding with senior police officials in countries such as Indonesia, Thailand, Colombia, the Philippines and Singapore to facilitate joint and cooperative assistance to address specific areas of criminality. [FN82] This may be an alternative way to facilitate effective \*190 cooperation on more than an *ad hoc* basis where there is little interest in a wholesale mutual legal assistance treaty.

Each of the countries identified as destination countries have mutual legal assistance obligations towards Canada to facilitate investigative activities into child sex crime allegations. Canada currently has bilateral mutual legal assistance treaties in criminal matters in force with eight of the thirty-three countries (24%) identified as destination countries, including: Argentina, China, India, Mexico, Peru, Russia, South Africa, and Thailand. [FN83] In addition, *all* of the destination countries, with the exception of Russia, have committed in Article 6 of the Optional Protocol to mutual legal assistance obligations concerning offences related to the sale of children (i.e. child trafficking), child prostitution and child pornography:

1. States Parties shall afford one another *the greatest measure of assistance* in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 3, paragraph 1, including assistance in obtaining evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of the present article in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. *In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.* [FN84]

These treaty provisions between Canada and destination countries constitute explicit authority to facilitate cooperation in extraterritorial enforcement activities in connection with criminal investigations and prosecutions under section 7(4.1). Additionally, while Article 6 of the Optional Protocol establishes mutual legal assistance

obligations in respect of the parties, the terms of some of the bilateral mutual legal assistance treaties between Canada and destination countries are more specific and could prove to be tremendously useful in practice. For example, some of these treaties authorize investigative activities without a formal request, such as consular officials taking evidence from a witness on a voluntary basis in the foreign state, upon notice to the foreign state. [FN85] The importance of effectively utilizing arrangements for mutual legal assistance in extraterritorial child sex crime cases was underlined during workshops at the 2nd World Congress against Commercial Sexual Exploitation of Children in Yokohama, Japan in 2001. [FN86]

\*191 In cases where the territorial state is not a party to the Optional Protocol and does not owe any mutual legal assistance obligations to Canada under any other multilateral or bilateral treaty, Canada could seek consent based on a non-treaty request. Likewise, it is advisable for police-to-police cooperation to be pursued in advance of any actual cases being discovered.

## **B. Applicable Standards in Investigations Abroad**

In *Klassen*, the applicant submitted that “to require the *Charter* to be applied abroad only with consent but not the *Code* would be logically incoherent, as Canadian officials could then enforce Canadian law abroad without being subject to *Charter* scrutiny.” [FN87] Justice Cullen disposed of this argument by noting that an accused may nevertheless seek to obtain redress, including the exclusion of evidence obtained in a foreign country, where it would impinge on trial fairness as guaranteed in section 7 of the *Canadian Charter of Rights and Freedoms*. [FN88]

The Supreme Court of Canada has recognized the need for Canadian law enforcement officials to cooperate with their counterparts in foreign jurisdictions in order to effectively address transnational crime, and that Canadian investigative procedures and standards may not always be possible in foreign jurisdictions. As Justice McLachlin (as she then was) stated in *R. v. Harrer*, “[w]e need to accommodate the reality that different countries apply different rules to evidence gathering, rules which must be respected in some measure if we are to retain the ability to prosecute those whose crime and travel take them beyond our borders.” [FN89]

The Court recently affirmed in *Hape* that the law of the jurisdiction in which the investigative activity was carried out governs. [FN90] In *Hape*, the majority held that in most cases the *Charter* will not apply to the conduct of Canadian law enforcement officials or other state actors, unless there is an exception that would justify the extraterritorial application of the *Charter*, such as consent of the territorial state. Nevertheless, there is “an incentive for Canadian police officers to encourage foreign police to maintain high standards in the course of a cooperative investigation so as to avoid having the evidence excluded or a stay entered”. [FN91] Justice LeBel emphasized that “Canadian police should strive to conduct investigations outside Canada in accordance with the letter and spirit of the *Charter*, even when its guarantees do not apply directly.” [FN92]

## **\*192 C. Extradition of Canadian Nationals**

In cases where the accused is outside Canadian territory, extradition may be sought either pursuant to the terms and conditions of applicable extradition treaties, or on a case-by-case basis through diplomatic channels based on the discretion of the custodial state. Canada has bilateral extradition treaties in force with one-third of destination countries, including: Argentina, Cuba, Ecuador, Guatemala, India, Mexico, Nicaragua, Peru, the Philippines, South Africa, and Thailand. [FN93] Many of these extradition treaties encompass various sexual of-

fences, including those in relation to minors. Each of these states is also a party to the Optional Protocol.

As with mutual legal assistance, the Optional Protocol establishes obligations among States Parties to facilitate the extradition of suspected child sex offenders. For the eleven destination countries with which Canada has bilateral extradition treaties, Article 5(1) of the Optional Protocol provides that the sale of children, child prostitution and child pornography are “deemed to be included as extraditable offences ... and shall be included as extraditable offences in every extradition treaty subsequently concluded between them.” [FN94]

If Canada were to seek the extradition of one of its nationals for conduct set out in the Optional Protocol from a state that does not have an extradition treaty with Canada but is party to the Protocol (all of the destination countries, except Russia), Article 5(2)-(5) establishes a legal obligation on that state to either extradite or prosecute the individual:

2. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider the present Protocol to be a legal basis for extradition in respect of such offences. Extradition shall be subject to the conditions provided by the law of the requested State.

3. States Parties that do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 4. [FN95]

\*193 5. If an extradition request is made with respect to an offence described in article 3, paragraph 1, and the requested State Party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution. [FN96]

It is significant that Article 5(5) enacts the *aut dedere aut judicare* principle (extradite or prosecute), which supports the view that the Optional Protocol is properly viewed as a suppression convention under international law, expressing the international community's shared consensus around the need to end impunity for child sex offenders. [FN97] Additionally, Article 5(5) provides a basic framework to deal with the situation where both the territorial state and the state of nationality of the accused seek to prosecute the individual: priority is afforded to whichever state is the custodial state, with that state having the obligation to prosecute or extradite to the other state. This provision establishes obligations that go beyond mere principles of comity.

In addition to these provisions in the Optional Protocol as well as bilateral extradition and mutual legal assistance treaties, regional and international multilateral arrangements have been instrumental in facilitating enforcement activities against traveling child sex offenders. For example, INTERPOL played a key role in identifying and apprehending Canadian Christopher Paul Neil in Thailand in 2007. The INTERPOL Secretariat processes requests for information and assistance from over 180 members worldwide within two hours, on average. [FN98] Its “red wanted notices” with detailed arrest warrant and offence information are used to secure suspects prior to the filing of formal extradition requests.

The Optional Protocol includes a number of important enforcement obligations to facilitate mutual legal as-

sistance and extradition with respect to Canadian nationals who have engaged in the sale of children, child prostitution, and child pornography. This systematic framework is designed to facilitate enforcement jurisdiction among signatories to the Optional Protocol. In addition to any other treaty obligations, the Optional Protocol is in place between Canada and individual destination countries with respect to mutual legal assistance in criminal matters and extradition. Law enforcement officials in Canada have a full range of legal tools available to enforce Canada's extraterritorial child sex crimes offences identified in section 7(4.1) and should, therefore, not be limited to enforcement activities within Canada. To do so would significantly undermine the aim of ending the impunity of travelling child sex offenders and run afoul of Canada's treaty obligations to investigate and prosecute its nationals for engaging in such conduct abroad.

#### \*194 V. Adjudicative Jurisdiction & Section 7(4.1) of the *Code*

The final aspect of asserting jurisdiction related to extraterritorial criminal prosecutions under section 7(4.1) is adjudicative jurisdiction. While the *Klassen* decision is correct in finding that adjudicative jurisdiction is properly exercised in such cases, the reasons could be strengthened. The state of conventional and customary international law related to nationality-based extraterritorial criminal prosecutions confirms that such judicial proceedings are consistent with international comity. Canadian courts are required to assert such jurisdiction to comply with Canada's international obligations.

#### A. International Comity & the Applicability of *Libman*

In *R. v. Libman*, the Supreme Court of Canada stated that in order for a Canadian court to assume jurisdiction over a matter, “it is sufficient that there be a ‘real and substantial link’ between an offence and this country [Canada], a test well known in public and private international law.” [FN99] Consequently, the “real and substantial link” test is frequently cited as the test for when a court should exercise adjudicative jurisdiction.

