

PROTECTION OF VICTIMS, PARTICULARLY WOMEN AND CHILDREN, AGAINST DOMESTIC VIOLENCE, SEXUAL OFFENCES AND HUMAN TRAFFICKING

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INTRODUCTION

Violence against women and children is an issue that has attained global significance and engaged the attention of the United Nations for many years. Just last month, on 10 October 2006 and 11 October 2006 respectively, the UN released reports on violence against women and violence against children.¹ The common themes in both reports were that violence against women and children was endemic and to a large extent socially and culturally tolerated. Tackling this problem is not easy and it is suggested that the solution lies not just in strengthening domestic laws, but in engineering a significant change to social and cultural attitudes towards women and children from one that is ambivalent toward or even tolerant of violence, to one that views such violence as wholly

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¹ Report of the Secretary-General, *In-Depth Study on all Forms of Violence Against Women* (October 2006) UN General Assembly 61st Session, UN Doc, A/61/122/Add 1 at 9 (available online, last accessed, 16 October 2006,

<http://daccessdds.un.org/doc/UNDOC/GEN/N06/419/74/PDF/N0641974.pdf?OpenElement>); Report of the Independent Expert for the United Nations Study on Violence Against Children (October 2006), UN Doc A/61/299 (available online, last accessed, 13 October 2006, <http://www.violencestudy.org/r25>).

unacceptable. In addition to changing societal norms and working at the grassroots level through individual and civil society efforts, these problems also need an international approach to engage the states as active players in order to bring about effective legal reform and provide adequate resources.

Violence against women and sexual exploitation of children are issues that are complicated by various structural forces, including cultural and historical norms, the impact of globalisation, international conflict, the division between public and private spheres and contested notions of agency, autonomy and victimhood. In addition, the strategies for dealing with these issues of violence against women and children are informed by the wrong perspective. Often, the approach to domestic violence is from a family perspective rather than a women's rights perspective; and the approach to human trafficking and related cross border crimes is from a state security perspective rather than a human rights perspective.

Finally, these problems, for different reasons, often fall outside the reach of either the state's legal jurisdiction or its comfort zone for public intervention. Domestic violence occurs within the family and the home, an area which the state prefers not to enter unless invited. Child sex exploitation often involves cross-border activity, where states, operating in an international legal order premised on notions of sovereignty, are hampered by territorial limitations. The issues raised in these areas are vast and this paper merely focuses on two specific problems: domestic violence against women in the home and cross border commercial sexual exploitation of children.

VIOLENCE AGAINST WOMEN²

Context, causes and challenges

Today, 25 November, is the International Day for the Elimination of Violence Against Women.³ It marks the anniversary of the assassination of three sisters in the

² I have dealt with this matter more fully elsewhere: K Amirthalingam, 'Women's Rights, International Norms and Domestic Violence: Asian Perspectives' (2005) 27 Human Rights Quarterly 683.

Dominican Republic who were political activists, and the day has come to symbolise the global struggle against gender violence as well as the victimisation of women. In 1991, an annual 16 day campaign to confront violence against women was launched, linking 25 November (International Day for the Elimination of Violence Against Women) and 10 December (Human Rights Day), thus creating a connection between women's rights and human rights.⁴

Violence against women has become a serious global issue even though, statistically, men are greater victims of violence, as shown by the crime statistics in England:

Men are more likely to be the victims of violent crime than women. Over 5 percent of men and just under 3 per cent of women aged 16 and over in England and Wales were the victims of some sort of violence in the twelve months prior to interview in 2002/03. Men and women aged 16 to 24 are the most at risk age group. Around 15 per cent of men and 7 per cent women of this age reporting that some sort of violence had been used against them.⁵

However, in most cases involving men, the violence occurs in a “context of violence” to which men are more likely to be exposed, for example, war, gang fights and crime. Violence against women is of a different order and characterised by three

³ On 19 October 1999, at the 17th meeting of the Third Committee during the 54th session of the UN General Assembly, the representative of the Dominican Republic on behalf of itself and 74 Member States introduced a draft resolution (document A/C.3/54/L.14) calling for the designation of 25 November as the International Day for the Elimination of Violence Against Women. On 17 December 1999, the UN General Assembly at its 83rd plenary meeting of the fifty-fourth session, on the basis of the Report of the Third Committee, adopted Resolution 54/134 on the International Day for the Elimination of Violence against Women.

⁴ This campaign was initiated by the Centre for Women's Global Leadership in 1991 and covers four significant dates for women: 25 November (International Day for the Elimination of Violence Against Women), 1 December (World AIDS Day), 6 December (the anniversary of the Montreal Massacre, when 14 women engineering students were gunned down in Montreal, Canada, for no other reason than that they were women) and 10 December (Human Rights Day).

⁵ United Kingdom National Crime Statistics (available online, last accessed, 29 September 2006, <http://www.statistics.gov.uk/cji/nugget.asp?id=442>)

significant, distinguishing features. One, it often occurs at home, which far from being violent should in fact be a sanctuary for safety. Two, the violence is often perpetrated by a family member or person in a relationship of love and trust. Three, there are historical and cultural assumptions that violence against women may be “normal” or “acceptable”; these norms, in so far as they exist, can no longer be justified. Underlying this is the fact that violence against women is often sexual in nature.

