2007

Note of the Year: A Modicum of Recovery: How Child Sex Tourism Constitutes Slavery under the Alien Tort Claims Act

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2007 NOTE OF THE YEAR

A MODICUM OF RECOVERY: HOW CHILD SEX TOURISM CONSTITUTES SLAVERY UNDER THE ALIEN TORT CLAIMS ACT

INTRODUCTION

Somewhere in the United States, a man has boarded an overseas flight to a distant land. Along with his passport, he packs a camera, a money belt, a few changes of clothes, and some light reading for the long plane ride. Although the ticket cost him thousands of dollars—a significant investment for a man of modest means—he has likely taken this flight before and may already be imagining his next trip. Just minutes earlier, our traveler passed through United States airport security, requiring him to show proof of identification and produce his passport. Although the security agent may notice the stamps from sojourns to Thailand, Costa Rica, or Brazil, his documents raise little suspicion and he passes through security without delay.

But as the plane taxis down the runway, our traveler becomes a criminal in the eyes of his country. Despite having just passed through one of the tightest civilian security checkpoints in the United States, he has effectively avoided detection. And he knows the procedure from here: a fourteen hour flight, a pass through a cursory foreign passport checkpoint, and a few predictable questions. Reason for traveling? Sightseeing. Business. A little of both. His passport operates like a royal seal, vesting power and authority, and within moments of producing it he receives nearly unlimited access to the country’s resources and citizenry. Upon collecting his single bag, he passes beyond the airport into the dense, humid air of Phnom Penh or
into the chaotic streets of Mexico City or into the tumultuous thoroughfares of Calcutta. And although he has already committed a crime in the eyes of his home country, the real crimes and tragedies have yet to occur in this far-off place where he has decided to spend a relaxing vacation. He is, after all, a tourist of sorts.

Somewhere in that same city a child is made to wait. The child could be a boy, although more likely than not it is a young girl. Her family, a mother or father, may be forcing her to work. Or perhaps her family sent her to live with an aunt in the city, who, short on money, saw financial potential in her young charge. Or perhaps she has no family and instead lives on the streets, controlled by an unfamiliar, yet omniscient, authority—a twenty-first century Fagin who, instead of prompting children to pick pockets, demands an infinitely more abhorrent and destructive chore. Either way, she is a kept commodity, enslaved for the purpose of providing sexual release for the arriving tourists.

And once the tourist approaches her pimp, she will become his property, a human chattel for which he bartered. He will pay pennies on the dollar for the chance to abuse her repeatedly. Compared to his plane ticket to reach his destination, she costs nothing. When he is done, he will return home. On the ride to airport, in his rickshaw or taxi, he may see signs placed throughout the city admonishing his behavior. One sign simply reads: “Abusing Me Is a Crime.”

But something more than a crime has occurred. Indeed, what transpired between the child and her abuser is a form of modern-day slavery. While the sex tourist’s actions may be criminalized in both the United States and in the destination country, it is doubtful that many child sex tourists—if forced to own up to their transgressions—would consider themselves contemporaries of history’s slave traders. But as this Note explains, in certain circumstances child sex tourists commit acts of slavery which are recognized as universal crimes to be forbidden and punished by all nations.

I. THE PROBLEM OF CHILD SEX TOURISM

This Note confronts the repulsive and all-too-prevalent phenomenon of child sex tourism and explains how the abuse of a child constitutes a violation of the law of nations. Although the United States has developed a comprehensive statutory scheme to punish child sex tourists, it has avoided directly labeling child sex tourism as a form of slavery. Through an analysis of the Alien Tort
Claims Act, this Note seeks to encourage lawmakers and lawyers to conceive of the problem of child sex tourism as both a criminal act and an act of slavery. Indeed, the problem of child sex tourism affects all countries, regardless of whether the country is primarily a “sending” one, meaning that its citizens leave its borders in order to travel to the other country, or the “receiving” state, which receives the foreign tourist and provides a venue for the sexual violation to occur. While instances of child sexual abuse occur tragically often in the United States, the United States functions primarily as a sending state due to both the relative affluence of its citizens and the freedom they enjoy in traveling outside of the country. By engaging in child sex tourism, U.S. citizens create a demand for these children, thus perpetuating an environment of terror and suffering for tens of thousands of children in receiving countries.

Despite the considerable cost of international travel for Americans, United States citizens account for nearly twenty-five percent of all sex tourists worldwide—the largest percentage of any country in the world. U.S. citizens make up nearly eighty percent of child sex tourists traveling to Latin America. In fact, a review of the records of sex tourism reveals that Americans have consistently made up the largest citizenry of sex tourists in Southeast Asia, as evidenced by a National Center for Missing and Exploited Children report released in 1999. As one commentator noted, “[s]ex tourism has a peculiar poignancy [as] . . . one of the rare occasions when privilege confronts poverty face to face.” Ironically, while the citizens of the United States have shown themselves at times, to be exceedingly generous with humanitarian aid and through efforts to increase awareness about global poverty, rarely do these acts of kindness result in the face-to-face interactions that tragically define child sex tourism.

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1 Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (originally part of the Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789)).
3 Id.
The uniquely American dimension of child sex tourism has attracted the attention of many U.S.-based non-governmental organizations ("NGOs"), which in turn have made both education about and prevention of child sex tourism a major focus of their work. For example, the Christian global-relief organization World Vision recently joined with the Department of Homeland Security's U.S. Immigration and Customs Enforcement ("ICE") office to develop a marketing campaign specifically designed to deter potential sex tourists, to educate tourist agencies and other bodies involuntarily connected to the sexual abuse and to create an atmosphere of awareness in the receiving country, thereby promoting the prevention of sexual abuse as well as the investigation of alleged abuses. The campaign, entitled the "Child Sex Tourism Prevention Project," focuses on five receiving countries (Cambodia, Thailand, Costa Rica, Mexico, and Brazil) as well as the United States, the sole sending country. As part of the project, World Vision placed deterrent messages in numerous locations: from airports to hotel rooms in foreign countries and even on airplane in-flight movies.

Such activities undertaken by both the public and private sectors exemplify the efforts needed to curb instances of child sex tourism. On January 17, 2007, U.S. First Lady Laura Bush remarked at the International Center for Missing and Exploited Children Conference that "every country must educate its citizens [on child sexual trafficking and abuse]" and "[g]overnments must also reduce the demand for child prostitution among their own citizens."

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7 ICE's work with World Vision is only a small part of its larger program, Operation Predator, which seeks to eradicate child sex tourism as well as investigate and arrest child pornographers, foreign sexual predators, and child traffickers. On July 19, 2005, ICE, in a news release, stated that through Operation Predator it had made over 6,000 arrests domestically and approximately 1,000 arrests abroad in conjunction with crimes against children. News Release, U.S. Immigration and Customs Enforcement, Operation Predator Nets More than 6,000 Arrests and 1,000 Overseas Arrests in its First Two Years: Over 250 Predators Arrested in Florida (July 19, 2005), available at http://www.ice.gov/pi/news/newsreleases/articles/050719miami.htm. For more information on Operation Predator, see U.S. Immigration and Customs Enforcement, Child Exploitation—Operation Predator, http://www.ice.gov/partners/predator/index.htm (last visited Jan. 9, 2007).
9 Id.
10 Id. World Vision also places ads on billboards and in magazines. The billboards are particularly striking, showing the sad eyes of a child with the subscript, "I am not a tourist attraction. It is a crime to make me one." Another magazine ad emphasizes the likelihood of criminal penalties; a long line of prison cells is captioned with the clear warning: "Sexually exploit a child in this country, go to jail in yours." Id.
Confronting instances of child sex tourism as a modern form of slavery—and a violation of the law of all nations—would place pressure on nations to enact comprehensive anti-child sex tourist laws. Part II of this Note introduces the phenomena of sex tourism and child sex tourism. Part III discusses the steps that the U.S. Congress has taken to criminalize child sex tourism. Part IV discusses the concurrent civil remedy available to victims of child sex tourism and analyzes arguments for and against the provision of civil damages. Part V proposes an alternative means of pursuing a civil remedy from child sex tourists through the Alien Tort Claims Act ("ATCA"). Part VI discusses three potential claims that a child may raise when suing under the ATCA and their relative strengths and weaknesses. Part VI also addresses the state-action requirement for suits under the ATCA and concludes that, in certain cases, state action is not required and does not present a bar to a suit brought by a child under the ATCA.