However, in *Klassen*, Justice Cullen agreed with the respondent Crown that the *Libman* “real and substantial link” test is not applicable to prosecutions under section 7(4.1) of the *Criminal Code*, stating: “*Libman* was dealing with the circumstances that justify a court assuming jurisdiction over a particular offence in the absence of explicit extraterritorial legislation, and was thus necessarily based on the territorial principle alone. It says little or nothing about jurisdiction over offences based on the four other principles recognized in customary international law.” [FN100] While Justice Cullen was correct in finding that Canadian courts may appropriately exercise adjudicative jurisdiction in extraterritorial criminal prosecutions under section 7(4.1), his reasons are not particularly extensive. Therefore, it is necessary to delve more fully into the question of when the exercise of extraterritorial adjudicative jurisdiction is appropriate.

*Libman* is fundamentally about ensuring that claims of adjudicative jurisdiction respect the international principle of comity. The “real and substantial link” test is well suited to assessing claims of adjudicative jurisdiction based on territoriality; however, it is ill-equipped to address extraterritorial claims of adjudicative jurisdiction. For example, the “real and substantial link” test provides no explanation for why Canadian courts may exercise adjudicative jurisdiction in prosecutions for war crimes or crimes against humanity taking place abroad. Rather than the “real and substantial link” \*195 test providing a safeguard for comity in such cases, it is the presence of international conventions and customary international law that provide permissive or mandatory adjudicative jurisdiction over these international crimes. In *Finta*, Justice La Forest discussed the importance of taking into account international legal obligations when considering the applicability of *Libman*: “[t]he interna-

tional community has not only stated that it does not object to our exercising jurisdiction in this field; it actively encourages the prosecution of those whose criminal conduct also constitutes war crimes or crimes against humanity.” [FN101] More recently, in *Hape*, Justice LeBel stated for the majority that “comity is not necessarily offended where a state’s courts assume jurisdiction over a dispute that occurred abroad (extraterritorial adjudicative jurisdiction), provided that the enforcement measures are carried out within the state’s own territory.” [FN102]

In a treatise on the territorial ambit of English criminal law, Michael Hirst argues that invoking comity to *limit* adjudicative jurisdiction is incorrect where such jurisdiction is exercised to discharge obligations under international law: “considerations of international law or comity impose no such general constraints on the ambit of a state’s criminal law. In recent years, considerations of international law have tended to push English criminal law in the opposite direction--extending its ambit so as to enable the United Kingdom to discharge international responsibilities.” [FN103] Hirst’s proposition is particularly strong in the situation where each of the states that could have jurisdictional claims in a given matter is also a party to a relevant international treaty that grants permissive jurisdiction to each other.

International conventions, to which Canada is a party, as well as customary international law, may establish permissive or mandatory extraterritorial criminal jurisdiction over an offence that physically took place outside of Canada. It may be argued that such reliance on international convention or customary international law as a basis for exercising adjudicative jurisdiction respects comity more fully than other possible approaches. Treaty obligations have been explicitly agreed to between Canada and the other signatories. Therefore, criminal provisions that implement Canada’s international treaty obligations are within the dictates of international comity based on the consensus and encouragement of the international community to prosecute these crimes.

This practice of asserting extraterritorial jurisdiction grounded in the provisions of international treaties, based on either nationality or universal jurisdiction, is well established in Canadian criminal law. This is reflected by the adoption of several offences in the *Criminal Code* to implement Canada’s treaty obligations. These offences, each of which appear along with section 7(4.1) as exceptions to the general territorial ambit of Canadian \*196 criminal law, include: offences on an aircraft (section 7 (1)), offences committed in relation to cultural property (section 7(2.01)), offence against hostage taking (section 7(3.1)), offences against United Nations or associated personnel (section 7(3.71)), offences involving nuclear material, explosives, or other lethal devices (7(3.2) and 7(3.72)), and offences related to the financing of terrorism (section 7(3.73)). Offences of war crimes and crimes against humanity in the *Crimes Against Humanity and War Crimes Act* [FN104] also reflect Canada’s implementation of international obligations.

Each of the foregoing extraterritorial offences are difficult for one state alone to prosecute, and “in such circumstances international law recognizes that domestic legal orders may validly establish and exercise jurisdiction over the alleged offenders.” [FN105] International law confers domestic jurisdiction to prosecute offenders through so-called suppression conventions, and in our increasingly globalized world, offences of this nature are growing. By signing a treaty that establishes mandatory or permissive extraterritorial criminal jurisdiction over certain offences, the parties recognize that exceptions are necessary to an absolutist view of state sovereignty in order to address certain conduct. Since comity is “a pragmatic principle of reciprocal expectations,” [FN106] international treaties are an ideal location to identify such expectations. As a result, international treaties or customary international law must be considered to determine whether a given exercise of extraterritorial adjudicative jurisdiction is appropriate.

In the case of charges laid against Canadian nationals for extraterritorial child sex crimes under section 7(4.1), Canadian courts should exercise adjudicative jurisdiction owing to both the nationality of the accused and Canada's obligations under international law. [FN107] As the majority held in *Hape*, “[t]he nationality principle is not necessarily problematic as a justification for asserting prescriptive or adjudicative jurisdiction in order to attach domestic consequences to events that occurred abroad.” [FN108] Furthermore, rather than conventional or customary international law imposing *limitations* on Canada's adjudicative jurisdiction in cases of child sex offences committed abroad by Canadian nationals, Canada could be in violation of specific international legal obligations were Canadian courts to decline to exercise adjudicative jurisdiction over Canadian nationals for such offences. It is, therefore, necessary to review the specific content of Canada's \*197 treaty and customary obligations under international law with respect to prosecuting child sex crimes.

### **B. International Conventions Support Adjudicative Jurisdiction in Section 7(4.1) Cases**

Widely-adopted international conventions that Canada has ratified provide a clear basis under which Canadian courts should exercise adjudicative jurisdiction under section 7(4.1). An analysis here of the relevant treaty provisions and the *travaux préparatoires* confirms such a finding.

Canada signed the *UN Convention on the Rights of the Child* (“CRC”) on May 28, 1990, and ratified it on December 13, 1991. [FN109] The CRC entered into force on September 2, 1990, and is one of the most widely ratified treaties, with 193 parties. [FN110] A decade later, Canada signed the Optional Protocol on November 10, 2001, and ratified it on September 14, 2005. The Optional Protocol came into force on January 12, 2002, and has 128 signatories. [FN111] Canada and each of the countries identified as “destination countries” are parties to both the CRC and the Optional Protocol (with the exception of Russia which is only party to the CRC). These international legal agreements strongly denounce all forms of child sexual abuse and exploitation and establish obligations on the parties to take a wide range of measures to confront this problem.

In terms of the specific obligations imposed in these treaties, Articles 34 and 35 of the CRC, to which no reservations have been made, provide as follows:

#### **Article 34**

States Parties undertake to protect the child from *all forms of sexual exploitation and sexual abuse*. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

#### **\*198 Article 35**

States 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. [FN112]

At a minimum, Article 34 authorizes Canada to exercise adjudicative jurisdiction over its nationals on an extraterritorial basis in those foreign jurisdictions that are parties to the CRC, with respect to all of the listed offences in section 7(4.1), including those with commercial and non-commercial aspects. Each of the listed offences in section 7(4.1) would fall within the broad language of “all forms of sexual exploitation and sexual abuse.”

Subsequent to the adoption of the CRC, the UN *Programme for Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography* drafted in 1992 stated that “[l]egislative and other measures should be taken to prevent and combat sex tourism, both in the countries from which the customers come and those to which they go.” [FN113] In 1994, the U.N. appointed Special Rapporteur on the sale of children, child prostitution, and child pornography recognized the “trend toward extraterritoriality” [FN114] in prosecuting child sex offenders as “a welcome step towards promoting accountability and responsibility with respect to the ever-expanding transnational sexual exploitation of children. [FN115]

In 2002, the Optional Protocol provided greater specificity with respect to the extraterritorial prosecution of sexual offences committed against children. The preamble of the Optional Protocol expressly recognizes “the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography.” [FN116] Articles 3(1) and 4(2)(a) explicitly authorize nationality-based extraterritorial jurisdiction in relation to the sale of children, child prostitution and child pornography. Article 2 defines these offences as follows:

(a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;

\*199 (b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;

(c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes. [FN117]

Article 3(1) of the Optional Protocol is a *mandatory* clause that requires each state to criminalize listed offences “whether such offences are committed domestically or transnationally or on an individual or organized basis.” The listed offences consist of the following:

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

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

- a. Sexual exploitation of the child;
- b. Transfer of organs of the child for profit;
- c. Engagement of the child in forced labour;

(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;

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

(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2. [FN118]

In the first draft of the Optional Protocol the Australian Human Rights and Equal Opportunity Commission pro-

posed that states should “give effect in their national legislation to the principle of *universal criminal jurisdiction* regarding crimes of sexual exploitation or of trafficking in children wherever committed.” [FN119] A subsequent draft proposed by France did not refer to universal jurisdiction, but would have made extraterritorial jurisdiction *mandatory* on *both* a territoriality and nationality basis. [FN120] As negotiations proceeded, the drafters reached a compromise, such that Article 4(1) created *mandatory* territoriality-based jurisdiction over listed offences in Article 3(1), while Article 4(2) of the Optional Protocol created *permissive* extraterritorial criminal jurisdiction over those offences, based on either the nationality of the accused (active personality), or the nationality of the victim \*200 (passive personality). [FN121] Therefore, the exercise of nationality-based extraterritorial criminal jurisdiction is explicitly authorized between States Parties to the Optional Protocol.

