

# International Child Sex Tourism: A South African Perspective

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## Abstract

After explaining the nature and extent of the problem of child sex tourism, this article identifies the relevant instruments of international law, before discussing the legal tools available in South Africa to deal with this issue.

## INTRODUCTION

International tourism has a long history,<sup>1</sup> but only started on a large scale after the Second World War.<sup>2</sup> It is very widely seen as a beneficial activity for tourists because “[i]t satisfies a deep need for encounters and exchanges with other cultures, for escape, health and social progress”.<sup>3</sup> It can also be argued that,

“[i]n an age when the media dominates and shapes our views of the world, ... we have no better way to understand the global crisis that we face than through people-to-people communication. Through firsthand, one-on-one meetings with people we encounter in our travels, we discover universal themes of human culture. We become aware that no matter where we live, we are all confronting similar situations.”<sup>4</sup>

This consensus disappears however with regard to the impact of international tourism on the destinations. Advocates of tourism stress that international tourism is “an earner of foreign exchange for participating countries[,] a source of new income, a promoter of a wide range of businesses and professions, a very significant base for the development of small and medium enterprises, a stimulus to job creation, a support for poor regions and

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1 See for instance LE Hudman and DE Hawkins *Tourism in Contemporary Society* (1989, Englewood Cliffs) at 8–14, as well as CR Goeldner and JRB Ritchie *Tourism. Principles, Practices, Philosophies* (2006, John Wiley & Sons) at 39–72.

2 See SJ Page and J Connell *Tourism. A Modern Synthesis* (2006, Thomson) at 35.

3 F Vellas and L Bécherel *International Tourism. An Economic Perspective* (1995, St Martin's Press) at xxii.

4 D McClaren *Rethinking Tourism and Ecotourism* (2003, Kumarian Press) at xiv.

locations within countries and a replacement for declining or lost enterprises".<sup>5</sup>

Proponents also point out non-economic benefits such as the financing of cultural facilities and activities, an improvement in land use and transportation patterns as well as "a greater environmental awareness and sense of cultural identity by residents when they see tourists enjoying the local environmental, historical and cultural heritage".<sup>6</sup> As far as they are concerned, critics highlight a whole range of political, social, cultural, economic and environmental problems.<sup>7</sup> One of the problems which is most "emotive and prone to sensationalism"<sup>8</sup> is the extent to which international tourism contributes to the sexual exploitation of children.

After explaining the nature and extent of the problem, this article identifies the relevant instruments of international law, before discussing the legal tools available in South Africa to deal with this issue.

## NATURE AND EXTENT OF INTERNATIONAL CHILD SEX TOURISM

As Robinson stresses,

"[s]ex has always been part of the tourism industry, be it in the form of the naughty postcard, the holiday romance, the dirty weekend or the inebriated post-disco fumbblings of eighteen to thirty year olds in a hotel room somewhere in Benidorm. Sex in this sense is accepted (within limits!), although it is clearly not an aspect that most tour operators advertise."<sup>9</sup>

Such practices are however seen in a very serious light when they involve the sexual exploitation of minors.<sup>10</sup>

5 D Jeffries *Governments and Tourism* (2001, Butterworth-Heinemann) at 21.

6 World Tourism Organization (UNWTO) *Guide for Local Authorities on Developing Sustainable Tourism* (1998, UNWTO) at 29.

7 See for instance S Britton "Tourism, dependency and development" in S Williams (ed) *Tourism. Critical Concepts in the Social Sciences* (2004, Routledge) vol III at 29; A-M d'Hauterres "Postcolonialism, colonialism, and tourism" in AA Lew, CM Hall and AM Williams (eds) *A Companion to Tourism* (2004, Blackwell Publishing) 235 at 235; P Roper "The case against tourism: Doubters and sceptics" in Jeffries *Governments and Tourism*, above at note 5, 27 at 30.

8 CM Hall "Sex tourism in south-east Asia" in D Harrison (ed) *Tourism and the Less Developed Countries* (1992, John Wiley & Sons) 64 at 64.

9 M Robinson "Holiday sex for sale: Money back guarantees?" (1995) *Travel Law Journal* 13 at 13. See also J O'Connell Davidson "Child sex tourism: An anomalous form of movement?" (2004) 12 *Journal of Contemporary European Studies* 31 at 31; C Ryan and R Kinder "Sex, tourism and sex tourism: Fulfilling similar needs?" (1996) 17 *Tourism Management* 507 at 507. Nevertheless, "the issue of sex tourism is an uncomfortable one for tourism industry groups": K Kempadoo and R Ghuma "For the children. Trends in international policies and law on sex tourism" in DL Rhode and C Sanger (eds) *Gender and Rights* (2005, Ashgate) 503 at 509.

10 This is despite the fact that "children who trade sex do not all alike conform to dominant

International child sex tourism has an opportunistic facet and a premeditated one. The former involves tourists who do not travel to a foreign destination for sex purposes, but make use of opportunities when they present themselves. The latter involves tourists who do travel to a foreign destination for the main, and often only, purpose of engaging in sex with juveniles.<sup>11</sup>

International child sex tourism has a long history.<sup>12</sup> However, the practice has developed substantially during the last few decades as it feeds, in the context of globalization,<sup>13</sup> on poverty, the growth of consumerism, an increase in travel opportunities and internet access,<sup>14</sup> weak law enforcement<sup>15</sup> as well as racist fantasies on the hypersexual nature of the inhabitants of developing countries.<sup>16</sup> The issue rose to political prominence during the 1990s<sup>17</sup> as a result, among others, of the public-awareness campaigns mounted by ECPAT,<sup>18</sup> a network of organizations and individuals working together to eliminate the commercial sexual exploitation of children.<sup>19</sup> It remains nevertheless very difficult to assess exactly how many children are involved. On the one hand, it is clear that the magnitude of the phenomenon has been exaggerated in some instances.<sup>20</sup> On the other hand, there is little doubt that the victims of child sex tourists constitute a sizeable proportion of the more than one million children that enter the global commercial sex trade every

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models of the 'innocent victim': J O'Connell Davidson *Children in the Global Sex Trade* (2005, Polity) at 60.

- 11 J Sánchez Taylor "Dollars are a girl's best friend? Female tourists' sexual behaviour in the Caribbean" (2001) 35 *Sociology* 749 at 749 and 761 argues that, although "[t]he stereotypical image of the 'sex tourist' is that of the Western man who travels to Thailand or the Philippines in order to pay for sex with Go Go bar/brothel prostitutes", one should not overlook "the complex and contradictory interplay between gendered, raced and economic power" which also shapes the sexual experiences of female tourists with locals.
- 12 See HC Giordanella "Status of 2423(b): Prosecuting United States nationals for sexually exploiting children in foreign countries" (1998) 12 *Temple International and Comparative Law Journal* 133 at 136.
- 13 See J Seabrook *No Hiding Place. Child Sex Tourism and the Role of Extraterritorial Legislation* (2000, Zed Books) at xi.
- 14 See A Fraley "Child sex tourism legislation under the PROTECT Act: Does it really protect?" (2005) 79 *St John's Law Review* 445 at 454–56.
- 15 See K Jullien "The recent international efforts to end commercial sexual exploitation of children" (2003) 31 *Denver Journal of International Law and Policy* 579 at 584.
- 16 See O'Connell Davidson "Child sex tourism", above at note 9 at 40.
- 17 As illustrated by the World Congress Against the Commercial Sexual Exploitation of Children held in Stockholm on 27–31 August 1996, and which ended with the unanimous adoption of a declaration and agenda of action. See Giordanella "Status of 2423 (b)", above at note 12 at 143–47.
- 18 End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes.
- 19 This is after the concept of "sex tourism" was identified by "feminist research and action around prostitution in Southeast Asia in the 1980s": Kempadoo and Ghuma "For the children", above at note 9 at 503.
- 20 See O'Connell Davidson "Child sex tourism", above at note 9 at 34.

year.<sup>21</sup> South Africa is also affected, with foreign tourists being involved in child sex activities<sup>22</sup> and children being trafficked from, via and into the country for sexual exploitation purposes.<sup>23</sup> The most recent publicized case is that of Peter Zimmerman, a 46-year-old Swiss tourist, who was found with a 14-year-old boy from Alexandra township in his Johannesburg hotel room in October 2005.<sup>24</sup>

## INTERNATIONAL INSTRUMENTS

The first relevant multilateral treaty was the 1904 Paris Agreement for the Suppression of the White Slave Traffic (1904 Agreement),<sup>25</sup> which aimed at protecting, among others, female children who were, or had been taken abroad for immoral purposes. This was to be done mainly by states keeping watch at their borders,<sup>26</sup> exercising supervision over the offices or agencies engaged in finding employment for girls abroad,<sup>27</sup> and taking responsibility

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21 B Jackson "Children's Rights World Congress" (2005) 1 *UN Chronicle* 35 at 35.