Domestic violence is thus not merely an issue of violence but is a greater issue of institutionalised gender discrimination. The United Nations Special Rapporteur on Violence Against Women has reiterated this in her definition of domestic violence as “violence perpetrated in the domestic sphere which targets women because of their role within that sphere or as violence which is intended to impact, directly and negatively, on women within the domestic sphere.”⁶ Domestic violence is highly gendered and closely connected to the preservation of male dominance in patriarchal societies. As society became increasingly patriarchal, and arguably more authoritarian,⁷ women were subordinated to men who sought exclusive possession and control over women. This manifested itself in violence against women, which gradually became entrenched in our social fabric.⁸

Wife beating in particular was legitimised and regulated, and rape within marriage was historically not a criminal offence in many jurisdictions and that is still the case in several jurisdictions today, including Singapore. Popular folklore reinforces the acceptance of violence against women. An example that resonates with this paper, as it relates to women and children, is the story of Bluebeard, which some writers have used to highlight the cultural acceptance of violence against women. The “original” Bluebeard

⁶ *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, Ms Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85, a Framework for Model Legislation on Domestic Violence, UN ESCOR Commission on Human Rights, 52nd Sess, Agenda Item 9(a), addendum para 28, UN Doc E/CN.4/1996/53/Add.2 (1996).

⁷ GR Taylor, *Sex in History* (New York: Vanguard Press, 1954).

⁸ See T Davidson, “Wifebeating: A Recurring Phenomenon Throughout History” in M Roy (ed), *Battered Women* (New York: VanNostrand Reinhold Co, 1977).

was a French soldier in the fifteenth century, a notorious paedophile who had raped and killed a large number of young boys. The true story of Bluebeard, a vicious sex-murderer of young boys gradually became a story about a man who killed his wives. As one author noted, “It is almost as if the *truth* of Bluebeard’s atrocities was too frightening to men to survive in the popular imagination ...”⁹ Conversely, the abuse or killing of wives was a phenomenon so much the norm that it was less difficult to accept.

In addition to the gender dimension, two other important factors that explain violence against women are economic and sexual inequality as well as violent conflict resolution.¹⁰ Collectively, these factors suggest that any lasting solution to the problem of violence against women requires a structural realignment of some of our values and assumptions about the rights and roles of women in society, a greater commitment to improving the socio-economic status of women and a non-violent philosophy towards conflict resolution whether in the domestic or international sphere. These are significant impediments to reform, and even if law reform at the doctrinal level is achieved, implementation at the ground level will remain a serious challenge. It is only the collective will of the community and governments that can effectively turn the tide.

Law reform

The internationalisation of women’s rights and violence against women has created a greater awareness of the issues and has helped inform the domestic laws of many jurisdictions. The movement achieved prominence 30 years ago when the UN General Assembly recognised the International Decade for Women from 1975 to 1985. In 1979, the General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women and in 1993, the General Assembly adopted the Declaration on the Elimination of Violence Against Women. The effect of these international instruments, as well as a series of international conferences and related

⁹ S Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon & Shuster, 1975), quoted in T Davidson, “Wifebeating: A Recurring Phenomenon Throughout History” in M Roy (ed), *Battered Women* (New York: VanNostrandt Reinhold Co, 1977) p 13.

¹⁰ D Levison, *Family Violence in Cross-Cultural Perspective* (California: Sage Publications Inc, 1989).

declarations,¹¹ was to encourage states to do their utmost to end violence against women.¹²

Law reforms in Singapore

The extent of domestic violence in Singapore is unclear, although anecdotal evidence suggests that the problem is not as widespread as in many other regions. In 1995, there were 3639 reported cases of family violence, of which 90% or 3245 involved women as the victims.¹³ The total number involving spousal violence was 2446.¹⁴ In its first report to the UN, the Government figures on police reports of spousal violence were 28, 33 and 25 respectively for the years 1995 to 1997.¹⁵ On 1 May 1997, the Women's Charter was amended to broaden the scope of family violence and in Singapore's second report to the UN, the number of reports of spousal violence in 1998 dramatically increased to 2223.¹⁶ In its third report, covering the period from 2000 to

¹¹ The 1993 World Conference on Human Rights in Vienna, the 1994 International Conference on Population and Development in Cairo, the Fourth World Conference on Women in Beijing in 1995 (Beijing Declaration and Platform for Action), the 1995 World Summit for Social Development in Copenhagen and the 1996 United Nations Conference on Human Settlements.

¹² The UN has recognized the obligation of states in this regard. "States have an obligation to protect women from violence, to hold perpetrators accountable and to provide justice and remedies to victims." Report of the Secretary-General, *In-Depth Study on all Forms of Violence Against Women* (October 2006) UN General Assembly 61st Session, UN Doc, A/61/122/Add 1 at 9 (available online, last accessed, 16 October 2006, <http://daccessdds.un.org/doc/UNDOC/GEN/N06/419/74/PDF/N0641974.pdf?OpenElement>).

¹³ Singapore Parliamentary Debates, *Official Reports*, 2 May 1996, col 121.

¹⁴ According to analysis by the subordinate courts, almost 90% of family violence complaints in 1997 comprised of spousal violence. In 1995, there were 695 complaints, all of which involved spousal violence. See, Subordinate Courts of Singapore, *Research Bulletin*, Issue No 13, August, 1998, 3.

¹⁵ Ministry of Community Development Singapore, *Singapore's Initial Report to the UN Committee for the Convention on the Elimination of All Forms of Discrimination Against Women* (January 2000) 52. It is not clear how spousal violence was defined in this report, as the Ministry of Home Affairs had given the figure of 2446 for 1995 in Parliament Question Time. The report is available online: http://www.mcds.gov.sg/MCDSFiles/download/CEDAW_initial_report.pdf

¹⁶ Ministry of Community Development Singapore, *Singapore's Second Periodic Report to the UN Committee for the Convention on the Elimination of All Forms of Discrimination Against Women* (April 2001) 29. The report is available online: http://www.mcds.gov.sg/MCDSFiles/download/CEDAW_second_report.pdf.