In addition to the sale of children, child prostitution and child pornography, the Optional Protocol also imposes obligations in Article 10(1) to combat “child sex tourism”—a term that is not defined in the final agreed text:

States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. States Parties shall also promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations. [FN122]

For crimes identified in Article 3(1), the Optional Protocol mandates the exercise of criminal jurisdiction within the territory of States Parties on a mandatory basis, and extraterritorially to their nationals on a permissive basis. It is important to note that the permissive nature of Article 4(2)(a) and the scope of the Optional Protocol should not be viewed as *limiting* either the parent CRC treaty, or the domestic law of States Parties that provide for more expansive criminal jurisdiction in respect to crimes involving the sexual abuse and exploitation of children. Article 4(4) clarifies that “[t]he present Protocol does not exclude any criminal jurisdiction exercised in accordance with internal law.” This provision is important for two reasons. First, it acknowledges that nationality-based jurisdiction in criminal matters is routine in many states, namely civilian jurisdictions. Second, it explicitly reflects the view of many NGOs and states, as seen in the *travaux préparatoires*, that the more expansive language used in the CRC already afforded permissive extraterritorial jurisdiction in Article 34 and 35 over both commercial and non-commercial child sexual exploitation and abuse. Therefore, any supposed distinction between commercial and non-commercial child sexual exploitation and abuse is untenable.

### C. Customary International Law Supports Adjudicative Jurisdiction in Section 7(4.1) Cases

In addition to the widespread adoption of the CRC and Optional Protocol, international and regional declarations have provided evidence of *opinio juris*, supported by state practice, which supports the proposition that customary international law recognizes nationality-based extraterritorial criminal jurisdiction for crimes involving child sexual abuse and exploitation.

\*201 A series of international declarations adopted by World Congresses in 1996, 2001, and 2008 have called for states to adopt and proactively implement extraterritorial laws against child sexual exploitation and abuse. The initiatives taken by the United Nations in the early 1990s laid the groundwork for the World Congress against the Commercial Sexual Exploitation of Children, held in Stockholm, Sweden in 1996. [FN123] At the Congress, the Rapporteur-General stated that extraterritorial criminal laws were necessary to protect children from sex tourism. [FN124] The panel on law enforcement and law reform also recommended Countries that ex-

tend their criminal jurisdiction, recognizing that “[e]xtraterritorial legislation is a valuable tool for the pursuit of child abusers.” [FN125] Consensus was reached on the goal of eradicating the commercial sexual exploitation of children through a non-binding agreement, the *Declaration and Agenda for Action* (the “Stockholm Declaration”), which defined the scope of the problem and necessary measures for combating it. Canada was one of 122 countries that signed the Stockholm Declaration, calling upon states to:

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

... in the case of sex tourism, *develop or strengthen and implement laws to criminalize the acts of the nationals of the countries of origin when committed against children in the counties of destination (“extra-territorial criminal laws”)*; promote extradition and other arrangements to ensure that a person who exploits a person for sexual purposes in another country (the destination country) is prosecuted either in the country of origin or the destination country; strengthen laws and law enforcement; including confiscation and seizure of assets and profits, and other sanctions against those who commit sexual crimes against children in destination countries, and share relevant data; [FN126]

In the year following the Stockholm World Congress, Bill C-27 came into force in Canada, enacting section 7(4.1) of the *Criminal Code*, with an \*202 explicit stated purpose to “fulfill Canada’s commitments under the United Nations *Convention on the Rights of the Child* and 1996 World Congress Against Commercial Sexual Exploitation of Children.” [FN127]

In 2001, the *Yokohama Global Commitment* was adopted by 136 states at World Congress II, calling for “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 criminalize this phenomenon, including provisions with extraterritorial effect.” [FN128] In the lead up to World Congress II, several regional declarations, including in Europe and South America, similarly called for extraterritorial laws against child sexual exploitation and abuse. [FN129]

The most recent World Congress III against the Sexual Exploitation of Children and Adolescents held in November 2008, involved participants from over 140 governments as well as non-governmental organizations. The *Rio de Janeiro Declaration and Plan of Action to Prevent and Stop Sexual Exploitation of Children and Adolescents* (“Rio Pact”) recognizes that “[i]mpunity for perpetrators of sexual exploitation of children and adolescents is perpetuated by the lack of investigation and prosecution of offenders in the country where the crime takes place, and of consistent and effective extraterritorial jurisdiction.” [FN130] The Rio Pact specifically calls on all states to proactively investigate and prosecute their nationals on an extraterritorial basis for the sexual exploitation and abuse of children by committing to:

Establish effective extraterritorial jurisdiction, abolishing the requirement of double criminality for offences of sexual exploitation of children and adolescents, and facilitate effective extradition and mutual legal assistance, in order to achieve effective prosecution of perpetrators and appropriate sanctions;

\*203 Designate a lead law enforcement agency, where appropriate to national circumstances, to proactively enforce extraterritorial laws related to sexual exploitation of children and adolescents; [FN131]

In addition to the CRC, Optional Protocol and the World Congress declarations providing evidence of *opinio juris*, state practice also supports the proposition that nationality-based extraterritorial criminal jurisdiction for child sexual abuse and exploitation has achieved customary international law status. Dozens of jurisdictions, representing all of the major legal systems of the world, with a diverse geographic representation, have adopted

extraterritorial child sex tourism legislation. [FN132] Most notably, from a common law perspective, courts in Australia, the United States, and the United Kingdom have all assumed jurisdiction in cases involving extraterritorial charges against their nationals for sexual offences against children. Each of these jurisdictions has exercised nationality-based adjudicative jurisdiction on an extraterritorial basis.

Australia was one of the first common law jurisdictions to enact extraterritorial jurisdiction related to child sex tourism in 1994 with the *Crimes (Child Sex Tourism) Amendment Act 1994*. [FN133] Under Commonwealth law, Australian nationals (individuals and corporate entities) may be prosecuted for the following broadly framed extraterritorial child sex offences: sexual intercourse with a child under 16; inducing a child under 16 to engage in sexual intercourse; sexual conduct involving a child under 16; inducing a child under 16 to be involved in sexual conduct; and, encouraging sexual conduct that constitutes any of the previous offences. [FN134] There is no requirement under Australian law for the territorial state to request the commencement of extraterritorial criminal proceedings under these provisions, and the offences encompass both commercial and non-commercial child sexual abuse and exploitation.

\*204 From 1995 to 2007, the Australian Federal Police conducted 158 investigations into extraterritorial child sex offences by Australian nationals, resulting in 28 persons being charged and 19 convictions, with several cases still being prosecuted. [FN135] Australian courts have consistently and routinely exercised adjudicative jurisdiction over Australian nationals charged with committing acts of child sexual abuse and exploitation abroad under the extraterritorial law. [FN136] In *XYZ v. Commonwealth*, [FN137] the High Court of Australia upheld the constitutionality of Australia's nationality-based extraterritorial offences of sexual intercourse with a child under 16, and sexual conduct involving a child. [FN138] Chief Justice Gleeson, for the majority, found that Australia's claim of jurisdiction in respect to child sex offences was proper and in full accordance with the principle of the comity of nations:

The assertion of extra-territorial criminal jurisdiction is not, in itself, contrary to the principles of international law. As has already been noted, an exercise of extra-territorial jurisdiction in respect of this kind of offence has been undertaken by many other countries. The territorial principle of legislative jurisdiction over crime is not the exclusive source of competence recognised by international law ...