22 See R Smalberger "The extent and impact of sex tourism in certain metropolitan areas in South Africa" (MPhil dissertation submitted to the then University of Potchefstroom, South Africa, 1999) at 91.

23 *Trafficking in Persons Report: 2006* (2006, US Department of State) at 226. See also *Trafficking in Human Beings, Especially Women and Children, in Africa* (2005, UNICEF) at 14–15. In its first report to the Committee on the Rights of the Child submitted in 1999 (see note 159 below), the South African government explained that, "[l]ike many social problems which were swept under the carpet during the apartheid years, the commercial sexual exploitation of children and abuse now emerge as serious challenges to society" (at para 551). Indeed, "[s]ex tourism using children is on the increase and, in addition, large numbers of (often minor) females have been brought into the country" (at para 552). The report explained that "[k]nowledge about the incidence and nature of commercial sexual exploitation in South Africa is scant" (at para 554). One of the reasons is that sexually exploited children are often not paid in cash, but receive shelter, food and other necessities in return for sex. Another reason is that "adolescent boys and girls with no other means of supporting themselves and their families regard sex as an 'acceptable' way to earn money" (at para 554). It has nevertheless been estimated that at least 28,000 children are sexually exploited on a commercial basis in South Africa's urban centres: see K Fitzgibbon "Modern-day slavery? The scope of trafficking in persons in Africa" (2003) 12(1) *African Security Review* 81 at 83. See also J O'Connell Davidson and J Sánchez Taylor *Child Prostitution and Sex Tourism. South Africa* (1996, ECPAT).

24 "Swiss man arrested for sexually abusing boy (14)" 9 October 2005, available at: <<http://www.sabcnews.com>> (last accessed 12 March 2007). It was also reported in 2006 that street children, some as young as eight years old, are increasingly being lured into prostitution by local and foreign tourists in the Garden Route area, a world renowned tourism destination; see <[http://www.theherald.co.za/herald/news/n03\\_25072006.htm](http://www.theherald.co.za/herald/news/n03_25072006.htm)> (last accessed 12 March 2007).

25 1 *League of Nations Treaty Series (LNTS)* 83 (entered into force in 1905). The signatories were only concerned by the exploitation of white girls and women. For the background to the concept of "white slavery", see NV Demleitner "Forced prostitution: Naming an international offense" (1994) 18 *Fordham International Law Journal* 163 at 165–67.

26 1904 Agreement, art 2.

27 *Id.*, art 6.

for their repatriation.<sup>28</sup> The 1904 Agreement was complemented by the 1910 Paris Convention for the Suppression of the White Slave Traffic (1910 Convention),<sup>29</sup> which aimed at punishing the exploiters. The 1910 Convention made it an offence for anybody to procure, entice or lead away a female under 20 years of age, with or without her consent, in order to gratify the passions of another person, irrespective of the fact that the various acts constituting the offence may have been committed in different countries.<sup>30</sup> The 1910 Convention compelled the states parties to adopt legislation providing for the necessary steps to punish offenders according to the gravity of the offences.<sup>31</sup> The offences were also deemed to be lawfully included in the list of offences for which extradition may be granted.<sup>32</sup> Finally, the states parties were expected to communicate to each other the records of convictions whenever the various acts constituting the offences had been committed in different countries.<sup>33</sup>

At the end of the First World War, trafficking in women and children was seen in such a serious light that the members of the League of Nations entrusted the League with “general supervision over the execution of agreements with regard to the traffic in women and children”.<sup>34</sup> On that basis, the League’s council promptly convened an international conference that resulted in the adoption of the 1921 Geneva Convention for the Suppression of the Traffic in Women and Children (1921 Convention),<sup>35</sup> which aimed at supplementing the 1904 Agreement and the 1910 Convention.<sup>36</sup> The 1921 Convention extended the protection offered by the international regime, in that it applied to children of both sexes<sup>37</sup> as well as to acts preparatory to the commission of the offences specified in the 1910 Convention.<sup>38</sup> The states parties agreed that, in cases where there were no extradition treaties in force between them, they would take all measures within their power to extradite

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28 Id, art 3. The four colonies that would a few years later merge into the Union of South Africa (the Cape, Natal, Orange River and Transvaal) consented to concur in art 1 of the agreement, thereby undertaking to establish or name an authority charged with the coordination of all information relative to the procuring of girls for immoral purposes abroad; see <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterVII/treaty8.asp>> (last accessed 19 March 2007).

29 3 LNTS 278. The convention was declared by Great Britain to be applicable in the Union of South Africa in terms of art 11; see <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterVII/treaty10.asp>> (last accessed 19 March 2007).

30 1910 Convention, arts 1 and 2 read with para B of the final protocol.

31 Id, art 3.

32 Id, art 5.

33 Id, art 7.

34 Art 23(c) of the Covenant of the League of Nations.

35 9 LNTS 415 (entered into force in 1922). Art 1 of the convention compelled states parties to become parties to the 1904 Agreement and the 1910 Convention, if they were not already so.

36 South Africa ratified the 1921 Convention in 1922.

37 1921 Convention, art 2.

38 Id, art 3.

or provide for the extradition of persons accused or convicted of the offences specified in the 1910 Convention.<sup>39</sup> The age until which consent is not a defence was raised by the 1921 Convention from 20 to 21.<sup>40</sup> The states parties also agreed that, in case they have not already taken legislative or administrative measures regarding the licensing and supervision of employment agencies and offices engaged in finding employment for girls and boys abroad, they would make such regulations as were required to ensure the protection of children seeking employment in another country.<sup>41</sup> Finally, the states parties undertook to ensure that they had in place the administrative and legislative measures required to check the traffic in children, especially at ports of departure and arrival, and to arrange for the exhibition, in railway stations and ports, of notices warning children of the danger of being trafficked and indicating the places where they could obtain accommodation and assistance.<sup>42</sup>

In the wake of the Second World War, France's facilitating functions under the 1904 Agreement and the 1910 Convention were transferred to the United Nations.<sup>43</sup> At the same time, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention)<sup>44</sup> was adopted to consolidate and extend the scope of the 1904 Agreement as well as the 1910 and 1921 Conventions.<sup>45</sup> The states parties to the 1949 Convention undertook to punish any person who procures, entices or leads away another person, for purposes of prostitution, even with the consent of that person;<sup>46</sup> any person who exploits the prostitution of another person, even with the consent of that person;<sup>47</sup> any person who keeps or manages, or knowingly finances or takes part in the financing of a brothel;<sup>48</sup> and any person who knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.<sup>49</sup> The 1949 Convention expected those offences to be defined, prosecuted and punished in accordance with the domestic law of the states concerned.<sup>50</sup> States parties

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39 Id, art 4.

40 Id, art 5.

41 Id, art 6.

42 Id, art 7.

43 1949 Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic: 30 *United Nations Treaty Series (UNTS)* 23 (entered into force in 1949). South Africa accepted the protocol in 1951.

44 96 *UNTS* 271 (entered into force in 1951). South Africa ratified the convention in 1951.

45 Together with the 1933 Geneva Convention for the Suppression of the Traffic in Women of Full Age (150 *LNTS* 12; entered into force in 1934).

46 1949 Convention, art 1(1).