2003, the numbers of applications for personal protection orders were 2,861 in the year 2000, 2,974 in the year 2001, 2,944 in the year 2002 and 2,783 in the year 2003.¹⁷

The groundwork for reform was laid through a long and sustained campaign by women activists led by the Association of Women for Action and Research (AWARE) and resulted in the Family Violence Bill.¹⁸ Instead of enacting the Family Violence Bill, amendments were made to the Women's Charter in 1996 to give effect to some of the proposals in the Family Violence Bill. The amendments were timely and illustrate the significance of internationalising this issue, as they came hot on the heels of Singapore's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women on 5 October 1995.¹⁹ The Government also established a specialist Family Court on 1 March 1995. The establishment of a family court to provide a holistic approach to family matters is highly commendable. In addition to legal reform, Singapore has also developed a sophisticated infrastructure to facilitate an integrated and multidisciplinary approach to domestic violence.²⁰

Nevertheless, it may be argued that the reforms did not go far enough. The reforms did not create an offence of domestic violence; they failed to criminalise marital rape and adopted a family-centric rather than woman-centric approach. These were key elements of the Family Violence Bill, which were not accepted in Parliament.²¹ One of the reasons for refusing to recognise a new offence of domestic violence was the

¹⁷ Ministry of Community Development Singapore, *Singapore's Second Periodic Report to the UN Committee for the Convention on the Elimination of All Forms of Discrimination Against Women* (November 2004). The report is available online: <http://daccessdds.un.org/doc/UNDOC/GEN/N04/624/53/PDF/N0462453.pdf?OpenElement>

¹⁸ The Bill was presented to Parliament by a Nominated Member of Parliament, Ms Kanwaljit Soin.

¹⁹ See generally, Thio Li-ann, *The Impact of Internationalisation on Domestic Governance: Gender Egalitarianism & the Transformative Potential of Cedaw* (1997) 1 *Singapore Journal of International & Comparative Law* 278.

²⁰ See text at nn 24-25.

²¹ See, Singapore Parliamentary Debates, *Official Reports*, 1 November 1995, cols 114, 169, 170.

assumption that existing offences in the Penal Code were adequate. This was erroneous, as it failed to understand the nature of domestic violence, which goes beyond mere instances of violent behaviour and encompasses a relationship of abuse, dominance and exploitation.

Most of the Penal Code offences that would be activated in any particular instance of domestic violence are likely to be non-seizable offences, which cannot be investigated by the police without an order from the Public Prosecutor. This causes delays in responding. The position here can be contrasted with that in the Children and Young Persons Act 1993 s 5(1) which makes child abuse an offence in itself. This divergence in approach again suggests that child abuse is wholly unacceptable, but the message is less clear when it comes to violence against women. The Women's Charter does ameliorate some of these problems by obviating the distinction between seizable and non-seizable offences in its provisions on protection orders. Under s 65(1) of the Charter, a protection order may be granted if the court is satisfied that family violence has occurred or is likely to occur and that such an order is necessary for the protection of the applicant.

The refusal to criminalise marital rape has been an issue of grave concern in various countries, as is evident from a survey of recent media reports, with the most recent Parliamentary debate on this issue occurring in Malaysia.²² It is disturbing that marital rape remains outside the scope of the law on the ground that this is a private matter or that the sanctity of the family unit in certain cultures should prevail over the woman's interest and security. The United Nations Committee on the Elimination of

²² "MP regrets marital rape remarks" New Straits Times (25 July 2006); "MP's jibe over marital rape irks Chew" New Straits Times (24 July 2006); "Panel should have addressed marital rape issue, says MP" New Straits Times (14 July 2006); "Issue on marital rape actively debated in parliament" Bernama Daily Malaysian News (13 July 2006); "Treat marital rape as a crime" The Times of India (22 June 2006); "News – Marital – a crime with no punishment for 16 years" Sunday Tribune (22 January 2006); "Ireland 'still doesn't see marital rape as criminal'" The Irish News (19 November 2005); "Marital rape now a crime" El Universal (Mexico) (4 November 2005); "Lawyers oppose bill on marital rape" Korea Times (18 August 2005); Panafrikan News Agency (PANA) Daily Newswire: HWR wants decade-old Ugandan bill on 'marital rape' passed" Panafrikan News Agency (PANA) Daily Newswire (1 June 2005); "Call grows to declare marital rape a crime" South China Morning Post (24 August 2004); "The week that was – Law on marital rape faces a long and difficult road" The Nation (Thailand) (24 November 2002); "Domestic Violence –Women's rights activists to run campaign against marital rape" Bangkok Post (23 November 2002).

Discrimination Against Women, while commending Singapore on its efforts in dealing with family violence,²³ expressed its concerns on Singapore's reservations to some of the provisions in CEDAW on the basis of incompatibility with certain "Asian values". The Committee expressed concern that such views "might be interpreted so as to perpetuate stereotyped gender roles in the family and reinforce discrimination against women."²⁴

Although the prevailing attitude to family violence in Singapore may not be seen as fully embracing gender perspectives and women's rights, there are several commendable and effective initiatives that have been taken and which have allowed Singapore to adopt a holistic approach to this issue. The government established the Family Violence Dialogue Group in 2001 under the joint stewardship of MCDS and the Singapore Police Force. The Group comprises the Courts, Prisons, Ministry of Health, Ministry of Education and various social services agencies. A National Family Violence Networking System has been put in place to connect all these stakeholders and facilitate access for victims. The structure involves all Neighbourhood Police Posts, Neighbourhood Police Centres, the Police Divisional Headquarters, government and restructured hospitals, the Family Court and more than 30 social service agencies and crisis shelters.²⁵

Public education is another key plank of the strategy to raise awareness about family violence and especially to inform men about their roles and responsibilities in curbing such violence. Finally, there are several community based organisations such as Promoting Alternative to Violence (PAVE), Community Addictions Management Programme (CAMP) and most recently an Elder Protection Team to protect against abuse of the elderly. This type of integrated approach may often be far more effective

²³ *Report of the Committee on the Elimination of Discrimination Against Women, 25th Session*, UN GAOR 56th Session, Supp No 38, UN Doc A/56/38 at 53.