This legislation is expressed to apply to conduct outside Australia, but only where engaged in by persons over whom Australia, according to the comity of nations, has jurisdiction. *Nor are we concerned with legislation which manifests a clear intention to reach beyond bounds that would be regarded as acceptable according to the comity of nations.* [FN139]

In a concurring opinion, Justice Kirby noted the “critical importance” of the widespread adoption of the CRC and Optional Protocol for the protection of children, and their relevance to understand the international context of Australia's assertion of extraterritorial jurisdiction over child sex crimes. [FN140]

The United States also enacted federal legislation in 1994 that made it a crime for American nationals to travel abroad, or conspire to do so, with \*205 the intent of engaging in certain prohibited sexual acts with a child less than 18 years old. [FN141] Out of concern that establishing such intent created difficult evidentiary issues, and that not all child sex tourist conduct would be caught by the 1994 provisions, the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003* (the “PROTECT Act”) [FN142] was enacted. Under the PROTECT Act, offences encompass both commercial and non-commercial child sexual abuse and exploitation. There is no requirement that the territorial state request the commencement of criminal proceedings.

Between 2003 and January 2008, U.S. Immigrations and Customs Enforcement made 67 arrests under the child sex tourism provisions of the PROTECT Act, resulting in 47 convictions, with several pending cases. [FN143] U.S. courts have routinely and consistently retained adjudicative jurisdiction in child sex tourism cases involving American nationals, [FN144] and rejected constitutional challenges to the exercise of nationality-based extraterritorial jurisdiction for child sex offences under the PROTECT Act.

In *U.S. v. Clark*, [FN145] the first charges laid under the PROTECT Act, the accused pleaded guilty to two counts for acts committed in Cambodia, but moved to dismiss his conviction on constitutional, jurisdictional and statutory interpretation grounds. District Judge Lasnik of the U.S. District Court for the Western District of Washington denied Clark's motion, concluding that the PROTECT Act was constitutional and that it applied to him. Judge Lasnik also rejected the argument of the accused that the PROTECT Act violated international law, stating that "the sexual abuse of children criminalized by this statute is universally condemned. The Court therefore finds that Congress may exercise extraterritorial jurisdiction over the acts criminalized ... under both the nationality principle and the universality principle." [FN146] Judge Lasnik continued to find that the extraterritorial assertion of jurisdiction in the PROTECT Act was reasonable:

\*206 Although there is only a minimal link between the activity sought to be regulated by this statute and the territory of the United States, several ... factors favor a finding of reasonableness here. There is a strong connection between the United States and its citizens (and resident aliens) who commit the illicit activity. The prohibition against sexual activity with young children is considered desirable and is widely accepted. There is very little likelihood of conflict with regulation by other states. [FN147]

The U.S. Court of Appeal for the 9th Circuit affirmed Judge Lasnik's decision. For the majority, Judge McKeown upheld the impugned provision of the PROTECT Act stating, *inter alia*, that they were valid under international law: "we hold that extraterritorial application is proper based on the nationality principle". [FN148] Judge McKeown also found that the exercise of extraterritorial jurisdiction in Clark's case was reasonable, holding "Clark cites no precedent in which extraterritorial application was found unreasonable in a similar situation. Cambodia consented to the United States taking jurisdiction and nothing suggests that Cambodia objected in any way to Clark's extradition and trial under U.S. law." [FN149]

Motions to dismiss charges under the PROTECT Act based on a lack of a "nexus between [the accused's] conduct and the United States" have also been rejected. In *U.S. v. Bianchi*, the U.S. District Court for the Eastern District of Pennsylvania cited the Optional Protocol as authority for this finding: "[t]he Court has held open the possibility that a nexus may be required to criminalize extraterritorial conduct if that 'conduct were generally lawful throughout the world.' But that is not the situation here. The sexual abuse of children is universally condemned." [FN150] Likewise, in *U.S. v. Frank*, [FN151] which involved charges under the PROTECT Act related to child sex tourism in Cambodia, the U.S. District Court for the Southern District of Florida cited the Optional Protocol, signed by both the U.S. and Cambodia, in finding that the exercise of jurisdiction over the accused was reasonable under international law:

If Cambodia does not believe that the Optional Protocol infringes on its sovereignty--and it obviously does not [because it is a party to the Optional Protocol]--it will not be offended by laws enacted by the United States to implement the Optional Protocol, which regulate the conduct of American citizens abroad. [FN152]

Finally, while the United Kingdom has been criticized along with Canada for not being more active in implementing its extraterritorial child sex \*207 crime laws, [FN153] U.K. courts have nevertheless assumed adjudicative jurisdiction and convicted at least one British national for committing sexual offences against children

committed in Cambodia, [FN154] and another British national for attempting to engage in child sex offences in relation to a planned trip to Sri Lanka. [FN155] The United Kingdom does not impose a requirement that the territorial state request the initiation of criminal proceedings under their extraterritorial child sex crime legislation.

To conclude on this issue, rather than being offended, international comity is supported by Canada's exercise of nationality-based extraterritorial adjudicative jurisdiction in criminal cases involving all forms of child sexual exploitation and abuse. For these reasons, as stated in *Klassen*, there is no requirement under international law that the territorial state request the commencement of proceedings by the state of nationality of the offender. [FN156] There is no evidence that any destination countries have registered any diplomatic complaints regarding the adjudication of such charges based on the nationality of the offender in their own state. This is not surprising, given that all of the destinations countries identified earlier are States Parties to the CRC, and, with the exception of Russia, are also parties to the Optional Protocol. They have consented to a transnational approach to confront this transnational crime. A Canadian court would be an international outlier if it were to decline to exercise adjudicative jurisdiction over a Canadian national charged under section 7(4.1), and risk offending Canada's international obligations under the CRC and Optional Protocol as well as international declarations made at successive World Congresses in 1996, 2001, and 2008.

## VI. Conclusion

Child sex tourism is a serious transnational crime that has proliferated due to impunity. Extraterritorial child sex tourism laws were designed to confront this pressing problem, based on an international consensus that children must be protected from all forms of sexual abuse and exploitation. "Because of the transnational nature of abuses, countries will risk becoming safe havens for child traffickers unless the principle of extra-territorial jurisdiction is widely recognized and applied to all aspects of the sexual exploitation of children." [FN157] As the majority of the Supreme Court of Canada stated in *Hape*, "[c]ooperation between states is imperative if transnational crimes are not to be committed with impunity because they fall through jurisdictional\*208 cracks along national borders." [FN158] It is for this reason that nationality-based extraterritorial jurisdiction for child sexual abuse and exploitation has emerged in conventional and customary international law to confront this special crime.

This article has addressed several legal questions with respect to the implementation of Canada's extraterritorial child sex offender law, in light of the recent landmark decision of the B.C. Supreme Court in *Klassen*. While this decision is on solid ground in finding that section 7(4.1) is a valid exercise of prescriptive jurisdiction, the decision has been found lacking in its analysis around important questions related to enforcement and adjudicative jurisdiction.

Canada's enforcement jurisdiction to implement section 7(4.1) is supported by Articles 5 and 6 of the Optional Protocol, governing mutual legal assistance and extradition, as well as various bilateral and multilateral-mutual legal assistance and extradition treaties that are in force between Canada and numerous child sex tourism destination countries. With respect to adjudicative jurisdiction, international comity fully supports the assumption of jurisdiction by a Canadian court in respect to charges laid pursuant to section 7(4.1). Since nationality-based extraterritorial criminal jurisdiction for crimes involving sexual abuse and exploitation of children is now an established principle under conventional and customary international law, it is a sufficient basis on which Canadian courts could exercise adjudicative jurisdiction. [FN159]

Unfortunately, Canada's approach has been to only use section 7(4.1) infrequently and as a last resort, if at

all. While there are certainly advantages to local prosecutions of Canadian nationals for child sex offences abroad, and Canada should do more to build the capacity of law enforcement agencies in destination countries, [FN160] nationality-based extraterritorial legislation is a vital measure to combat the impunity of Canadian nationals engaging in such illicit criminal activity. Failure to rigorously investigate, charge, and prosecute Canadian nationals for engaging in acts contrary to section 7(4.1) is likely to result in an inadequate deterrence effect. Studies on general deterrence have found that “more education, greater enforcement, more media coverage,” [FN161] and “the likelihood of apprehension is important in reducing the crime rate.” [FN162]