47 Id, art 1(2).

48 Id, art 2(1).

49 Id, art 2(2).

50 Id, art 12. S Fariior "The international law on trafficking in women and children for prostitution: Making it live up to its potential" (1997) 10 *Harvard Human Rights Journal* 213 at

also undertook, but only to the extent that their domestic laws allowed them to do so, to punish both attempts to commit the above offences<sup>51</sup> and international participation in those acts,<sup>52</sup> as well as to take into account previous convictions pronounced in foreign states for the purpose of establishing recidivism or disqualifying the offender from the exercise of civil rights.<sup>53</sup> The 1949 Convention did not prohibit prostitution, but the states parties agreed to take or to encourage measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution.<sup>54</sup> The 1949 Convention reiterated that the above offences must be regarded as extraditable offences in any extradition treaty which has been or may be concluded between any of the states parties, and that the parties that do not make extradition conditional on the existence of a treaty must recognize those offences as cases for extradition.<sup>55</sup> All the states parties were also required to establish and/or maintain a service responsible, firstly, for the coordination and centralization of the results of the investigation of convention offences and, secondly, for disseminating both domestically and across borders the information necessary to facilitate the prevention and punishment of convention offences.<sup>56</sup> Furthermore, the states parties undertook to adopt and/or maintain the immigration and emigration measures required to check the traffic in persons for the purpose of prostitution.<sup>57</sup> Once foreign nationals who were prostitutes had been identified, the states parties were, in accordance with the conditions laid down by their domestic law, to take declarations from them to establish their identity and civil status and to discover who had caused them to leave their state of origin. That information had to be communicated to the authorities of the state of origin in order to facilitate the repatriation of those nationals.<sup>58</sup> However, the states parties were only compelled to repatriate persons who desired to be repatriated and those claimed by persons exercising authority over them. Repatriation was only to take place once agreement had been reached with the state of origin as to the identity and nationality of the persons concerned as well as to the place and date of their arrival in that state.<sup>59</sup> Moreover, the 1949 Convention reiterated that states were to ensure that employment agencies were supervised in such a

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219 argues that “[t]his deference to national law could be explained by the fact that in 1949, the notion of human rights as a matter of international concern was still relatively new in international law. Unease still existed within the UN about perceptions of undue interference in the domestic affairs of a state by international organizations”.

51 1949 Convention, art 3.

52 *Id.*, art 4.

53 *Id.*, art 7.

54 *Id.*, art 16.

55 *Id.*, art 8. See also arts 9–11 and 13.

56 *Id.*, arts 14 and 15.

57 *Id.*, art 17.

58 *Id.*, art 18.

59 *Id.*, art 19(2).

way as to prevent persons seeking employment from being exposed to the danger of prostitution.<sup>60</sup> Finally, so far as enforcement is concerned, the 1949 Convention merely required states parties to communicate to the UN Secretary General the laws and regulations in force when the convention was adopted and, thereafter, to report annually on relevant legislative developments.<sup>61</sup> In 1974, the UN Economic and Social Council (ECOSOC) decided that the states' reports should be submitted to the UN Commission on Human Rights' Sub-commission on the Prevention of Discrimination and the Protection of Minorities.<sup>62</sup> That body unfortunately does not have the power to take action on those reports.<sup>63</sup>

Half a century later, the 1949 Convention had proved unsuccessful and a renewed attempt was made to deal with human trafficking. This was "due in part to the large number of people involved and its enormous financial impact".<sup>64</sup> The framework used is that of the 2000 Convention against Transnational Organized Crime (2000 Convention),<sup>65</sup> the purpose of which is to promote international cooperation to prevent and combat transnational organized crime more effectively.<sup>66</sup> The 2000 Convention defines an organized criminal group as a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing serious crimes for financial or other material benefit.<sup>67</sup> An offence is transnational if it is committed in more than one state, if it is committed in one state but substantially prepared, planned, directed or controlled in another state, if it involves an organized criminal group that engages in crime in more than one state, or if it is committed in one state but has substantial effects in another state.<sup>68</sup> The 2000 Convention is supplemented by a number of protocols including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000 Protocol).<sup>69</sup> This protocol for the first time defines "trafficking in children" as the recruitment, transportation, transfer, harbouring or receipt of persons under 18 years of age, for the purpose of exploitation, which includes the exploitation of the prostitution of children or other forms of sexual exploitation.<sup>70</sup> The 2000 Protocol

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60 Id, art 20.

61 Id, art 21. That information had to be published periodically by the Secretary General and sent to all UN members.

62 UN ECOSOC doc E/CN.4/Sub.2/AC.2/1995/1/Add.1 of 28 March 1995 at para 5.

63 See Fariior "The international law on trafficking", above at note 50 at 221.

64 EM Bruch "Models wanted: The search for an effective response to human trafficking" (2004) 40 *Stanford Journal of International Law* 1 at 3.

65 (2001) 40 *International Legal Materials (ILM)* 353 (entered into force in 2003). South Africa ratified the convention in 2004.

66 2000 Convention, art 1.

67 Id, art 2(a).

68 Id, art 3.

69 (2001) 40 *ILM* 377 (entered into force in 2003). South Africa ratified the protocol in 2004.

70 Id, art 3. O'Connell Davidson *Children in the Global Sex Trade*, above at note 10 at 74 warns that, "[u]nless we can say precisely what is meant by 'exploitation', then to define

compels states parties to adopt such legislative and other measures as may be necessary to make trafficking in persons a criminal offence.<sup>71</sup> It also requires states parties to give assistance and protection to victims of trafficking.<sup>72</sup> States parties must either permit victims of trafficking to remain in their territory, temporarily or permanently,<sup>73</sup> or facilitate and accept the return of victims of trafficking to their state of nationality or residence without undue or unreasonable delay.<sup>74</sup> The 2000 Protocol goes further by placing an obligation upon states parties to establish comprehensive policies, programmes and other measures both to prevent and combat trafficking in persons, and to protect victims of trafficking from revictimization.<sup>75</sup> The government authorities of states parties must exchange information with one another.<sup>76</sup> States parties must provide or strengthen training in the prevention of trafficking in persons for law enforcement, immigration and other relevant officials.<sup>77</sup> States parties are also expected to strengthen such border controls as may be necessary to prevent and detect trafficking in persons.<sup>78</sup> The 2000 Protocol has been criticized for not viewing trafficking in the context of migration<sup>79</sup> and not sufficiently protecting the rights of the victims of trafficking.<sup>80</sup> The latter concern was addressed to some extent by the appointment in 2004 by the UN Commission on Human Rights of a Special Rapporteur on Trafficking in Persons, Especially Women and Children.<sup>81</sup> In her first report, the rapporteur confirmed that the commission had requested her “to focus on the human rights aspects of trafficked persons”. She also pointed out that her actions would be guided by two principles: “(a) that the human rights of trafficked

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trafficking as the movement of persons for purposes of exploitation is to invite policy-makers and others to fall back on prejudices about what constitutes a ‘proper’ and ‘tolerable’ relationship between parent/guardian and child, or husband and wife, or employer and employee, or pimp and prostitute”.

- 71 When it is committed intentionally or merely attempted, as well as when the individual concerned acted as an accomplice or organized or directed other individuals to commit the offence (2000 Protocol, art 5).
- 72 *Id.*, art 6.
- 73 *Id.*, art 7.
- 74 *Id.*, art 8.
- 75 *Id.*, art 9(1).
- 76 *Id.*, art 10(1).
- 77 *Id.*, art 10(2).
- 78 *Id.*, art 11(1).
- 79 A Zalewski “Migrants for sale: The international failure to address contemporary human trafficking” (2005) 29 *Suffolk Transnational Law Review* 113 at 134–36.
- 80 EF Defeis “Protocol to Prevent, Suppress and Punish Trafficking in Persons. A new approach” (2004) 10 *ILSA Journal of International and Comparative Law* 485 at 490. On the strengths and weaknesses of the main three approaches to human trafficking (the law enforcement approach, the labour rights approach and the human rights approach), see Bruch “Models wanted”, above at note 64 at 15–37.
- 81 Decision 2004/110, available at: <[http://ap.ohchr.org/documents/E/CHR/decisions/E-CN\\_4-DEC-2004-110.doc](http://ap.ohchr.org/documents/E/CHR/decisions/E-CN_4-DEC-2004-110.doc)> (last accessed 20 March 2007).

persons shall be at the centre of all efforts to combat trafficking and to protect, assist and provide redress to those affected by trafficking; and (b) that anti-trafficking measures should not adversely affect the human rights and dignity of the persons concerned”.<sup>82</sup> In her second report, the rapporteur rejected “the assumed premise that men have a human right to engage in the use of prostituted persons”. She argued that a human-rights approach to sex trafficking implies that, “[w]here the human rights of trafficking victims conflict with the legal rights granted to prostitute-users, the human rights of trafficking victims must prevail”.<sup>83</sup>

Finally, one of a number of regional instruments<sup>84</sup> is the Convention on Action against Trafficking in Human Beings<sup>85</sup> adopted by the Council of Europe in 2005 “to strengthen the protection afforded by [existing] instruments and to raise the standards which they lay down”.<sup>86</sup> This is indeed necessary because, for instance, the 2000 Protocol does not apply in principle to domestic trafficking and to individual traffickers.<sup>87</sup> This convention is intended to apply mainly in European states.<sup>88</sup> Unfortunately, its success in Europe may result in an increase in child sex tourism in South Africa, because the majority of non-African inbound tourists originate from western Europe.<sup>89</sup>

Slavery instruments are also useful in the fight against child sex tourism.<sup>90</sup> The 1926 Convention on Slavery, Servitude, Forced Labour and Similar

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82 Doc no E/CN.4/2005/71 of 22 December 2004, para 11, available at: <<http://daccessdds.un.org/doc/UNDOC/GEN/G04/169/28/PDF/G0416928.pdf?OpenElement>> (last accessed 19 March 2007).