II. BASIC CONCEPTS

A. Defining Child Sex Tourism

Before delving into further discussion of child sex tourism, it is important to distinguish sex tourism from child sex tourism, as the laws of individual nations and multi-national treaties vary greatly depending on the intention of the tourist. The World Tourism Organization defines sex tourism as "trips organized from within the tourism sector . . . with the primary purpose of effecting a commercial sexual relationship by the tourist with residents at the destination." As a commentator has noted, "[s]ex is widely understood to be part of the tourist experience, and whether with other tourists, through local 'holiday romances,' or with sex workers, many people expect to have more sex whilst on vacation." Even if this opinion over-values the role that sex plays in the tourism industry, it is certainly the reality for many (predominately Western) individuals seeking risky, and oftentimes stereotyped, exotic experiences. "In many ways, the sex tourist . . . can give vent to forms of power which would not pass unchallenged at home," such as misogyny, sexism, and in certain

14 Id.
countries, racism. Surprisingly, the World Tourism Organization's definition of sexual tourism fails to account for the opportunistic sexual tourist, who, finding himself in a country with a pervasive and unregulated sex trade, spontaneously elects to enter the market.

Sex tourism, while regulated at various levels, may be legal in both the sending and receiving states. But prostitution is rarely legal. While individual countries may have conflicting laws on prostitution, solicitation, or pornography, most acts of consensual adult sex tourism do not violate domestic or international law. Violations of international law, however, haunt the sex industry. Many adult prostitutes in the sex industry in destination countries for sex tourists have been either pressed into service due to poverty, abandonment, or coercion; many others have been trafficked in some form or another to their destination. In especially under-developed countries, sex tourism provides one of the few ways in which locals can access amenities such as potable water, dependable electricity, and communication services that otherwise would be unavailable. In such circumstances, prostitution is rarely a choice.

Unlike adult sex tourism, child sex tourism is always illegal in both the national and the international arena, but laws against child sex tourism may be infrequently enforced. The United Nations defined child sex tourism as, "tourism organized with the primary purpose of facilitating the effecting of a commercial sexual relationship with a child." Like most sex tourists, child sex tourists are nearly always male. As with the definition of sex tourism, the United Nations' definition of child sex tourism fails to acknowledge those tourists, businesspersons, or other travelers who exploit children in destination countries without any prior inclination to do so. Ironically, as discussed in greater detail below, these perpetrators are often the most difficult to investigate and apprehend.

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15 SEABROOK, supra note 5, at 4.
17 Id. at xi–xii.
18 DAVIDSON, supra note 13, at 127.
20 DAVIDSON, supra note 13, at 126.
B. Characteristics of Child Sex Tourism

According to the State Department’s Office to Monitor and Combat Trafficking in Persons (otherwise known as “G/TIP”), over one million children each year are abused as a result of the commercial sex trade around the world. World Vision attributes this volume of activity in the child sex trade to specific factors. These factors include: (1) the ease with which one may travel to foreign countries; (2) the relative lack of law enforcement in the receiving countries to investigate and punish instances of child sex tourism; and, (3) poverty, which in turn forces children to become laborers either for their families or pushes them to the streets. Due to these factors, “there is no hemisphere, continent, or region unaffected by the child-sex trade.”

While some divide in academic thought exists as to whether child sex tourism should be phrased as a problem of domestic child prostitution targeting pedophiles or whether it is an endemic, global problem promoted by the tourist industry, child sex tourism encompasses aspects of both. Without the availability of child prostitutes, foreign pedophiles and opportunistic abusers could not operate abroad as they do now. Moreover, without the tourism industry providing a means by which abusers can travel abroad, child prostitution would be primarily a domestic concern, and the obligations of foreign states to prevent such prostitution would be minimal. Regardless of phraseology, both the domestic society and the international traveler share the blame for the problem of child sex tourism.

The Convention on the Rights of the Child vests children with the right “to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”

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21 U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, The Facts About Child Sex Tourism (Aug. 19, 2005), http://www.state.gov/g/tip/rls/fs/2005/51351.htm. Naturally, due to the clandestine nature of the industry, it is difficult to estimate the number of children abused as a result of child sex tourism. World Vision estimates that two million children are abused in the global sex trade, which would include child sex tourism. See World Vision, supra note 2.
22 World Vision, supra note 2.
23 Id.
24 KLAIN, supra note 4, at 33.
25 E.g., DAVIDSON, supra note 13, at 127.
26 Id. at 128. Although “no country ever actively promoted tourist-related child prostitution,” many governments, especially in the 1980s and 1990s, appeared willing to allow the problem to exist with little or no preventative law enforcement. Id.
though, dictates that a child earn a salary long before the child should be considered a breadwinner. Sadly, this can often mean a career in the sex industry. "When the children of the poor are expected to work for a living . . . it is only a short step to the perception of them as adults," Indeed, many sex tourists rationalize their acts by perceiving their victims as willing participants in an industry that their home country has elected to outlaw. To these pedophiles, "[a]ge means something different in a strange and 'exotic' land where children, like tropical plants, grow fast, and girls of 13 can be attracted to men of 60." Therefore, some child sex tourists may return home with a clear conscience, unconcerned with what may have transpired a world away. They may not even realize that they committed a crime or that international law might regard their activity as a modern variant of slavery.

III. THE CRIMINALIZATION OF CHILD SEX TOURISM IN THE UNITED STATES: THE PROTECT ACT

A. Criminal Penalties

Upon his return to the United States, an American child sex tourist may face severe criminal sanctions. On January 25, 2006, the U.S. Court of Appeals for the Ninth Circuit upheld the conviction of

28 JEREMY SEABROOK, NO HIDING PLACE xiii (Zed Books 2000).
29 See generally DAVIDSON, supra note 13, at 136 (describing different methods sex tourists utilize to rationalize their use of prostitutes and avoid framing their acts as prostitution, such as inserting money into a poor economy or labeling the locals as culturally or racially inclined to hypersexuality).
30 Id. at 137. Because much international law, including the Convention on the Rights of the Child, defines the child as any person under the age of eighteen, e.g., Convention on the Rights of the Child, supra note 27, at art. 1, many sex tourists, never desiring to sexually abuse children, unwittingly do so. As one commentator points out, these tourists do not seek out children; yet when approached by a fifteen-year-old girl who flirts and behaves like an adult, the tourist will perceive her as an adult and child abuse will occur. DAVIDSON, supra note 13, at 138.
seventy-one-year-old Michael Lewis Clark under the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today ("PROTECT") Act. Enacted in 2003, the PROTECT Act makes it a crime for any United States citizen or alien to "travel[] in foreign commerce, and engage[] in any illicit sexual conduct with another person." It defines "illicit sexual conduct" as "a sexual act... with a person under 18 years of age... or... any commercial sex act... with a person under 18 years of age" and proscribes a maximum penalty of thirty years in prison. Clark pled guilty to two counts under the PROTECT Act and reserved his right to challenge, on appeal, the constitutionality of the Act as exceeding Congress's power under the Foreign Commerce Clause. On appeal, the Ninth Circuit held that Congress possessed broad powers under the Foreign Commerce Clause and that the PROTECT Act properly fell within those powers as it bore a substantial relationship to the regulation of foreign commerce.

Clark's conviction resulted from the extensive, combined efforts of U.S. authorities, Cambodian police, and private human rights organizations operating in Cambodia. Clark, a United States citizen, resided in Cambodia for several years and had frequently engaged in the sexual abuse of minors. The Phnom Penh-based non-governmental organization Action Pour Les Enfants began investigating Clark after Cambodian street children told social workers that he frequently molested young boys. Action Pour Les Enfants works to protect Cambodian street children from sexual abuse suffered at the hands of foreign individuals and participates with local and international authorities in prosecuting child abusers. In addition to alerting the authorities to sexual abuses, Action Pour Les Enfants shelters the young victims, providing them with clothing, food, and education.