²⁴ *Report of the Committee on the Elimination of Discrimination Against Women, 25th Session*, UN GAOR 56th Session, Supp No 38, UN Doc A/56/38 at 54.

²⁵ See, Ministry of Community Development and Sports, "National Family Violence Networking System" in R Magnus et al, *Families in Conflict: Theories and Approaches in Mediation and Counselling* (2000) 271.

than focusing on laws that specifically target domestic violence, although that is not to say that law reform is not important; it should be seen as element of a multi-prong approach.

COMERCIAL SEXUAL EXPLOITATION OF CHILDREN

Contexts, causes and challenges

According to UNICEF estimates, over one million children are trafficked each year and almost a quarter of a billion children are involved in child labour.²⁶ The worst form of exploitation of children is commercial sexual exploitation where children are forced into prostitution both domestically and across borders. While accurate figures are impossible to compile due to the illicit and underground nature of this industry, UNICEF estimates that in Southeast Asia alone there are around one million children involved in the sex industry.²⁷ While the majority of these children are forced into sexual labour, many choose it out of poverty or, in some cases, because of the attractive income. For example, in Hanoi, where the monthly average income is USD 25, a child prostitute can earn up to USD 1,000.²⁸

We know there is a correlation between the child sex industry and poor economic conditions. Equally, there is evidence of correlation with international conflict and natural disasters, all of which have affected Asia in recent decades. Conflicts and disasters displace people,²⁹ and women and children are often the worst affected. This leaves them vulnerable to exploitation, including exploitation for sexual purposes. The Vietnam War is but one illustration. American soldiers, away from female company,

²⁶ See information at UNICEF website (available online, last accessed, 30 September, http://www.unicef.org.uk/campaigns/campaign_detail.asp?campaign=16).

²⁷ Ibid.

²⁸ Ibid.

²⁹ *Report of the Independent Expert for the United Nations Study on Violence Against Children* (October 2006), UN Doc A/61/299 (available online, last accessed, 13 October 2006, <http://www.violencestudy.org/r25>), para [78].

turned to local women in Vietnam and Thailand, and given the conditions of war and distance from home, engaged in sexual activity unbridled by their own moral convictions. Child sex became common, and, as demand grew, the market was created and has continued to this day. The departure of the soldiers did not end the activity, as the taboos had been broken and the supply-led market drew in local men as clients and later foreign tourists.³⁰

Tackling the problem

The leading global organisation against sexual exploitation of children was created in Thailand in 1990 by Sudarat Sereewat who founded End Child Prostitution in Asian Tourism (ECPAT). ECPAT has broadened its mission and is now called End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes, although its acronym remains the same.³¹ ECPAT achieved a global milestone in 1996 at the First World Congress Against Commercial Sexual Exploitation of Children in Stockholm when 122 states came together and committed themselves to the Stockholm Declaration and Agenda for Action, which, drawing on the UN Convention on the Rights of the Child 1989, called for all states to take various measures to combat the commercial sexual exploitation of children.³²

This was followed by a second conference in Yokohama in 2001, which reviewed the developments in the preceding five years and made further commitments in the Yokohama Global Commitment.³³ Singapore, which has ratified the Convention on the Rights of the Child has not signed the Stockholm Declaration or the Yokohama

³⁰ J Kane, *Sold for Sex* (Hants: Ashgate Publishing Ltd, 1998) 3-4.

³¹ ECPAT is now a network of 70 states. Sudarat Sereewat has founded another organisation called Foundation Against Child Exploitation (FACE). See E Fry, "Closing the Loopholes" *Bangkok Post*, 24 September 2006.

³² Available online, last accessed 16 October 2006, http://www.ecpat.net/eng/Ecpat_inter/projects/monitoring/agenda_for_action.pdf.

³³ Available online, last accessed 16 October 2006, <http://www.unicef.org/events/yokohama/outcome.html>.

Commitment. The official position is that since the Stockholm Declaration and Yokohama Commitment do not add to the Convention on the Rights of the Child, to which Singapore is already a signatory, there is no need to sign on to these additional instruments. The Government is however considering reform of local laws to address some of these issues.³⁴

This paper focuses on commercial sexual exploitation of children across borders, ie situations where a child is forced into providing sexual services outside his or her jurisdiction or for clients from other jurisdictions. One of the reasons for focusing on cross border issues is because in many cases, the countries in which commercial child sex tourism is rampant are countries which, for socio-economic reasons, are not in the best position to deal effectively with the problem. Unsavoury though it is, the availability of sexual services, whether from adults or children, is an attraction to tourists and many of these countries are heavily dependent on tourism.³⁵ According to one estimate, in the mid-1990s, of about the six million annual visitors to Thailand, almost two-thirds were single males.³⁶

The overseas clients are generally from more developed countries which have the resources, incentives and mechanisms to clamp down on this problem. Many of the clients are from Western countries,³⁷ but recently Singapore has become a major client country for the sex industries in the neighbourhood, particularly in Batam, Indonesia due

³⁴ See, Singapore Parliamentary Debates, *Official Reports*, 2 September 2004, col 526; Singapore Parliamentary Debates, *Official Reports*, 6 May 2005, col 587.

³⁵ For example, the Fujian provincial government conducted a survey in 1994 to find out from foreign visitors whether China's ban on prostitution would hinder the development of tourism. South Korean sex workers were in the past praised for their contribution to tourism and the development of the country's economy. See, J O'Connell Davidson, *Children in the Global Sex Trade* (Cambridge: Polity Press, 2005) 128.