83 Doc no E/CN.4/2006/62 of 20 February 2006, para 81, available at <<http://daccessdds.un.org/doc/UNDOC/GEN/G06/109/64/PDF/G0610964.pdf?OpenElement>> (last accessed 19 March 2007).

84 See for instance the 1994 Inter-American Convention on International Traffic in Minors ((1994) 33 *ILM* 721, entered into force in 1997) and the 2002 Convention on Prevention and Combating Trafficking in Women and Children for Prostitution of the South Asian Association for Regional Cooperation, available at: <<http://action.web.ca/home/catw/attach/conv-traffiking.pdf>> (last accessed 23 March 2007).

85 (2006) 45 *ILM* 12 (not yet entered into force).

86 Para 6 of the explanatory report: (2006) 45 *ILM* 28.

87 Art 4. See however UN Office on Drugs and Crime *Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2004), available at: <[http://www.unodc.org/pdf/crime/legislative\\_guides/03%20Legislative%20guide\\_Trafficking%20in%20Persons%20Protocol.pdf](http://www.unodc.org/pdf/crime/legislative_guides/03%20Legislative%20guide_Trafficking%20in%20Persons%20Protocol.pdf)> (last accessed 23 March 2007), which states at para 25 that, “[i]n the case of trafficking in persons, domestic offences should apply even where transnationality and the involvement of organized criminal groups does not exist”.

88 See arts 42(1), 43(1) and 44, as well as paras 381, 383 and 384 of the explanatory report (above at note 86).

89 See December 2006 statistics, available at: <<http://www.southafrica.net/satourism/research/viewResearchDocument.cfm?ResearchDocumentID=432>> (last accessed 4 April 2007).

90 Although “a number of moral, political and theoretical problems attend on the treatment of child prostitution as a ‘contemporary form of slavery’”: O’Connell

Institutions and Practices (1926 Convention)<sup>91</sup> defined slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.<sup>92</sup> It also defined the term “slave trade” as including “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves”.<sup>93</sup> In many instances, traffickers and victims of trafficking for sexual purposes do fall within those definitions.<sup>94</sup> They should then be affected by the measures that states parties have to take under the 1926 Convention, which include the imposition of severe penalties.<sup>95</sup> Unfortunately, the 1926 Convention suffers from the same weaknesses with regard to enforcement as the 1949 Convention.<sup>96</sup> The 1926 Convention was immediately complemented by the 1930 International Labour Organization (ILO) Forced Labour Convention (no 29) (ILO 1930 Convention).<sup>97</sup> All states ratifying the ILO 1930 Convention undertook “to suppress the use of forced or compulsory labour in all its forms within the shortest possible period”.<sup>98</sup> Child sex exploitation is a form of forced or compulsory labour to the extent that it constitutes “work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself [or herself] voluntarily”.<sup>99</sup> The ILO 1930 Convention’s supervision and enforcement mechanisms are stronger than those of the 1926 Convention. As in the latter’s case, states parties must submit annual reports to the International Labour Office on the measures which they have taken to give effect to the provisions of the convention.<sup>100</sup> Those measures include giving effect to the convention in municipal law and practice.<sup>101</sup> A summary of the information submitted is then tabled at the

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Davidson *Children in the Global Sex Trade*, above at note 10 at 26. On the extent of the contemporary slave trade, see EB Kapstein “The new global slave trade” (2006) 85(6) *Foreign Affairs* 103 at 103.

- 91 60 LNTS 253 (entered into force in 1927). South Africa ratified the convention in 1927.  
 92 *Id.*, art 1(1).  
 93 *Id.*, art 1(2).  
 94 Fariior “The international law on trafficking”, above at note 50 at 221.  
 95 1926 Convention, art 6.  
 96 See note 44 above and Fariior “The international law on trafficking”, above at note 50 at 221.  
 97 39 UNTS 55 (entered into force in 1932). South Africa ratified the convention in 1997.  
 98 ILO 1930 Convention, art 1(1).  
 99 *Id.*, art 2(1).  
 100 Art 22 of the 1946 Constitution of the ILO: 15 UNTS 18. South Africa left the ILO in 1966 and rejoined in 1994: see G Erasmus and B Jordaan “South Africa and the ILO: Towards a new relationship?” (1993/4) 19 *South African Yearbook of International Law (SAYIL)* 64 at 84.  
 101 Art 19(5)(d) of the 1946 Constitution of the ILO, as interpreted in *Handbook of Procedures Relating to International Labour Conventions and Recommendations* (2006, ILO) at 18.

meetings of the general conference of representatives of states members.<sup>102</sup> States parties must also submit copies of their reports to the organizations representing employees and employers at the ILO.<sup>103</sup> These organizations may make their own observations on the implementation by states parties of the ILO conventions, and “States are requested to supply information in their reports on any such observations received”.<sup>104</sup> The annual reports, together with relevant legislation and the information contained in the comments made by the representative organizations, are also reviewed by the ILO’s Committee of Experts on the Application of Conventions and Recommendations. This committee, which has labelled the use of children for prostitution as “one of the worst forms of forced labour, which must be fought energetically and punished severely”,<sup>105</sup> makes comments mainly in the form of “observations” communicated to the state concerned and the ILO conference. The committee may also “initiate direct contact with governments”.<sup>106</sup>

After the Second World War, the 1948 Universal Declaration of Human Rights<sup>107</sup> proclaimed that “[n]o one shall be held in slavery or servitude” and that “slavery and the slave trade shall be prohibited in all their forms”.<sup>108</sup> The 1926 Convention was then amended to take into account the demise of the League of Nations and the creation of the UN.<sup>109</sup> It was however felt that, while the 1926 Convention remained operative, further steps should be taken to tackle slavery. To that end, states adopted the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956 Convention).<sup>110</sup> The 1956 Convention compels all states parties to take “all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of ... [a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour”.<sup>111</sup> “Unfortunately, the enforcement provisions of the 1956 Convention are as

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102 Art 23(1) of the ILO constitution.

103 Art 23(2) read with art 3(5) of the ILO constitution.

104 N Valticos “The International Labour Organization” in SM Schwebel (ed) *The Effectiveness of International Decisions* (1971, Sijthoff) 134 at 145.

105 H Bartolomei de la Cruz, G von Potobsky and L Swepston *The International Labor Organization. The International Standards System and Basic Human Rights* (1996, Westview Press) at 145.

106 Valticos “The International Labour Organization”, above at note 104 at 146–47.

107 (1949) 43 *American Journal of International Law* supp 127.

108 *Id.*, art 4.

109 1953 Protocol Amending the 1926 Slavery Convention: 182 UNTS 51 (entered into force in 1953). South Africa signed the protocol in 1953.

110 266 UNTS 3 (entered into force in 1957).

111 *Id.*, art 1(d).

weak as those of the 1949 Trafficking Convention".<sup>112</sup> The ILO reacted to the 1956 Convention by adopting the 1957 Abolition of Forced Labour Convention (no 105),<sup>113</sup> which compels states parties to take effective measures to secure the immediate and complete abolition of forced or compulsory labour.<sup>114</sup>

During the following decade, the 1966 International Covenant on Civil and Political Rights<sup>115</sup> reiterated the prohibition of slavery,<sup>116</sup> as did article 5 of the 1981 African Charter on Human and Peoples' Rights.<sup>117</sup> Meanwhile the International Court of Justice confirmed in *Barcelona Traction, Light and Power Company Limited* that the prohibition of slavery enjoyed the status of *ius cogens* [a peremptory norm of general international law].<sup>118</sup> At the same time, the ILO adopted the 1973 Minimum Age Convention (no 138),<sup>119</sup> which provides for a minimum age for admission to employment of 15 years<sup>120</sup> subject to certain exceptions.<sup>121</sup>

In 1999, the ILO adopted the Convention (no 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO 1999 Convention).<sup>122</sup> This convention includes among the worst forms of child labour the sale and trafficking of children, child prostitution and any other work "which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children".<sup>123</sup> The ILO 1999 Convention not only compels states parties to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.<sup>124</sup> It also requires states parties to take all necessary measures to ensure the effective implementation and enforcement of the municipal provisions giving effect to the

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112 Farrior "The international law on trafficking", above at note 50 at 222.

113 320 UNTS 291 (entered into force in 1959). South Africa ratified the convention in 1997.

114 *Id.*, art 2.

115 999 UNTS 171 (entered into force in 1976). South Africa ratified the covenant in 1998.

