

**Child Sex Tourism in South Africa: A children's rights perspective**

**By**

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“While the practice of child sex tourism can erode the economic, social and moral integrity of a nation as a whole. The greatest victims are, of course, the defenceless children: their voices unheard, their plight implacable, and their innocence stolen.”<sup>1</sup>



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<sup>1</sup> Geldenhuys K. 'Child sex tourism- When children become tourist attractions (2016)' Journal Servamus Community- based Safety and Security Magazine 109 (2) 18-21.

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**Declaration**

I declare that 'Child Sex Tourism in South Africa: A children's rights perspective' is my own work, that has not been submitted before any degree or examination in any other university, and that all the sources I have used have been quoted have been indicated and acknowledged as complete references.

**Student: Ntombizodidi Jenniffer Mapapu**

Signed: .....

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**Supervisor: Professor Benyam Dawitt Mezmur**

Signed: .....

Date: .....



## **Dedication**

Mama, ndiyabulela nozala wam ngayo yonke into undenzela yona.



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## **Acknowledgments:**

I would like to extend my heartfelt thanks to:

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To my family:

Thank you for everything.

To my mother:

I Love you beyond words and beyond the imagination.

To God:

Thank you for the strength that you continuously restored. Thank you.

## **List of abbreviations and acronyms**

African Charter on the Rights and Welfare of the Child: ACRWC

African Committee of Experts on the Rights of the Child: ACERC

African Union: AU

Child Sex Tourism/ child sexual exploitation through travel and tourism: CST

Committee of Experts on the Rights of the Child: CERC

Commercial Sexual Exploitation of Children: CSEC

Constitution of the Republic of South Africa: Constitution

Department of Social Development: DSD

Deputy Director-General: DDG

End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes: ECPAT

Fair Trade Tourism SA: FTTSA

Interagency Working Group: IWG

National Assembly: NA

National Child Protection Register; NCPR

National Council of Provinces: NCOP

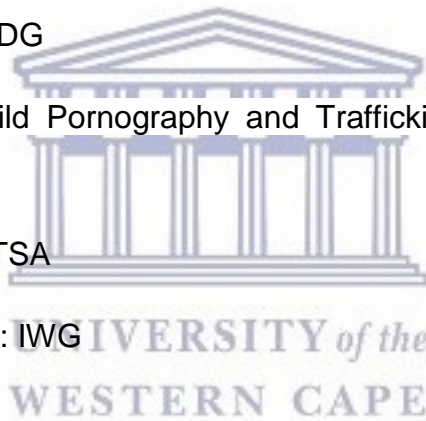
National Programme of Action: NPA

National Programme of Action for Children: NPAC

Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography: OPSC

South African Human Rights Commission SAHRC

South African Police Service: SAPs





United Nations: UN

United Nations Convention on the Rights of the Child: UN CRC or CRC

United Nations General Assembly: UNGA



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## Chapter 1: Introduction

### 1.1 Introduction

In the words of Najat Maall M'jid, former United Nations (UN) Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography:

'As the world reflects on the universal development goals for the post-2015 era, bearing in mind the strong connections between economic, social, and political development and child protection issues, child-sensitive protection must be included in the Post-2015 Development Agenda..'<sup>2</sup>

Three World Congresses against the Sexual Exploitation of Children between 1996<sup>3</sup> and 2008<sup>4</sup> convened to specifically address the rapidly advancing Commercial Sexual Exploitation of Children (herein referred to as CSEC)<sup>5</sup>. In these conferences global commitments were undertaken by countries partaking, to provide measures to prevent prohibit and protect children from sexual exploitation.



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<sup>2</sup> *United Nations Report of the Special Rapporteur on the sale of children, child prostitution and child pornography*, [2013] A/HRC/25/48.

<sup>3</sup> First World Congress sat in Stockholm in 1996 which resolved on The Stockholm Declaration and Agenda for Action (A4A) 1996. The Stockholm Declaration and Agenda for Action urges action to ensure the full implementation of the Convention on the Rights of the Child. It calls for the commercial sexual exploitation of children to be outlawed; greater international cooperation; a renewed emphasis on education and awareness; and new laws aimed at prevention and the protection of victims.

<sup>4</sup> The Second World Congress on Commercial Sexual Exploitation of Children took place in Yokohama December 2001. The objectives of the SWC were to enhance political commitment to the implementation of the A4A adopted at the FWC, review progress in its implementation, share expertise and good practices, identify main problem areas and/or gaps in the fight against commercial sexual exploitation of children, and strengthen the follow-up process of the World Congress. One of the main outcomes of the Congress was the re-commitment to the Stockholm Declaration and A4A and the identification of specific targeted work to be taken up in the different regions of the world.

The World Congress 2008 was an important opportunity to renew global commitment to combating sexual exploitation of children and to galvanise international will and support for the concrete action required. The Congress helped to maintain the global focus on the specific problem of sexual exploitation of children, allowing stakeholders to analyse, refine, re-tool and recommit to both action agendas for the elimination of CSEC.

<sup>5</sup> Child sex tourism is a specific form of commercial sexual exploitation of children (CSEC), which has many overlaps with and can foster other forms of CSEC, including child prostitution, child trafficking, sale for the purpose of sexual exploitation and child pornography. ECPAT international, *Combating Child Sex Tourism: Questions and Answers* (2008).

It must be acknowledged that there have been significant achievements attained with regards to the protection of children post these conferences<sup>6</sup>.

Although significant achievements have been attained, there remains challenges that relate to the prevention or addressing of CSEC such as a lack of consensus on the use of terminology. This challenge was noted by Vitit Muntarbhorn in his assertion that, 'there remains disagreement among operational actors concerning the definitions behind the phenomenon of the sexual exploitation of children.'<sup>7</sup>

Significant disparities still exist within countries with regards to facilitating the prevention and prohibition of child sex tourism. This is demonstrated by State Parties lack of abilities to attain legislative commitments that stringently address child sex offenders. South Africa is no exception in this regard.

South Africa as a signatory to international and regional conventions <sup>8</sup> and is a signatory to the Declaration and Agenda Act<sup>9</sup> that was committed to, at the first world congress which became the guiding and founding document of World Congresses on Child Sexual Exploitation.

This Declaration is underpinned by amongst other documents, the 1989 United Nations Convention on the Rights of the Child (herein referred to as the CRC)<sup>10</sup>, which is the primary international convention that seeks to address the rights and welfare of the child.

Under the international and regional instruments, it is expected that laws will be harmonised into domestic law to facilitate their implementation in order to fulfil the commitments undertaken to protect the rights and welfare of the country's children.

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<sup>6</sup> These include ratifications of conventions, and protocols, legislative reforms, action plans, awareness activities and campaigns, child participation, child assistance and protection services, dismantling of criminal networks, involvement of the private sector within the context of corporate social responsibility, and regional and international cooperation.

<sup>7</sup> Muntarbhorn, V. 'Report of the Second World Congress against Commercial Sexual Exploitation of Children.' (2001) Yokohama, Japan

<sup>8</sup>In this regard the United Nations Convention of the Rights of the Child, the Optional Protocol on the Sale of Children and Child Pornography, and the African Commission on the Rights and Welfare of the Child.

<sup>9</sup> The World Congress adopted this Declaration and Agenda for Action to assist in protecting child rights, particularly the implementation of the Convention on the Rights of the Child and other relevant instruments, to put an end to the commercial sexual exploitation of children worldwide.

<sup>10</sup> United Nations Convention on the Rights of the Child, 1989 United Nations General Assembly Resolution 44/25 (1989)

It is mostly developing countries that are impacted by CSEC due to various issues such as poverty, unemployment, inequality, the internet and cross border movement of people. South Africa is no exception in this regard.

Travel and tourism has increasingly become a contributing element in the violation of children's rights. This is in part as a result of the gaps in the implementation of laws that meant to advance the protection of children in countries. That is why child sex offenders opt to commit sexual offences against children in countries where there is weak enforcement of law protecting children. This is demonstrated in ECPAT Internationals findings that:

Currently, a number of African countries do not have the relevant mechanisms to protect children from commercial sexual exploitation in tourism. There are major gaps in: laws to protect children and to prosecute child sex tourists and traffickers and Enforcement of laws by the police and the community.<sup>11</sup>

Although, it is economically useful to have a tourism sector that is thriving, it cannot be at the expense of children's rights that a certain portion of this success is due to the commercial sexual exploitation of children. In this regard the focus is on the sexual exploitation of children through travel and tourism (CST).

In its 2013 report, the End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT) reported that:

'South Africa is not immune from this disturbing phenomenon. The vulnerability of South Africa's children is linked to the growth within South Africa's tourism industry, and tourism infrastructure which is used as a mechanism for gaining access to children in which the sex crimes are permitted.'<sup>12</sup>

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<sup>11</sup> ECPAT, 'Commercial Sexual Exploitation of Children in Africa.' (2007) p .10-11

<sup>12</sup> SAACI 'Leading Tourism Industry Players Pledge Their Support To Protect South African Children from Exploitation' available at <http://www.saaci.co.za/NewsArticle.asp?newsid=246> (accessed 15 November 2015)

## 1.2. Research question

The main question that the paper seeks to answer is 'to what extent is the legislative framework of South Africa protecting children from being sexually exploited through tourism?'

## 1.3. Research methodology

A desk review is used as the methodology to respond to the aforementioned questions. This methodology will comprise of sources that include international and regional conventions, national laws (Constitution, Acts, Bills, case law, and so forth). General Comments, declarations, resolutions, action plans State Party reports under the different international and regional children and human rights instruments. The paper will also use books, journals, and academic literature as secondary sources that will contribute to the paper. The paper will also look into two cases that will highlight issues that relate CST within the South African context.

## 1.4. Literature review

Globally, child sex tourism is a growing phenomenon largely affecting developing and less developed countries. South Africa is not exempted from this phenomenon, in fact child sex tourism lies at the core of some tourism industries of African countries. Precisely because tourism is encouraged in order to attract foreign investment and to fund the development of the country. It has been noted that Africa in 2012 had a growth rate of 6.3% increase from over 2011 and accounted for 5.1% of global arrivals and a total of 53 million tourist visits<sup>13</sup>.

The End Child Prostitution Child Pornography and Trafficking of Children (ECPAT) have described CST as the act of travelling from one location to another in order to have sexual encounters with children. A child sex tourist can be domestic or international tourist.<sup>14</sup> As the discourse on the child sex tourism is gaining traction various role players have expressed sentiments about the rapidly advancing child sex tourism.

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<sup>13</sup>Tourism, '2012 Annual Report South African Tourism Strategic Research Unir.' (2013) 12.

<sup>14</sup> ECPAT, 'Combating Child Sex Tourism: Questions and Answers. (2005) Thailand Bangkok 6.

Some of these include Phouthone Sisavath who argues in his Master of Business thesis that:

Developing countries can do better to prevent and combat child sexual exploitation if they can learn from past experiences in other countries. Child protection, prevention, rehabilitation, and reintegration initiatives should be effectively implemented if the fight against CST is to be achieved.<sup>15</sup>

In their conference paper presented at the Interdisciplinary Conference on Human Trafficking Zafta and Tidball noted that:

CST is illegal under international legislation and is a violation of the CRC and against human rights. Definitions of what constitute CST vary and it is imperative to create appropriate and meaningful terms. And that inconclusively of the definition of CST is linked definitional issues that often surround the problem.<sup>16</sup>

In the African context Sakulpitakphon asserts that:

Some African countries are considered emerging CST destinations. The challenge remains in obtaining statistics and actual figures on the magnitude of CST, due to the lack of data and research on CST. There is high prevalence of CST in Africa. Tourism is encouraged to facilitate economic development on the continent. However, the concern is on the lack of protective mechanisms in place in tourism development could have negative effects on children. And that child protection should remain a key focus in promoting sustainable development.<sup>17</sup>

ECPAT International further argues that weak application of laws and corruption of some officials, proliferation of new flights allowing for offenders to commit abuses against children without impunity facilitate the increasing levels of CST.<sup>18</sup>

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<sup>15</sup> Sisavath P *Combatting Child Sex Tourism in a new destination*, 2012, (published thesis), Unitec New Zealand (2012) 1.

<sup>16</sup> Zaft C.R & Tidball S. *A Survey of Child Sex Tourism in the Philippines*. (2010), University of Nebraska 2

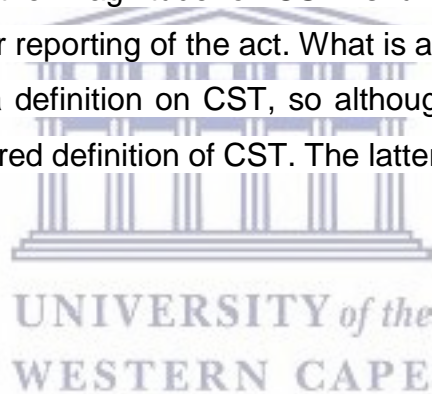
<sup>17</sup> Sakulpitakphon P. *African Tourism Development and the Commercial Sexual Exploitation of Children in ECPAT International 'Confronting the Commercial Sexual Exploitation of Children in African*, (2007), Thailand, Bangkok 5.

<sup>18</sup> ECPAT, *The Commercial Sexual Exploitation of Children in Africa: Developments, Progress, Challenges and Recommended strategies*, (2014) iii.

As one of the advancing economies in Africa, South Africa is considered as one of the most popular countries in Africa for travelling child sex offenders. The hotspot areas have been identified as the Eastern Cape, Gauteng, Kwa- Zulu Natal, Mpumalanga and the Western Cape.<sup>19</sup> Accurate data on CST is a challenge, because perpetrators that are apprehended are charged with indecent assault or rape and not on charges of sex tourism.

The report 'Don't Look Away' indicates that protecting children is an imperative. As tourism grows, risks to children deepen. The true magnitude of CST is unclear because of its clandestine nature.<sup>20</sup> In an interview, Regional Development Manager of Fair Trade Tourism, Netsai Sebanda shared that according to research child sex tourism is on the rise.<sup>21</sup>

It is noted that there is common consensus that CST is an illegal act and is a violation of children's rights. That the magnitude of CST is unclear or unknown due to unavailable data, and under reporting of the act. What is also noted is that there is no shared understanding on a definition on CST, so although what constitutes CST is understood, there is no shared definition of CST. The latter is addressed in the paper.



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<sup>19</sup> Van Niekerk J & Mancama Don't Look Away Be Aware and Report the Sexual Exploitation of Children in Travel and Tourism, (2013) ECPAT Germany 8.