³⁶ J Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation* (London: Zedbooks, 2000) xi.

³⁷ See for example, J O'Connell Davidson, *Children in the Global Sex Trade* (Cambridge: Polity Press, 2005) ch 7; J Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation* (London: Zedbooks, 2000); J Kane, *Sold for Sex* (Hants: Ashgate Publishing Ltd, 1998).

to its physical proximity and easy access. A study showed that Singaporeans formed the largest client group in Batam, with approximately 600 Singaporean males going to the island each weekend for sex.³⁸ As such, Singapore has a special responsibility in actively engaging with this problem and striving to curb the proliferation of the industry by targeting the demand side of the equation. Campaigners are calling for enhanced laws on human trafficking and child sex tourism.

Human trafficking

Human trafficking is big business; an ILO study in 2005 found that the profits generated from human trafficking were almost USD32 billion per annum.³⁹ The profits from trafficking for commercial sexual exploitation, based on a 1993 estimate, were in the region of USD 5-7 billion per annum.⁴⁰ Just under half of all human trafficking was for the purpose of commercial sexual exploitation. There is considerable literature and there are various international instruments dealing with human trafficking for various purposes, including that of children for sexual exploitation.⁴¹ The main UN instrument is the UN Convention against Transnational Organised Crime and the related Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children. The Protocol defines trafficking broadly:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force

³⁸ See “Minding the Children” *The Straits Times*, 29 September 2006.

³⁹ *A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2005) at para [59] (available online, last accessed 30 September 2006, http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=5059)

⁴⁰ Ibid at para [266].

⁴¹ See for example, K Beeks & D Amir (eds), *Trafficking and the Global Sex Industry* (Oxford: Lexington Books, 2006); K Kempadoo, J Sanghera & B Pattanaik (eds) *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights* (London: Paradigm Publishers, 2005); AM Troubnikoff (ed) *Trafficking in Women and Children: Current Issues and Developments* (New York: Nova Science Publishers Inc, 2003); Asian Development Bank, *Combating Trafficking of Women and Children in South Asia* (2003).

or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at the minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

I shall not elaborate on human trafficking in this paper due to word limit and time constraints. There is a helpful UN publication which provides an overview and explanation of the numerous instruments and conventions dealing with trafficking in the Asia and Pacific regions.⁴² UNICEF has also recently published a handbook for parliamentarians on how to tackle child trafficking.⁴³

Child sex tourism

Due to various socio-economic factors, countries in Southeast Asia have become hosts to thriving sex industries,⁴⁴ servicing tourists from the region and outside. While a separate debate may be had on the legitimacy of voluntary prostitution as a form of employment, the problem is that many children are *forced* into the sex industry; economic and political realities make it very difficult for the host countries to stop this, despite having domestic laws that criminalise sex with children. This has led to calls for law reform to criminalise child sex tourism so that offenders can be prosecuted in their own countries when they return from their travels.

⁴² UN Economic and Social Commission for Asia and the Pacific, *Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices* (2003).

⁴³ Inter-Parliamentary Union and UNICEF, *Combating Child Trafficking: Handbook for Parliamentarians* (2005) (available online, last accessed, 9 October 2006, [http://www.unicef.org/publications/files/IPU_combattingchildtrafficking_GB\(1\).pdf](http://www.unicef.org/publications/files/IPU_combattingchildtrafficking_GB(1).pdf)).

⁴⁴ A 1998 ILO report, *The Sex Sector: The economic and social bases of prostitution in Southeast Asia* showed that the sex industry in Southeast Asia was a significant contributor to gross domestic product, accounting for up to 14% in some instances. See ILO press release – Sex Industry Assuming Massive Proportions in Southeast Asia (available online, last accessed 30 September 2006, <http://www.ilo.org/public/english/bureau/inf/pr/1998/31.htm>).

The exploitation and abuse of children, particularly of a sexual nature, evokes considerable emotions of anger, revulsion and sympathy. However, an overly emotive approach to law reform runs the risk of obfuscating the complex causal factors underpinning child sex tourism, which include socio-economic inequality, international conflict, supply and demand, a culture of domestic tolerance in pursuit of the tourism dollar, affordable and frequent international air travel, as well access to the internet, which provides an instant communication tool for advertisement and coordination. Law reform targeting child sex tourism can only play a small, albeit important, symbolic part in this effort.

Our strategy must be holistic, objective and measured, designed to have a real and sustained impact on the child sex industry, which will hopefully lead to its contraction and eventual containment. Julia O’Connell Davidson, a leading sociologist who has carried out extensive research in this area and worked with ECPAT in its early years, has warned of the danger of reducing the issue to a bipolar tension between good, innocent children and evil predatory adult exploiters.⁴⁵ She has consistently argued for a realistic assessment that does not automatically portray every woman and child in the sex industry as an innocent victim and every alleged offender as a demonic paedophile. This victim-orientation of women and children in the sex trade denies them their autonomy and agency,⁴⁶ while demonizing offenders suggests that child sex tourists are paedophiles and perverts, whereas many are part of the mainstream. As one NGO noted, “The use of paedophile as synonymous with all abusers also ignores the development of a large, organised, highly profitable commercial market providing children to satisfy a consumer demand.”⁴⁷

⁴⁵ See, J O’Connell Davidson, *Children in the Global Sex Trade* (Cambridge: Polity, 2005) and references contained therein to her earlier research.

⁴⁶ The agency and autonomy arguments have to be more nuanced with respect to children. Few would challenge the idea that a five year old is not a responsible agent and is a vulnerable person in need of protection, but the same cannot necessarily be said of a seventeen year old.