116 *Id.*, art 8. The 1966 International Covenant on Economic, Social and Cultural Rights (993 UNTS 3, which entered into force in 1976 and which South Africa signed in 1994 but has not ratified) does not mention slavery, but the Committee on Economic, Social and Cultural Rights, created in 1985 by ECOSOC to monitor the covenant's implementation, has made references to the trafficking in persons in its comments on state reports: see S Scarpa "Child trafficking. International instruments to protect the most vulnerable victims" (2006) 44 *Family Court Review* 429 at 439.

117 (1982) 21 *ILM* 58 (entered into force in 1986). South Africa ratified the charter in 1996.

118 1970 *ICJ Reports* 32.

119 See <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>> (last accessed 20 March 2007). The convention entered into force in 1976 and South Africa ratified it in 2000.

120 *Id.*, art 2(3).

121 *Id.*, arts 4–8.

122 (1999) 38 *ILM* 1207 (entered into force in 2000). South Africa ratified the convention in 2000. See Y Noguchi "ILO Convention no 182 on the Worst Forms of Child Labour and the Convention on the Rights of the Child" (2002) 10 *International Journal of Children's Rights* 355.

123 *Id.*, art 3.

124 *Id.*, art 1.

convention, including the provision and application of penal sanctions or, as appropriate, other sanctions.<sup>125</sup> The ILO 1999 Convention was complemented by the 1999 Recommendation (no 190) Supplementing the Worst Forms of Child Labour Convention.<sup>126</sup> This instrument enjoins<sup>127</sup> ILO member states to make criminal offences the sale and trafficking of children, as well as the use, procuring or offering of a child for prostitution.<sup>128</sup> It also calls upon members to provide as a matter of urgency for other criminal, civil or administrative remedies, where appropriate, to ensure the effective enforcement of national provisions for the prohibition and elimination of the worst forms of child labour, such as special supervision of enterprises which have used the worst forms of child labour and, in cases of persistent violation, consideration of the temporary or permanent revocation of permits to operate.<sup>129</sup>

Girls subjected to sexual exploitation also benefit from the protection afforded by instruments protecting the rights of women. The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>130</sup> compels all states parties to take “all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation or prostitution of women”,<sup>131</sup> including minors.<sup>132</sup> A committee on the elimination of discrimination against women was established to consider the progress made in implementing the convention (CEDAW Committee).<sup>133</sup> In its 1992 general recommendation no 19,<sup>134</sup> the CEDAW Committee confirmed that “[p]overty and unemployment increase opportunities for trafficking in women” as well as “new forms of sexual exploitation, such as sex tourism ... . These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse”.<sup>135</sup> Poverty and unemployment also “force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection

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125 *Id.*, art 7(1).

126 (1999) 38 *ILM* 1211.

127 Under art 19(6)(d) of the ILO constitution, ILO recommendations do not create any obligation for member states beyond: (a) bringing recommendations before the national authority or authorities within whose competence the matter lies for the enactment of legislation or other action; and (b) reporting to the director general of the International Labour Office, at appropriate intervals as requested by the ILO governing body, the position of the law and practice in their country in regard to the matters dealt with in the recommendations.

128 1999 Recommendation, above at note 126, para 12.

129 *Id.*, para 14.

130 1249 *UNTS* 13 (entered into force in 1981). South Africa ratified the convention in 1995.

131 *Id.*, art 6.

132 *Id.*, art 10(f) refers to “girls” and art 16(2) to “[t]he betrothal and the marriage of a child”.

133 *Id.*, art 17(1).

134 UN doc A/47/38 (1993).

135 *Id.*, para 14.

of laws against rape and other forms of violence".<sup>136</sup> Another problem resides in wars, armed conflicts and the occupation of territories, which "often lead to increased prostitution, trafficking in women and sexual assault of women, [and] which require specific protective and punitive measures".<sup>137</sup> States parties are expected to submit reports on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of CEDAW, as well as on the progress made in this respect.<sup>138</sup> In its first report submitted in 1998,<sup>139</sup> the South African government acknowledged that the country did not have any "explicit legislation controlling 'sex tourism' or trafficking in women across [the] borders of South Africa".<sup>140</sup> In its concluding observations on the report,<sup>141</sup> the CEDAW Committee regretted "that insufficient attention was being devoted to trafficking in women", and recommended that "both the legal situation and the reality with regard to trafficking in women be addressed".<sup>142</sup>

In 1999, the UN General Assembly adopted an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.<sup>143</sup> This instrument allows communications to be submitted by or on behalf of individuals or groups of individuals, who are under the jurisdiction of a state party to the protocol and who claim to be victims of a violation by that state party of any of the rights set forth in CEDAW.<sup>144</sup> The protocol also allows the CEDAW Committee, after it has received reliable information indicating grave or systematic violations by a state party of rights set forth in the CEDAW, to invite that state party to cooperate in the examination of the information and, to this end, to submit observations with regard to the information concerned.<sup>145</sup> Finally, a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted in 2003.<sup>146</sup> This protocol confirms that every

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136 *Id.*, para 15.

137 *Id.*, para 16.

138 CEDAW, art 18.

139 Doc no CEDAW/C/ZAF/1, available at: <<http://daccessdds.un.org/doc/UNDOC/GEN/N98/065/49/IMG/N9806549.pdf?OpenElement>> (last accessed 20 March 2007). No reports appear to have been submitted since then.

140 *Id.* at 43.

141 Doc no CEDAW/C/1998/II/L.1/Add.3 of 30 June 1998, available at: <<http://www.hri.ca/fortherecord1998/documentation/tbodies/cedaw-c-1998-ii-11-add3.htm>> (last accessed 20 March 2007).

142 *Id.*, paras 27 and 28.

143 (2000) 39 *ILM* 281 (entered into force in 2000). South Africa ratified the protocol in 2005.

144 *Id.*, art 2. Under art 4(1), the committee may only consider a communication after it has ascertained that all available domestic remedies have been exhausted, unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

145 *Id.*, art 8(1).

146 See <[http://www.chr.up.ac.za/hr\\_docs/documents/Protocol%20on%20the%20Rights%20of%20Women.pdf](http://www.chr.up.ac.za/hr_docs/documents/Protocol%20on%20the%20Rights%20of%20Women.pdf)> (last accessed 20 March 2007) (entered into force in 2005). South Africa ratified the protocol in 2004; see <<http://www.africa-union.org/root/au/>

woman<sup>147</sup> is entitled to respect for her life and the integrity and security of her person, and that all forms of exploitation and cruel, inhuman or degrading treatment are prohibited.<sup>148</sup> Furthermore, it compels states parties to take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex, as well as prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.<sup>149</sup>

In recent years, international instruments have also been adopted to protect the rights of children.<sup>150</sup> The 1989 Convention on the Rights of the Child (CRC)<sup>151</sup> defines a child as any “human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.<sup>152</sup> States parties must take measures to combat the illicit transfer and non-return of children abroad.<sup>153</sup> They must also take all appropriate legislative, administrative, social and educational measures to protect children from persons under whose care they are, and who allow them to be sexually exploited.<sup>154</sup> States parties undertake further to protect children from all forms of sexual exploitation and sexual abuse,<sup>155</sup> and must take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose and in any form.<sup>156</sup> A Committee on the Rights of the Child (CRC Committee) was established for

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Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf> (last accessed 20 March 2007).

147 That is every person of female gender, including girls (id, art 1(k)).

148 Id, art 4(1).

149 Id, arts 4(2)(a) and (g).

150 On the history and theories of children’s rights, see MDA Freeman “Introduction” in MDA Freeman (ed) *Children’s Rights* (2004, Ashgate) vol I at xi.

151 1577 UNTS 3 (entered into force in 1990). South Africa ratified the convention in 1995. See J Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law” (1995) 11 *South African Journal on Human Rights* (SAJHR) 401 at 401.

152 Id, art 1. O’Connell Davidson *Children in the Global Sex Trade*, above at note 10 at 61–62, argues that this “age boundary of childhood ... seemingly reflects the interests and experience of the affluent in the affluent world ... . In reality, ... there are millions of people in the world who, long before the age of 18, have had to assume responsibilities, face discrimination, suffer losses, endure hardships and make choice that a middle-class adult from an affluent society will never have to assume, face, endure or choose. Some of them trade sex as part of a strategy for coping with the circumstances in which they find themselves. And they do find themselves in these circumstances simply because they are ‘children’, but also because they are members of impoverished communities, and/or groups that are socially, economically and politically disadvantaged on grounds of race, ethnicity or caste, or groups that are forgotten, feared or despised by the wider community (homeless, gay, slum-dwellers, drug users)”.