<sup>20</sup> Van Niekerk J & Mancama *Don't Look Away Be Aware and Report the Sexual Exploitation of Children in Travel and Tourism*, (2013) 19.

<sup>21</sup> Sebanda N 'SA sees rise in child sex tourism' available at <http://www.sabc.co.za/news/a/4fd638804c5c5edb9c2ebc8be7d9f0df/SA-sees-rise-in-child-sex-tourism--20160411> (accessed 12 December 2016)



## **Chapter 2: The International and regional context with regards to children's**

### **Rights with a focus on Child Sex Tourism.**

#### **2.1. Introduction**

This chapter outlines the significant international and regional conventions that promote the protection of the rights of the child. This chapter gives a brief on the origins of instruments that were developed not only to protect children but to also promote their rights. These international conventions include the primary instrument that advocates for the protection and promotion of children's rights, the 1989 United Nations Convention of the Child (CRC) of 1989 and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC) of 2000. Regionally the primary instrument is the African Charter on the Rights and Welfare of the Child (ARCWC). It also has a focus on child sex tourism within the international context of children's rights

#### **2.2. International legal instruments**

In the early years of the 20<sup>th</sup> century, the great world powers that were instrumental in World War I met at the Paris Peace Conference in 1919 to amongst other things appoint a committee that would draft the Covenant of the League of Nations. It was in the same year that this Covenant was ratified by 42 nations, enforced on the 10<sup>th</sup> of January 1920 leading to the League of Nations being in operation.

Amongst the documents that the League of Nations adopted was the Declaration of the Rights of the Child (the Geneva Declaration), which is a document that for the first time recognised the existence of the rights of children and asserted that promoting and protecting these rights was not only government's responsibility but is also a responsibility of adults. This acknowledgement was perceived as a major breakthrough for children's rights taking into consideration that at that time in history the focus was on world peace and not on the rights of the child.



A key feature of the Declaration is that in its preamble it asserts that “It recognises that mankind owes to the Child the best that it has to give us furthermore states in its texts that: ‘the child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.’<sup>22</sup>

The document addressed a variety of issues that are still relevant to the well-being of the child. Though not a legally binding instrument, the Declaration remains the first internationally recognised human rights document in history to deal with issues that relate to children’s rights, and was a major breakthrough in children’s rights. The key features of the Declaration are the ten principles that constitute the Declaration, principle 2 refers to the: “right to special protection for the child’s physical, mental and social development and the best interests of the child shall be paramount consideration.” principle 9 refers to: “the right to protection against all forms of neglect, cruelty and exploitation.”<sup>23</sup> The Declaration was the premise upon which the CRC was drafted.

The CRC<sup>24</sup> has been noted as the most ratified human rights instrument that advocates for the promotion and protection of children within the international human rights framework.

Sloth-Nielsen and Mezmur note that ‘The popularity of CRC and the Children’s Charter suggests a high level of normative consensus among the various nations of the world (particularly in Africa on the idea and content of children’s rights as human rights.)’<sup>25</sup> This has been acknowledged as a global indication to the commitment of the universal protection and promotion of children’s rights.

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<sup>22</sup> Geneva Declaration of the Child, 1924 League of Nations Doc. O.J Spec. Supp. 21/43/(1924)

<sup>23</sup> Declaration of the Rights of the Child, 1959 UN General Assembly resolution 1386 (XIV) (1959)

<sup>24</sup>United Nations Convention on the Rights of the Child, 1989 United Nations General Assembly Resolution 44/25 (1989)

<sup>25</sup> Sloth-Nielsen J & Mezmur B ‘Surveying the research landscape to promote children’s legal rights in an African Context.’ (2007) 7 *AHRLJ* 331.

Santos- Pais reflected on the CRC when she observed that:

‘It reflects the political compromise between different legal systems and cultural traditions, in respect of universally recognised human rights. It became an instrument of consensus, entering into force less than a year after its approval and being widely accepted by an unprecedented number of States from all regions of the world.’<sup>26</sup>

Ratified and ascended to by the United Nations General Assembly (UNGA) resolution 44/25 on November 20<sup>th</sup> 1989 and entered into force on the 2<sup>nd</sup> of September 1990, the CRC is underpinned by four general principles: (i) non-discrimination<sup>27</sup>; (ii) best interests of the child<sup>28</sup>; (iii) the right to life, survival and development <sup>29</sup>and (v) respect for the views of the child<sup>30</sup>.

It is in articles 34 and 35 that States are obliged to protect children from all forms of sexual exploitation. These provisions in the CRC are fundamental because they are the premise for the international legal protection of children against sexual abuse and exploitation.

The first of the CRC’s Optional Protocols to be entered into force in 2002 is the Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography<sup>31</sup>. It is a key legal instrument because it recognises all forms of child sexual exploitation that fall within the ambit of the sale of children, child prostitution and child pornography.

To ensure that the provisions in the CRC and its Optional Protocol are adhered a committee of experts, namely the Committee on the Rights of the Child is charged with the responsibility to oversee that State Parties to both the CRC and its OPSC execute into law and practice the provisions in the CRC and OPSC.

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<sup>26</sup> Santos-Pais M *the Convention on the Rights of the Child* (undated) 393.

<sup>27</sup> Article 2

<sup>28</sup> Article 3

<sup>29</sup> Article 6

<sup>30</sup> Article 12

<sup>31</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000 United Nations General Assembly Resolution 54/263 (2000)

General Comment No. 5 of 2003 notes that: The Committee on the Rights of the Child has drafted this General Comment to outline State Parties' obligations to develop what it terms the "general measures of implementation".<sup>32</sup> The General Comment is premised on Article 4 of the CRC which addresses State Parties' obligation under the CRC to implement the provisions in the CRC.

As a universal document, the CRC covered the universal aspects that relate to children's rights. However, it must be noted that there are aspects that pertain to certain regions of the world that have specific issues that are not covered in the CRC. One such example is in the African context.

### 2.3. Regional legal instruments

The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>33</sup> herein referred to as the Children's Charter is the first regional treaty of its kind on the rights and welfare of the child within the African context. It is Abrahams and Matthews that assert that:

'The CRC and the ACRWC are premised more on the rights of the child than the powers of the parent over the child. More emphasis has been placed on continent specific issues in the ACRWC such as inter-country adoptions and child trafficking.'<sup>34</sup>

Furthermore, Viljoen asserts that:

'African involvement in the drafting process was limited. Only three African states participated for at least five of the nine years that the working group took to draft the final proposal. This is the lowest percentage of all continents, contrasting sharply with Western Europe (61% of the continent potential) and even Latin America (29%) participation over a similar period.'<sup>35</sup>

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<sup>32</sup> CRC Committee, General Comment No 5 'General measures of implementation of the Convention of the Rights of the Child (2003) 1.

<sup>33</sup> African Charter on the Rights and Welfare of the Child, 1990 OAU Doc. 24.9/49 (1990)

<sup>34</sup> Abrahams K & Matthews T *Child Rights Manual: Handbook for Parliamentarians* (2011) 28.

<sup>35</sup> Viljoen F 'Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *The Comparative and International Law Journal of Southern Africa* 200.

All of the members of the African Union (AU) have signed and ratified the ACRWC. Just like the CRC, the ACRWC is founded on the following four pillars: (i) non-discrimination of children<sup>36</sup>; (ii) the best interest of the child<sup>37</sup>; (iii) the right to survival, protection and development of each child<sup>38</sup>; and (iv) the right to participation<sup>39</sup>.

Kaime notes that:

‘The preamble of the Africa Charter makes two important statements regarding the instrument’s conception of the rights and welfare of the child. Firstly, it identifies the Children’s Charter’s foundation as the principles of the international law on the rights and welfare of the child as contained in the declarations and other instruments of the OAU and the UN. Secondly, the Children’s Charter charges that the concept of the rights and welfare of the child should be inspired and characterised by the virtues of African cultural heritage, historical background and the values of the African civilisation.’<sup>40</sup>

Just like the CRC, the ACRWC is facilitated by a highly knowledgeable team of experts in the field of children’s rights known as the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). Its Mandate is outlined in articles 32-46 of the ACRWC.

It is evident that the CRC is relevant legal instrument to protect the rights of the child. However, its appropriateness to the context of the conditions that face the African child remained a contentious issue. That is why there was a drafting of a region specific document that would address the issues of the African child. The CRC is universal in its approach and is not specific on certain issues such as issues facing children within a specific region of the world. The ACRWC fulfilled this challenge by addressing region specific issues and provided legal instruments to address these challenges on the continent.

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<sup>36</sup> Article 3

<sup>37</sup> Article 4(1)

<sup>38</sup> Article 5 & 9(d)

<sup>39</sup> Article 4(2)

<sup>40</sup> Kaime T *The African Charter on the Rights of the Child: A socio-legal perspective* (2009) 4.

## 2.4. The universal implementation of conventions

The universal implementation of these conventions into domestic legislation is an ongoing process. Practical implementation is observed through the reports that State Parties submit to the Committee on the Rights of the Child and the ACERWC. Whilst these reports are imperative to note the trajectory that State Parties under the conventions have undergone to give expression of the conventions into domestic law, it also gives an overview of the issues that State Parties grapple with when it comes children and their rights. Henceforth the progressive realisation of these rights.

These abovementioned international and regional instruments are important pieces of legislation that assist in advocating for children's rights. They have been central in the discussions around the protection of children from exploitation. One such discussion is on the sexual exploitation of children in travel and tourism.

## 2.5. Child Sex Tourism (CST)

Within the international context of children's rights and the Commercial Sexual Exploitation of the Child (CSEC), Child Sex Tourism (CST) has historically existed but has done so in a clandestine manner. It is acknowledged that this phenomenon is rapidly growing. According to Fraley: "it has developed substantially over the last few decades because of poverty, growth of consumerism, an increase in travel opportunity and infinite access."<sup>41</sup>

UNICEF's factsheet on the Commercial Sexual Exploitation of Children notes that: "the sexual exploitation of children affects an estimated 2 million children worldwide each year."<sup>42</sup> The veracity of the actual estimated number of children affected worldwide is unknown because of a lack in existing research and availability of data of victims and perpetrators.<sup>43</sup>

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<sup>41</sup> Fraley A. 'Child sex tourism under the PROTECT Act: Does it really protect?' (2005) in Vrancken P. & Chetty K. (ed) 'International Child Sex Tourism: A South African Perspective.' (2009) *Journal of African Law* 53, 1.

<sup>42</sup> UNICEF, "Factsheet on Commercial Sexual Exploitation and Trafficking of Children", (2010) 1.

<sup>43</sup> The lack of understanding and misperception of the issue by key actors also implies that CST cases are often not classified as such, which contributes to the shortage of information. The criminal nature of the activity and the fear of the negative repercussions that such disclosures may have on the tourism development also represent major challenges in accessing information.

It has also been noted that a comprehensive study on the scope and effect of child sex tourism has not been undertaken at national levels globally. This is asserted by the data that was submitted to the office of the former Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M'jid. Noted in her Report to the Twenty-Second session of the Human Rights Council.<sup>44</sup> The Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M'jid in her report tabled to the Twenty- Second session of Human Rights Council noted that: 'commercial exploitation of children in travel and tourism is the exploitation of children sexually by individuals who travel internationally and locally to have sexual encounters with children'<sup>45</sup>

Murriann o' Brien in her contribution to the Second World Congress against Sexual Exploitation of Children and Adolescents argues that: "child sex tourists are particularly attracted to places where their activities go unnoticed and their motives unsuspected, like countries or communities in crisis and where risk is small."<sup>46</sup>

In addition, Judith Masson has described child sex tourism as 'an appalling consequence of global recreation and the vast disparity between the resources of wealthy adults in the North and poor children in the South.'<sup>47</sup>

ECPAT International in *Confronting the Commercial Sexual Exploitation of Children in Africa* defines child sex tourism as: "the exploitation of children by a person or persons who travel from one place to another usually from a richer country to one that is less developed and then engage in sexual acts with children."<sup>48</sup>

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<sup>44</sup> The sporadic information on victims and perpetrators obtained by the Special Rapporteur through NGOs or United Nations entities was outdated, concerned only some particular regions of a country or referred to some isolated cases. These data could not be used to illustrate the current scope of the phenomenon at the global level.

<sup>45</sup> M'jid M.M. 'Report of the Special Rapporteur on the sale of children, child prostitution and child pornography' (2012) available at <http://www.unric.org/en/latest-un-buzz/29095-sexual-exploitation-of-children-a-growing-problem> (accessed 24 November 2014)

<sup>46</sup> O'Brien, M. 'Sexual Exploitation of Children and Adolescents in Tourism. Thematic paper submitted by ECPAT International as a contribution to the World Congress II against the Sexual Exploitation of Children and Adolescents' (2008)

<sup>47</sup> Masson, J. 'Letters: UK Law Can't Stop Sex Tourists' (2002) in Hall, A. 'Sex Offenders and Child Sex Tourism' (2011) *Virginia Journal of Social Policy and the Law*. 157.

<sup>48</sup> ECPAT, 'Commercial Sexual Exploitation of Children in Africa.' (2007) .6.



There is a common understanding that it is opportunistic, is driven by many factors such as poverty, “globalisation, consumerism and weak law enforcement.”<sup>49</sup>

Developing countries are understood to be more prone to this phenomenon as opposed to developed countries. Socio-economic factors seem to be a contributing factor in this entire phenomenon. Perpetrators will travel to countries where socio-economic conditions are conducive for them to engage in the sexual exploitation of the child. In this regard, developing countries use tourism to bolster economic development.

However, there are negative effects of tourism such as the exploitation of children through travel and tourism that are driven by amongst other things socio-economic factors such as inequality and poverty, which lead to the opportunistic tendencies that tourists with hidden agendas exploit.

Paul Nitze argues that: “development of tourism alone, even in combination with conditions of poverty, will not necessarily foster sex tourism or child sex tourism. Other conditions are likely to be in place for these phenomena to take off on a massive scale.”<sup>50</sup> World Vision and Christian Gruth argue that: “what preferential child sex tourists look for in potential destination countries are easily accessible prostitutes or vulnerable children, impunity from prosecution, and silence and seclusion.”<sup>51</sup>

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<sup>49</sup> In general, opportunistic individuals seeking children for sex are likely to take advantage of situations where the legal framework is non-existent or weak and/or where law enforcement is lax - in other words, where authorities can be relied on to either look the other way or be easily corrupted.

<sup>50</sup> Nitze, P.H. 'International Child Sex Tourism: Scope of the Problem and Comparative Case Studies.' (2007) John Hopkins University Ch. 2 9.