⁴⁷ International Save the Children Alliance, *Policy Paper on Protecting Children from Sexual Abuse and Exploitation* (2003) 5 (available online, last accessed, 9 October 2006, <http://www.savethechildren.net/alliance/resources/publications.html#exp>)

Law reform

Criminal jurisdiction is generally limited by the territoriality principle.⁴⁸ There are two reasons for the territoriality principle. First, and most importantly, the international legal order is premised on a system of nation states with sovereign power. To allow one state to exercise jurisdiction over another is an intrusion that is likely to lead to conflict. The second reason is historical; as most crimes were local, the procedures and mechanisms that evolved were premised on this “all crime is local”⁴⁹ model and are thus not altogether suitable for dealing with cross border or transnational crimes.⁵⁰

Nevertheless, there is a growing body of jurisprudence recognising extraterritorial jurisdiction based on various other factors, including where the offender is a citizen or permanent resident (nationality principle); where the conduct by foreigners is harmful to citizens (passive nationality principle); where the activity has an effect on the state or threatens the security of the state; and where the conduct is one that attracts universal jurisdiction, for example, piracy.⁵¹ A leading international law scholar has argued that extraterritorial jurisdiction is subject to the following restrictions:

There should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction

The principle of non-intervention in the domestic or territorial jurisdiction of other states should be observed

A principle based on elements of accommodation, mutuality and proportionality should be applied. Thus nationals resident abroad should not be constrained to violate the law of the place of residence.⁵²

⁴⁸ *Cox v Army Council* [1963] AC 48; *R v Thompson* (1989) 86 ALR 1. For a discussion of the local position, see M Sornarajah, “Extraterritorial Jurisdiction over Crimes in Singapore, Malaysia and the Commonwealth” (1987) 29 *Malayan Law Review* 200.

⁴⁹ *McCleod v Attorney General for New South Wales* [1891] AC 455 per Lord Halsbury.

⁵⁰ M Sornarajah, “Globalisation and Crime: The Challenges to Jurisdictional Principles” [1999] *Singapore Journal of Legal Studies* 409 at 411.

⁵¹ See generally, I Brownlie, *Principles of Public International Law* (6th ed, 2003). See also, M Sornarajah, “Extraterritorial Criminal Jurisdiction: British, American and Commonwealth Perspectives” (1998) 2 *Singapore Journal of International & Comparative Law* 1

⁵² Brownlie, *Principles of Public International Law* (6th ed, 2003) 309.

Singapore has several statutes with extraterritorial effect, most notably the Misuse of Drugs Act (Cap 185), the Computer Misuse Act (Cap 50A) and the Prevention of Corruption Act (Cap 241). It has yet to enact child sex tourism law with extraterritorial effect, although it is considering doing so.⁵³ While the existing extraterritorial statutes in Singapore have rarely been invoked,⁵⁴ arguably the existence of these statutes acts as a deterrent, and when the occasion arises, affords a mechanism for doing justice. If Singapore takes the view that it should be entitled to prosecute one of its citizens who, during an overseas visit to a country where it is legal to consume marijuana, does consume marijuana before returning to Singapore, then it is very difficult to argue against enacting child sex tourism laws to prosecute Singaporeans who go overseas in order to have sex with children, which is both a crime in the other country as well as in Singapore.⁵⁵

Several countries have enacted extraterritorial legislation to deal with child sex tourism. The exact number is unclear, with different figures provided by different sources. The largest figure is provided by Child Wise, an Australian NGO, which estimates that over 40 countries have enacted such legislation.⁵⁶ Australia was one of the first countries to legislate in this area and enacted the Crimes (Child Sex Tourism) Amendment Act in 1994. To date, there have been more than 20 prosecutions in

⁵³ AWARE has recently submitted a position paper on this issue to the Government: *Beyond Borders: Sex with Children – Implementing Extraterritorial Legislation for Singaporeans, An AWARE Position Paper* (September 2006).

⁵⁴ For example, there has only been one case under the Prevention of Corruption Act – *Tan Cheng Kong v PP* [1998] 2 SLR 410.

⁵⁵ The Singapore Government is in fact considering enacting child sex tourism laws. See, Singapore Parliamentary Debates, *Official Reports*, 3 April 2006, col 1821.

⁵⁶ K Flanagan, “Global Action to Combat Child Sex Tourism” presented at *Crime in Australia: International Connection*, Australian Institute of Criminology International Conference (29-30 November 2004) (available online, last accessed, 1 October 2006, <http://www.aic.gov.au/conferences/2004/flanagan.pdf#search=%22childwise%20sex%20tourism%2040%22>). It should be noted that the majority of the countries have not targeted child sex tourism per se, but have generally extraterritorial laws against child abuse or serious offences against children.

Australia under this Act and earlier this year a challenge to the constitutional validity of the Act was dismissed by the High Court of Australia.⁵⁷

In *XYZ v The Commonwealth*,⁵⁸ the plaintiff sought a declaration that Australia's extraterritorial legislation on child sex tourism was invalid in that the external affairs power granted to the Federal Government under s 51 (xxix) of the Constitution did not extend to this type of legislation. The plaintiff's principle argument was that private conduct of citizens outside Australian territory could not be construed as relating to "external affairs" which the plaintiff contended should be construed as referring to matters pertinent to Australia's relations with other states. The government argued that existing authority pointed to a broader interpretation of s51(xxix), and alternatively argued that the child sex tourism laws could be justified under the doctrine of "matters of international concern."