153 CRC, art 11(1).

154 Id, art 19(1).

155 Id, art 34.

156 Id, art 35.

the purpose of examining the progress made by states parties in realizing the obligations undertaken in the CRC.<sup>157</sup> One of the functions of the CRC Committee is to consider reports submitted by states parties on the measures they have adopted which give effect to the rights recognized in the CRC as well as on the progress made on the enjoyment of those rights.<sup>158</sup> In its first report submitted in 1999,<sup>159</sup> the South African government pointed out that South Africa acceded to the 1980 Hague Convention on the Civil Aspects of International Child Abduction<sup>160</sup> and acknowledged, as it had done in its 1998 CEDAW report, that South African criminal law and criminal procedure were to a large extent inappropriate and ineffective.<sup>161</sup> In its concluding observations on the report,<sup>162</sup> the CRC Committee expressed its appreciation for the efforts made by South Africa in the area of legal reform.<sup>163</sup> It also acknowledged the challenges faced by South Africa

“in overcoming the legacy of apartheid which continues to have a negative impact on the situation of children and to impede the full implementation of the Convention. In particular, the Committee note[d] the vast economic and social disparities that continue to exist between various segments of society as well as the relatively high levels of unemployment and poverty which adversely affect the full implementation of the Convention and remain challenges for [South Africa].”<sup>164</sup>

At the same time, the CRC Committee expressed its concern at the high incidence of commercial sexual exploitation, and recommended that South Africa undertake studies with a view to designing and implementing appropriate policies and measures, including care and rehabilitation, to prevent and combat the sexual exploitation of children.<sup>165</sup> The CRC Committee was also concerned about the increasing incidence of the sale and trafficking of children, particularly girls, and the lack of adequate measures to enforce legislative guarantees and to prevent and combat this phenomenon. In order to address this issue, the CRC Committee recommended that South

157 Id, art 43(1). M Freeman “The future of children’s rights” (2000) 14 *Children and Society* 277 at 290 stresses that the committee has no real teeth and is under-resourced with the result that “it is clearly overwhelmed by the work the Convention generates”.

158 Id, art 44(1). See D McGoldrick “The United Nations Convention on the Rights of the Child” (1991) 5 *International Journal of Law and the Family* 132 at 155–57.

159 Doc no CRC/C/51/Add.2, available at: <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.51.Add.2.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.51.Add.2.En?Opendocument)> (last accessed 20 March 2007). No reports appear to have been submitted since then.

160 1343 UNTS (entered into force in 1983). South Africa ratified the convention in 1997.

161 See paras 555–70.

162 Doc no CRC/C/15/Add.122 of 23 February 2000, available at: <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)](http://www.unhchr.ch/tbs/doc.nsf/(Symbol))> (last accessed 20 March 2007).

163 Id, para 3.

164 Id, para 9.

165 Id, para 39.

Africa take effective measures to strengthen law enforcement, and seek to establish bilateral agreements with neighbouring countries to prevent the sale, trafficking and abduction of children and to facilitate their protection and safe return to their families.<sup>166</sup>

In 2000, the CRC was supplemented by an Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.<sup>167</sup> In the preamble to the protocol, states parties express their deep concern “at the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography”. The protocol places an obligation upon states parties to “promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to ... child sex tourism”.<sup>168</sup> States parties must promote international cooperation to assist child victims in their physical and psychological recovery, social reintegration and repatriation.<sup>169</sup> States parties must also take all necessary steps to strengthen international cooperation by multi-lateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving child sex tourism.<sup>170</sup> The protocol itself improves international law enforcement co-operation with provisions on jurisdiction, extradition, assistance in investigations and criminal or extradition proceedings, as well as the seizure and confiscation of assets.<sup>171</sup> The special rapporteur of the Commission on Human Rights on the sale of children, child prostitution and child pornography visited South Africa in 2002. He recommended in his report that “[t]he good level of commitment to children’s concerns by the police and judiciary in the main cities must be emulated throughout South Africa, and training provided to these sectors working in less developed and more isolated areas”.<sup>172</sup> The rapporteur also recommended that “[t]he judicial process for dealing with crimes of a sexual nature must be speeded up, particularly in rural areas”.<sup>173</sup>

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166 *Id.*, para 40.

167 (2000) 39 *ILM* 1292 (entered into force in 2002). South Africa ratified the protocol in 2003. On a 1993 draft protocol which asserted that the trafficking and sexual exploitation of children constitute crimes against humanity, see MA Healy “Prosecuting child sex tourists at home: Do laws in Sweden, Australia, and the United States safeguard the rights of children as mandated by international law?” (1995) 18 *Fordham International Law Journal* 1852 at 1879–80.

168 *Id.*, art 10(3).

169 *Id.*, art 10(2).

170 *Id.*, art 10(1).

171 *Id.*, arts 4–7.

172 Doc no E/CN.4/2003/79/Add.1, para 86(g), available at: <<http://daccessdds.un.org/doc/UNDOC/GEN/G03/101/04/PDF/G0310104.pdf?OpenElement>> (last accessed 19 March 2007).

173 *Id.*, para 86(h).

The African Charter on the Rights and Welfare of the Child (African Charter) was adopted immediately after the CRC.<sup>174</sup> A number of factors led African states to adopt their own instrument. Among them are: (a) the critical situation of most African children, due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger; and (b) the virtues of the African cultural heritage, the African historical background and the values of the African civilization which should inspire and characterize African reflection on the concept of the rights and welfare of the child.<sup>175</sup> Under the African Charter, states parties undertake to protect children from all forms of sexual exploitation and sexual abuse, and must in particular take measures to prevent the inducement, coercion or encouragement of a child to engage in any sexual activity, as well as the use of children in prostitution or other sexual practices.<sup>176</sup> An African Committee of Experts on the Rights and Welfare of the Child was established within the Organization of African Unity (OAU) to promote and protect the rights and welfare of the child.<sup>177</sup> One of the committee's tasks is to monitor the implementation of, and ensure the protection of, the rights enshrined in the African Charter.<sup>178</sup> The committee does so by examining state reports<sup>179</sup> and communications received from any person, group or non-governmental organization recognized by the OAU, a member state or the UN,<sup>180</sup> as well as by investigating any matter falling within the ambit of the African Charter, and requesting from states parties any information relevant to the implementation of the charter.<sup>181</sup> The committee is confronted with a huge task with regard to abduction, as the UN High Commissioner for Human Rights recently reported.<sup>182</sup>

Finally, child sex tourism has prompted a number of specific steps.<sup>183</sup> For instance, the General Assembly of the World Tourism Organization

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174 Available at: <[http://www.chr.up.ac.za/hr\\_docs/african/docs/oau/oau2.doc](http://www.chr.up.ac.za/hr_docs/african/docs/oau/oau2.doc)> (last accessed 20 March 2007) (entered into force in 1999). South Africa ratified the charter in 2000.

175 Id, preamble. On the interaction between the CRC and African cultural values, see T Kaime "The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections" (2005) 5 *African Human Rights Law Journal* 221 at 221.

176 Id, art 27. Under art 29(a), states parties must also take appropriate measures to prevent the abduction or sale of, or trafficking in children for any purpose or in any form, by any person including the parents or legal guardians of the child.

177 Id, art 32.

178 Id, art 42(b).

179 Id, art 43(1).

180 Id, art 44(1).

181 Id, art 45(1).

182 Doc no A/HRC/4/72 of 13 March 2007, available at: <<http://daccessdds.un.org/doc/UNDOC/GEN/G07/118/96/PDF/G0711896.pdf?OpenElement>> (last accessed 19 March 2007).