<sup>51</sup> WorldVision.org, 'Child Sex Tourism Prevention Project, Slavery in the 21st Century' available at [http://www.protectionproject.org/wp-content/uploads/2010/09/JHU\\_Report.pdf](http://www.protectionproject.org/wp-content/uploads/2010/09/JHU_Report.pdf) (accessed 24 November 2014)

So what is deduced is the CST, is the commercial sexual exploitation of the children through travel and tourism. Due it being an act committed through travel and tourism means that it can be of a domestic or an international nature. Meaning that it can be conducted by child sex offenders in their country of origin (domestic) or child sex offender's travel from their country of origin to another country usually with weak laws to exploit sexually through commercial means vulnerable children (international). This understanding is in- line with the common understanding of what constitutes CST. However, the focus of this paper focuses on the international CST within the South African context.

There are various ways in which ways through the vulnerability of children is exploited noting that the exploited children are vulnerable. Therefore some are easily lobbied through extravagant gifts, food and money. Through intermediaries known as third parties who work within the tourism industry (hotels, brothels, shuttle services) who can identify vulnerable children and sell them off to the child sex offenders for a nominal fee. The two case laws below in chapter three expand on the various which children are exploited by child sex offenders.

One of the biggest challenges noted in existing literature on CST is the existing gaps between domestication of international law into national law and implementing them. What is of importance in the implementation of these laws is the practical existence of protective measures to protect children from being sexually exploited through travel and Tourism.



## **Chapter 3: The South African context with regards to children's rights**

### **: with a focus on Child Sex Tourism (CST)**

#### **3.1. Introduction**

This chapter looks at children's rights in South Africa within the context of child sex tourism. It seeks to revert to the introductory chapter, probe the questions raised and seek to answer them. The main question that the paper seeks to answer is 'to what extent is the legislative framework of South Africa protecting children from being sexually exploited through international tourism?' Case law is used in the chapter to substantiate arguments.

#### **3.2. South Africa's implementation of its international law obligations within the context of CSEC with particular focus on child sex tourism**

South Africa as State Party to the CRC and its OPSC, as per Article 4(a) of the CRC embarked on a process to reform its domestic legislature, aligning it to the provisions committed to in the CRC and the OPSC. The CRC and the OPSC are relevant in this paper; specifically because of their reference to the commercial sexual exploitation of children and child sex tourism in particular.

Article 4 of the CRC gave rise to General Comment 5. Article 4 of the CRC obligates State Parties to take 'all appropriate legislative, administrative and other measures' in the implementation of the rights in the Convention. The obligation thus lies with State Parties to monitor the implementation of the rights of children.

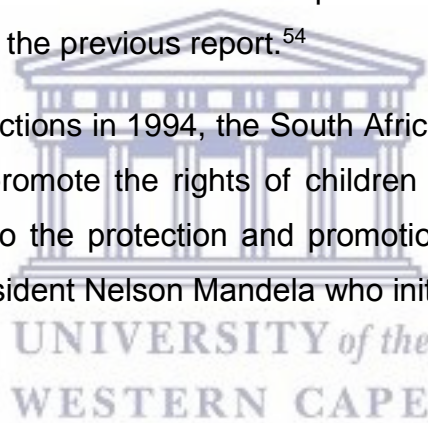
Article 4 has reporting guidelines, which are termed in General Comment No.5 of 2003 as the 'General Measures of Implementation'. General Comment No. 5 was drafted by the CRC Committee to give directive to State Parties have in monitoring and implementing the provisions in the CRC.

Article 4 of the Convention stipulates that the following information is to be included in the initial reports that State Parties submit to the CRC Committee

- (a) The measures taken to harmonise national law and policy with provisions of the Convention; and
- (b) Existing or planned mechanisms at national or local level for coordinating policies relating to children and for monitoring the implementation of the Convention.<sup>52</sup>

Upon receipt of State Parties' reports, the CRC Committee gives focus in the report to the section which addresses the 'general measures of implementation.'<sup>53</sup> Premised on the findings in this section, the CRC Committee provides recommendations related to the general measures. The expectation is that in the following report, State Parties will indicate the measures that have been implemented in response to the recommendations made on the previous report.<sup>54</sup>

After its first democratic elections in 1994, the South African government set in place measures to protect and promote the rights of children in South Africa. The initial commitments with regard to the protection and promotion of children's rights were observed under former president Nelson Mandela who initiated the 'put the child first' campaign.



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<sup>52</sup> CRC Committee, *General Guidelines Regarding the Form and Content of the Initial Reports to be Submitted under Article 44, Paragraph 1 (b) of the Convention on the Rights of the Child*, (UN Doc. CRC/C/5,1991). Para.9.

<sup>53</sup> Article 2 of General Comment No.5 (2003): In its periodic examination of States parties' reports under the Convention, the Committee pays particular attention to what it has termed "general measures of implementation". In its concluding observations issued following examination, the Committee provides specific recommendations relating to general measures. It expects the State party to describe action taken in response to these recommendations in its subsequent periodic report. The Committee's reporting guidelines arrange the Convention's articles in clusters,<sup>53</sup> the first being on "general measures of implementation" and groups article 4 with article 42 (the obligation to make the content of the Convention widely known to children and adults; see, paragraph 66 below) and article 44, paragraph 6 (the obligation to make reports widely available within the State).

<sup>54</sup> CRC Committee, General Comment No.5 General measures of implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para. 6) 2003 Committee on the Rights of the Child CRC/GC/2003/5 (2003)

In its adoption, the Constitution of the Republic of South Africa<sup>55</sup> (herein referred to as the Constitution), ensured that it guarantees in its provisions the promotion and protection of children's rights, including the right, 'to be protected from maltreatment, neglect, abuse or degradation'.<sup>56</sup> It furthermore, reinforces the provision that 'the child's best interests are paramount in every matter relating to the child.' The term abuse is not specific but it is applicable to all forms of abuse, including sexual abuse.

Section A of General Comment Number 5 notes that State Parties must develop a comprehensive national strategy that is underpinned by the Convention. This is in line with Article 4(b) of the CRC. It encourages the development of a rights based national strategy, premised on the CRC that will promote the rights of the child.

Premised on the above, South Africa was obligated to develop its National Programme of Action for Children (NPAC). When the initial NPAC was drafted, it was done so on the premise of a comprehensive situational analysis of the country's children. Through the NPAC, various stakeholders participated in extensive workshops to engage the National Programme of Action (NPA).

It is a tool to monitor South Africa's implementation of its international law obligations, specifically its obligations to the CRC. In summation the NPAC 2012-2017 seeks to in one framework align domestic and international priorities.

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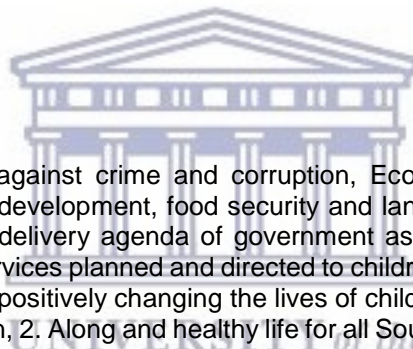
<sup>55</sup> Constitution of the Republic of South Africa, 1996.

<sup>56</sup> s 28 (1)(e)

The NPAC is aligned to the five government priorities<sup>57</sup> and the twelve government outcomes<sup>58</sup> to the different themes of the NPAC. This is to ensure that the rights of children are promoted, protected and are fulfilled. Importantly, this is also to ensure that the strategic plans, policies, budget allocations, monitoring and evaluation systems, and annual performance plans of government departments include government departments' commitment towards promoting, protecting and fulfilling children's rights that fall within their ambit.

The NPAC is now in its third phase from 2012 to 2017<sup>59</sup>. The review was brought about because of the changes that were happening in society, including the changes<sup>60</sup> that had transpired between 1996 and 2011/12.

These changes were brought about because of the legislative reforms that had transpired domestically<sup>61</sup>, regionally<sup>62</sup> and internationally<sup>63</sup>.



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<sup>57</sup> Education, Health, The fight against crime and corruption, Economic growth, decent work and sustainable livelihoods and rural development, food security and land reform. These five government priorities seek to streamline the delivery agenda of government as all spheres of government work towards tangible deliverables. Services planned and directed to children are also informed by these five priorities and should be aimed at positively changing the lives of children.

<sup>58</sup> 1. Improved quality of Education, 2. Along and healthy life for all South Africans, 3. All people in South Africa feel safe, 4. Decent employment through inclusive economic growth, 5. A skilled and capable workforce to support an inclusive growth path, 6. An efficient, competitive and responsive economic infrastructure network, 7. Vibrant, equitable and sustainable rural communities with food security for all, 8. Sustainable human settlements and improved quality of household life, 9. A responsive, accountable, effective and efficient local government system, 10. Environment assets, and natural resources that are well protected and continually enhances, 11. Create a better South Africa and contribute to a better and safer Africa and World, 12. An efficient, effective and development oriented public service and an empowered, fair and inclusive citizenship.

<sup>59</sup> The first phase of the NPAC had seven priority areas<sup>59</sup> upon review in 1999 these were redrafted into seven priority areas<sup>59</sup> to advance the reviewed objectives<sup>59</sup> of the second phase of the NPAC as found in the document, The National Programme of Action: 2000 and beyond. The second priority of the second phase of the NPAC referred to special protection measures<sup>59</sup> which comprised of amongst other issues the commercial sexual exploitation of children.

<sup>60</sup> Changes in society, culture, technology and more significantly in the legal sphere.

<sup>61</sup> Children's Act 38 of 2005, Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Child Justice Act 75 of 2008.

<sup>62</sup> African (Banjul) Charter on Human and People's Rights of 1981 (signed in 1996, ratified in 1996 and deposited in 1996), African Charter on the Rights and Welfare of the Child of 1990 (signed in 1997, ratified in 2000 and deposited in 2000), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of 2003 (signed in 2004, ratified in 2004 and deposited in 2005),

<sup>63</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000 (signed in 2002 and ratified in 2009), Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 2000 (ratified in 2003), Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993 (ratified in 2003), Hague Convention on the Civil Aspects of International Child Abduction of 1980 (ascended to in 1997)

The review of the NPAC, significantly was to ensure that it is in line with the mandate of the then newly formed Minister for Women, Children and People with Disabilities. In his presentation on the NPAC 2012-2017 to the then National Assembly Portfolio Committee on Women, Children and People with Disabilities, the then Deputy Director-General (DDG) of the Department on Women, Children and Persons with Disabilities, Mr Mzolisi ka Toni noted the following:

‘The approach used when structuring the NPAC was that of mainly collecting baseline information on every issue concerning ‘The Child’, such as child mortality under an overall theme, such as Child Survival. Existing governmental goals that were contributing towards the achievement of mandates focusing on children had been used as benchmarks to inform Government programmes. Also broad national indicators were set to guide and track progress during the implementation of these goals and the roles of the lead and supporting departments in all sub-themes were outlined.’<sup>64</sup>

It has as one of its goals for 2012-2017 period, the protection of children from all forms of sexual abuse and exploitation.<sup>65</sup> As part of this goal there are objectives and strategies that are meant to be implemented which include primary and secondary levels of prevention and national indicators.<sup>66</sup>

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<sup>64</sup> Department of Women and People with Disabilities. National Plan of Action for Children 2012-2017: Report of the National Women’s Conference, August 2011: DWCPD briefing (2012) available at <https://pmg.org.za/committee-meeting/15327/> (accessed 19 November 2015)

<sup>65</sup> It is of utmost importance to note that discussions on terminology have indicated that there is a difference between child sexual abuse and sexual exploitation. Article 34 of the CRC refers to “all forms of sexual exploitation and sexual abuse.” Article 27 of the ACRWC also refers to: “all forms of sexual exploitation and sexual abuse.’ The primary distinction as Clayton puts it is the ‘pecuniary gain acquired as a result of the exploitation of the Child.

<sup>66</sup> Department of Women, Children & People with Disabilities, *National Plan of Action for Children in South Africa* (2012), 65-68.



Section C2 of the NPAC 2012-2017 is dedicated to the Sexual Exploitation of Children, child prostitution, child trafficking and child pornography. It addresses the goals<sup>67</sup>, objectives<sup>68</sup>, strategies<sup>69</sup> and prevention levels<sup>70</sup> that South Africa has set out for itself in relation to these three areas. All three of these are fundamental pillars of the OPSC and CSEC.

However, of concern is that child sex tourism although similar in characteristics to the three areas<sup>71</sup>, it is different and is an area within the CSEC.

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<sup>67</sup> To protect all children, from all forms of sexual abuse and exploitation

<sup>68</sup> To ensure the safety, protection and security of all child victims of sexual exploitation., to ensure the provision of services to child victims of sexual exploitation that assist with their recovery and healing., to implement prevention and early intervention strategies to counter and address the sexual exploitation and trafficking of children and to ensure a high level of digital awareness and safety amongst all children.

<sup>69</sup> Review, develop and ensure implementation of national protocols on the management of child pornography, sexual exploitation and child trafficking, which include police, justice personnel, social workers, teachers, oversee the implementation of preventative, protective and rehabilitative strategies and services for child who are victims of trafficking, review, establish and implement programmes that ensure the safety, protection and security of all child victims of trafficking, facilitate the implementation of programmes that will educate children about online and digital safety, cyber bullying and related safety on new technologies, ensure the establishment and maintenance of management information systems on the incidences of child pornography, sexual exploitation and child trafficking, ensure that legislative frameworks are in place to protect children from exposure to pornography, which include the manner in which pornography is discarded, avail education programmes to parents about online and digital safety for their children., ensure the availability of programmes that will educate children about sex-ting (cyber), and ensure the inclusion of aspects of cyber and online safety in the national school curriculum (LO).

<sup>70</sup> Primary Level of Prevention: Ensure the availability of material that will inform/educate children, parents and community members about the risk factors by means of community dialogues, talk shows, media, pamphlets, posters, youth programmes, peer education, life skills and parenting programmes, programmes to target vulnerable groups and strengthen social cohesion and protection, to encourage the spirit of Ubuntu., publication of relevant legislation, policies and programmes to prevent the exploitation of children, publish the Charter on moral values, and ensure the education of children about primary and secondary levels of prevention, initiate gender- sensitive information campaigns to raise awareness and educate about child rights and exploitation.

Secondary Level of Prevention: develop, strengthen, and implement relevant legislation, policies and programmes to prevent the exploitation of children, collaborate with relevant stakeholders about child exploitation matters; strengthen support and services to exploited children, to prevent reoccurrences of exploitation, continue to encourage child participation, strengthen family structures and assess needs of affected families to enable the re-integration of victims of child exploitation - assist with appropriate intervention as per identified needs and advocate minimising the risk factors within the home and the community, in collaboration with relevant stakeholders.