**\*209** Consequently, a more proactive approach to implementing Canada's extraterritorial child sex tourism legislation is required, as called for during the consultations for the World Congress III against Sexual Exploitation of Children and Adolescents. [FN163] It is simply impractical to assume that local police forces in Canada will have the capacity to do so on a proactive basis. It is recommended that the RCMP, through its National Child Exploitation Coordination Centre (NCECC), support the expansion of the overseas liaison officer program to work as the lead Canadian law enforcement agency in child sex tourism destination countries. The liaison officer program would have the capacity to facilitate the investigation and prosecution of Canadian nationals who are suspected of engaging in child sexual abuse and exploitation abroad, contrary to section 7(4.1), [FN164] and to create strategic partnerships with local police forces and NGOs within destination countries. The role of the NCECC in this capacity would also include intelligence gathering, as well as support and training for investigations being conducted by local law enforcement in destination countries. Local Canadian police forces should become involved as needed, but a policy decision to expand the RCMP liaison officer program is a vital step to initiate cases. The adoption of a Canadian National Strategy dedicated to the issue of traveling child sex offenders would provide the necessary focus, leadership, and partnerships needed to create an integrated response to improve the deterrence, investigation and prosecution of Canadian traveling child sex offenders. The Senate Standing Committee on Human Rights recently called for the development and implementation of such a strategy to address the demand created by Canadian nationals abroad for victims of sexual abuse and exploitation. [FN165]

Canadian nationals are sexually abusing and exploiting vulnerable children in developing countries with a high level of impunity. Canada's extraterritorial child sex tourism law is a necessary response to the harm they are visiting on these victims of crime and is fully supported by both Canadian constitutional law and international law. It is time for Canada to put an end to its child sex offenders taking a vacation from the law when traveling abroad.

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[FN1]. *Criminal Code*, R.S.C. 1985, c. C-46, s. 7(4.1) [*Criminal Code*].

[FN2]. See Jennifer Wells, “Canada's Offshore Child Sex Law Faces its First Test,” *Toronto Star* (August 29, 2004) at A2; Jane Armstrong, “Sex-tourism Law Faces its First Challenge in B.C. case,” *The Globe and Mail*

(September 8, 2004) at A9.

[FN3]. *R. v. Bakker*, 2005 CarswellBC 1758, 2005 BCPC 289 (B.C. Prov. Ct.).

[FN4]. U.S. Department of State, *Trafficking in Persons Report* (June 2008), U.S. Department of State Publication No. 11407 at 86, online: <<http://www.state.gov/documents/organization/105501.pdf>> [TIP Report 2008].

[FN5]. Beyond Borders, ECPAT-USA, Shared Hope International, *Report of the Canada-U.S. Consultation in Preparation for World Congress III against Sexual Exploitation of Children and Adolescents* (Arlington, VA: October 2-3, 2008) at 1, online: <[http://www.ecpat.net/WorldCongressIII/PDF/RegionalMTGs/canada\\_us\\_consult\\_report\\_final.pdf](http://www.ecpat.net/WorldCongressIII/PDF/RegionalMTGs/canada_us_consult_report_final.pdf)> (accessed March 6, 2009) [Canada-U.S. Consultation].

[FN6]. *R. v. Klassen*, 2008 CarswellBC 2747, 2008 BCSC 1762 (B.C. S.C.), at para. 95 [BCSC] [*Klassen*].

[FN7]. *Ibid.*, para. 1 [citations omitted].

[FN8]. *R. v. Hape*, 2007 CarswellOnt 3563, 2007 CarswellOnt 3564, 2007 SCC 26, 47 C.R. (6th) 96, 220 C.C.C. (3d) 161, [2007] 2 S.C.R. 292, per LeBel J. [*Hape*].

[FN9]. Steve Coughlan, Robert J. Currie, Hugh M. Kindred, Teresa Scassa, “Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization,” (Prepared for the Law Commission of Canada, June 23, 2006) at 4 [Coughlan *et al.*].

[FN10]. *Hape*, *supra* note 8 at para. 57 per LeBel J.

[FN11]. See *ibid.*, at para. 58 per LeBel J.

[FN12]. *Ibid.* at para. 57 per LeBel J.

[FN13]. Coughlan *et al.*, *supra* note 9 at 9. See *Hape*, *supra* note 8 at para. 58 per LeBel J.

[FN14]. Martin Dixon, *Textbook on International Law*, 5th ed. (Oxford: Oxford University Press, 2005) at 133 [Dixon].

[FN15]. Coughlan *et al.*, *supra* note 9 at 9.

[FN16]. *Hape*, *supra* note 8 at para. 58.

[FN17]. American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States* (1987) at Part IV - Introductory Note, current through March 2008 (Westlaw) [American Law Institute]; see also Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 306; Coughlan *et al.*, *supra* note 9 at 9, 22.

[FN18]. American Law Institute, *supra* note 17 at Part IV, Chapter 3 - Introductory Note.

[FN19]. *Hape*, *supra* note 8 at para. 64 per LeBel J.

[FN20]. See *ibid.*, at paras. 64, 68-69, 105 per LeBel J.

[FN21]. *The Case of the S.S. “Lotus”* (1927), P.C.I.J. Ser. A, No. 10 at pp. 18-19 [*Lotus*] cited in *Hape*, *supra*

note 8 at para. 64 per LeBel J.

[FN22]. See American Law Institute, *supra* note 17 at § 432 - Comment (b).

[FN23]. *Ibid.*, at § 432(1); see also *ibid.*, § 432(2).

[FN24]. *Hape*, *supra* note 8 at para. 58 per LeBel J.

[FN25]. Coughlan *et al.*, *supra* note 9 at 9.

[FN26]. *Hape*, *supra* note 8 at para. 62 per LeBel J. See *R. v. Libman*, 1985 CarswellOnt 951, 1985 CarswellOnt 951F, 21 C.C.C. (3d) 206, [1985] 2 S.C.R. 178, at p. 213 [S.C.R.] [*Libman*].

[FN27]. *Hape*, *supra* note 8 at para. 64 per LeBel J.

[FN28]. Harvard Research of International Law, “Draft Convention on Jurisdiction with Respect to Crime” (1935 Supp.) 29 Am. J. Int'l L. 439.

[FN29]. Harold G. Maier, “Jurisdictional Rules in Customary International Law” in Karl M. Meessen, ed., *Extraterritorial Jurisdiction in Theory and Practice* (London: Kluwer Law International, 1996) 64 at 67 [Maier].

[FN30]. *Criminal Code*, *supra* note 1 at s. 6(2).

[FN31]. Hugh M. Kindred and Phillip M. Saunders, Eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 7th ed., (Toronto: Emond Montgomery, 2006) at 557 [Kindred].

[FN32]. See *Lotus*, *supra* note 21 at 20 cited with approval in *Hape*, *supra* note 8 at para. 60 per LeBel J.

[FN33]. *R. v. Cook*, 1998 CarswellBC 2001, 1998 CarswellBC 2002, 19 C.R. (5th) 1, 128 C.C.C. (3d) 1, [1998] 2 S.C.R. 597, [1998] S.C.J. No. 68 at para. 27 [S.C.J.] [*Cook*].

[FN34]. Coughlan *et al.*, *supra* note 9 at 8.

[FN35]. Sharon Williams and J.-G. Castel, *Canadian Criminal Law: International and Transnational Aspects* (Toronto: Butterworths, 1981) at 6.

[FN36]. Under international law, a state has the right to determine whether an individual has acquired its nationality.

[FN37]. See, e.g. Michael Hirst, *Jurisdiction and the Ambit of Criminal Law* (Oxford: Oxford University Press, 2003) at 29-36, 49 [Hirst].

[FN38]. See, e.g., *Tolofson v. Jensen*, 1994 CarswellBC 1, 1994 CarswellBC 2578, (sub nom. *Lucas (Litigation Guardian of) v. Gagnon*) [1994] 3 S.C.R. 1022, at p. 1051 [S.C.R.] cited in *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 CarswellNat 1919, 2004 CarswellNat 1920, 2004 SCC 45, (sub nom. *Socan v. Canadian Assn. of Internet Providers*) [2004] 2 S.C.R. 427, at para. 54 [S.C.R.] [*Society of Composers*].

[FN39]. *Hape*, *supra* note 8 at para. 60 per LeBel J.

[FN40]. *Ibid.* at para. 79 per LeBel J. referring to *Cook*, *supra* note 33 per Cory and Iacobucci JJ.