35 Clark, 435 F.3d at 1116.
36 See Brief of Appellee at 3, United States v. Clark, 435 F.3d 1100, No. 04-30249 (9th Cir. 2006) [hereinafter Appellee Br.]. World Vision estimates that one-third of prostitutes in Cambodia are children. World Vision, supra note 8.
37 See Appellee Br., supra note 36, at 3-7.
38 Id. at 3-4.
40 Appellee Br., supra note 36, at 4.
The street children sexually abused by Clark explained that he often used a fifteen-year-old boy to recruit younger children, to whom he paid approximately five to ten dollars for sex acts. After hearing of Clark's activity, an agent of Action Pour Les Enfants shadowed Clark as he hired two small boys and took them to a local Phnom Penh guesthouse, where he proceeded to molest them. The agent contacted the local police, who, upon finding Clark and the two boys naked in the guesthouse, arrested Clark and turned him over to American authorities. Once in U.S. custody, Clark admitted that he had molested the boys, that he had been a pedophile since 1996, and that he had molested about fifty children during his travels in locations such as Cambodia, Thailand, Malaysia, and Panama.

B. Profiles of Abuse

Clark's story is emblematic of the growing problem of child sex tourism—recidivists traveling to various economically-depressed areas to take advantage of the numerous street children, many of whom are prostituted out by parents, relatives, or strangers. In February, 2004, ICE agents apprehended sixty-one-year-old Richard Arthur Schmidt and returned him to the United States from Cambodia, where he had sexually abused male children. Although previously convicted in Maryland three different times for sexually abusing children, Schmidt received a visa to travel to the Philippines and Cambodia, where he was eventually detained after abusing three male boys. Schmidt received a fifteen-year prison sentence in the United States, followed by a lifetime of supervised release.

On October 26, 2006, police from Cambodia's anti-human trafficking division arrested San Francisco police officer Donald Rene Ramirez on suspicion of raping a fourteen-year-old girl. The Cambodian police also arrested the girl's mother, who has been charged with providing the girl to Ramirez. Although Cambodian
and U.S. authorities discussed the possibility of extraditing Ramirez back to the United States for prosecution under the PROTECT Act, Ramirez died in what appears to be a suicide in a Cambodian prison on October 31, 2006.\(^{50}\)

Just days later, a Cambodian municipal judge sentenced Belgian national Philippe Dessart to eighteen years in prison for debauchery (Cambodia’s moniker for sexual crimes against a minor) in connection with the sexual abuse of a minor.\(^ {51}\) Dessart’s arrest proceeded in nearly the exact same fashion as Clark’s: Cambodian authorities seized him in bed with a fourteen-year-old boy at a guesthouse after receiving a tip from Action Pour Les Enfants.\(^ {52}\) Katherine Keane of Action Pour Les Enfants hailed the conviction as a “very important warning for other foreigners traveling to Cambodia that they are not able to do so without accountability.”\(^ {53}\) Director of the Cambodian anti-human trafficking unit Keo Thea expressed it slightly differently: “paedophiles thought that Cambodia was a heaven for them . . . Now, if they still think the same, then they will find Cambodia is a hell for those paedophiles.”\(^ {54}\)

C. The Difficulty of Prosecuting Child Sex Tourism

As demonstrated above, these recent arrests, convictions, and extraditions portend a positive movement in Cambodia towards deterring international citizens from engaging in child sex tourism. Legislation such as the PROTECT Act in the United States provides domestic punishment for American citizens who (1) escaped arrest in the destination state, (2) would not be prosecuted by domestic authorities, or (3) as in Clark’s case, were extradited back to the United States specifically for prosecution. As of August 2005, the federal government has procured over twenty indictments and twelve convictions under the PROTECT Act.\(^ {55}\) Special Agent Terri Patterson of the FBI’s Miami office commented that because the PROTECT Act “eliminated the requirement that investigators provide evidence

\(^ {50}\) Jaxon Van Derbeken, Questions Linger over Officer’s Death in Asia, S. F. CHRON., Nov. 1, 2006, available at http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/11/01/BAG1PM3QAT1.DTL.


\(^ {52}\) Id.

\(^ {53}\) Id.


\(^ {55}\) U.S. Department of State, supra note 21.
of the offender's intent to engage in commercial sex with a child prior to departing" the United States, law enforcement could conduct broader investigations into suspicious activity without that evidentiary burden.\footnote{Patterson, supra note 56, at 17.}

Despite the investigatory advantages the PROTECT Act provides, child sex tourism "requires an aggressive, transnational, and multi-jurisdictional response by law enforcement."\footnote{Id. at 21.} These investigations prove to be challenging, expensive, and infrequently successful. "As the number of international travelers from the United States and other economically-developed countries continues to rise, so does the risk posed by child sexual offenders to innocent victims around the world."\footnote{Id. at 149.}

Overall, many factors combine to make the investigation and prosecution of child sex tourists exceedingly difficult. First, domestic laws may fail to account for all instances of child sexual abuse or treat some cases of abuse as worse than others. For example, Thailand's strictest laws regarding sexual abuse concern those acts of "rape and copulation" which may result in pregnancy. This omits offences against younger girls and assumes that boys are not subject to sexual assault."\footnote{SEABROOK, supra note 5, at 149.} Second, corruption at various levels of government contributes to a lack of a thorough enforcement mechanism: Westerners may buy off authorities with relatively paltry sums.\footnote{SEABROOK, supra note 28, at ix.} Third, international relations between countries and the role of appeasement, along with the willingness, or lack thereof, of countries to push others to adopt stricter child-abuse laws, also contribute to the prevalence of the child sex trade.\footnote{Id. at xii.}

Moreover, the invasive nature of a criminal prosecution can overwhelm a young victim, discouraging him or her from speaking with authorities (especially foreign authorities) about their abusers. This problem becomes exponentially greater when the child's own parents or relatives have prostituted the child. These family connections create emotional dilemmas that can prevent the child from participating in the investigation and trial, which themselves can

\footnote{56 Terri Patterson, Child Sex Tourism: A Dark Journey, 76 FBI L. ENFORCEMENT BULL. 16, 17 (January 2007), available at http://www.fbi.gov/publications/leb/2007/jan07leb.pdf. The Federal Rules of Evidence also facilitate convictions of recidivists by allowing evidence of past sexual abuse to be used in trial. FED. R. EVID. 414. This also applies to civil remedies. FED. R. EVID. 415.}

\footnote{57 Patterson, supra note 56, at 17.}

\footnote{58 Id. at 21.}

\footnote{59 SEABROOK, supra note 5, at 149.}

\footnote{60 SEABROOK, supra note 28, at ix.}

\footnote{61 Id. at xii.}
be quite trying. Protracted, complicated criminal procedure creates an atmosphere in which, even under the best circumstances, "most [children] find it difficult to cooperate for the duration of the investigation and subsequent prosecution [because] many lack a strong support system or suffer a variety of functional difficulties." The scarcity of victim-focused services, such as counseling centers, also contributes to victims' hesitation to come forward and assist in the investigation. Therefore, a police investigation, conducted by both local and U.S. forces, may be overly invasive and trying to the point that it suffocates the victim and discourages his or her participation.

While U.S. and foreign authorities may be more likely to apprehend recidivists like Clark who have substantial contacts with the receiving country, first-time offenders and infrequent tourists remain difficult to detect and arrest. Because "[m]uch of the evidence needed for prosecution remains in another country," where barriers such as language, police-enforcement-capabilities, and social attitudes may impede the investigation, a first-time offender who has not left a trail of many such abuses may be difficult to identify, arrest, and convict. The high evidentiary burden for a criminal conviction of "beyond a reasonable doubt" requires law enforcement to provide a thorough and a near-unassailable narrative of the abuse perpetrated by the defendant. Yet because of the many difficulties in investigating child sex tourists and the location and status of the evidence, this high burden frequently cannot be met. Therefore, many actual abusers go unpunished.