The High Court of Australia, by 5-2 majority, upheld the validity of the legislation. Four of the majority upheld it on the broad interpretation of s51(xxix),⁵⁹ while the fifth upheld it under a narrower construction, holding that even on a strict interpretation, the external affairs power was in fact engaged.⁶⁰ What is of interest is that none of the majority was prepared to accept that the child sex tourism laws as drafted were justifiable on the ground that they related to matters of international concern. The dissenting judges expressly held that the laws did not relate to matters of international concern, largely because the wide reach of the laws went beyond any possible international consensus on this issue.

Even if there are relevant matters of international concern, and even if the international concern doctrine is sound, that doctrine could not support ss

⁵⁷ *XYZ v The Commonwealth* [2006] HCA 25.

⁵⁸ [2006] HCA 25.

⁵⁹ Gleeson CJ, Gummow, Hayne, Crennan JJ.

⁶⁰ Kirby J.

50BA and 50BC. The material relied on by the defendant reveals concern - let it be assumed to be "international" - about the sale of children, child prostitution and child pornography. Sections 50BA and 50BC do not criminalise that conduct, they criminalise different conduct. The material also reveals general concern about sexual activity involving children under 12 - not under 16, because some of the legislation relied on by the defendant for another purpose reveals that in some countries, no matter how many Australians might deprecate it, activity with children as young as 12 is lawful, and in others with children as young as 14 or 15. If the material demonstrates a general concern about children under 12, the legislation, in criminalising conduct with older children, goes beyond the area of international concern.⁶¹

This Australian High Court decision serves as a reminder that legislation on child sex tourism must be drafted in a way that ensures the correct balance and is fair to all stakeholders – the victims, the offenders and the community. Otherwise, there is a real risk that such laws may well be challenged and struck down or severely read down. While it is important to have tough laws, it is equally important to ensure that these laws are enforceable, both constitutionally and practically.

Apart from the extraterritoriality point, which does not pose a constitutional problem for Singapore, some of the controversial issues that need to be addressed in any child sex tourism laws include the following:⁶²

- Double criminality
- Double jeopardy
- Age of child

⁶¹ *XYZ v The Commonwealth* [2006] HCA 25 at para [226] per Callinan and Heydon JJ.

⁶² Some of these issues have been identified by ECPAT in its publication: J Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation* (London: Zedbooks, 2000); and in various reports and works by Vitit Muntarbhorn, Special Rapporteur for the UN on the sale of children, child prostitution and child pornography (1990-1994).

- Identity of offender (citizens, PRs, EP holders, WP holders, visitors, corporations)
- Related complicity and inchoate offences
- Child friendly procedures
- Evidence gathering rules
- Registry of offenders

I will comment on the first five points but, while recognising the importance of the remaining three issues which raise significant procedural challenges, I will not deal with those in this paper. The double criminality rule refers to the requirement in some extraterritorial legislation for the conduct to be an offence in the place of commission as well as in the legislating country. For example, the United Kingdom's laws on child sex tourism have a double criminality requirement,⁶³ whereas the Australian legislation does not have such a requirement.⁶⁴ There are two clear arguments in favour of the double criminality requirement. First, it may be offensive to a state to have a foreign state declare illegal conduct within another state's border which that state treats as legitimate. This may create impediments in investigation and evidence gathering as cooperation may not be forthcoming. Secondly, such an approach has an element of legal imperialism.⁶⁵ However, the whole point of extra-territorial legislation is for the legislating country to enforce its own standards on its own citizens.⁶⁶ While there may be a perception of imperialism, the fact that child sex tourism laws without double criminality operate successfully in several countries suggests that the double criminality rule is not necessary and can be ignored.

⁶³ Sexual Offences Act 2003 s 7.

⁶⁴ Crimes (Child Sex Tourism) Amendment Act (1994).

⁶⁵ See V Muntarhorn, "Extra-territorial Criminal Laws to Combat Trafficking in Humans" cited in AWARE, *Beyond Borders: Sex with Children – Implementing Extra-Territorial Legislation for Singaporeans* (2006) at Appendix E.

⁶⁶ A clear example is s8A of the Misuse of Drugs Act in Singapore which criminalizes certain drug-related activity by Singaporeans and permanent residents even when they outside Singapore and in a country where such conduct is perfectly legal and even socially acceptable.

The double jeopardy rule is more significant. This refers to the risk that an accused could be liable both under the laws of the country where the conduct occurs and the country with the extraterritorial laws. For example, an accused commits an offence in Country A and is punished for it. On his return to his home country, he is tried and punished again under his home country's extraterritorial laws. To expose an accused to double jeopardy risks subjecting such laws to legal challenge. On the other hand, applying double jeopardy strictly could result in some accused persons slipping between the cracks. For example, if Country A's punishment for underaged sex is a mere fine, the accused can effectively buy immunity from prosecution in his home country where the punishment may be much heavier. One option could be to apply double jeopardy only where the accused has been convicted and punished in the country of offence to an extent comparable to the punishment available under the extraterritorial laws of his home country.

One of the most controversial aspects of child sex tourism laws is in determining the age of the child. Different countries have different ages when a child can legally have sex. This ranges from twelve years to eighteen.⁶⁷ To apply the higher end for the purposes of child sex offences may not be wise, particular if it captures consensual sex. The Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography have adopted eighteen years as the relevant age for a child. However, these instruments are not targeted at consensual sex, but are focused on exploitation and coercion of children in sex-related activity. Article 34 of the Convention on the Rights of the Child states:

⁶⁷ According to the evidence in *XYZ v The Commonwealth* [2006] HCA 25 at para [141] Canada, Albania, Croatia, China, Colombia, Germany, Hungary and Iceland adopt a general age of consent of fourteen years for most sexual activity. In some countries, such as Chile and Mexico, the age of consent is said to be twelve years. Recently, members of an isolated community in the Pitcairn Islands were charged with statutory rape under English law on the basis that the United Kingdom retained sovereignty over the islands, even though for over two centuries the islanders had lived by their own code and according to their custom, sex with children as young as twelve was permitted. See, AH Angelo & A Townsend, Pitcairn: A Contemporary Comment" [2003] 1 NZJPIIL 229; A Trenwith, "The Empire Strikes Back: Human Rights and the Pitcairn Proceedings" (2003) 7 Journal of South Pacific Law (Working Paper).