[FN41]. Sean D. Murphy, *Principles of International Law* (St. Paul, MN: Thomson, 2006) at 242 referring to Geoffrey Watson, “Offender Abroad: The Case for Nationality-Based Criminal Jurisdiction” (1992) 17 *Yale J. Int’l. L.* 41.

[FN42]. Kindred, *supra* note 31 at 557.

[FN43]. Coughlan *et al.*, *supra* note 9 at 7.

[FN44]. See Hugh M. Kindred *et al.*, *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000) at 639-641.

[FN45]. Coughlan *et al.*, *supra* note 9 at 7.

[FN46]. *Ibid.* at 7.

[FN47]. Kindred, *supra* note 31 at 559.

[FN48]. *R. v. Finta*, 1994 CarswellOnt 61, 1994 CarswellOnt 1154, 28 C.R. (4th) 265, 88 C.C.C. (3d) 417, [1994] 1 S.C.R. 701, reconsideration refused (June 23, 1994), Doc. 23023, 23097 [*Finta*].

[FN49]. *Ibid.* at para. 22.

[FN50]. *Hape*, *supra* note 8 at para. 59 per LeBel J.

[FN51]. *Ibid.*, at para. 60 per LeBel J.

[FN52]. American Law Institute, *supra* note 17 at § 402. English law similarly recognizes prescriptive jurisdiction over its nationals is possible on an extraterritorial basis, see Dixon, *supra* note 14 at 137.

[FN53]. American Law Institute, *supra* note 17 at § 421(2)(d), Comment (c).

[FN54]. Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005) at 44-45.

[FN55]. *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, ss. 6(1), 8 [*Crimes Against Humanity and War Crimes Act*].

[FN56]. *Hape*, *supra* note 8 at para. 66 per LeBel J.

[FN57]. Bill C-27, *An act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)* 2nd Sess., 35th Parl., 1997 (assented to 25 April 1997).

[FN58]. *Statute of Westminster, 1931* (U.K.) 22 George V., c. 4, s. 3: “It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extraterritorial operation.” See *Hape*, *supra* note 8 at paras. 66, 68 per LeBel J. Likewise, the Privy Council confirmed in *Croft v. Dunphy* (1932), 1932 CarswellINS 69, 59 C.C.C. 141 (Nova Scotia P.C.) [*Croft v. Dunphy*] that *The British North America Act 1867* (U.K.), 30 & 31 Vict., c. 30, as am, places no restriction upon the capacity of Parliament to enact extraterritorial

laws.

[FN59]. *Croft v. Dunphy*, *supra* note 58.

[FN60]. *Hape*, *supra* note 8 at para. 53.

[FN61]. Bill C-27, *supra* note 57.

[FN62]. Hirst, *supra* note 37 at 28-29.

[FN63]. Coughlan *et al.*, *supra* note 9 at 32.

[FN64]. *R. v. Terry*, 1996 CarswellBC 2299, 1996 CarswellBC 2300, 48 C.R. (4th) 137, 106 C.C.C. (3d) 508, [1996] 2 S.C.R. 207, at para. 15 [S.C.R.] [*Terry*] [emphasis added].

[FN65]. See also M. Mattar *et al.*, “International Child Sex Tourism: Scope of the Problem and Comparative Case Studies,” The Protection Project (Washington, D.C.: John Hopkins University, 2007) [Mattar]; Amy Fraley, “Child Sex Tourism Legislation under the PROTECTAct: Does It Really Protect?” (2005) 79 *St. John's L. Rev.* 445; R. Barri Flowers, “The Sex Trade Industry's Worldwide Exploitation of Children” (2001) 575 *Ann. Amer. Acad. Pol. & Soc. Sci.* 147; Eva J. Klain, “Prostitution of Children and Child Sex Tourism: An Analysis of Domestic and International Responses” (National Center for Missing and Exploited Children, 1999); Geraldine Van Bueren, “Child Sexual Exploitation and the Law: A Report on the International Legal Framework and Current National Legislative and Enforcement Responses” (Paper presented to the Second World Congress Against the Commercial Exploitation of Children in Yokohama, Japan, 17-20 December 2001) at 9-10, online: <<http://www.csecworldcongress.org>> [Van Bueren]; ECPAT, *Combating Child Sex Tourism: Questions & Answers* (Bangkok: Saladaeng Printing Co. Ltd., 2008) at 19-21.

[FN66]. Commission on Human Rights, *Report of the Special Rapporteur on the sale of children, child prostitution, and child pornography*, UN CHOR, 1994, U.N. Doc. E/CN.4/1994/84 at para. 6 [Report of the Special Rapporteur, 1994].

[FN67]. *Klassen*, *supra* note 6, para. 95 [emphasis added].

[FN68]. *Ibid.*, para. 64.

[FN69]. *Ibid.*, para. 85.

[FN70]. *Ibid.* [Emphasis added.]

[FN71]. See *Hape*, *supra* note 8 at paras. 64, 68-69, 105 per LeBel J.

[FN72]. *Lotus*, *supra* note 21 at pp. 18-19 cited in *Hape*, *supra* note 8 at para. 64 per LeBel J.

[FN73]. Mattar, *supra* note 65 at 23.

[FN74]. Data compiled from TIP Report 2008, *supra* note 4.

[FN75]. Mattar, *supra* note 65 at 41.

[FN76]. See Department of Justice, *The Federal Prosecution Service Deskbook* at Part VIII, c. 43 (2000), online: <<http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch43.html>> [*The Federal Prosecution Service Deskbook*]; see also Royal Canadian Mounted Police, *Mutual Legal Assistance: An Investigator's Guide to Seeking Assistance Through the Department of Justice*, online: RCMP <[http://www.rcmp-grc.gc.ca/intpolicing/mlat\\_e.htm](http://www.rcmp-grc.gc.ca/intpolicing/mlat_e.htm)>.

[FN77]. The general framework for bilateral mutual legal assistance agreements involving Canada is set out in the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C., 1985, c. 30 (4th Supp.).

[FN78]. See *The Federal Prosecution Service Deskbook*, *supra* note 76 at 43.3.2 to 43.3.3.

[FN79]. *Ibid.* at 43.2.1.

[FN80]. *Hape*, *supra* note 8 at para. 3. The Supreme Court of Canada did not take issue with this basis of consent to the investigative activities of the RCMP in the Turks and Caicos, only to the applicability of the *Charter*.

[FN81]. *Ibid.* at para. 178 per Bastarache J. (concurring).

[FN82]. See Australian Federal Police, “Singapore and Australia sign cooperation agreement,” *Press Release*, June 7, 2005, online: <[http://www.afp.gov.au/\\_\\_data/assets/pdf\\_file/1916/mr\\_050607mou.pdf](http://www.afp.gov.au/__data/assets/pdf_file/1916/mr_050607mou.pdf)>.

[FN83]. For these treaties, see Department of Foreign Affairs and International Trade, *Canada Treaty Information*, online: DFAIT <<http://www.treaty-accord.gc.ca>>.

[FN84]. *UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 25 May 2000, A/RES/54/ 263, art. 6 (entered into force 18 January 2002) [Optional Protocol] [Emphasis added.] No declarations, reservations, or objections apply to article 6.

[FN85]. See, e.g., “Treaty between Canada and the Russian Federation on Mutual Legal Assistance in Criminal Matters” (2000) *Canada Treaty Series* No. 24, art. 19(1).

[FN86]. June Kane “Sharing and Learning: Workshops at the 2nd World Congress against Commercial Sexual Exploitation of Children, Yokohama, Japan, 17-20 December 2001” (August 2002) at 43-44, online: <<http://www.csecworldcongress.org/en/yokohama/Reports/Workshopfinal.doc>>.

[FN87]. *Klassen*, *supra* note 6, para. 24.

[FN88]. *Canadian Charter of Rights and Freedoms*, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7.

[FN89]. *R. v. Harrer*, 1995 CarswellBC 651, 1995 CarswellBC 1144, 42 C.R. (4th) 269, 101 C.C.C. (3d) 193, [1995] 3 S.C.R. 562, [1995] S.C.J. No. 81 at para. 55 per McLachlin J. (as she then was). See also *Hape*, *supra* note 8 at para. 98 per LeBel J.

[FN90]. *Hape*, *supra* note 8 at paras. 98, 117 per LeBel J. (majority) and para. 145 per Bastarache J. (concurring).

[FN91]. *Ibid.*, at para. 112 per LeBel J. citing *Terry*, *supra* note 64 at para. 26.