IV. CIVIL REMEDIES FOR VICTIMS OF CHILD SEX TOURISM

A. Statutory Protection

Aside from assigning criminal liability to those who travel in foreign commerce with the intent of committing a sex act with a minor, the PROTECT Act also provides a civil remedy. U.S. Code Section 2255 states that "[a]ny person who, while a minor, was a victim of a violation of section ... 2423 [or other sections] of this title and who suffers personal injury as a result of such violation ... may sue in any appropriate United States District Court and shall
recover actual damages such person sustains..." 66 The statute provides that any damages for a violation of Section 2423 will be at least $150,000. 67 At least one district court has concluded that a criminal conviction under the PROTECT Act is not a prerequisite for bringing a civil action under Section 2255. 68 Rather, the plaintiff need only prove by a preponderance of the evidence that the defendant committed an act in violation of one of the enumerated sections. 69

B. The Benefits of Providing a Civil Remedy to Victims of Child Sex Tourism

While the sexual abuse of any child is first and foremost a criminal act deserving of severe criminal punishment, the difficulties found in prosecuting child sex tourists and building a fact record to prove the abuse beyond a reasonable doubt mean that many child sex tourists are not held accountable for their acts. Given the difficulty prosecutors face in securing convictions of child sex tourists, civil remedies become an effective way for victims to draw attention to their accused abusers and encourage further investigation into allegation of child sex tourism. The following discusses three additional benefits of civil remedies: monetary damages, equitable remedies such as the revocation of abusers' passports, and the ability to attach assets to judgments rendered in the United States.

1. Monetary Damages

Experts agree that compensatory damages help in some way to prevent the cycle of child abuse. In calling upon Europe to consider caring for the victims of child sexual abuse, one commentator notes, "[i]t is one thing to advertise to the world that...Europe will not tolerate [child sex tourism], but another to ensure the well-being of the victims themselves." 70 Part of ensuring that well-being is

67 Id.
68 See Smith v. Hubbard, 428 F.Supp 2d 432 (E.D. Va. 2006) (interpreting Section 2255 as applied to an act of causing a minor to engage in a sex act by force or threat of force in violation of 18 U.S.C. 2241(a)).
69 Id. Federal courts have, however, limited the role that they will play in adjudicating suits brought by aliens against their abusers. In the recent decision Martinez v. White, 492 F.Supp. 2d 1186 (N.D. Cal. 2007), the Northern District of California court dismissed without prejudice the complaint of several Mexican-national minors claiming that the defendant had sexually abused them. The district court applied the doctrine of forum non conveniens, noting that all parties involved—including the plaintiffs and defendant—were located in Mexico. Id. at 1190. Mexico therefore provided a reasonable alternate forum justifying the dismissal of the plaintiff's complaint without prejudice. Id. at 1192.
70 SEABROOK, supra note 28, at xiii. Seabrook also notes that "[i]t is essential that child victims should receive adequate healing and counseling." Id. at 124.
accomplished through incarcerating child sex tourists and deterring future activities. Monetary damages may further counteract the factors that engender child sexual abuse in foreign countries and provide services to the abused child.

The same commentator cautions that foreign tribunals awarding damages to victims of child sex tourism could create unexpected problems: “money is not, after all, a vehicle of redemption.” The introduction of significant amounts of money into children’s lives could create vast complications in the healing process should the money be improperly managed—especially if that money only leads to further potential for abuse. Victims of child sex tourism and their families should not receive lump sum payments as if they had won the lottery or inherited money from a deceased relative. Nevertheless, the commentator agrees that money invested in education, work training, mental and physical healthcare, and other necessities would be valuable to child victims, but should be carefully distributed and monitored.

Therefore, in order to ensure that the child victim receives any money awarded in a civil action and that the money benefits the child to the fullest, the award should be placed in a trust in a bank in the child’s home country to be accessible once the child reaches the age of majority in his or her own country. However, provisions should be made within the trust that allow for supervised withdrawals so that the child may receive any needed counseling or medical attention or to help the child receive an education. As UNICEF notes in a recent online article: “With an estimated 30 per cent of sex workers in Cambodia under 18 years of age, having less than three years of basic schooling and little or no vocational skills, the link between the lack of education and vulnerability is clear.” As the child’s ability to further his or her education and job skills increases, the child’s proximity to a life of abuse lessens. The goal, therefore, of monetary damages should be to provide compensation for the child’s suffering, recognize the wrong that occurred, and place the child in a position where he or she shall never have to enter the sex trade again.

Some opportunistic child sex tourists may have considerable assets in the receiving country, oftentimes including motor vehicles, houses,
or apartments and, occasionally, bank accounts. These assets could become part of a court’s damage award. However, the ability to attach these assets to any judgment against the defendant requires the cooperation of the country where the property is located. No treaty or international agreement obliges countries to honor the judgment of U.S. courts. However, it is not unusual for countries to demonstrate comity to one another and honor the judgments, especially when those judgments do not affect citizens of the foreign country. Arguably, Cambodia, for example, would not object to attaching property owned by an American in Cambodia to the judgment for one of its own citizens. Cambodia would have a strong interest in seeing its citizens obtain property that the citizen could never have acquired without the civil judgment. Therefore, it is possible that a civil judgment could include assets located in the foreign country.

2. Equitable Damages

Furthermore, if the goal of allowing civil remedies is to prevent future recidivism of opportunistic sex tourists, then plaintiffs should also request a revocation of the abuser’s passport and travel privileges in a civil suit. By asking a court to withdraw one’s use of a passport, that court could limit the abuser’s ability to engage in sex tourism in foreign countries. If fewer potential recidivists could travel abroad and engage in the sex trade—lessening the demand for children—then perhaps the supply would be equally affected. Taking a sex tourist’s passport effectively takes him out of the market for children abroad, thus reducing the overall instances of child abuse. But Courts have been hesitant in the past to revoke passports. The defendant could argue that the passport revocation violates his constitutional right to travel. But, whereas the right to travel has broader implications for domestic U.S. travel, “the freedom to travel outside the United States must be distinguished” from intrastate travel. Noting that the right to interstate travel is “virtually unqualified,” the Supreme Court refused

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76 See, e.g., United States v. Clark, 435 F.3d 1100, 1103 (9th Cir. 2006).
78 See, e.g., British Midland Airways Ltd. V. Int’l Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974) (noting that comity with regards to foreign judgments is commonplace except in extreme circumstances where judgments represent “departures from our own [n]otions of ‘civilized jurisprudence.”’).
79 See Kent v. Dulles, 357 U.S. 116, 125 (1958) (noting that the right to a travel is a liberty which cannot be denied without due process of law.
to consider the right to interstate travel on the level of intrastate travel.\textsuperscript{81} In light of this distinction, it is unlikely that a defendant in a child sex tourism case could produce a compelling argument that the revocation of his passport violated his right to travel internationally.

3. Objections to Providing Civil Remedies for Victims of Child Sex Tourism

Introducing significant monetary remedies into impoverished parts of the world, even if delayed many years until the child reaches the age of majority, raises the very real concern of abuse. While the demand for child prostitutes knows no source or limit, money—and the absence of it—fuels the supply of children for the sex industry. Seemingly, a civil remedy would only introduce more money into an already detestable market. News of American courts dispensing money to abuse victims could create an atmosphere in which parents, guardians or street pimps trolled for sex tourists to abuse their charges only to later complain to the authorities in hopes of instigating a lawsuit.

There are a few practical ways to prevent this abuse, although an entire elimination of abuse may be impossible. First, by delaying the recovery of the child until he or she reaches the age of majority, the guardian of the child will never have a legal claim to the money. There will be no cash windfall for the opportunistic guardian attempting to further the child’s abuse in the hopes of suing the abuser. Second, the success of civil remedies depends in part on the responsible behavior of NGOs in identifying victims and bringing successful lawsuits or funneling cases to lawyers who can.\textsuperscript{82} Responsible NGOs such as Action Pour Les Enfants operating as the primary source of information in the vertiginous world of sex tourism should be able to discern the most pressing cases of child abuse. By focusing on the worst scenarios, the likely attention that both a court and an NGO would show to the disbursement of any remedies would be increased. Both would arguably take greater lengths to ensure that the child receive the money in the appropriate fashion. Therefore, although abuse cannot be entirely eliminated, certain factors can reduce the frequency and severity of abuse of civil judgments.