<sup>71</sup> ECPAT, 'CSEC Terminology', available at [http://resources.ecpat.net/EI/Csec\\_definition.asp](http://resources.ecpat.net/EI/Csec_definition.asp) (accessed 21 November 2015).

There are three primary and interrelated forms of commercial sexual exploitation of children: prostitution, pornography and trafficking for sexual purposes. Other forms of commercial sexual exploitation of children include child sex tourism, child marriages and forced marriages.

Child sex tourism is not addressed as a separate component within CSEC, but rather is encapsulated in the NPAC 2012-2017 as or within sexual exploitation. Implied that either child sex tourism has not been noted as a rapidly emerging phenomena, or that even if it is perceived as an emerging phenomena it is addressed and regarded as CSEC. Thus implying that there either are no or there is a lack of measures to prevent it because it falls within the ambit of sexual exploitation. Meaning that there is a challenge in monitoring the magnitude of other components within CSEC such as child sex tourism. South Africa therefore, needs to have a review on its legislative implementation of international and regional treaties on the protection of children in particular on the various components of CSEC. This would be noted in the Children's Act of 2005 and the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007. A system has to be developed to monitor and evaluate the implementation of international and regional treaties. This would include an impact assessment on the implementation of these obligations.

In relation to the protection of children and the promotion of their rights, various measures have been established to ensure the alignment of South Africa's domestic legislation to its international obligations. These measures include numerous Acts promulgated by the South African government to assist in the promotion of the rights of the child.

These include the Child Care Act 74 of 1983 (which is amended by the Child Care Act 13 of 1999<sup>72</sup>), Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 (herein referred to as Act 32 of 2007)<sup>73</sup> critical objects of the Act are s (2) (b)<sup>74</sup> and 2(b) (g)<sup>75</sup> and the Child Justice Act.

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<sup>72</sup> Child Care Act 13 of 1999 which amends the Child Care 74 of 1983, which seeks to provide for the prohibition against the commercial sexual exploitation of children

<sup>73</sup> Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007

<sup>74</sup> The objects of this Act are afford complainants of sexual offences the maximum and least traumatizing protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of offences committed in the republic by s(2)(b) criminalizing all forms of sexual abuse or exploitation

<sup>75</sup> s (2) (g) establishing a National Register of Sex Offenders in order to establish a record of persons who are or have been convicted of sexual offences against children and persons who are mentally disabled so as to prohibit such persons from being employed in a manner that places them in a position to work with or have access to or authority or supervision over or care of children or persons who are mentally disabled.

The abovementioned Acts give effect domestically to the responsibilities that South Africa is charged with as a commitment to the CRC, the OPSC and the ACRWC.

The above section sought to give an overview of how South Africa has complied with its international legal obligations under the CRC, OPSC and the ACRWC. It must be however noted, that there still challenges in South Africa's legal framework with regards to the protection of children from being sexually exploited through tourism.

### **3.3. Legislative gaps which exist in South Africa's domestic framework when it comes to the protection of children from being sexually exploited through tourism.**

Prior, to the 1994 democratic breakthrough, the Act that addressed the issue of commercial sexual exploitation of children was, the Child Care Act 74 of 1983 (amended by the Child Care 13 of 1999), which made provision in its clauses for the commercial sexual exploitation of children and provided a conviction of anyone found guilty of this act, through a fine, imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment<sup>76</sup>

Post 1994, critical pieces of legislation were drafted to address commercial sexual exploitation in South Africa these included the Child Care Amendment Act 13 of 1999, the Children's Act 32 of 2005, Criminal Law (Sexual Offences and Related Substances Matters) Amendment Act 32 of 2007 and the Sexual Offences Act 12 of 2009 .

Section 28 of the Constitution has been realised in Acts that have been promulgated over the years that seek to protect and promote the rights of children. This wave of law reform is indicative of the government's will to protect children and promote their rights.

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<sup>76</sup> s 50A(3)

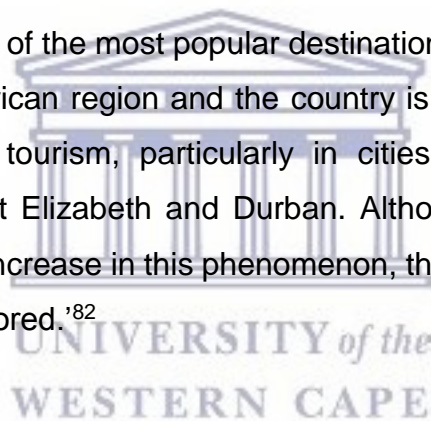


These pieces of legislations include (i) The Film and Publications Act 65 of 1996<sup>77</sup>, (ii) The Domestic Violence Act 116 of 1998<sup>78</sup>, (iii) The Child Care Amendment Act 13 of 1999, (iv) the Children's Act 32 of 2005<sup>79</sup> and its Amendment Bills (B13 and B14 of 2015), (v) The Child Justice Act 75 of 2008<sup>80</sup>, (vi) Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007<sup>81</sup>.

It must be noted that South Africa has no specific legislation against travelling child sex offenders. Act 32 of 2007 speaks of child sex tours and it defines what constitutes the promotion of child sex tourist. It finds brief expression in Act 32 of 2007, under sexual offences against the child (Chap. 15 part 12 par. 17). Whereas, the explicit naming of child sex tourism as an offence, within legislature (Act 38 of 2005) and (Act 32 of 2007) is of significance.

It is argued that:

'South Africa is one of the most popular destinations for travelling sex offenders in the African region and the country is becoming a major hub for child sex tourism, particularly in cities like Cape Town, Johannesburg, Port Elizabeth and Durban. Although media reports have indicated an increase in this phenomenon, the issue of child sex tourism is often ignored.'<sup>82</sup>



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<sup>77</sup> The purpose of this Act amongst other things to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences.

<sup>78</sup> The purpose of this Act is to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence.

<sup>79</sup> The purpose of this Act amongst others is to give effect to the following constitutional rights of children, namely 2 (b) (iii) protection from maltreatment, neglect, abuse or degradation; and 2 b (iv) that the best interests of a child are of paramount importance in every matter concerning the child, 2(c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic.

<sup>80</sup> The purpose of this Act amongst other things is to (a) protect the rights of children as provided for in the Constitution and 2(b)(i) promote the spirit of Ubuntu in the child justice system through fostering

<sup>81</sup> The purpose of this Act amongst others seeks to eradicate the relatively high incidence of sexual offences committed in the Republic by: 2(b) criminalising all forms of sexual abuse or exploitation and 2( e) promoting the spirit of batho pele ('the people first') in respect of service delivery in the criminal justice system dealing with sexual offence by 2(e )(i) ensuring more effective and efficient investigation and prosecution of perpetrators of sexual offences by clearly defining existing offences, and creating new offences

<sup>82</sup> ECPAT, *Reducing violence against children, with special focus on sexual exploitation against children and child sex tourism: In 30 countries in Africa, Asia, Europe, Latin America and the Middle East.* (2014) 26.

This is supported by ECPAT International when they state that establishing how often travelling child sex offenders are arrested in South Africa is difficult, mainly because they are usually charged with indecent assault or rape and not on account of sex tourism.<sup>83</sup>

This creates a lacuna for travelling child sex offenders to either remain unprosecuted or receive a light sentence that enables them to return back into the country and recommit the offence. South Africa's legal system is not strict in prosecuting child sex offenders.

The principle of double criminality is critical to cases of extradition as it requires that the crime for which extradition has been requested is a crime in the requested country. Extradition Act 67 of 1962 and its Amendment Act<sup>84</sup> are the laws regulating extradition in South Africa. Section 3 of the Act 67 of 1962 states the criteria regarding persons whom are liable to be extradited. As of the 8<sup>th</sup> of December 2010 South Africa currently has agreements with thirteen States to extradite.

South Africa has with nine States negotiated, but not yet signed similar agreements. It has also acceded to the European Convention on extradition.<sup>85</sup> Where extradition agreements do not exist the understanding is that countries will operate in comity. s3 (2)<sup>86</sup> of Act 67 of 1962 which demonstrates the application of comity, meaning it is done in goodwill or courtesy. This is reinforced in case law *Harksen v President of the Republic of South Africa and Others*<sup>87</sup> where ss3 (1) and 3(3) were not applicable in this case but rather s3 (2) was because South Africa does not have an extradition agreement with the Federal Republic of Germany.

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<sup>83</sup> ECPAT, Executive Summary South Africa 2.

<sup>84</sup> Extradition Amendment Act 77 of 1996

<sup>85</sup> DOJ&CD, International Legal Relations: Extradition and Mutual Legal Assistance in criminal matters <http://www.justice.gov.za/ilr/mla.html> (accessed 27 September 2016)

<sup>86</sup> Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered

<sup>87</sup> *Harksen v President of the Republic of South Africa and Others* (CCT 41/99) [2000] ZACC 29; 2000 (2) SA 825 (CC) ; 2000 (1) SACR 300; 2000 (5) BCLR 478

Envar Hartnick in her Masters in Law research paper explores the question and meaning of extradition within the international and domestic context.<sup>88</sup> Michael Watney further delves into extradition and the principle of double criminality in his paper is based on a paper read at the conference on *Globalisation of Crime – Criminal Justice Responses* presented by the International Society for the Reform of Criminal Law and the International Centre for Criminal Law Reform and Criminal Justice Policy on 9 August 2011, Ottawa, Canada.<sup>89</sup>

Hilary Clayton in her Masters in Law research proposal argued that: It was crucial for sending countries to have incorporated extraterritorial jurisdiction into their legislation. Without that component states lack the ability to prosecute nationals for crimes committed abroad. Whilst this was argued in the context of the 2010 World Cup it remains relevant post 2010 because of the rapid advancement of this phenomenon.<sup>90</sup>

Extraterritorial legislation is perceived as an instrument to fight child sex tourism. It is argued that: “for extraterritoriality to be of real value, it requires the abolition of the double criminality requirement, ensuring thus that a person is liable for the crime of child sex tourism regardless of whether such an offence is punishable in the country where the act has been committed.”<sup>91</sup> As a protective measure extraterritorial legislation needs to be adopted by States as well as extradition agreements need to be signed by States to ensure that child sex offenders in travel and tourism are prosecuted under domestic law in their own country.

This is evident *in Patel v S (2015) SA 382 (GJ)* in paragraph 12 which noted that the magistrate concluded that in the appellant’s defence that the offences were not could not hold.<sup>92</sup>

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<sup>88</sup> Hartnick, E.R. ‘South Africa’s Human Centred Approach to Extradition (Research Paper LLM University of the Western Cape, Western Cape (2013) 21-23. and Extradition in a Globalised World.’

<sup>89</sup> Watney, M. ‘A South African Perspective on Mutual Legal Assistance (2012) 297- 301, 307.

<sup>90</sup> Clayton H *South Africa’s Obligations Regarding Sexual Exploitation of Children*’ (Research Proposal LLM, North-West University, Potchefstroom Campus) (2010) 12.

<sup>91</sup> Projection project *International Child Sex Tourism: Scope of the Problem and Comparative Case*’ (2007) 188.

<sup>92</sup> *Patel v S* [2015] 4 All SA 382 (GJ)

Although s (3) of Act 67 of 1962 describes the individual who are liable for extradition, s (3) (2) becomes critical in cases where extradition agreements have not been signed by States. This section indicates the stringency and urgency for South Africa to conclude extradition agreements with other States to ensure that international child sex offenders are prosecuted for their crimes.

A concern is also on the porous state of South Africa's ports of entry. As noted in ECPATs 2014 Annual Report constantly evolving technology and fluid travel boundaries make it increasingly easy for travelling sex predators to target vulnerable children.<sup>93</sup>

The Immigration Act 13 of 2002, provides for the regulation of admission of persons to, their residence in, and their departure from the Republic and for matters connected therewith. It ensures amongst other things that security considerations are fully satisfied and the State retains control over the immigration of foreigners into the Republic.<sup>94</sup> The application of the ss(29) and (30) in this Act need to be strengthened, this can be in the form of the inclusion of crimes related to CSEC (this would include child sex tourism) in s(29)(b), s(30)<sup>95</sup> and s(20)(b)<sup>96</sup> should include anyone who has been alleged proof of committing sexual crimes against children including for commercial purposes, previously prosecuted on charges related to sexually exploiting a child/ren for commercial means and/or has a criminal record of being a child sex offender or who is wanted by any country for committing sex crimes against children including CSEC.

Recently the National Department of Home Affairs has been proactively engaging with various sectors of society with regards to improving South Africa's immigration laws.

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<sup>93</sup> ECPAT International, Annual Report June 2014- June 2015 22.

<sup>94</sup> Immigration Act 13 of 2002

<sup>95</sup> Immigration Act 13 of 2002

<sup>96</sup> Immigration Amendment Act 13 of 2011

South Africa's Immigration Regulations came into operation on the 26<sup>th</sup> of May 2014.<sup>97</sup> On 1 June 2015 the requirements specific to travelling with children through South Africa's ports of entry took effect.<sup>98</sup> This is in relation to South Africa's new documentation requirements for minors which is tabled as Immigration Directive No. 09 of 2015.<sup>99</sup> Cabinet reaffirmed its support for the Immigration Regulations, in particular the requirements for travelling with children through South Africa's ports of entry.

Whilst this move has been lauded as a bold move by the National Department of Home Affairs, concerning and descending sentiments have been expressed by certain tourism industry stakeholders. They have cited that these new changes may have detrimental effects on the tourism industry. And have proposed that there should be inter-departmental solutions to ensure that, whilst human rights issues are promoted, there should be a protection of the income that is generated through tourism for the country.

Apart from the Ministerial team formed by the Home Affairs Minister a Presidential Inter-Ministerial Committee (IMC) (Department of Home Affairs is part thereof) Immigration Regulations chaired by Deputy Ministers Cyril Ramaphosa was established in August 2015 with a mandate of looking into the unintended consequences and mitigating factors relating to the implementation of the Immigration Amendment Acts (2007 and 2011) and Immigration Regulations, 2014 which has made its recommendations<sup>100</sup> to Cabinet and the Home Affairs department.

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<sup>97</sup> Gigaba KMN 'Statement by Minister Gigaba on the meeting with child advocacy groups' available at <http://www.dha.gov.za/index.php/statements-speeches/646-statement-by-minister-gigaba-on-the-meeting-with-child-advocacy-groups-held-in-rosebank-on-02-july-2015> (accessed 16 July 2016)

<sup>98</sup> To promote the principle that all children must have consent of parents when travelling into or out of the Republic.