[FN92]. *Ibid.*, citing *Cook*, *supra* note 33 at para. 103 per L'Heureux-Dubé J. This admonition is poignant given

the recommendations in the *Report on the Events Relating to Maher Arar* on mutual legal assistance involving countries with problematic human rights records. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report on the Events Relating to Maher Arar: Analysis and Recommendations* (2006) at 344-349, online: <<http://www.ararcommission.ca>>.

[FN93]. For these treaties, see Department of Foreign Affairs and International Trade, *Canada Treaty Information*, online: DFAIT <<http://www.treaty-accord.gc.ca>>.

[FN94]. Optional Protocol, *supra* note 84, art. 5(1).

[FN95]. Article 4 of the Optional Protocol establishes permissive extraterritorial criminal jurisdiction on the basis of nationality of the accused and / or passive personality (nationality of the victim).

[FN96]. Optional Protocol, *supra* note 84, art. 5(2)-(5).

[FN97]. See M. Cherif Bassiouni and E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995).

[FN98]. Geoff Gilbert, *Responding to International Crime* (Leiden: Martinus Nijhoff, 2006) at 56.

[FN99]. *Libman*, *supra* note 26 at para. 74. *Libman* was decided on facts that were very different from those that would likely underlie a matter under s. 7(4.1). See Robert Currie and Stephen Coughlan, "Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?" (2007) 11 Can. Crim. Law Review 141 at 152; *Society of Composers*, *supra* note 38 at para. 147.

[FN100]. *Klassen*, *supra* note 6, para. 73.

[FN101]. *Finta*, *supra* note 48 at para. 84.

[FN102]. *Hape*, *supra* note 8 at para. 64 per LeBel J.

[FN103]. *Hirst*, *supra* note 37 at 34-35.

[FN104]. *Crimes Against Humanity and War Crimes Act*, *supra* note 55.

[FN105]. Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 598.

[FN106]. *Maier*, *supra* note 29 at 70-71.

[FN107]. In certain cases, additional links to Canada could include the nationality of the victim (as in non-commercial child sexual abuse cases where Canadian children are victims of family, friends or teachers on school trips overseas), or cases involving planned or organized child sex tourism trips that have elements taking place in Canada.

[FN108]. *Hape*, *supra* note 8 at para. 60 per LeBel J.

[FN109]. *United Nations Convention on the Rights of the Child*, 20 November 1989, G.A. Res. 44/25, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/736 (1989) (entered into force 2 September 1990) [CRC].

[FN110]. See Office of the United Nations High Commissioner for Human Rights, “Convention on the Rights of the Child New York, 20 November 1989”, (current to February 12, 2008), online: <<http://www2.ohchr.org/english/bodies/ratification/11.htm>>.

[FN111]. See Office of the United Nations High Commissioner for Human Rights, “Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, New York, 25 May 2000,” (current to July 29, 2008), online: <[http://www2.ohchr.org/english/bodies/ratification/11\\_c.htm](http://www2.ohchr.org/english/bodies/ratification/11_c.htm)>.

[FN112]. CRC, *supra* note 109, arts. 34-35 [emphasis added]. With respect to children in the care of parents, legal guardians or others who have care of a child, more expansive obligations are created in Article 19(1) of the CRC: “State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from *all forms* of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, *including sexual abuse*, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” *Ibid.*, art. 19(1) [emphasis added].

[FN113]. *Programme for Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, CHR Res. 1992/74, UN CHOR, 47th Sess., UN Doc. E/CN.4/RES/1992/74 (1992) at para. 47.

[FN114]. Report of the Special Rapporteur, 1994 *supra* note 66 at para. 166.

[FN115]. *Ibid.* at para. 170.

[FN116]. Optional Protocol, *supra* note 84, preamble.

[FN117]. *Ibid.*, art. 2.

[FN118]. *Ibid.*, art. 3(1).

[FN119]. U.N. Econ & Soc. Council [ECOSOC], Commission on Human Rights, *Report of the Second International Workshop on National Institutions for the Promotion and Protection of Human Rights, Addendum: Draft Optional Protocol to the United Nations Convention on the Rights of the Child Concerning the Elimination of Sexual Exploitation and Trafficking of Children*, U.N. Doc. E/CN.4/1994/45/Add.1, art. 2(a) (March 1, 1994) [First Draft Optional Protocol].

[FN120]. U.N. Econ & Soc. Council [ECOSOC], Commission on Human Rights, *Proposal Submitted by France 14 November 1994: Draft Optional Protocol to the United Nations Convention on the Rights of the Child Concerning the Elimination of Sexual Exploitation and Trafficking of Children*, U.N. Doc. E/CN.4/1994/WG.14/CRP.1 (November 14, 1994) at art. 3 [Second Draft Optional Protocol].

[FN121]. Of the offences listed in s. 7(4.1) of the *Criminal Code*, s. 212(4) (procuring sexual services of persons under eighteen) and s. 163.1 (child pornography) would clearly fall within the scope of Article 3(1) of the Optional Protocol, *supra* note 84.

[FN122]. Optional Protocol, *supra* note 84, art. 10(1).

[FN123]. World Congress against the Commercial Sexual Exploitation of Children (Stockholm, Sweden), online: <<http://www.csecworldcongress.org/en/stockholm/index.htm>>.

[FN124]. Professor Vitit Muntarbhorn, “Report of the Rapporteur-General,” (Paper presented to the World Congress Against the Commercial Sexual Exploitation of Children in Stockholm, Sweden, 27-31 August 1996) at 11, online: <[http://www.csecworldcongress.org/PDF/en/Stockholm/Reports/Stockholm%20Congress%CCC20General%CC20Rapporteur's%CCC20Final%CCC20Report%CCC96\\_EN.pdf](http://www.csecworldcongress.org/PDF/en/Stockholm/Reports/Stockholm%20Congress%CCC20General%CC20Rapporteur's%CCC20Final%CCC20Report%CCC96_EN.pdf)>.

[FN125]. “Stockholm Panel Report: Law Reform and Enforcement” (Paper presented to the World Congress Against the Commercial Sexual Exploitation of Children in Stockholm, Sweden, 27-31 August 1996) at 3, online: <[http://www.csecworldcongress.org/PDF/en/Stockholm/Reports/Panel\\_Reports/Panel%20on%CCC20Law%CCC20reform%CCC20and%CCC%enforcement.pdf](http://www.csecworldcongress.org/PDF/en/Stockholm/Reports/Panel_Reports/Panel%20on%CCC20Law%CCC20reform%CCC20and%CCC%enforcement.pdf)>.

[FN126]. World Congress against the Commercial Sexual Exploitation of Children, *Declaration and Agenda for Action*, (Stockholm, Sweden), online: <[http://www.csecworldcongress.org/PDF/en/Stockholm/Outcome\\_documents/Stockholm%20Declaration%CCC96\\_EN.pdf](http://www.csecworldcongress.org/PDF/en/Stockholm/Outcome_documents/Stockholm%20Declaration%CCC96_EN.pdf)> [emphasis added].

[FN127]. Bill C-27, *supra* note 57, preamble.

[FN128]. Second World Congress against Commercial Sexual Exploitation of Children, *Yokohama Global Commitment*, (Yokohama, Japan) at para. 2, online: 2nd CSEC World Congress <<http://www.csecworldcongress.org>>.

[FN129]. See Council of Europe, *The Budapest Commitment and Plan of Action*, (Adopted at the Conference “Protection of Children from Sexual Exploitation” in Budapest, 20-21 November 2001) CONFSE (2001) 1 REV, Strasbourg, 28 November 2001 at 4 [emphasis added], online: <<http://www.csecworldcongress.org>>; Montevideo Conference, *Montevideo Declaration and Action Plan: Commitment for the Implementation of a Strategy to deal with Commercial Sexual Exploitation and Other Forms of Sexual Violence to Children and Adolescents in Latin America and the Caribbean* (Montevideo, Uruguay) at para. 17, online: <<http://www.csecworldcongress.org>>.

[FN130]. World Congress III against the Sexual Exploitation of Children and Adolescents, *The Rio de Janeiro Declaration and Plan of Action to Prevent and Stop Sexual Exploitation of Children and Adolescents* (Rio de Janeiro, Brazil: November 25-28, 2008) at 3, online: <[http://www.ecpat.net/WorldCongressIII/PDF/Outcome/WCIII\\_Outcome\\_Document\\_Final.pdf](http://www.ecpat.net/WorldCongressIII/PDF/Outcome/WCIII_Outcome_Document_Final.pdf)> (accessed June 4, 2009).