\textsuperscript{82} Due to the uncertainty surrounding the collection of judgments resulting from ATCA suits, these suits are most often brought by NGOs or law firms acting on a pro bono basis. See, \textit{e.g.}, Edward A. Amley, Jr., Note, \textit{Sue and Be Recognized: Collecting § 1350 Judgments Abroad}, 107 \textit{Yale L.J.} 2177, 2178 (1998).
V. AN ALTERNATIVE PARADIGM: THE ALIEN TORT CLAIMS ACT

A. The History of the ATCA and a Discussion of the Formation and Ripening of Customary International Law

Although many U.S. citizens may not realize it, the Constitution incorporates international law, in the forms of both treaties and customary international law, into United States law. The Supremacy Clause of the U.S. Constitution states that “[t]his Constitution and the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”83 The incorporation of customary international law into U.S. law is more complicated and subject to much wider interpretation and debate.

Customary international law has played an important role in the jurisprudential history of the United States. The Supreme Court acknowledged in The Paquete Habana that, in certain cases where international law may be applicable, “[i]nternational law is part of our law . . . . [W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”84 The Restatement (Third) of Foreign Relations Law (“Restatement”) defines customary international law as globally recognized norms of conduct practiced by states out of a sense of legal obligation.85

One early example of customary international law incorporated into the law of the United States is the Judiciary Act of 1789, in which the First Congress vested federal district courts with jurisdiction to hear the tort claims of non-resident aliens.86 The ATCA (also known as the Alien Tort Statute) states that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”87 In attempting to make sense of the quixotic statute, one district judge speculated that “Congress intended [the ATCA] to provide concurrent federal jurisdiction over alien tort claims alleging

83 U.S. CONST. art. VI, cl. 2.
84 The Paquete Habana, 175 U.S. 677, 700 (1900) (explaining that because the President of the United States failed to develop any procedure for the capture of fishing vessels during a time of war, the Supreme Court was bound to follow the customary international law relating to admiralty, which forbade their capture).
85 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987).
86 1 Stat. 73, 77 (1789).
treaty or customary international law violations in order to facilitate federal oversight of matters involving foreign relations and international law.\textsuperscript{88} Therefore, instead of allowing aliens to sue for any tort in United States courts, the ATCA limits the types of torts for which aliens may sue to those torts that constitute a violation of the laws that nations consistently practice out of a sense of legal obligation.

After the adoption of the statute, plaintiff-aliens struggled to bring claims within the contours of the ATCA. Despite its existence in U.S. statutory law for over two hundred years, aliens rarely invoked the ATCA until the late twentieth century.\textsuperscript{89} Consequently, little case law existed to define the scope or breadth of the statute. In fact, in over 170 years after its passage, the ATCA "provided jurisdiction in only one case."\textsuperscript{90}

\textbf{B. Recent ATCA Jurisprudence}

While it is one thing to say that the United States authorizes jurisdiction for aliens suing for a tort committed in violation of customary international law, it is quite another thing to determine what constitutes a violation of customary international law. Supreme Court and lower court jurisprudence on the matter demonstrate the difficulty in defining the scope of the ATCA. Federal courts look for evidence of customary international law "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."\textsuperscript{91} Even so, the alleged tort must violate "well-established, universally recognized norms of international law" and not merely violate a certain rule that appears in the canon of various countries.\textsuperscript{92}

In recent years, however, plaintiffs have more frequently invoked the ATCA. But even now, plaintiffs struggle to elucidate the exact norm of international law alleged to be violated and the scope of the ATCA.\textsuperscript{93} The Supreme Court rejected the concept that the ATCA also

\textsuperscript{88} Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 n.6 (N.D. Cal. 1987). Interestingly, such a reading suggests that federal judges should be involved in the oversight of foreign governments, which would include an increased role for the judiciary in foreign affairs.\textsuperscript{89} Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).\textsuperscript{90} Id.\textsuperscript{91} Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820)). See also The Paquete Habana, 175 U.S. at 700, (noting that customary international law can be divined through "the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat").\textsuperscript{92} Filartiga, 630 F.2d at 888.\textsuperscript{93} See, e.g., IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (noting that although most nations have laws prohibiting stealing, the Eighth Commandment's admonition that "Thou
provides a cause of action; rather, the statute merely gives "the district courts 'cognizance' of certain causes of action." Consequently, federal courts have found jurisdiction under the ATCA for claims of torture, genocide, war crimes, and crimes against humanity. In Sosa, the U.S. federal government had indicted Alvarez-Machain for the torture and murder of a Drug Enforcement Administration ("DEA") agent and sought his extradition from Mexico. To accomplish this, the DEA hired Sosa, a Mexican national, to kidnap and bring Alvarez-Machain to the United States for prosecution. Sosa held Alvarez-Machain overnight in a motel before flying him to Texas to meet with DEA agents. In total, Alvarez-Machain's detention and arrest, which he claimed was arbitrary, lasted only one day.

The Sosa court set out a detailed and multi-faceted test to determine whether an alleged tort violated the law of nations. The Court noted that when the First Congress passed the Judiciary Act of 1789, it acknowledged only a handful of common law torts that would constitute international violations: piracy, violations of safe conduct, and crimes against diplomats and ambassadors. But the Court also noted that international law has developed since 1789 and moved away from strict respect for state sovereignty to increased accountability to the global community, the law of nations has expanded. Therefore, the Supreme Court, noting the limited number of crimes with which the First Congress was concerned, advocated a "restrained conception of the discretion a federal court should exercise in considering a new cause of action" in place of the prior

shall not steal" could not be cognized as an established norm of the law of nations to vest the plaintiff with federal jurisdiction). In this opinion, Judge Friendly referred to the ATCA as a "legal Lohengrin," musing that "no one seems to know whence it came." Id.

94 Sosa, 542 U.S. at 713. A defendant cannot be said to have violated the ATCA like one violates a civil battery statute. Rather, the statute allows federal district courts to entertain the suits of aliens for specific torts that violate customary international law. Id.

95 Filartiga, 630 F.2d at 885.

96 Kadid v. Karadzic, 70 F.3d 232, 244 (2d Cir. 1995). See also Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (holding a foreign oil company with offices in New York liable for violations of the law of nations); Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), reh'g granted, 395 F.3d 978 (9th Cir. 2003), vacated, 403 F.3d 708 (9th Cir. 2005) (holding that forced labor and slavery constituted violations of the law of nations).

97 Sosa, 542 U.S. at 697–98.

98 Id. at 698.

99 Id.

100 Id. at 732. Black's Law Dictionary defines the "law of nations" as "the law of international relations, embracing not only nations but also . . . individuals." BLACK'S LAW DICTIONARY 822 (7th ed. 1999).

101 Sosa, 542 U.S. at 720.

102 Id. at 725. Additionally, the Supreme Court noted that while the Constitution vests both
regime whereby federal courts were left to flounder through the dissertations and musings of global jurists to determine whether a crime would be universally recognized. Since the recognition of "new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken . . . with great caution." \(^{103}\)

The Supreme Court instructed district courts to "derive some substantive law in a common law way" by determining the specificity of the claim raised. \(^{104}\) To do so, any claims falling within the confines of the ATCA must have more "definite content and acceptance among civilized nations than the historical paradigms familiar when [the statute] was enacted." \(^{105}\) In other words, where the First Congress could identify with great specificity the violation it sought to punish, the district court must now find both a global recognition of the violation and that the violation may be clearly defined and universal. In addition, a determination of specificity must include "judgment about the practical consequences of making that cause available to litigants in the federal courts." \(^{106}\)

These factors provide a starting point for determining whether a victim of child sex tourism could proceed with a civil claim against his or her abuser. In Sosa, the Supreme Court concluded that Alvarez-Machain’s claim of a day-long arbitrary detention had been too broadly defined to fall within the purview of the ATCA. \(^{107}\) Although most states have domestic protection against arbitrary detention, provide for due process of the law, and subscribe to treaties binding them to refrain from arbitrarily arresting its citizens, the plaintiff failed to bring a claim which could be immediately and clearly identified as a norm of the law of nations. Therefore, a victim of child sex tourism would have to bring a claim to the district court that would be more specific than Alvarez-Machain’s arbitrary detention claim.