<sup>99</sup> McKay JW 'Immigration Directive 09 of 2015 New Document Requirements for Minors' available at <http://www.southafrica.be/wp-content/uploads/2015/05/Immigration-Directive-No-09-of-2015-1.pdf> (accessed 16 July 2016)

<sup>100</sup> GCIS, 'Statement on Cabinet meeting of 21 October 2015' available at <http://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-21-october-2015> (accessed 15 December 2016)



These regulations are in line with the Children's Act of 2005 and the Prevention and Combating of Trafficking in Persons Act of 2013. Specifically, the National Department of Home Affairs met with child advocacy groups<sup>101</sup> with regards to the recent immigration law amendments and regulations. Importantly is the intensification of stakeholder engagement relating to the implementation of legislative amendments and regulations.

In relation to the above, what has been critical in addressing the concerns raised by stakeholders are the various interactions between the Minister of Home Affairs and of Tourism. Significantly, the outcomes of the meeting of these interactions. Since July 2014, there have been successive meetings between the two Ministers and Departments to discuss the impact of the new Immigration Regulations on the tourism sector.

Furthermore, a first draft amendment of the Immigration Regulations as recommended by the IMC has been tabled. A Ministerial team has been established with a mandate to look at matters pertaining to the implementation of the Immigration Rules with a view to seek a balance between South Africa's economic development as well as security needs.<sup>102</sup>

In October 2016 the Department of Home Affairs noted that it is in the process of piloting the connection of the movement of a child to the Movement Control System to ensure continuous protection of children entering and departing from the country.

The National Departments of Home Affairs and Tourism have signed in December 2015 a Memorandum of Understanding on the accreditation of tourism companies. The latest bilateral meeting of the 7th of December 2016 between the national Departments of Home Affairs and Tourism to discuss the latest concessions on the immigration regulations. The statement on the outcome of the meeting is yet to be issued.

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<sup>101</sup> Molo Songololo, ChildlineSA, Save the Children, UNICEF are some of the stakeholders. The requirements specific to travelling with children are welcomed, as these are in the best interest of the child and would go a long way in rolling-back the frontiers of child abduction and human trafficking.

<sup>102</sup> DHA, 'Statement on Cabinet's reaffirmation of the Immigration Regulations' available at <http://www.dha.gov.za/index.php/statements-speeches/633-statement-on-cabinet-s-reaffirmation-of-the-immigration-regulations> (accessed 14 December 2016)

Additional to legislative gaps that exist, compilation of data on the child protection element of child sex tourism in South Africa, is characterised by a lack of accurate and reliable information. It is in this regard that Save the Children South Africa notes that:

‘There are no national child protection indicators, no research agenda on child protections and a lack of disaggregated data (urban/rural; gender; age of children. The South African Police Service (SAPs) releases annual statistics on crimes committed children below 18 years and the Department of Social Development (DSD) publishes their statistics in annual reports which includes data from the Child Protection Register. However, the reliability of these statistics in annual reports is questionable as they are dependent on accuracy of reporting from local level service profilers where data is not captured systematically.’<sup>103</sup>

There have been disputes about the ability or lack thereof of the police in handling cases related to child sex tourism. In a study conducted by ChildLine South Africa (National Office), the participants argued that:

‘Focus group discussion participants from the child protection sector in the Eastern and Western Cape considered SAPS to be a service capable of providing protection to victims. In Gauteng, SAPS was recognised as providing services on child protection but had no specific programmes for CSECTT victims, despite it being possible to call the police Child Protection and Sexual Offences Unit, which is mandated to fulfil an investigative function.’<sup>104</sup>

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<sup>103</sup> Save the Children Southern Africa Regional Office, ‘Baseline 2010: National Child Protection System in South Africa’ available at <http://resourcecentre.savethechildren.se/sites/default/files/documents/4445.pdf> (accessed 06 July 2016)

<sup>104</sup> Vuillard, Schrempp, and Solomons et. al Global Study on Sexual Exploitation of Children in Travel and Tourism Country- Specific Report South Africa (2015) 23.

Furthermore, it has been argued by Joan van Niekerk referenced in an article by van Schalkwyk that only a few cases of child sex tourism are reported. These reported cases only represent the tip of the iceberg implying that this is a complex and unexposed issue and that there is so much more to know about it.<sup>105</sup>

Part 3 on the National Policy Framework in sections 66(1)(a)<sup>106</sup>(i)<sup>107</sup>(ii)<sup>108</sup> of the Criminal Law (Sexual Offences and Related Matters) Amendment Act outline the National policy framework and the national instructions and directives, and outline the procedure that should be followed by police officials who are tasked with receiving reports of and the investigation of sexual offences.

The *Innovative Issues and Approaches in Social Sciences* argue that:

“A comparative analysis of international studies relating to corruption, crime and police reliability indicates that the variables from all three studies and countries where child sex tourism is present are correlated. Levels of corruption, the crime rate and the (un) reliability of the police are correlated with the presence of child sex tourism in the countries. In particular, this applies to countries such as Kenya, Honduras, Republic of South Africa and Russia as these countries in all three studies occupy the lowest rankings, and in all of these countries child sex tourism is well established.”<sup>109</sup>

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<sup>105</sup> Van Schalkwyk S Sex tourism takes hold in South Africa(2007) in Spurrier KJ *A multi-purpose response on the status of the knowledge of and response to commercial sexual exploitation of children with a specific focus on child prostitution and child sex tourism: A Social Work perspective* (published LLM thesis, University of South, (2015) 14.

<sup>106</sup> The National Commissioner of the South African Police Service must, in consultation with the Minister of Safety and Security and after consultation with the Minister, the *National* Director or Public Prosecutions, the National Commissioner of Correctional Services and the Directors-General: Health and Social Development, issue and publish in the Gazette national instructions regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigation of sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following:

<sup>107</sup> The manner in which the reporting of an alleged sexual offence is to be dealt with by police officials;

<sup>108</sup> the manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued;

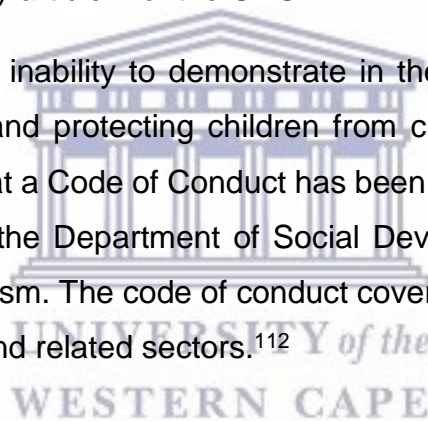
<sup>109</sup> Mekinc J & Music K ‘Sexual Exploitation of Children in the Tourism-The Darks Side of Tourism’ (2015) 8 *Innovative Issues and Approaches in Social Sciences* (IIASS) 82.



This indicates that SAPs need to be trained thoroughly on how to handle cases that relate to the commercial sex exploitation of children. Enforcement guides on the subject matter should be provided to them. They should also be trained on the legal procedures they should follow regarding child sex exploitation through commercial means. South Africa's laws are progressive regarding the care and protection of children of children however, the challenge remains in implementing legislation. The South African Human Rights Commission roundtable discussion also notes that South Africa has an excellent legislative framework on the rights of the child. However, the country has fallen short in monitoring compliance<sup>110</sup>.

South Africa's combined Second, Third and Fourth Period State Party Report to the UNCRC is on Special protection measures demonstrates that as per the UN's Committee on the Rights of the Child concluding observation number 10 the country's ability to pragmatically apply article 4 of the CRC.<sup>111</sup>

However of concern is the inability to demonstrate in the Report how South Africa legislatively is preventing and protecting children from child sex tourism. What the Report notes in Part 8 is that a Code of Conduct has been signed between Fair Trade Tourism SA (FTTSA) and the Department of Social Development (DSD) to protect children from child sex tourism. The code of conduct covers the hotel industry, places of entertainment, tourism and related sectors.<sup>112</sup>



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<sup>110</sup> South African Human Rights Commission, 'CRC @25 1989- 2014: How has South Africa protected its children?'(2014) 4.

<sup>111</sup> As per General Comment No.5 (2003) on General measures of implementation of the Convention: The second sentence of article 4 reflects a realistic acceptance that lack of resources - financial and other resources - can hamper the full implementation of economic, social and cultural rights in some States; this introduces the concept of "progressive realization" of such rights: States need to be able to demonstrate that they have implemented "to the maximum extent of their available resources" and, where necessary, have sought international cooperation .

<sup>112</sup> The statistics in the report focus mainly on child trafficking. The report has a section (period 2003-2011) on the number of reported cases on the sale of children, child prostitution, and child pornography and child sex tourism, however there is no data available on this 20.

Department of Women, Children and People with Disabilities, *Convention on the Rights of the Child: Combined Second, Third and Forth Periodic State Party Report to the Committee on the Rights of the Child* 76.

The challenge with regards to implementation is reaffirmed in the Initial Complementary Report to the African Committee of Experts which notes that although there is legislation and policy in place to ensure the protection of children, implementation has been problematic.<sup>113</sup> However, there is room for reviewing and improving law. This is evident and South Africa needs to review its legislation with regards to protecting children from all forms of CSEC. Particularly, protecting its children from child sex tourism since available legislation is not elaborate when it comes to this type of CSEC. Hawke and Raphael argue that: implementation has been so weak in Sub-Saharan African, so commitments made (international conventions) have generally not translated into meaningful action or change for children.

The same is true with regards to national legislation; even when updated laws are in place, enforcement is insufficient, leaving children vulnerable to CST and other forms of exploitation.<sup>114</sup>

There are several reasons as to why implementation of legislation remains a challenge in South Africa. Respondents in a research study conducted by Joan van Niekerk and Katarina Mancama considered laws and policies to be 'paper tigers' powerful looking on paper with little impact due to a lack of practical implementation.<sup>115</sup>

These can be attributed to a lack of staff available to implement the different legislative commitments that South Africa has obligated itself to. This indicates that there is a lack of qualified staff to implement these legislative commitments and this creates a lacuna which may lead to a lack of coherent and accurate capturing of data. This has an impact on the process of arresting and prosecution of child sex offenders, sentences that are deemed 'light' that are handed over to child sex offenders (the cases below are an illustration) which illustrate gaps in the country's judicial system.

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<sup>113</sup> Bower C (ed) Initial Complementary Report to the African Committee of Experts in response to South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child (2014) 72.

<sup>114</sup> Hawke A & Raphael A *The Global Study Report on Sexual Exploitation of Children in Travel and Tourism* (2016) 45.

<sup>115</sup> Van Niekerk J & Mancama *Don't Look Away Be Aware and Report the Sexual Exploitation of Children in Travel and Tourism*, (2013) 23.

In the developing world there is a predominant challenge that is related data collection. Lalor argues that:

‘A briefing paper for the 2<sup>nd</sup> World Congress against CSEC reported that neither CSEC nor child sexual abuse in the home/community cannot be easily quantified in sub-Saharan Africa (SSA) due to a lack of adequate data and that CSE cannot and that CSEC cannot be analysed in isolation from the broader problems of sexual abuse and sexual exploitation.’<sup>116</sup>

Delany’s argument reinforces Lalor’ argument by asserting that:

“There is no central monitoring system to record statistics relating to child sex abuse and exploitation in South Africa, making it difficult to ascertain the extent of the problem. Even more difficult to measure than sexual abuse is the prevalence of sexual exploitation of children, which includes prostitution, trafficking, child pornography and sexual-economic exchanges involving a child. The commercial exploitation of children is recognized as a growing problem in southern Africa, but again there is little data available on the extent of the problem.”<sup>117</sup>

Perhaps, one of the contributing factors to the challenge of data capturing and reporting could be related to the lack of a shared comprehensive understanding of the term child sex tourism.

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<sup>116</sup> Lalor K *Child sexual abuse in sub-Saharan Africa: a literature review*, 2004, (published thesis, Dublin Institute of Technology, (2004) 440.

<sup>117</sup>Delany A *Child Sexual Abuse and Exploitation in South Africa*, (2005) ii.

The reasons underlying the increasingly critical debates around the term “child sex tourism”, in particular by child protection professionals and law enforcement bodies, are that the term may inadvertently give the idea that this is a legitimate form of tourism, and may also associate the crime with the entire industry. Furthermore, by referring exclusively to tourism and tourists, it excludes many types of travelling offenders, such as business travellers and military personnel, and offenders in transit or residing out of their country more generally. Lastly, the term completely omits the fact that it refers to serious criminal conduct that a large number of States have included in the scope of extraterritorial legislation. The potential “normalisation” of the practice through the use of the term “child sex tourism” risks being harmful to the child.

Vetit Muntarhorn, General Rapporteur at the Second World Congress against the Commercial Sexual Exploitation of Children noted that: there remains disagreement among operational actors concerning definitions behind the phenomenon of the sexual exploitation of children.”<sup>118</sup>The publication on Semantics or Substances<sup>119</sup>, raises critically issues relating to semantics used when referring to the sexual abuse and exploitation of children. It notes that terms used to define specific acts are used inappropriately and interchangeably. The implication of this usage has been viewed to have a potential hindrance in the manner in which child sexual abuse or child sexual exploitation is addressed legislatively.

The terminology guideline adopted by the Interagency Working Group argues that:

‘The term “sexual exploitation of children in the context of travel and tourism” arguably represents the most adequate manner of referring to this practice, and ought to be the preferred term in the field of child protection. Child sex tourism is a term that could be harmful to the child. Alternative terms such as “sexual exploitation of children in travel and tourism” appear more appropriate; this explicitly mentions that the child is being exploited and adequately broadens the focus from the actions of offenders to a wider perspective on the settings in which the exploitation takes place.’<sup>120</sup>

A considerable number of respondents<sup>121</sup>, mostly from the child protection and public sectors, seemed to misunderstand the concept, conflating CST with trafficking of children for sexual purposes<sup>122</sup>.

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<sup>118</sup> Muntarhorn, V. Report of the Second World Congress against Commercial Sexual Exploitation of Children. 2001 in Semantics or Substance: *Towards a shared understanding of terminology referring to the sexual abuse and exploitation of children.* (2005) 9.

<sup>119</sup> Subgroup against the Sexual Exploitation of Children, ‘Semantics or Substance: Towards a shared understanding of terminology referring to the sexual abuse and exploitation of children.’ (2005)

<sup>120</sup> Interagency Working Group *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, (2016) 56.