[FN131]. *Ibid.*, at 8.

[FN132]. Jurisdictions confirmed to have extraterritorial child sex abuse and exploitation laws are as follows: Algeria, Austria, Australia, Belgium, Bulgaria, Canada, China, Denmark, Ethiopia (extraterritorial laws only apply to child pornography), Finland, France, Germany, Iceland, Israel, Ireland, Italy, Japan, Kazakhstan, Laos, Macau, Morocco, the Netherlands, New Zealand, Norway, Portugal, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, the United Kingdom, the United States, and Uzbekistan; records on file with author.

[FN133]. Establishing “Part IIIA - Child Sex Tourism,” *Crimes Act 1914* (Cth.). See, generally, Marianna

Brungs, “Abolishing Child Sex Tourism: Australia's Contribution” (2002) 8(2) Australian Journal of Human Rights 101 [Brungs].

[FN134]. *Crimes Act* 1914 (Cth.), ss. 50BA, 50BB, 50BC, 50BD, 50DB. The Attorney General of Australia has recently proposed strengthening and expanding the scope of this legislation in the *Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007* (Cth.), Bill - C2007B00192, House of Representatives, First Reading, September 13, 2007.

[FN135]. Australian Federal Police, “Inquiry into *Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007*”, submission to the Senate Standing Committee on Legal and Constitutional Affairs at 1, online: <<http://www.aph.gov.au>>.

[FN136]. See, e.g., *Lee v. The Queen*, [2000] WASCA 73 (Western Australia C.A.); *Assheton v. The Queen*, [2002] WASCA 209 (Western Australia C.A.); *Kaye v. The Queen*, [2004] WASCA 227 (Western Australia C.A.); *R. v. Wicks*, [2005] NSWCCA 409 (New South Wales C.A.); *Sage v. The Queen*, [2007] NSWCCA 224 (New South Wales C.A.); and see the following unreported cases cited in Brungs, *supra* note 133: *R. v. Anthony Richard Carr* (April 26, 1996), Saunders J. (New South Wales D.C.); *R. v. Jesse Spencer Pearce* (August 8, 1997), CA212/97, Pincus J.A., Shepherdson & White JJ. (Queensland C.A.); *R. v. John Scott Holloway* (November 1996), unreported (Queensland D.C.); *R. v. Robert Marlow* (May 19, 2000), unreported (Victoria D.C.).

[FN137]. *XYZ v. Commonwealth*, [2006] HCA 25, 227 ALR 495 (Australia H.C) [XYZ].

[FN138]. *Crimes Act* 1914 (Cth.), ss. 50BA, 50BC. “Sexual intercourse” is defined in *ibid.*, s. 50AC.

[FN139]. *XYZ*, *supra* note 137 at paras. 4, 7 per Gleeson C.J. (majority) [Emphasis added.]

[FN140]. *Ibid.* at para. 62 per Kirby J. (concurring).

[FN141]. The *Violent Crime Control and Law Enforcement Act of 1994* (U.S.), Pub.L. 103-322, 108 Stat. 1796, Sec. 160001 (1994) (codified as amended at U.S.C., tit. 18, § 2423(b)).

[FN142]. *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003* (PROTECT Act), Pub.L. No. 108-21, 117 Stat. 650 (2003) (codified and amended at U.S.C., tit. 18 § 2423 (a)-(g), 2246, 2516(1)(c), 1591, 3142(e), 3283, 3559(e)).

[FN143]. U.S. Immigrations and Customs Enforcement, “Operation Predator: Child Exploitation and Sex Crimes”, January 25, 2008, online: <<http://www.ice.gov>>.

[FN144]. See, e.g., *U.S. v. Hersh*, 297 F.3d 1233 (C.A.11 (Fla.), 2002); *U.S. v. Garcia-Lopez*, 234 F.3d 217 (C.A.5 (Tex.), 2000); *U.S. v. Clarke*, 159 Fed. Appx. 128 (C.A.11 (Fla.), 2005); *U.S. v. Armstrong*, 2007 WL 3171775 (W.D. Tex.); *U.S. v. Bianchi*, 2007 WL 1521123 (E.D.Pa.) [*Bianchi*]; *U.S. v. Bollea*, 144 Fed.Appx. 69, 2005WL1939438 (C.A.11 (Fla.)); *U.S. v. Castellon*, 213 Fed.Appx. 732, 2007 WL 172216 (C.A.10 (N.M.)); *U.S. v. Doe*, 488 F.3d 1154 (C.A.9 (Cal.), 2007); *U.S. v. Lindblad*, 2007 WL 4039782 (C.A.9 (Cal.)); *U.S. v. Strevell*, 185 Fed.Appx. 841 (C.A.11 (Fla.), 2006); *U.S. v. Frank*, 486 F. Supp. 2d 1353 (S.D.Fla., 2007) [*Frank*].

[FN145]. *U.S. v. Clark*, 435 F.3d 1100 (C.A.9 (Wash.), 2006), affirming 315 F. Supp. 2d 1127 (W.D. Wash.).

2004), at 1131 [*Clark* (C.A.9 (Wash.))].

[FN146]. *Ibid.*, at 1131.

[FN147]. *Ibid.*, at 1132.

[FN148]. *Clark* (C.A.9 (Wash.)), *supra* note 145 at 1106. The Circuit Court did not address whether the PROTECT Act was also justified based on universal jurisdiction: *ibid.*, at 1107.

[FN149]. *Ibid.*, at 1107.

[FN150]. *Bianchi*, *supra* note 144 at 1.

[FN151]. *Frank*, *supra* note 144.

[FN152]. *Ibid.* at 1360; see also, *ibid.*, at 1359.

[FN153]. *Sexual Offences Act 2003* (U.K.), c. 42, s. 72 and Sch. 2; *Sexual Offences (Conspiracy and Incitement) Act 1996* (U.K.), c. 29 (as amended). Daniel Edelson, “The Prosecution of Persons Who Sexually Exploit Children in Countries Other Than Their Own: A Model for Amending Existing Legislation” (2001-2002) 25 *Fordham Int'l L. J.* 483 at 513.

[FN154]. See *R. v. Towner* (2001) unreported, 18 June (Crown Court at Maidstone) cited in Hirst, *supra* note 37 at 271, n. 201.

[FN155]. *R. v. Parnell (Brian Michael)*, [2004] EWCA Crim 2523 (C.A. (Crim. Div.)).

[FN156]. *Klassen*, *supra* note 6, para. 104.

[FN157]. Van Bueren, *supra* note 65 at 9-10. See also *Frank*, *supra* note 144 at 1360.

[FN158]. *Hape*, *supra* note 8 at para. 99 per LeBel J.

[FN159]. It is not necessary to reach a finding that such crimes are also “universal” in nature, although such a finding was made in *Klassen*, *supra* note 6 at para. 93.

[FN160]. Some police training in Cambodia has been sought and provided by Canadian law enforcement as a good first step: see “Canadian Police Help Curb Child Sex Tourism in Cambodia,” *Canadian Press*, March 19, 2007.

[FN161]. *R. v. Sweeney* (1992), 1992 CarswellBC 460, 11 C.R. (4th) 1, 71 C.C.C. (3d) 82 (B.C. C.A.), at para. 63 [C.C.C.] per Wood JA (concurring).

[FN162]. *R. v. McLeod* (1993), 1993 CarswellSask 292, 81 C.C.C. (3d) 83, 109 Sask. R. 8 (Sask. C.A.) at para. 27 [Sask. R.] per Vancise JA.

[FN163]. Canada-U.S. Consultation, *supra* note 5 at 6: “In Canada, designate a lead law enforcement agency mandated to proactively enforce sex tourism offenses. A dedicated prosecutor should provide advice on issues such as mutual legal assistance and extradition.”

[FN164]. The RCMP liaison officer program was established “to represent the interests of the Canadian law enforcement community” abroad, share criminal intelligence as well as liaise with foreign law enforcement agencies “in relation to investigations of significance to the RCMP”: untitled document released to author by the RCMP under the *Access to Information Act*, R.S.C., 1985, c. A-1 on June 5, 2008, File No. GA-3951-3-01974/08 (on file with author).

[FN165]. Raynell Andreychuk, and Joan Fraser. “Children: The Silenced Citizens: Effective Implementation of Canada's International Obligations with Respect to the Rights of Children,” *Final Report of the Standing Committee on Human Rights* (Ottawa: April 2007).

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