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Congress and the President with foreign relations power, it does not grant the same power to the judiciary. In other words, while American courts may exercise jurisdiction over the claims of aliens, they should be very hesitant to "consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government . . . has transgressed those limits." *Id.* at 727.

\(^{103}\) *Id.* at 728.

\(^{104}\) *Id.* at 729.

\(^{105}\) *Id.* at 732.

\(^{106}\) *Sosa*, 542 U.S. at 732–33.

\(^{107}\) *Id.* at 736. Under the plaintiff’s definition of arbitrary detention, the Supreme Court saw the potential for a cause of action “for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction.” *Id.*
VI. THREE POTENTIAL CAUSES OF ACTION FOR A VICTIM OF CHILD SEX TOURISM

In considering the test set out in *Sosa* and the current state of the law of nations, this Note proposes two major claims potentially applicable to child sex tourism that a federal court could likely find constitute violations of customary international law: slavery and forced labor. A third option, an amalgam of the prior two, is also considered briefly. While similar to the prior claims, a victim of child sex tourism could also argue that their forced labor was so severe that it constituted slavery. This is slightly different from asserting that forced labor is always a violation of international law and does not require the court to adopt a standard that forced labor is always slavery.

A. Slavery

A claim of slavery would be the most logical and, arguably, compelling claim that a victim of child sex tourism could bring under the ATCA. While the Supreme Court has yet to whether slavery is a violation of the law of nations specific enough to create jurisdiction under the ATCA, there are strong indications in existing case law that a claim of slavery could vest a federal court to hear the suit of a victim of child sex tourism. United States courts have produced some case law noting that slavery violates customary international law. The Second Circuit in *Filartiga v. Pena-Irala* described both the torturer and the slaver as "*hostis humani generis*, an enemy of all mankind."[108] The Supreme Court in *Sosa* cited this same quote from *Filartiga* in support of its proposition that there were some particularly horrible and pervasive wrongs that had ripened into norms of international law.[109] Whereas the United States and many other countries once practiced slavery openly and actively engaged in the slave trade, no nation exists today that expressly claims to maintain slavery within its borders. Just as no country claims to engage in torture, neither does any country claim a legal right to

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[108] *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). Ironically, one of the first appearances of the ATCA in American jurisprudence occurred in 1795 in the case of *Bellcho v. Darrell*, where district court Judge Bee determined that the ATCA vested the court with jurisdiction to determine which party retained property rights to a group of slaves captured on the high seas. 3 F. Cas. 810 (D.S.C. 1795).

[109] *Sosa*, 542 U.S. at 732 (explaining that the court’s reasoning in *Filartiga*, finding that torture, like slavery, ripened into a violation of the law of nations, exemplified the analysis federal courts should undertake when considering the ATCA).
practice slavery, even though its conduct away from an international audience might demonstrate otherwise.

1. Slavery as a Violation of Customary International Law

Slavery is now considered a *jus cogens* norm that no country may legally undertake.110 *Jus cogens* laws "[are] derived from values taken to be fundamental by the international community" and therefore constitute a type of customary international law.111 Unlike customary international law which binds states through consent, "*jus cogens* transcend such consent" and constitute the most basic and non-derogable obligations of states.112 With slavery established as a *jus cogens* norm from which no state may derogate, new forms of slavery, previously-unconsidered violations of customary international law, ripen into such violations and may themselves become *jus cogens* norms.113

The development of a comprehensive and universal canon of human rights law forbidding acts of slavery further supports the assertion that slavery has become, at all times, a violation of the law of nations. In the last century, aside from expressing its disdain for the practice of slavery and the slave trade, the international community has consistently and drastically broadened the definition of slavery beyond the traditional, historical paradigm to incorporate concepts of forced labor and, in some cases, child sex tourism specifically. In 1926, the League of Nations promulgated the Slavery Convention to secure "the complete suppression of slavery in all its forms and of the slave trade by land and sea."114 It defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."115 The Supplementary Convention, promulgated in 1956, further obliged states parties to abolish practices that may constitute slavery "whether or not they are covered" by the 1926 Convention.116 The International

110 Restatement (Third) of Foreign Relations § 702(b) (1987).
112 Siderman de Blake, 965 F.2d at 715.
113 Restatement (Third) of Foreign Relations § 702(g) (1987) (noting that new norms of customary international law – as well as definitions of already-existing norms, may ripen over time).
115 Slavery Convention art. 1, at 2191 (emphasis added).
116 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and
Covenant on Civil and Political Rights ("ICCPR"), one of the human rights treaties promulgated by the United Nations and based on the Universal Declaration of Human Rights, prohibits both slavery and slave-trading and does not permit any state to derogate from that prohibition, even during times of national emergency. Most regional human rights bodies also forbid member-states from engaging in any form of slavery and bind members to take proactive steps to punish instances of slavery within their borders. These many treaties and conventions on slavery provide compelling evidence that slavery violates the law of nations.

2. Child Sex Tourism as Slavery in Customary International Law

Some experts have already begun discussing child sex tourism as a modern-day form of slavery. Deputy Executive Director of the United Nations Children's Fund ("UNICEF") described Asia's child sex trade as "the largest slave trade in history," saying that children are abused in "even more cruel and devious means than the original slave trade." However, as one commentator pointed out, for "sex workers, the term slavery may be entirely appropriate, but . . . it can be difficult to identify the point where particular circumstances 'cross a line,' and should therefore be described as forms of slavery." A legal problem concerns distinguishing slavery from "severe forms of

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118 ICCPR, supra note 117, at art. 4.


dominion and ill-treatment" which are not broadly addressed in international and domestic legal systems.\textsuperscript{122}

The United Nations Centre for Human Rights broadly defined contemporary forms of slavery to include "sale of children, child prostitution, child pornography" and other forms of child abuse.\textsuperscript{123} Unlike traditional slavery where slavers kept their victims indefinitely, the modern legal approach to slavery—reflected in both treaties and scholarly writing—encompasses more transitory or temporary captive conditions, provided that either ownership or a heightened level of domination exists. The United Nations has played a leading role in expanding notions of slavery beyond the traditional and historical, thereby contributing to the law of nations' understanding of slavery. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, formed in 1963 through the UN's Special Rapporteur, designated a Working Group on Contemporary Slavery ("Working Group") to analyze issues of slavery throughout the world and report on new trends in slavery-like activity.\textsuperscript{124} The Working Group included child sex tourism in its definition of slavery in 1993—years before child sex tourism became a prevalent activity and drew international attention.\textsuperscript{125}

As noted by the Anti-Slavery Project, an Australian-based organization dedicated to the abolition of human slavery and trafficking, the problems of slavery are both "the ownership of human beings and the extreme dominion and exploitation."\textsuperscript{126} This paradigm shift in the international community's definition of slavery reflects the reality of a world where transactions in humans occur outside of any legal framework and on smaller, near-undetectable levels. In fact, the modern understanding of slavery covers numerous clandestine activities and not merely the purchase and sale of human beings.\textsuperscript{127} Indeed, slavery has regressed into the world of the black markets and trafficking both on a local and international level. Now, along with traditional chattel slavery, slavery encompasses the keeping of

\begin{footnotesize}
\begin{enumerate}
\item Id. at 594.
\item Quirk, supra note 121, at 587 (emphasis omitted).
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individuals for bonded or forced labor, of which the conditions of child sex tourism are a part.\textsuperscript{128}

3. Profile of a Victim of Slavery

The rubric set out by the Anti-Slavery Project offers a workable means of distinguishing those truly kept in states of slavery from those whose oppression does not rise to the level of internationally-understood slavery. Practically speaking, the higher the control that one exerts over another in the form of ownership or dominion, the greater the likelihood that a court, U.S.-based or otherwise, would consider that control actual slavery. Consider the story of one Cambodian girl—a victim of forced child prostitution—and the horrors of her confinement, as recorded by World Vision.