<sup>121</sup> For example, one participant in a focus group discussion in Kwazulu-Natal, when debating whether CSECTT is an issue in South Africa, suggested, after another participant said it was not a big issue, to “put it in a more familiar term, like child trafficking”.

<sup>122</sup> Vuillard, Schrempp, and Solomons et. al *Global Study on Sexual Exploitation of Children in Travel and Tourism Country- Specific Report South Africa* (2015) 12.

The content of what constitutes CSEC is applicable to child sex tourism, child pornography and child trafficking. This becomes a legislative challenge because child sex tourism is treated as CSEC, sexual exploitation or sexual abuse and not as CSEC in tourism.

Kruger and Oosthuizen note that: what is useful for the purpose of prosecuting agents involved in child sex trafficking are the broadly defined offences of sex exploitation, promoting of child sex tours, and the sexual grooming of children.<sup>123</sup> However, the argument is that because of its broadness, there is no legal definition of child sex tourism in South Africa, which (the absence of a definition of child sex tourism) has been a discussion in the field of children's rights. It is argued that: The absence of a clear yet broad definition of SECTT has been an obstacle to effective responses.<sup>124</sup>

This is a legislative gap which needs to be addressed as this impacts the legal procedures to be followed in prosecuting those that not only have been caught committing child sex tourism but ensures that they are prosecuted accordingly in the court of law.

The legal instruments<sup>125</sup> in South Africa do not refer to child sex tourism but refer to as CSEC or sexual exploitation or child sex tours. This implies that child sex tourism is addressed as CSEC or sexual exploitation, noting that at times sexual exploitation is referred to all forms of sexual exploitation against children, and sometimes child pornography and child trafficking are emphasised outside the definition of sexual exploitation, reference is made to Act 32 of 2007. It must also be noted that because they are not charged on account of child sex tourism, but rather with indecent assault or rape it is difficult to establish the frequency of child sex tourist's arrests in South Africa. Convictions of child sex tourists who are foreigners are still a challenge to identify in South Africa.

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<sup>123</sup> Kruger AB & Oosthuizen H South Africa- Safe Haven for Human Traffickers? Employing the Arsenal of Existing Law to Combat Human Trafficking, (2012) 15(1) *PEJL* 313.

<sup>124</sup> Hawke A & Raphael A *The Global Study Report on Sexual Exploitation of Children in Travel and Tourism*, (2016) 15.

<sup>125</sup> The Constitution of the Republic of South Africa, Children's Act and the Criminal Law (Sexual Offences and Related Matters) Act.



Furthermore, it must be noted that South African legal instruments have minimal provisions that address the prevention of sexual offences against children. Critical to this, is the lack of provisions that address child sex offenders. They are instead grouped together under the ambit of the criminalisation of all sexual abuse of children, there is no specific criminalisation of child sex tourist offenders

Whilst legislation exists to address CSEC, the majority of the public might be unknowledgeable about their legal responsibility to report cases relating CSEC. This responsibility is also applicable to those that operate in the tourism industry. Reporting of CSEC is mandatory and is prescribed in South African law. The challenge that exists legislatively, is the complex nature of reporting, especially when it comes to which reporting authority should be approached<sup>126</sup>

It is of significance that coherent and concise definitions are developed and agreed to, to prevent legislative gaps, ineffective prevention and promotion mechanisms as well as align domestic legislation with international legal obligations.

Child sex tourism, is referred to as CSEC, sexual exploitation or sexual abuse in legal instruments. It is not defined as or referred to as CSEC in tourism.

Below is a reflection of case law used to identify legislative gaps in South Africa's ability to address child sex tourism.

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<sup>126</sup> For instance, the Children's Act requires that cases relating to abuse and neglect are reported to Child Protection organisations, the Department of Social Development or the police. Whereas, the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 41 of 2007, the Films and Publications Act No. 65 of 1996, and the Prevention and Combatting of Trafficking in Persons Act No. 7 require that cases of sexual exploitation of children, child pornography and the trafficking of children for sexual purposes are reported directly to the police.

### 3.3.1. Case number one

Legislative gaps are evident in the 2005 Zimmerman case that never reached the courts.

Peter Zimmerman, a Swiss lawyer was caught in a Johannesburg hotel having sexual relations with a 14-year old boy. He made a settlement (because the boy as a plaintiff could not be found) out of court after his plea of guilt to indecent assault and was given an option of R10 000 or 12 months in incarceration, and was given a one-year suspended sentence for five years. After an investigation it was found out that the 14-year old boy was not his only victim. However it was a challenge to trace the other boys who were his victims.

There have been various views from children's rights activist:

Joan van Niekerk from Child Line South Africa expressed that the R10 000 fine for a Swiss lawyer caught with a young boy is “a slap on the wrist” and “is sending out the wrong message” and that “the R10 000 fine was “very, very light” She further noted that South African law carries a minimum sentence of 15 years for indecent assault against a minor.

Samantha Waterhouse, former advocacy manager of Resources Aimed (now the Project Head of the Women and Democracy Initiative at the Dullah Omar Institute at the University of the Western Cape argued that:

‘It is difficult to establish how often sex tourists are arrested in South Africa because these offenders are charged with indecent assault or rape and not on account of sex tourism. She describes the policing and criminal justice response to these cases as “fundamentally flawed”, and in some areas there has been little development in policing and court practice over the past few years.’<sup>127</sup>

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<sup>127</sup> Mans M ‘Sex tourism takes hold in South Africa’ available at <https://www.stormfront.org/forum/t213555-311/> (accessed 14 September 2015).



Linda Abhor, a child rights activist expressed that Child abusers are often not prosecuted because anal penetration is still considered to be indecent assault and not rape"<sup>128</sup>.Abhor further notes that she reported other incidents that happened in Cape Town, where an alleged sex tourist, a British Anglican priest Anthony Hogg, who sexually abused three children, the youngest being a 10-year-old boy. He was arrested and during a raid of his flat where he conducted the deeds pornographic material was found in the flat. He was arrested and appeared in court on charges of sexual assault. He was released on R1000 fine and is allowed to frequent South Africa as he pleases.

### **3.3.1.1. Issues emanating from the case:**

These cases transpired between 2005 and 2006, South African legislation that would have been applicable are the Child Care Act 74 of 1983.<sup>129</sup>

Burchell and Mitchell assert that: South African criminal law punishes forms of assault. The purpose of punishing indecent assault is primarily to protect the sexual autonomy, bodily integrity and dignity of a person<sup>130</sup>.

Snyman further argues that: sexual intercourse per anum between males; sodomy no longer is a crime. Post 1994 this interaction between males is no longer charged as sodomy but as indecent assault. Burchell and Milton further add that:

‘The fundamental issue is rather whether consent ought to be afforded recognition as a matter of public policy. In determining the bounds of public policy recognition should be had to various factors, including the nature and extent of harm as well as the age and relationship between the parties, especially if the conduct involves the exploitation of children.’<sup>131</sup>

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<sup>128</sup> Mans M ‘Sex tourism takes hold in South Africa’ available at <https://www.stormfront.org/forum/t213555-311/> (accessed 14 September 2015)

<sup>129</sup> Any person, who is convicted of an offence in terms of this section, shall be liable to a fine, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment

<sup>130</sup> Burchell JM & Milton J *Principles of Criminal Law* 3<sup>rd</sup> ed (2005) 165.

<sup>131</sup> Burchell & Milton *Principles of Criminal Law* (2005) 339.

Zimmerman pleaded guilty to indecent assault. Noted above, South African law carries a minimum sentence of 15 years for indecent assault against a minor. Zimmerman should have been prosecuted and received a harsher sentence than the punishment that he received.

And his judgment would be based on s 56 (2) (a) which states that:

‘Whenever an accused person is charged with an offence under (a) section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of 30 the offence and the accused person reasonably believed that the child was 16 years or older.’<sup>132</sup>

Whether the boy was 14 or 16 years old, Zimmerman been prosecuted in a South African court, he would have been charged for statutory rape under Act 32 of 2007. He would have also been charged under s 56 (7) (a) (b)

if a person is convicted of any offence under this Act, the court that imposes the sentence shall consider as an aggravating factor the fact that the person (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

The case highlighted the defects that exist within South Africa’s law with regards to the protection of children from sexual exploitation in particular the prosecution of adults who commit sexually exploitative crimes against children.

It is also indicative that at that point there was a need for improved legislature to address the sexual exploitation of children in tourism.

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<sup>132</sup> s 56(2) (a)

### 3.3.2. Case number two

Georg Kerkhoff, a priest from Germany based in a Catholic Church in the North-West province was extradited to Germany on charges of child sexual abuse.

He was transferred to South Africa from Germany in 2007. Prior, his transferal to South Africa in 2007, Kerkhoff was wanted for several sex crimes against children.

He resumed his activities in the North-West branch of the parish in 2007. It is in 2008 that he was accused of abusing five boys aged nine and ten years. He was prosecuted for five years in South Africa for charges brought against him relating to alleged sexual assault of these five boys in a church camp which took place in Gauteng in 2008.

#### 3.3.2.1. Issues emanating from the case

He was arrested and charged on seven charges in the Brits regional court, three of which are related to the sexual exploitation of children. These three sexual exploitation charges contravened s 5 (a)<sup>133</sup> of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Act'); three counts of compelling or causing three children to witness a sexual act (contravening s 2 (21) (1) and account of assault<sup>134</sup>.

Section 10 of the Immigration Act, addresses the issue of Temporary Residence. Section 10(4) asserts that: a visa is to be issued on terms and conditions that the holder is not or does not become prohibited as an undesirable person.<sup>135</sup> Furthermore, if Kerkhoff was a fugitive wanted in Germany for sex crimes against children.

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<sup>133</sup> The provisions of (a) section 2(2), (3), (4) and (5) relating to the circumstances in which an act which causes penetration is prima facie unlawful.

<sup>134</sup> *Kerkhoff v Minister of Justice and Constitutional Development and Others* [2010] (2) SACR 109 (GNP)

<sup>135</sup> s(30) (1) The following foreigners may be declared undesirable by the Director-General, as prescribed, and after such declaration do not qualify for a port of entry visa, visa, admission into the Republic or a permanent residence permit: (a) Anyone who is or is likely to become a public charge; (b) anyone identified as such by the Minister; (c) anyone who has been judicially declared incompetent; (d) an rehabilitated insolvent; (e) anyone who has been ordered to depart in terms of this Act; (f) anyone who is a fugitive from justice; (g) anyone with previous convictions, without the option of a fine for conduct which would be an offence in the Republic, with the exclusion of certain prescribed offences; and (h) any person who has overstayed the prescribed number of times.

South Africa should have picked it up and rejected his visa application and declared him as an undesirable person as per the Immigration Act of 2002 s 30(1) <sup>136(a)</sup> <sup>137(3)</sup><sup>138</sup>. It is argued that Kerkhoff did arrive with the correct paperwork as stipulated by the church.

Kerkhoff was prosecuted in South Africa from 2008 to 2013, until South African courts heard that Interpol sought to extradite him to Germany where he would be prosecuted for sex exploitation crimes committed to children Germany. His case in South Africa was dropped on preference by the National Prosecuting Authority (NPA) that he would be tried in his own country and was extradited to Germany in 2013.

He went to court in Germany and was found guilty of between 20 to 36 sexual crimes against children. He was sentenced to six years in a German prison.

From 2001 to 2006, Kerkhoff committed sexual crimes against children in Krefeld and Nettetal in Germany. South African authorities did not conduct thorough vetting prior to him coming into the country. As a result he was only vetted by the clergy when allegations of his sexual exploitation of children were raised.

The legislative process in this regard was compromised in that the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 makes provision for those found guilty of sexual offences against children to be prosecuted.<sup>139</sup>

Act 32 of 2007, in section 61 addresses issues that relate to extra-territorial legislation. The provisions in section 61<sup>140</sup> are relevant in the Kerkhoff case.

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<sup>136</sup> The following foreigners may be declared undesirable by the Director-General, as prescribed, and after such declaration do not qualify for a port of entry visa, visa, admission into the Republic or a permanent residence permit:

<sup>137</sup> Anyone who is or is likely to become a public charge.

<sup>138</sup> Anyone who is a fugitive from justice.

<sup>139</sup> 5.(1) A person ("A") who unlawfully and intentionally sexually violates a complainant ("B"), without the consent of B, is guilty of the offence of sexual assault. (2) A person ("A") who unlawfully and intentionally inspires the belief in a complainant ("B") that B will be sexually violated is guilty of the offence of sexual 20 assaults. (1) A person ("A") who commits an act of sexual violation with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child. (1) A person ("A") who unlawfully and intentionally engages the services of a child complainant ("B"), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person ("C")— (a) for the purpose of engaging in a sexual act with B, irrespective of whether the 20 sexual act is committed or not; or (b) by committing a sexual act with B, is, in addition to any other offence which he or she may be convicted of, guilty of the sexual exploitation of a child

<sup>140</sup> 61. (1) Even if the act alleged to constitute a sexual offence or other offence under this Act occurred outside the Republic, a court of the Republic, whether or not the act constitutes an offence at the place

They are relevant because they imply that Kerkhoff under s 61 (1) (c) was supposed to have been prosecuted and a judgment passed on the sexual exploitation that he committed on young boys.

Amongst other charges that Kerkhoff should have been prosecuted for is statutory rape, which is defined in section 15(1) of Act 32 as: A person ("A") who commits an act of sexual penetration with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child<sup>141</sup>. Furthermore, charges of sexual grooming<sup>142</sup> of the young boys should have been levelled against Kerkhoff.

Both cases indicate various legislative gaps<sup>143</sup> in these sexual offences for being prosecuted and sentenced in a court of law in South Africa. Child sex tourism as a form of sexual abuse and sexual exploitation is a violation of international, regional and domestic conventions and laws that seek to protect the rights of the child.

Prior 2005, South Africa's legal system grappled with the sentencing of child sex offenders.

Law has been there on how CSEC cases should be processed. However application of this law into practice is where the challenge lies in the South Africa criminal justice system. Act 13 of 1999 and Act 32 of 2007, are direct in terms of the application of the sentencing of those found guilty of sexually exploiting children, but perhaps there should be a proviso that the sentence should be stringent.