183 For an extensive list of policy documents and codes of conduct, see <<http://www.ecpat>

(UNWTO) adopted in 1995 a statement on the prevention of organized sex tourism,<sup>184</sup> in which it denounced and condemned child sex tourism, considering it a violation of article 34 of the CRC which requires strict legal action by countries sending and receiving tourists. The assembly requested governments of both tourist sending and receiving countries to establish and enforce, where applicable, legal and administrative measures to prevent and eradicate child sex tourism, in particular through bilateral agreements to facilitate, inter alia, the prosecution of tourists engaged in any unlawful sexual activity involving children and juveniles. A few years later, the UN General Assembly endorsed the 1999 UNWTO Global Code of Ethics for Tourism.<sup>185</sup> This code<sup>186</sup> states that tourism activities should promote the individual rights of children.<sup>187</sup> More specifically, the code stresses that the sexual exploitation of children “conflicts with the fundamental aims of tourism and is the negation of tourism”. For that reason, it should be “energetically combated with the cooperation of all states concerned, and penalized without concession by the national legislation of both the countries visited and the countries of the perpetrators of these acts, even when they are carried out abroad”.<sup>188</sup> The code is not legally binding, but provides for a World Committee on Tourism Ethics to which stakeholders in tourism development are enjoined to refer their disputes concerning the application or interpretation of the code.<sup>189</sup> At its fourth meeting in 2006, the committee constituted its Task Force Against the Sexual Exploitation of Children Through Tourism as one of its advisory bodies.<sup>190</sup> The task force, originally established in 1997, is “a global action platform of tourism-related key-players from the government and the tourism industry sectors, international organizations and non-governmental organizations (NGOs), and media associations whose aim is to prevent, uncover, isolate and eradicate the sexual exploitation of children in tourism”.<sup>191</sup> At the regional level, South Africa’s main non-African inbound market, the European Union, has developed a series of measures since

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[net/eng/ecpat\\_inter/projects/sex\\_tourism/sex\\_tourism.asp](http://net/eng/ecpat_inter/projects/sex_tourism/sex_tourism.asp) (last accessed 20 March 2007).

184 Res A/RES/338 (XI), available at: [http://www.world-tourism.org/protect\\_children/statements/wto\\_a.htm](http://www.world-tourism.org/protect_children/statements/wto_a.htm) (last accessed 22 March 2007).

185 Doc no A/RES/56/212 of 28 February 2002, available at: [http://www.unwto.org/code\\_ethics/pdf/UNres.56.pdf](http://www.unwto.org/code_ethics/pdf/UNres.56.pdf) (last accessed 22 March 2007).

186 See [http://www.unwto.org/code\\_ethics/pdf/RES406-English.pdf](http://www.unwto.org/code_ethics/pdf/RES406-English.pdf) (last accessed 22 March 2007).

187 Id, art 2(2).

188 Id, art 2(3).

189 Id, art 10(3).

190 See <http://www.unwto.org/newsroom/Releases/2006/june/bangalore.html> (last accessed 22 March 2007).

191 See [http://www.world-tourism.org/protect\\_children/index.htm](http://www.world-tourism.org/protect_children/index.htm) (emphasis removed) (last accessed 22 March 2007).

1996.<sup>192</sup> These include the 2003 Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography.<sup>193</sup> In Africa, the 2003 Dakar Declaration on the Protection of Children from Sexual Exploitation in Tourism<sup>194</sup> urges African governments to “adopt and strengthen national legislation against the sexual exploitation of children in tourism, including extra-territorial laws and regulations allowing the prosecution of nationals for child sex offences committed abroad, and to ensure strict enforcement of these laws”.<sup>195</sup> The declaration also strongly recommends African states to “[f]urther intensify their regional cooperation on the protection of children from sexual exploitation in tourism”.<sup>196</sup>

## SOUTH AFRICAN INSTRUMENTS

The Constitution<sup>197</sup> is the supreme law of South Africa.<sup>198</sup> As a result, the Bill of Rights applies to all the organs of state<sup>199</sup> and, whenever applicable, to all natural and juristic persons.<sup>200</sup> The Bill of Rights does not refer explicitly to child sex tourism or, more generally, the sexual exploitation of children.<sup>201</sup> It entrenches however the right of children to be protected from abuse and not to be required or permitted to provide services that are inappropriate to their age, or place at risk their “well-being, education, physical or mental health or spiritual, moral or social development”.<sup>202</sup> This right, which must be interpreted in the light of international law<sup>203</sup> including the CRC and the African Charter,<sup>204</sup> is not absolute,<sup>205</sup> but may only be limited by a

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192 Commission communication COM(96) 547 final of 27 November 1996 (*Official Journal* C 3 of 7 January 1997).

193 Decision 2004/68/JHA of 22 December 2003 (*Official Journal* L13 of 20 January 2004 44).

194 Proceedings of the Regional Consultation for Africa on the Protection of Children from Sexual Exploitation in Tourism (Dakar, Senegal, 2003) at 135–37, available at: <[http://www.world-tourism.org/protect\\_children/reunions/final-report-africa.pdf](http://www.world-tourism.org/protect_children/reunions/final-report-africa.pdf)> (last accessed 22 March 2007).

195 *Id.*, para 4 (emphasis removed).

196 *Id.*, para 19 (emphasis removed).

197 Constitution of the Republic of South Africa 1996 (Constitution), available at: <<http://www.info.gov.za/documents/constitution/index.htm>> (last accessed 12 April 2007).

198 *Id.*, sec 2.

199 *Id.*, sec 8(1).

200 *Id.*, sec 8(2).

201 A child is “a person under the age of 18 years” (*id.*, sec 28(3)).

202 *Id.*, sec 28(1)(d) and (f).

203 *Id.*, sec 39(1)(b). See J Dugard *International Law. A South African Perspective* (2005, Juta) at 336–40.

204 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 CC 75 and *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50 TPD. See S Rosa and M Dutschke “Child rights at the core: The use of international law in South African cases on children’s socio-economic rights” (2006) 22 SAJHR 224 at 224; and A van der Burg “Legal protection of undocumented foreign migrant children in South Africa: Reality or myth?” (2006) 10 *Law, Democracy and Development* 82 at 82.

205 The Constitution, sec 7(3).

provision of the Constitution<sup>206</sup> or “in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.<sup>207</sup> This is also the case of the rights: to human dignity;<sup>208</sup> to be free from all forms of violence;<sup>209</sup> to bodily and psychological integrity;<sup>210</sup> not to be treated in a cruel, inhuman or degrading way;<sup>211</sup> and not to be subjected to slavery, servitude or forced labour.<sup>212</sup> To that extent, the state is compelled not only to respect, but also to protect, promote and fulfil those rights,<sup>213</sup> keeping in mind that a child’s best interests are of paramount importance in all matters concerning that child.<sup>214</sup>

Parliament passed the Children’s Act 2005 (Children’s Act),<sup>215</sup> to give effect to some of the rights entrenched in the Constitution<sup>216</sup> as well as to the relevant international instruments to which South Africa is bound.<sup>217</sup> This concluded a consultative review of the Child Care Act 1983,<sup>218</sup> which was embarked upon in 1997.<sup>219</sup> The Children’s Act does not deal specifically with child sex tourism. However, it ensures that the 1980 Hague Convention on the Civil Aspects of International Child Abduction continues to have force in South Africa<sup>220</sup> and, as a result, its provisions are law in the country, subject to the provisions of the Children’s Act.<sup>221</sup> The act<sup>222</sup> retains as South Africa’s central authority for convention purposes the chief family advocate appointed by the minister of justice and constitutional development under the Mediation in Certain Divorce Matters Act 1987.<sup>223</sup> But the Children’s Act

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206 Id, sec 36(2).

207 Id, sec 36(1).

208 Id, sec 10.

209 Id, sec 12(1)(c).

210 Id, sec 12(2).

211 Id, sec 12(1)(e).

212 Id, sec 13.

213 Id, sec 7(2).

214 Id, sec 28(2).

215 Act no 38 of 2005, available at: <<http://www.polity.org.za/pdf/ChildrensAct38.pdf>> (last accessed 12 April 2007).

216 Id, sec 2(b). Sec 8(1) explains that “[t]he rights which a child has in terms of th[e] Act supplement the rights which a child has in terms of the Bill of Rights”.

217 Id, sec 2(c).

218 Act no 74 of 1983, available at: <[http://www.acts.co.za/child\\_care/Child\\_Ca.htm](http://www.acts.co.za/child_care/Child_Ca.htm)> (last accessed 12 April 2007).

219 South African Law Reform Commission report on the review of the Child Care Act, project 110 (2002), available at: <[http://www.doj.gov.za/salrc/reports/r\\_prj110\\_childcare/r\\_pr110\\_cont\\_2002dec.pdf](http://www.doj.gov.za/salrc/reports/r_prj110_childcare/r_pr110_cont_2002dec.pdf)> (last accessed 12 April 2007).

220 The convention was incorporated into South African law by sec 2 of the Hague Convention on the Civil Aspects of International Child Abduction Act 1996 (act no 72 of 1996), available at: <<http://www.info.gov.za/acts/1996/a72-96.pdf>> (last accessed 12 April 2007).