The girl, Lan (a pseudonym), had traveled from her grandparents house in Phnom Penh to her aunt’s house outside of town.\textsuperscript{129} While there, her aunt took Lan to an abandoned house and left her alone until a large man arrived; this man raped her repeatedly.\textsuperscript{130} When finished, he bound and gagged her and kept her in the house, abusing her repeatedly.\textsuperscript{131} After two months of abuse and imprisonment, her abuser finally let Lan go.\textsuperscript{132}

Lan’s story presents an example, extreme in description yet not entirely uncommon in practice, of a child’s experience in the sex trade. Sold by her aunt to this unknown man, Lan remained under his physical and psychological control and entirely lost her freedom. Her experience clearly reflects modern-day slavery in one of its worst forms. If Lan’s abuser could be found, her case would be ripe for a suit under the ATCA with a claim of slavery.

4. The Broadening Definition of Slavery in U.S. Jurisprudence Supports a Conclusion that Child Sex Tourism Constitutes Slavery

Dispute Lan’s tragic story, discussing child sex tourism as a form of slavery departs somewhat from traditional notions of slavery in the United States and the history that led to the passage of the Thirteenth Amendment. Slavery in the historical context meant not merely that a man or woman was forced to work for the slave owner; the bonds of

\textsuperscript{128} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
slavery went far beyond forced labor into the realm of property and ownership. The slave owner could both compel the slave to work and did so claiming the authority of legal ownership over the slave as one might over a beast of burden. While the ATCA requires federal courts to consider the definition of slavery as contained in customary international law, some federal courts may be hesitant to stray too far from any definition of slavery found either in the Constitution or handed down by the Supreme Court. Customary international law on slavery is undoubtedly broader than U.S. law, yet some evidence supports the conclusion that considering child sex tourism as slavery does not drastically depart from U.S. law on slavery. Therefore, it is helpful to consider briefly the status of U.S. law on slavery.

The Thirteenth Amendment to the U.S. Constitution, passed in the wake of the U.S. Civil War, states: "Neither slavery nor involuntary servitude ... shall exist within the United States, or any place subject to their jurisdiction." The Supreme Court has further defined the contours of the Thirteenth Amendment in several cases, including in United States v. Kozminski. In Kozminski, the Supreme Court considered whether a dairy farmer who had psychologically-coerced two handicapped men to remain on his farm and work through threats and intimidation violated a statute to enforce the Thirteenth Amendment which prohibited involuntary servitude. According to the Kozminski court, individuals violate the Thirteenth Amendment by compelling involuntary servitude through "the use or threatened use of physical or legal coercion." The Supreme Court rejected the proposition that psychological force, such as manipulation, lies, or other ploys to compel labor, rather than actual physical or legal force, engendered a Thirteenth Amendment violation. Therefore, at first blush it appears that although some aspects of the child sex trade involve intense psychological force, (absent physical force or restraint) such force would not constitute a violation of the Thirteenth Amendment under the traditional understanding of the Supreme Court.

However, as with the PROTECT Act, Congress has seen fit to legislate on this matter further by drafting the Trafficking Victims

133 Quirk, supra note 121, at 568.
134 Id.
135 U.S. CONST. amend. XIII, § 1.
137 Id. at 934–36.
138 Id. at 944.
139 Id. at 947.
Protection Act ("TVPA"), which expands on the concept of psychological force as an element of slavery. Unlike the Kozminski decision, the TVPA recognizes psychological coercion as a means of achieving involuntary servitude. This allows children moved in the sex trade, among many other victims of human trafficking, to argue that they were kept in states of slavery through psychological coercion. The "TVPA was intended to define and expand the anti-slavery laws that would apply in trafficking situations, in order to reflect modern understanding of victimization." This "modern understanding" of slavery, which the U.S. government appears willing to accept, applies equally to the problem of child sex tourism as it does to sex trafficking, an act which often involves children. As discussed above, the purveyors of children for sex tourists tend to coerce the children through psychological, as opposed to physical, force—despite some exceptions. Under this modern approach to slavery adopted by Congress, child victims are clearly kept in states of slavery by both their proprietors and their customers. These children may therefore be considered slaves under U.S. law. Altogether, this bolsters the chance of success for a victim of child sex tourism claiming a violation of slavery in a U.S. court.

B. Forced Labor

1. Forced Labor as a Violation of Customary International Law

Aside from slavery, a victim of child sex tourism may be able to argue that he or she was forced into the sex trade as a laborer in violation of the law of nations. The 1930 Forced Labour Convention defines "forced labor" as "work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." The Supreme Court in

143 When weighing the consequences of allowing plaintiffs to sue their slavers in federal courts, federal judges must also consider aspects of practicality. Here, the suit by a foreign child against his or her U.S.-citizen or resident-alien abuser does not raise any of the jurisdictional nightmares or gymnastic stretches of federal authority that caused the Supreme Court to eschew a broad interpretation of the ATCA in Sosa. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004). Because the defendant would be a United States citizen, most likely residing in this country, a suit by the child would not vest the federal court with any new or unusual powers over an individual that it would normally not consider under its purview.
Kozminski,\textsuperscript{145} distinguished between forced labor and slavery, noting that "not all situations in which labor is compelled by physical coercion or force of law violate the Thirteenth Amendment."\textsuperscript{146} While this certainly applies to U.S. cases involving slavery, its effect on customary international law may be minimal. However, it should be noted that not all instances of involuntary servitude coerced by force or law constitute violations of the Thirteenth Amendment. The Kozminski court noted that State and Federal Governments may compel individuals to "perform certain civic duties" without violating the Thirteenth Amendment.\textsuperscript{147} For example, the Supreme Court cited military service in \textit{Selective Draft Law Cases},\textsuperscript{148} pretrial detention of material witnesses in \textit{Hurtado v. United States},\textsuperscript{149} and roadwork in \textit{Butler v. Perry},\textsuperscript{150} as examples of legal forced labor. Ostensibly, these exceptions to the general rule against forced labor exist in many countries, including other democracies like the United States. Therefore, it would not be inconsistent for the United States to recognize the general rule that forced labor violates customary international law, yet retain a few narrow exceptions, primarily involving civic duty.

But a few U.S. courts have indicated that an argument that forced labor as a violation of customary international law might be successful. In \textit{Doe I v. Unocal Corp.}, the Ninth Circuit Court of Appeals held that the Myanmar government, along with multinational oil companies, had forced its citizens to construct oil pipelines.\textsuperscript{151} The plaintiffs in \textit{Doe I}, citizens of Myanmar pressed into service—in part by foreign oil companies—worked grueling hours to construct the pipelines and other edifices necessary to facilitate the flow of oil.\textsuperscript{152} In considering the ATCA suit of the victims claiming that the forced labor violated the law of nations, the Ninth Circuit held that "forced labor is so widely condemned that it has achieved the status of a jus


\textsuperscript{146} Id. at 943.

\textsuperscript{147} Id. at 944.

\textsuperscript{148} 245 U.S. 366 (1918).

\textsuperscript{149} 410 U.S. 578 (1973).

\textsuperscript{150} 240 U.S. 328 (1916).

\textsuperscript{151} 395 F.3d 932 (9th Cir. 2002), \textit{reh'g granted}, 395 F.3d 978 (9th Cir. 2003), \textit{vacated}, 403 F.3d 708 (9th Cir. 2005).

\textsuperscript{152} Id. at 939–40.
This Ninth Circuit decision goes beyond finding force labor to be a violation of the law of nations; rather, the court declared it a *jus cogens* norm from which states cannot derogate. Furthermore, the District Court of New Jersey declared that “[t]he use of unpaid, forced labor during World War II” constituted a violation of customary international law. Therefore, as with the slavery discussion above, forced labor constitutes a violation of the law of nations and, quite possibly, a *jus cogens* norm, as well.