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of its commission, has, subject to subsections (4)<sup>140</sup> and (5)<sup>140</sup>, jurisdiction in respect of that offence if the person to be charged: (c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed; (2) Subject to subsections (4) and (5), any act alleged to constitute a sexual offence or other offence under this Act and which is committed outside the Republic by a person, other than a person contemplated in subsection (1), is, whether or not the act constitutes an offence at the place of its commission, deemed to have been committed in the Republic if that— (a) act was committed against a person referred to in paragraphs (a) or (b) of subsection (1); 5 (b) person is found in the Republic

<sup>141</sup> s15(1)

<sup>142</sup> s 18

<sup>143</sup> These would include a lack of legislative will to prosecute those who have pleaded guilty to the violation of children in South Africa. Indecent assault as pleaded to by Zimmerman, is a serious offence that should have been prosecuted. The challenge also relates to the absence of the victim, which affects the operation of the case and the prosecution of the accused. Prosecution on the contravention of laws relating to the witnessing of sexual acts s 2 (21) (1) and s 55 (a) of the Criminal Laws Amendment Act. Prosecution on the contravention of extra territorial legislation s 61(1) (c). Primarily, the legislative gaps are in relation to the prosecution of those who have admitted to a crime but will be released without a prosecuted but will be given a warning of a fine as punishment.



### **3.4. Current legislative amendments which are underway with regards to the sexual exploitation of children. I.e. the Children's Amendment Bill [B13 of 2015] and Act No. 5 Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2015.**

The Children's Amendment Bill [B13 of 2015] and the Children's Second Amendment Bill [B14 of 2015], were tabled in both a National Assembly (NA) sitting on the 20<sup>th</sup> May 2015 by the Minister of Social Development in terms of Joint Rule 159. They were adopted on the 30<sup>th</sup> August 2016 in the National Assembly and both bills were sent to the National Council of Provinces (NCOP) for concurrence. However, B14 was the relevant Bill because it's an s76 Bill<sup>144</sup> needed to be deliberated in all Provincial Legislatures, negotiating and final mandates sent to the NCOP through their NCOP deployees.

In his presentation to the National Assembly's Portfolio Committee on Social Development as well as the NCOP Select Committee on Social Services, the Director of Legal Services of the Department of Social Development, Siyabonga Shoji asserted that:

'The Children's Amendment Bill was seeking to introduce the following amendment (i) to insert a definition of sexual offence, thereby aligning the Children's Act to the Sexual Offences Act, (ii) to create a deeming provision in section 120, thereby making it easier to detect adult offenders unsuitable to work with children.'<sup>145</sup>

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<sup>144</sup> Bills that affect the provinces are generally those that relate to areas of shared national and provincial legislative competence, such as Health, Education, etc. The NCOP endeavours to finalise these Bills at least within the six-weeks to enable active public involvement and to allow sufficient time for provinces to confer mandates on their delegations. These Bills are dealt with in terms of the procedure prescribed in section 76 of the Constitution. When deciding on Bills affecting provinces the provincial delegations vote in accordance with the mandate conferred on them by their respective provincial legislatures. Each province has one vote. A section 76 Bill is agreed to if at least five provinces vote in favour of the Bill.

<sup>145</sup> Portfolio Committee on Social Development, *Children's Amendment Bill and Children's Second Amendment Bill*: Departmental briefings, (2015).

### 3.4.1. Portfolio Committee on Social Development

The Portfolio Committee held public hearings on the B13 of 2015 (relevant for the paper) were convened on the 2<sup>nd</sup> and the 4<sup>th</sup> of September 2015 in the parliamentary chambers. The bill drew the interests of various stakeholders in the field of children's rights.

The predominant view from all the submissions by stakeholders was an agreement to the proposed amendment of s120. This is because the proposed amendments to this section are a significant in ensuring that children are protected from persons who have committed crimes. As well as ensuring that child offenders do not unjustifiably have their names entered into part B of the National Child Protection Register (NCPR).

Part B of the NCPR, is a repository of persons are unsuitable to work with children. The information in the register is used to protect children against abuse by these people. An observation noted is the lack of clarity is whether those foreigners who come into the country and sexually abuse children in South Africa are categorised into the register.

The Children's Act notes that should be part of the register in s120 (a)<sup>146</sup> (b)<sup>147</sup> (c)<sup>148</sup> s120 (4)<sup>149</sup> (a)<sup>150</sup> (b)<sup>151</sup> 120 (5)<sup>152</sup>. These clauses in the Children's Act constitute crimes that must have been committed for an individual in order to be deemed unsuitable to work with children. Additionally, it also outlines the procedures followed mainly by a court to deem an individual to be unfit to work with children. As well as the procedure that leads to one finding their names on the National Child Protection

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<sup>146</sup> A finding that a person is unsuitable to work with children may be made by a children's court;

<sup>147</sup> Any other court in any criminal or civil proceeding in which that person is involved; or

<sup>148</sup> Any forum established or recognised by law in any disciplinary proceedings concerning the conduct of that person relating to a child.

<sup>149</sup> In criminal proceedings, a person must be found unsuitable to work with children

<sup>150</sup> On conviction of murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child; or

<sup>151</sup> If a court makes a finding and gives a direction in terms of section 77 (6) or 78 (6) of the Criminal Procedure Act, 1977 (Act 51 of 1977) that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, indecent assault with the intent to do grievous bodily harm with regard to a child

<sup>152</sup> Any person who has been convicted of murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child during the five years preceding the commencing of this Chapter, is deemed to have been found unsuitable to work with children.



Register. This poses as a challenge with those cases that involve foreigners who don't get charged for these crimes or who are charged and don't get convicted.

The challenge is that the clauses do not provide guidance in terms of is it only South African citizens who are affected by the National Children Protection Register or is it generally applicable to all who are found guilty the crimes defined in the clauses.

The understanding is that all who commit the crimes provided for in the register should be placed in the Register so that they do not work with children because of the potential harm that they are to children. The main concern is on international child sex offenders (through CSEC) who get away with the perpetual sexual abuse of South African children because of the law or lack thereof that seems not to provide adequate provisions to prosecute international sex offenders.

Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2015 Act No.5 of 2015, amends two sections (s15 and 16) of Chapter 3 of Act 32 of 2007 which addresses sexual offences against children. s (17) could have also been amend so that harsher measures are applied to foreigners who sexually exploit children for commercial purposes.

#### **3.4.2. Select Committee on Social Services**

The Select Committee on Social Services dealt with B14 because as aforementioned it is an s76 bill so it was facilitated by the Select Committee through the provinces (through the Provincial Legislatures). The Bill had been referred to the Committee on 13 August 2015, and having deliberated on the Bill after it was referred by National Assembly, s76, and classified by the Joint Tagging Mechanism (JTM) as such (s76), it was reported to have been agreed to as a Bill. The final mandates of all of the provinces supported and were in favour of the B13. These final mandates were signed by the Speakers of all Provincial Legislatures. The Select Committee voted in favour of the amendment bill.

However, the B13 which is the relevant Bill for the paper, because it's a s75 bill there were no public hearing submissions or comments on this Bill, so the Committee had nothing consider. The committee therefore voted and concurred to the amendment bills.

### 3.5. Conclusion

The chapter sought to address the question: 'to what extent is the legislative framework of South Africa protecting children from being sexually exploited through tourism. Case law has been referred to in the chapter to ascertain the extent of this question. The summation of this chapter infers that, it is to a limited extent that South Africa's legislative framework protects children from being sexually exploited through tourism. The section identified the gaps that exist in South Africa's legal framework. Chapter four notes that there is room for legislative improvement and thus the recommendations are made in that chapter.



## Chapter 4: Conclusion

### 4.1. Conclusion

The paper sought to assess the extent to which the legislative framework of South Africa is protecting children from being sexually exploited through international travel and tourism. In order to answer the abovementioned question the paper further enquired: How South Africa is complying with its international law obligations? What gaps exist in South Africa's legislative framework in protecting children from child sex tourism? And what legislative matters need to be undertaken to prevent and address child sex tourism?

One of the biggest challenges noted in existing literature on CST are the existing gaps between domestication of international law into national law and implementing these. As noted in the latter part of chapter three the formulation of a shared understanding of CST holistically<sup>153</sup> not only by those in the children's rights field but also of society is crucial in comprehending CST. What is of particular importance to the paper is the practical existence of protective measures<sup>154</sup> to protect children from being sexually exploited through . These include the strengthening of legislation particularly its implementation, training of not only police, but also of those that are dealing with children's rights and society at large.

Although committed to the protection of children in theory<sup>155</sup>, South Africa has been challenged in protecting its children due to this rapidly evolving phenomena. South Africa's laws have not been able to grasp the extent of child sexual exploitation in particularly CST. Thus its laws need to continuously be reviewed and enhanced so that they not only in theory, but pragmatically demonstrate the country's ability to protect its children.

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<sup>153</sup> What are its components, what is its relation to CSEC and the other components of CSEC

<sup>154</sup> This have been engaged with in chapter three

<sup>155</sup> This is demonstrated through the country's political will to protect its children.

The conclusion of the paper is that it is to a limited extent that South Africa's legislative framework protects children from being sexually exploited through tourism. Chapter three demonstrates that South Africa has been complying with its international law obligations to a certain extent, however as argued the challenge remains in the implementation of laws to prevent and protect children from being exploited through the various forms of sexual exploitation in particular CST.

## **4.2. Legislative amendments which have been undertaken with regards to the sexual exploitation of children**

South Africa's laws need to be reviewed so that they are able to address the legislative gaps identified in chapter three. These being: South African legal instruments have minimal provisions that address the prevention of sexual offences against children. Critical to this, is the lack of provisions that address child sex offenders. They are instead grouped together under the ambit of the criminalisation of all sexual abuse of children; there is no specific criminalisation of child sex tourist offenders.

### **4.2.1. The recommended timeframe for the implementation of the legislative recommendations is as follows:**

#### **4.2.1.1. Short term (immediate)**

- (i) It is of significance that coherent and concise definitions are developed and agreed to, to prevent legislative gaps, ineffective prevention and promotion mechanisms as well as align domestic legislation with international legal obligations. Child sex tourism, is referred to as CSEC, sexual exploitation or sexual abuse in legal instruments. It is not defined as or referred to as CSEC in tourism. Some documents defined it as falling within the ambit of CSEC, along with child pornography, and child trafficking. South Africa is not immune to this challenge. The content of what constitutes CSEC is applicable to child sex tourism, child pornography and child trafficking. However, CST is specific as aforementioned in definitions in the paper.

(ii) South African legal instruments need to be lucid in how they address the prevention of the various forms of child sexual exploitation, including CST which is a component of CSEC. Critical to this, are the lack of provisions that address child sex offenders. They are instead grouped together under the ambit of the criminalisation of all sexual abuse of children, there is no specific criminalisation of child sex tourist offenders. It must also be noted that because they are not charged on account of child sex tourism, but rather with indecent assault or rape it is difficult to establish the frequency of child sex tourist's arrests in South Africa. Convictions of child sex tourists who are foreigners are still a challenge to identify in South Africa. There needs to be an improvement of conviction rates. The *Optimus Study South Africa: Technical Report on the Sexual victimisation of children in South Africa* notes some of the challenges which when improved upon will improve the conviction rates.<sup>156</sup>

(iii) One of the issues that needs to be addressed is that South Africa's legislation does not express who is considered as a child sex offender. This is fundamental as it should be able to assist in identifying based on a legislated definition which assists in defining who constitutes what and who is a child sex offender including travelling sex offenders.

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<sup>156</sup> UBS Optimus Foundation (ed), *Optimus Study South Africa: Technical Report Sexual victimisation of children in South Africa Final report of the Optimus Foundation Study: South Africa'* (2016) 60.

Cases could take a very long time to be resolved, resulting in a host of issues, including the victim being unable to remember clear details of the incident, the court environment was generally not child friendly, and this meant the testimonies provided by children were often quite poor. Part of the problem was that prosecutors did not adapt their style of questioning for children, expecting children to show the same kind of consistency in their testimony as they would an adult. The court process could also be hugely difficult and taxing on a child, as well as extremely intimidating.

In addition

Improvement in the quality of conviction rates can be demonstrated through children that were victimized should be tracked down and protected, they must receive the necessary support to deal with the sexual exploitation. Police as well as those that are interacting with child need to take into cognizance that they must understand the child so that interrogation and investigation is conducted in a manner which is in the best interests of the child. It does not inflict harm to the child's wellbeing. This will assist greatly in ensuring that the victimized child is tracked, protected and appear in court to give their view on the victimization that has committed to them. To enable the child sex offender is prosecuted.

- (iv) Whilst legislation exists to address CSEC, the majority of the public might be unknowledgeable about their legal responsibility to report cases relating CSEC. This responsibility is also applicable to those that operate in the tourism industry. Reporting of CSEC is mandatory and is prescribed in South African law. The challenge that exists legislatively, is the complex nature of reporting, especially when it comes to which reporting authority should be approached.<sup>157</sup>



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<sup>157</sup> For instance, the Children's Act in s 110(10) requires that cases relating to abuse and neglect are reported to Child Protection organisations, the Department of Social Development or the police. Whereas, Chapter 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 41 of 2007, the Films and Publications Act No. 65 of 1996, and the Prevention and Combatting of Trafficking in Persons Act No. 7 require that cases of sexual exploitation of children, child pornography and the trafficking of children for sexual purposes are reported directly to the police.



- (v) The Children's Act clarifies in chapter 7 part 1 ss (4)<sup>158</sup> (5)<sup>159</sup> (6) <sup>160</sup>(7) <sup>161</sup>(8)<sup>162</sup> and Chapter 4 s 18(4)<sup>163</sup> of the Prevention and Combatting of Trafficking in Persons Act No. 7 clarifies the role of those listed reporting authorities, however the Films and Publications Act No. 65 of 1996, and the Prevention and Combatting of Trafficking in Persons Act No. 7 do not clarify the roles of the reporting authorities. This should be corrected so that the identified reporting authorities are clarified on their legal responsibilities upon receiving a CSEC related case.

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<sup>158</sup> s 110 ss (4) A police official to whom a report has been made in terms of subsection (1) or (2) or who becomes aware of a child in need of care and protection must (a) ensure the safety and well-being of the child concerned if the child's safety or well-being is at risk; and (b) within 24 hours notify the provincial department or a designated child protection organisation of the report and any steps that have been taken with regard to the child.

<sup>159</sup> s 110 (5) The provincial department of social development or designated child protection organisation to whom a report is made must (a) ensure the safety and well-being of the child concerned, if the child's safety or well-being is at risk, (b) make an initial assessment of the report, (c) unless the report is frivolous or obviously unfounded, investigated the truthfulness of the report or cause it to be investigated, (d) if the report is substantiated by such an investigation, without delay initiate proceedings in terms of this Act for the protection of the child; and (e) submit such particulars as may be prescribed to the Director- General for the inclusion in Part A of the National Child Protection Register.