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.

The Australian Crime (Child Sex Tourism) Amendment Act 1994 s50BA provides that “A person must not, while outside Australia, engage in sexual intercourse with a person who is under 16.” As noted in the *XYZ Case*, this is problematic as it potentially casts the net of criminal liability over otherwise perfectly legal conduct. If Singapore were to adopt a similar provision with the age set at eighteen, it would mean that when a couple in a sexual relationship in Singapore, where one partner is seventeen years old, goes overseas and consensual sex occurs, a crime is committed. The same act committed by the same people in Singapore would not be any offence. While one could argue that prosecutorial discretion could weed out such cases, it is suggested that there is no need to cast the net so widely and invite legal challenge or public discontentment.

If the age is set at eighteen, then it must clearly state that the conduct must contain at least an element of coercion, inducement, exploitation, abuse or lack of consent; i.e. it must be tainted in some way to suggest moral culpability on the part of the alleged offender. It should be remembered that what is intended to be criminalised is not sexual *activity* per se but child sex *tourism*, which is a problem because it involves the commercialisation of child sex and coercion or exploitation of children. A graduated scheme may be considered with different approaches according to the child’s age: strict

approach to children below twelve years old, where there is presumably international consensus, and a more nuanced approach to children between twelve and eighteen.⁶⁸

In order to maintain the connection with the jurisdiction under the nationality principle, the offenders should be citizens or habitual residents of the country.⁶⁹ Offenders should also include corporations and other organisations that are involved in facilitating child sex tourism. Where such facilitation occurs within the country, there is clearly no need for extraterritorial legislation, as existing laws would be sufficient.⁷⁰ The abetment provision in the Penal Code is the clearest example of this:⁷¹

Abetment in Singapore of offences outside Singapore

108A. A person abets an offence within the meaning of this Code who, in Singapore, abets the commission of any act without and beyond Singapore which would constitute an offence if committed in Singapore.

Illustration

A, in Singapore, instigates *B*, a foreigner in Java, to commit murder in Java. *A* is guilty of abetting murder.

⁶⁸ Many countries adopt this graduated approach to domestic sexual offences. For example, in Singapore, s375(e) of the Penal Code creates the strict liability of offence of rape where the victim is under fourteen years of age and s140(1)(i) of the Women's Charter creates the offence of carnal connection where the victim is under sixteen years of age and not married to the accused.

⁶⁹ Citizens and permanent or habitual resident may fairly be held to have accepted the laws of their home/host country. Different considerations may apply to other categories of residents, for example, those on long or short term work permits, long or short term social visit stays and so on.

⁷⁰ The Senior Minister of State for Home Affairs, Associate Professor Ho Peng Kee has made this clear. See Singapore Parliamentary Debates, *Official Reports*, 16 May 2005, col 587.

⁷¹ Equally, there may be liability for conspiracy, attempt, instigation and so on under various provisions of the Penal Code, as long as these activities occurred in Singapore.

Where individuals or organisations facilitate or attempt to facilitate such activity from outside Singapore but using the internet to source clients from Singapore, there is a strong chance that such conduct will be caught by s 11 of the Computer Misuse Act.⁷²

CONCLUSION

Just as Singapore's response towards domestic violence involved a broad-based, multidisciplinary approach, so too must our approach be towards child sex tourism. Law reform is important, but other avenues should also be explored and fully utilised. A good example is ECPAT's strategy to target the tourism industry itself and engage it in this ongoing campaign against commercial sexual exploitation of children. ECPAT, in collaboration with Scandinavian tour operators and the World Tourism Organisation, launched the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism in 1998. This Code has been adopted and implemented by over forty organisations in thirteen countries and by 2003 was estimated to impact on over 30 million tourists.⁷³

It is important that child sex tourism be given high priority and visibility, as this will have a knock-on effect. Singapore has a responsibility to take a lead in this regional campaign, and the Secretary-General of ASEAN has stated as much in an interview:⁷⁴

Singapore has a good brand name. It is well-known in this region and internationally. So if Singapore takes a pro-active stand in combating trafficking against persons, in combating child sex tourism, it will basically bring international attention to a higher level. Because, when Singapore talks, when Singapore does anything, people pay attention. And that is why many of the non-

⁷² Section 11 of the Computer Misuse Act provides for extraterritorial jurisdiction and applies to any person, regardless of nationality, as long as the person was in Singapore or the computer, programme or data was in Singapore at the material time.

⁷³ Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism (available online, last accessed, 16 October 2006, <http://www.thecode.org/>).

⁷⁴ ASEAN Secretary-General, Mr Ong Keng Yong, "The Problem of Child Sex Tourism and Sex Trafficking in Asia" Radio Singapore International Asian Journal programme, 4 May 2005 (available online, last accessed 16 October 2006, http://www.thecode.org/news/05_04_05.html).

governmental bodies and international bodies want Singapore to do something, because to them, once Singapore does something, it has many good spin-offs, it can bring a lot of good, positive impact.

This global crisis of violence against the most vulnerable amongst us requires urgent attention by states; it is only the state that is in the position to overcome some of the structural barriers to implementing effective solutions. Law reform alone is not the panacea; it is merely the anchor for a holistic agenda that brings together state, civil society, victims, offenders and the community in an ongoing dialogue and action plan to reorient our existing attitudes towards violence against women and children.