2. Child Sex Tourism as Forced Labor

Like the children Clark and other child sex tourists abused, many children in the sex trade operate as sex workers, receiving money for their services, which are then distributed to their pimps or proprietors. Many children prostituted for sex tourists are kept in one of two fashions: (1) either their parents compel them into the trade (or pimp them out directly) with threats of expulsion and no choice in the matter; or (2) children living on the streets, without any parental structure, are recruited into the trade by virtue of their homelessness. While their captors may press them into servitude using physical force (through kidnappings, for example), physical force may not be employed by the captors. Children are oftentimes recruited through promises quite the opposite of what they receive: parents often tell their children that they are making the family proud or are starting a career that will lead to success. Once forced into servitude, however, their parents or “bosses” can employ both physical and psychological force to prevent the child from escaping or considering options other than remaining in forced service.

3. Profile of a Victim of Forced Labor

Oftentimes, children volunteer for work in cities to earn extra money for their families, yet find themselves forced to work as prostitutes in brothels with little hope of escape. At the age of thirteen, Kalliyan (a pseudonym) left her family and moved to Phnom Penh in order to earn money at what she believed to be a good job.

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153 *Id.* at 945 (citing Universal Declaration of Human Rights, G.A. Res. 217(A)(III) (1948) (forbidding forced labor)).
155 United States v. Clark, 435 F.3d 1100 (9th Cir. 2006).
156 *SEABROOK*, supra note 28, at 123.
157 *Id.*
Upon arriving, however, Kalliyan was sold to a brothel, where she was forced to work and sleep with foreign tourists.\textsuperscript{159} As a result of this abuse, Kalliyan contracted HIV.\textsuperscript{160} Only after police raided the brothel and arrested the owners could Kalliyan escape and find shelter with a local NGO.\textsuperscript{161} Once again, Kalliyan’s story presents a common experience for many children violated by foreign tourists. While the circumstances of her confinement were as severe as Lan’s, Kalliyan’s captors forced her to work in the sex trade, giving her little hope of escape or reprieve. Despite receiving shelter as a consequence of her confinement, Kalliyan was compelled under force and coercion to work for her captors.

\textit{C. Forced Labor Which Constitutes Slavery}

This final claim blends the first two arguments that child sex tourism results from slavery or forced labor, but allows for some creative reasoning on the court’s behalf to reach an equitable resolution for the child. By finding that a child’s circumstances constituted forced labor rising to the level of slavery, the court could consider other forms of forced labor (such as labor mandated in prison) as legal or, at the very least, not in violation of the law of nations, yet still allow the child to recover under the facts of their specific circumstances. Following this argument, the court would be splitting the phenomenon of forced labor into two categories: one in which the forced labor constitutes slavery, and, thus, a violation of the law of nations, and one in which forced labor does not constitute slavery, and, therefore, is not a violation.

Such a conclusion is not without precedent. As the Ninth Circuit has held, “[o]ur case law strongly supports the conclusion that forced labor is a modern variant of slavery.”\textsuperscript{162} Furthermore, the Restatement specifically discusses forced labor as a variant of slavery, stating that both are violations of international law.\textsuperscript{163} Courts have also noted that forced labor is included both in the definition of slavery in the Thirteenth Amendment and in other statutes, including 18 U.S.C. § 1583, a statute preventing the shipment of former slaves to countries

\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Doe I v. Unocal Corp., 395 F.3d 932, 946 (9th Cir. 2002), \textit{reh’g granted}, 395 F.3d 978 (9th Cir. 2003), \textit{vacated}, 403 F.3d 708 (9th Cir. 2005).
\textsuperscript{163} \textsc{Restatement (Third) of Foreign Relations} § 702 rep. n. 4 (1987).
still practicing slavery.164 Whether this leads a court to conclude that forced labor is always slavery (and, therefore, always a violation of customary international law) or that only certain forms of forced labor are such violations, a victim’s ATCA claim could possibly succeed. Therefore, this option may be useful in allowing a court, hesitant to label all forced labor a violation of customary international law, to produce an equitable conclusion for the victim.

D. The ATCA’s State-Action Requirement

After going through the lengthy analysis above, there still exists another major hurdle that needs to be overcome for a victim of child sex tourism claiming a violation of the law of nations. U.S. courts have traditionally recognized only states or state actors as violators of international law.165 But in Kadic v. Karadzic, the Second Circuit acknowledged that while claims brought under the ATCA usually require state action, most frequently achieved by naming the government as a defendant, the court held that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”166 The court concluded that the plaintiff could proceed with claims of genocide and war crimes against private actors but rejected a claim under the ATCA for torture and degrading treatment absent state action.167 Furthermore, the Restatement recognizes both state actor liability for violations of the law of nations,168 as well as private actor liability in crimes of “universal concern” (apparently alluding to jus cogens violations, among others).169 As demonstrated above, slavery (and, arguably, forced labor) constitutes a jus cogens violation. Therefore, a plaintiff would likely be able to show that private actors may be liable for actions of slavery or forced labor.

In addition, the United States Supreme Court has long recognized that private actors may be held liable for both slavery and “badges of

164 See Doe I, 395 F.3d at 946.


166 Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1996).

167 Id. at 241–244. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS pt. II, introductory n. (1987) (declaring that “[i]ndividuals may be held liable for offenses against international law such as piracy, war crimes, or genocide”). As with the Supreme Court’s decision in Sosa, it appears that the Restatement writers are concerned with specificity when identifying offenses for which individuals could be liable. Sosa v. Alvarez-Machain, 542 U.S. 692, 736 (2004).

168 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1987) (declaring that a “state violates international law if, as a matter of state policy, it practices, encourages, or condones” genocide, torture, and other listed violations of customary international law).

169 Id. at § 404.
slavery." Although the Supreme Court in Kozminski found that the plaintiff had not been compelled into involuntary servitude, the Court would have been willing to do so had the private actors used physical or legal force. Such a reading conforms to the broad purpose of the Thirteenth Amendment as "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Therefore, given the emphasis that U.S. law places on eliminating all forms of slavery, without distinguishing between state and private actors, a federal court would likely find that slavery does not require state action.

Moreover, some circuit courts have been willing to directly state that private individuals may commit slavery and forced labor. Building upon the Kadic decision, other courts have been willing to dispense with state action for acts of slavery and forced labor, both of which are relevant to children abused in sex tourism. The Ninth Circuit Court of Appeals in Doe I conclusively held that "forced labor, like traditional variants of slave trading, is among the ‘handful of crimes . . . to which the law of nations attributes individual liability,’ such that state action is not required." The Ninth Circuit relied in part on a similar D.C. Circuit holding. According to these decisions, regardless of whether the victim succeeds with his or her slavery or forced labor claims, neither requires state action. Therefore, the state action requirement should not present a bar to the success of the child’s claim.

VII. CONCLUSION

Around the world—and especially in the poorest parts of the world—children are still made to wait and suffer at the hands of foreign abusers. The civil remedy in Section 2255 of the U.S. Code provides an adequate means for an alien to bring an action against an abuser and eschews the complex analysis inherent in a claim under the ATCA. But the process of analyzing an act of child sex tourism

\footnotesize{170 See, e.g., Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 383 (1979) (holding that badges of slavery may be violated by private actors). See also Civil Rights Cases, 109 U.S. 3, 35 (1883) (explaining that badges of slavery and servitude are "burdens and disabilities" resulting from the discriminatory history of slavery) (Harlan, J., dissenting).


172 Doe I v. Unocal Corp., 395 F.3d 932, 946 (9th Cir. 2002) (quoting in part Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring)), reh'g granted, 395 F.3d 978 (9th Cir. 2003), vacated, 403 F.3d 708 (9th Cir. 2005).

173 Tel-Oren, 726 F.2d at 795.}
under the ATCA challenges lawmakers and lawyers to conceive of these monstrous acts not just as crimes and civil wrongs, but as acts of slavery—deserving of the full and complete condemnation that our laws can provide. By moving the discussion of child sex tourism into the realm of international slavery, the United States can take a proactive role to encourage other countries to pass comprehensive anti-sex tourism laws similar to the PROTECT Act. The stigma of slavery and its status as a *jus cogens* violation will hopefully pressure more countries—receiving and sending alike—to provide protections for the victims and likewise ensure a modicum of recovery in the forum of monetary and equitable relief.

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