<sup>160</sup>s 110 (6) (a) A designated child protection organisation with whom a report has been made in terms of subsection (1), (2) or (4) must report the matter to the relevant provincial department of social development. (b) The provincial head of social development must monitor the progress of all matters reported to it in terms of paragraph (a).

<sup>161</sup> s 110 (7) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) may (a) take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation; (b) if he or she satisfied that it is in the best interest of the child not to be removed from his home or place where he or she resides, but that the removal of the alleged offender from such home or place would secure the safety and well-being of the child, request a police official in the prescribed manner to take the steps referred to in section 153; or (c) deal with the child in the manner contemplated in sections 151, 152 or 155.

<sup>162</sup>s 110 (8) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in sub-section (5) must report the possible commission of an offence to a police official.

<sup>163</sup> s 18(4) A police official to whom a report has been made in terms of subsection (1) or section 8(1)(b) or (2)(b)(i) or 9(2) in respect of a child or a police official who knows or ought to reasonably to have known or suspected that a child is a victim of child trafficking (a) may where necessary, and despite the proviso contained in the Criminal Procedure Act, without warrant, enter any premises if he or she, on reasonable grounds, believes that the safety of the child is at risk or that the child may be moved from those premises and may use such force as may be necessary to overcome any resistance against entry to the premises, including the breaking of any door or window of those premises, on condition that the police official must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter those premises; (b) must deal with that child in terms of section 110(4) of the Children's Act, pending a police investigation into the matter; and (b) must deal with that child in terms of section 110(4) of the Children's Act, pending police investigation into the matter, and (c) may place that child in temporary safe care in terms of section 152 of the Children's Act, pending the transfer of the child to a designated child protection organisation of provincial department of social development/

- (vi) South Africa needs to review its laws (Children's Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act) 111 to strengthen them, train those officials who handle these cases so that they are well equipped and South African courts need to apply South Africa's law stringently on those who are child sex offenders. The legislative measures for instance on the amendments to the Children's Amendment Bill and Criminal Law (Sexual Offences and Related Matters) Amendment Act could have been more bold with regards to the prosecution of international child sex offenders. The major challenge is bringing the case to court, and the child is central in the case.
- (vii) The Criminal Law (Sexual Offences and Related Matters) Amendment Act addresses extra-territorial jurisdiction under section 61. Extra-territorial jurisdiction addresses the offences that a national of a particular country commits in a foreign country. Besides the extradition agreements that countries have amongst each other, there needs to be a provision in international conventions in this regards the CRC and its OPSC which states that any foreigner found committing or is part of any offence committed relation to the sexual exploitation of the child (including CSEC of which CST is part of) will be prosecuted immediately. This process would include informing the country of origin of the foreigner so that it is aware of the offence committed.

The legislative measures on the amendments to the Children's Amendment Bill and Criminal Law (Sexual Offences and Related Matters) Amendment Act could be bolder with regards to the prosecution of travelling sex offenders. The major challenge is bringing the case to court, because the child is central to the case. This means that the legislation needs to ensure that these child sex offenders are not permitted to return to South Africa. Bail needs to be set out for those that are found guilty, civil penalties also need to be implemented. The existing commitment from the hotel sector with regards to their fight against child sex tourism needs to be included into law, extra-territorial legislation needs to be strengthened to ensure that child

sex tourists are prosecuted for their actions. This could be done through the Passive Personality Principle.<sup>164</sup>

- (viii) The role of the private sector remains critical. There have been progressive strides made by the tourism sector through Fair Trade Tourism to combat and prevent CST, hence the signing of 'The Code'. However, there is room for the improvement, such as ensuring that those in the private sector that have not signed 'The Code' support and sign it. What remains critical is ensuring that the six commitments in 'The Code' are adhered to. Linked to reporting annually on the implementation of Code related activities should be a continuous monitoring and evaluation of this implementation.

The media (includes all forms of media) is an instrument that could also be used constructively to educate society about the scourge of not only CST, but CSEC in general thus assisting to fight the sexual exploitation of the child. Financial institutions should be encouraged and pursued to assist in the fight against CST.

Their contributions could be in the form of banning the use of their facilities such as (cheque and credit cards, cellphone and internet banking) from being used in actions such as CST and other forms of CSEC. These facilities could also be used to track down those who partake in these activities

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<sup>164</sup> The Principle prescribes that a State may assert jurisdiction on the basis of the nationality of the victim. It derives from the ideas that a State must protect its own nationals, even when they are living or travelling abroad. In practice this means that State A could prosecute a crime committed by a national of State B against a child who is a national of State A. Even if the offence was committed outside the borders of State A.

#### 4.2.1.2. Medium term

- (i) Part B of the National Child Offenders Register both in the Children's Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act need to reflect South Africa's stance with regards to international child sex offenders, particularly travelling sex offenders. The proposal would mean that South Africa needs to ensure that it globally pursues and lobbies that the principle of double criminality is abolished to ensure that those foreign child sex offenders that commit these offences are prosecuted are charged and prosecuted in their own countries. Double criminality may constitute a significant obstacle to the prosecution of child sex tourists.<sup>165</sup>
- (ii) South Africa also needs to increase extradition agreements with other countries to ensure that those foreign child sex offenders that are caught engaging in CST in South Africa in the absence of the principle of double criminality are extradited back into the country to be prosecuted.
- (iii) All three spheres of South Africa's State must work together to ensure that the country's children are protected. Parliament as the legislative arm of the state should ensure that it exercises its oversight role over the executive to ensure that as per its international conventions and domestic laws it implements what it has committed to. This means that there needs to be an effective monitoring and evaluation system that tracks the implementation of laws committed to.

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<sup>165</sup> Beaulieu C, ECPAT International: 'Extraterritorial Laws: Why they are not working and how they can be strengthened.' (2008) 12.

For instance, an offender of country A, where laws protect children up to the age of 18 and where the double criminality requirement is upheld, travels to country B, where children are protected up to the age of 15, and there abuses a child aged 16. Although the act amounts to a crime according to the legislation of country A, the courts of that country would be barred from criminally prosecuting the offender since the act does not amount to a crime in the legal system of country B.

This coordinated work would also include the Chapter Nine institution, the South African Human Rights Commission (herein referred to as the SAHRC)<sup>166</sup> whose mandate is derived from s 184<sup>167</sup> from the Constitution. The SAHRC is critical in the protection of children, not only because it is a Chapter Nine institution but General Comment 2<sup>168</sup> of the CRC mentions the role of the National Human Rights Institutions in promoting the rights contained in the CRC but also within the commission's structures is its portfolio that has a foci on Children's Rights and Basic Education (herein referred to as the portfolio), that has a mandate to promote, protect and monitor the realisation of children's rights, including the right to basic education. This portfolio benefits from the counsel of an Advisory Committee, which advises the SAHRC on matters and interventions relating to children's rights<sup>169</sup>.



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<sup>166</sup> As a stakeholder of the initial 1994 Inter-ministerial Cabinet Committee's Steering Committee that was formed to oversee the development of the Government-led NPA process.

<sup>167</sup> 184. (1) The South African Human Rights Commission must— (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic. (2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power— (a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to educate. (3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. (4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

<sup>168</sup> CRC Committee, *General Comment No. 2 The role of independent national human rights institutions in the promotion and protection of the rights of children* 2002 Committee on the Rights of the Child CRC/GC/2002/2 (2002)

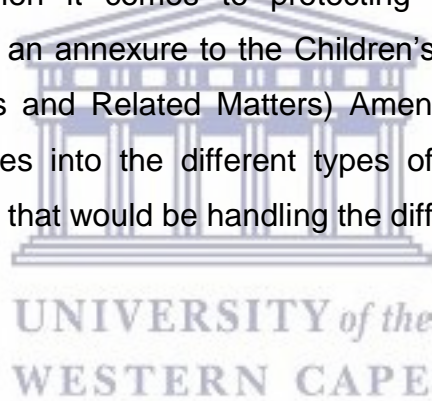
<sup>169</sup> South African Human Rights Commission: 'Children's Rights and Basic Education'; available <http://www.sahrc.org.za/index.php/focus-areas/children-s-rights-and-basic-education> (accessed 27 October 2016)



In 2014 this portfolio hosted a roundtable discussion<sup>170</sup> which reflected on the measures taken by South Africa to protect its children within the context of the 25<sup>th</sup> anniversary of the CRC. Among the challenges that were noted in the roundtable discussion was the challenge on child abuse and sexual violence, a lack of a national coordinator and integrated programmes and intervention, and the Monitoring and reporting on government progress and accountability issues.

The roundtable made the following recommendations<sup>171</sup> and noted that over seventy countries in the world have national ombudsman for children, South Africa should consider the same.

- (iv) Perhaps, what also is missing is the absence of a domestic regulatory framework that would assist government to implement its legislative commitments when it comes to protecting the child. This could be demonstrated as an annexure to the Children's Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act that addresses CSEC, and delves into the different types of CSECs, gives legislative direction to those that would be handling the different types of CSECs.



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<sup>170</sup> The objective of the roundtable was to reflect on South Africa's successes and failures in the context of the UNCRC, as well as review the country's progress with a view to suggesting ways forward to address shortcomings.

<sup>171</sup> There is a need for political will at the highest level to fulfil CRC; Children must be a national priority; South Africa has begun to erode a number of gains and there needs to be a discussion around that; National plan of action for children there is a need to look at that and how it equates to the national development plan 2030 this needs to be rolled out; Address gaps and challenges effectively; Effective resource allocation; Policy guidelines child participation in public decision making and progress chapter 9 institutions can do a lot around developing policy on this for government departments - Revive earlier proposals on ombudsperson for children, and have constructive dialogue on that Finally, we need to agree on how we move forward.



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## 6. ANNEXURE A

Country of Origin	Date of Arrest	Age	Gender	Profession	Details	Conviction/Status
Germany	2013	50+	M	Church Priest	The accused was arrested for acts of indecency were allegedly committed in 2008 on four boys aged nine and 10, some of German origin, who attended a German-language youth camp near Johannesburg. <a href="http://www.timeslive.co.za/local/2013/09/21/south-africa-frees-german-paedophile-suspect-on-bail">http://www.timeslive.co.za/local/2013/09/21/south-africa-frees-german-paedophile-suspect-on-bail</a>	After hearing in November 2013 hearing, the accused was extradited to Germany.
United States	2011	33	M	U.S. Peace Corps Volunteer	While volunteering at an NGO, the offender enticed four young girls, all of whom were under the age of six, to engage in illicit sexual acts with him. He persuaded the children to engage in this conduct by playing games with them and providing them with candy. He sexually abused one of the victims approximately two times a week over the course of approximately five months.	180 months in prison, followed by 10 years of supervised release.

					<a href="http://www.ice.gov/news/releases/1210/121011johannesburg.htm">http://www.ice.gov/news/releases/1210/121011johannesburg.htm</a>	
<b>United Kingdom</b>	2005	52	M	Church Priest	<p>The accused visited and volunteered at street-children organisation in Cape Town where he was accused of</p> <p>Sexually abusing three children, the youngest being a 10-year-old boy. Pornographic material was found at his flat. The accused denied the charges.</p> <p><a href="http://www.oxfordmail.co.uk/news/766994.popular_priest_to_deny_sex_charge/">http://www.oxfordmail.co.uk/news/766994.popular_priest_to_deny_sex_charge/</a></p>	<p>Pleaded not guilty.</p> <p>Released</p> <p>By the court for R1 000 bail.</p> <p>Permitted to return to UK also free to return to South Africa.</p>
<b>Germany</b>	2005	64	M	Businessman	<p>Police identified that the accused sexually abused eight girls all under 16 years old. The victims claimed they'd been abused for over two years, forced to perform indecent sexual acts with the accused at multiple venues. Some of the girls, who all come from poor families, were apparently only 11 at the time.</p> <p><a href="http://www.iol.co.za/news/south-africa/state-eyes-car-of-">http://www.iol.co.za/news/south-africa/state-eyes-car-of-</a></p>	<p>The accused fled to Namibia before arrest. The Western Cape High Court declared that vehicle which belonged to the accused be forfeited to the State as it was instrumental in the offences.</p>

					alleged-child-sex-offender-1.489340#.Uo_evuK_  AYE	
<b>Switzerland</b>	2005	46	M	Tourist	The accused (a self-confessed paedophile) was caught having intercourse with a 14-year-old Alexandra boy in his Sandton hotel room in 2005. Police confiscated pornographic material, a laptop computer and cell phone. Media later identified four additional child victims (mostly street children) who had been sexually abused by the accused.  <a href="http://www.iol.co.za/news/south-africa/swiss-sex-tourist-facing-civil-claim-1.264796#.UpGIR-K_AYF">http://www.iol.co.za/news/south-africa/swiss-sex-tourist-facing-civil-claim-1.264796#.UpGIR-K_AYF</a>	The accused was released on R10 000 bail.

Annexure A<sup>172</sup>

Annexure A is an indication of CSEC cases and how South Africa falls short of legislatively punishing those that sexually abuse South Africa children.

The above mentioned cases indicate that South Africa's laws needs to be enhanced. It is noted that in the recent years from 2010, there have been stringent measures that have been applied to those that have been arrested and charged on sexual assault cases. However, the challenge still remains with the implementation of law which ensures that those who are caught sexually exploiting underage children are charged prosecuted and are punished for their conduct.

<sup>172</sup> Van Niekerk J & Mancama Don't Look Away Be Aware and Report the Sexual Exploitation of Children in Travel and Tourism, (2013) ECPAT Germany 25.



Hawke and Raphael argue that: very low levels of prosecution for SECTT<sup>173</sup> crimes were attributed to two main factors: corruption in the judicial system and reluctance among victims to report cases or testify, due to fear or reprisals or belief that they themselves are responsible for the crime.<sup>174</sup> Out of the five cases listed below, it is in only one case that a travelling sex offender is charged, prosecuted and is stringently punished for his actions.

Progress has been made by various stakeholders to ensure that all forms of sexual exploitation of children are criminalised. However, stringent mechanisms need to be established to ensure that the judicial system and the law enforcement sector ensure effective laws and stringent enforcement mechanisms so that child sex tourism is prevented, children are protected and that offenders are harshly punished.



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<sup>173</sup> Sexual Exploitation of Children through Travel and Tourism

<sup>174</sup> Hawke A & Raphael A *The Global Study Report on Sexual Exploitation of Children in Travel and Tourism* (2016) 45.