221 Id, sec 275.

222 Id, sec 276(1)(a).

223 Act no 24 of 1987, available in: *Juta’s Statutes of South Africa* (2007, Juta) vol 5 at 2.

innovates by providing that the High Court, on the one hand, “may, prior to the making of an order for the return of the child, order interim protective relief for the child, the applicant or the defendant” and, on the other hand, must, in considering an application “for the return of a child, afford that child the opportunity to raise an objection to being returned and in so doing must give due weight to that objection, taking into account the age and maturity of the child”.<sup>224</sup>

The Children’s Act also gives force in South Africa to the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, thereby making its provisions law in the country, subject to the provisions of the Children’s Act.<sup>225</sup> The act makes it an offence for any natural or juristic person and any partnership to “traffic a child or allow a child to be trafficked” in South Africa,<sup>226</sup> and for a South African citizen or permanent resident, or a juristic person or partnership registered under South African law to commit such an act outside South Africa.<sup>227</sup> A person convicted of such an offence “is, in addition to a sentence for any other offence of which he or she may be convicted, liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment”.<sup>228</sup> The Children’s Act provides that it is no defence to a child trafficking charge that the child who is a victim of trafficking or a person having control over that child consented to the intended exploitation, or that the intended exploitation did not occur.<sup>229</sup> The act further provides that the conduct of an employee or agent of, or any other person acting on behalf of, a tourism employer or principal, for instance, may be attributed to the employer or principal if that person is acting within the scope of his or her employment, or within the scope of his or her actual or apparent authority, or with the express or implied consent of a director, member or partner of the employer or principal.<sup>230</sup> Such a court finding constitutes a ground for revoking the licence or registration of the employer or principal to operate.<sup>231</sup> The act also makes it an offence for any natural or juristic person and any partnership knowingly to lease or sublease or allow any room, house, building or establishment in South Africa to be used for the purpose of harbouring a child who is a victim of trafficking;<sup>232</sup> and for a person who is the owner, lessor, manager, tenant or occupier of any premises on which the commercial sexual exploitation of a

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224 Children’s Act, above at note 215, secs 278(2) and (3).

225 *Id.*, sec 282.

226 *Id.*, sec 284(1) read with sec 305(1)(s).

227 *Id.*, sec 291.

228 *Id.*, sec 305(8).

229 *Id.*, sec 284(2).

230 *Id.*, sec 284(3).

231 *Id.*, sec 284(4).

232 *Id.*, sec 285(1)(a). Under sec 291, it is also an offence for a South African citizen or permanent resident, or a juristic person or partnership registered under South African law to commit such an act outside South Africa.

child has occurred, to fail, on gaining information of that occurrence, promptly to take reasonable steps to report the occurrence to the South African police.<sup>233</sup> It is further an offence to advertise, publish, print, broadcast, distribute or cause the advertisement, publication, printing, broadcast or distribution in South Africa of information that suggests or alludes to trafficking by any means, including the use of the internet or other information technology.<sup>234</sup> In all those instances, the person convicted is liable to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment.<sup>235</sup> The Children's Act compels the state to facilitate the return to South Africa of children who are South African citizens or permanent residents, and who are victims of trafficking.<sup>236</sup> With regard to victims found in South Africa, the act makes it mandatory for such children to be referred to social workers for investigation,<sup>237</sup> and allows those children to be placed in temporary safe care pending such an investigation.<sup>238</sup> Should a children's court ruling upon the outcome of that investigation find that an illegal foreign child who is a victim of trafficking is a child in need of care and protection,<sup>239</sup> that finding "serves as authorisation for allowing the child to remain in the Republic for the duration of the children's court order".<sup>240</sup> The court may also order<sup>241</sup> that the child be assisted in applying for asylum under the Refugees Act 1998.<sup>242</sup> The Children's Act forbids the state to return an illegal foreign child "to his or her country of origin or the country from where the child has been trafficked without giving due consideration to: (a) the availability of care arrangements in the country to which the child is to be returned; (b) the safety of the child in the country to which the child is to be returned; and (c) the possibility that the child might be trafficked again, harmed or killed".<sup>243</sup> The expenses of an escort must be borne by the

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233 *Id.*, sec 305(5).

234 *Id.*, sec 285(1)(b). Under sec 291, it is also an offence for a South African citizen or permanent resident, or a juristic person or partnership registered under South African law to commit such an act outside South Africa. Under sec 285(2), an internet service provider operating in South Africa must report to the South African police any site on its server that contains such information.

235 *Id.*, sec 305(6). Under sec 305(7), a person convicted more than once is liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.

236 *Id.*, sec 286.

237 *Id.*, secs 288 and 289(1)(a). Under sec 155(2), social workers must then "investigate the matter and within 90 days compile a report ... on whether the child is in need of care and protection".

238 *Id.*, sec 289(1)(b).

239 *Id.*, sec 150 explains when a child is in need of care and protection.

240 *Id.*, sec 289(3).

241 *Id.*, under sec 289(2).

242 Act no 130 of 1998, available at: <<http://www.info.gov.za/gazette/acts/1998/a130-98.pdf>> (last accessed 12 April 2007).

243 Children's Act, above at note 215, sec 290(1). See further van der Burg "Legal protection", above at note 204 at 82.

state, unless “the parent, guardian, care-giver or other person who has parental responsibilities and rights in respect of the child” has sufficient financial means.<sup>244</sup> A further weapon against child sex tourism created by the Children’s Act is the national child protection register.<sup>245</sup> This contains, *inter alia*, all convictions of all persons on charges involving the abuse of a child, which includes: “(a) sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted; (b) encouraging, inducing or forcing a child to be used for the sexual gratification of another person; (c) using a child in or deliberately exposing a child to sexual activities or pornography; or (d) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child”.<sup>246</sup> That information may be released in limited instances, including for the purpose of protecting the interests, safety or well-being of a specific child; or for the purpose of facilitating an investigation by the South African police following a criminal charge involving abuse or deliberate neglect of a specific child.<sup>247</sup> The register will also contain a record of persons who are unsuitable to work with children, to be used in order to protect children in general against abuse from these persons.<sup>248</sup>

Due to constitutional constraints, the Children’s Act will only come into effect after parliament has passed the Children’s Amendment Bill 2006,<sup>249</sup> which provides, *inter alia*, for the insertion of a provision forbidding the taking<sup>250</sup> or sending<sup>251</sup> of a child out of South Africa without the consent of a court or the “persons holding relevant parental responsibilities and rights in respect of that child”.<sup>252</sup> Other provisions forbid the employing of a child who is under the age of 15 years<sup>253</sup> as well as the use, procuring, offering or employing of a child for purposes of commercial sexual exploitation.<sup>254</sup> Until then, the Child Care Act 1983, continues to apply, as amended by the Child Care Amendment Act 1999,<sup>255</sup> so that it is already an offence for any person to participate or be involved in the commercial sexual exploitation

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244 *Id.*, sec 290(2).

245 *Id.*, sec 111(1).

246 *Id.*, sec 114(1)(b) read with sec 1(1).

247 *Id.*, secs 116(1)(a) and (c).

248 *Id.*, sec 118.

249 Bill no B19-2006, available at: <<http://www.info.gov.za/gazette/bills/2006/b19-06.pdf>> (last accessed 12 April 2007).

250 “Taking” includes causing to be taken, in any way assisting in taking, as well as causing or inducing to accompany or join oneself when departing from South Africa: *id.*, sec 138(2)(a).

251 “Sending” includes causing to be sent or in any way assisting in sending: *id.*, sec 138(2)(b).

252 *Id.*, sec 138(1)(b).

253 *Id.*, sec 141(1)(a). Exceptions are allowed under sec 141(2).

254 *Id.*, sec 141(1)(b).

255 Act no 13 of 1999, available at: <<http://www.polity.org.za/html/govdocs/legislation/1999/act13.pdf>> (last accessed 12 April 2007).

of a child,<sup>256</sup> to abduct a child,<sup>257</sup> to employ or provide work to any child under the age of 15 years<sup>258</sup> or, when an owner, lessor, manager, tenant or occupier of property on which the commercial sexual exploitation of a child occurs, to fail to report such occurrence at a police station within a reasonable time of gaining information of such occurrence.<sup>259</sup>

Parliament is also in the process of adopting the Criminal Law (Sexual Offences and Related Matters) Amendment Bill 2003 (Sexual Offences Amendment Bill),<sup>260</sup> which will amend the Sexual Offences Act 1957,<sup>261</sup> among other things to take into account that “children, being particularly vulnerable, are more likely to become victims of sexual offences, including ... sexual exploitation”.<sup>262</sup> The bill includes a whole chapter on sexual offences against children.<sup>263</sup> One of those offences is the offence of “sexual exploitation of a child”. In order to commit that offence, a person must unlawfully and intentionally engage the services of the child<sup>264</sup> who is the alleged victim of the offence, with or without the consent of that child, for financial or other reward, favour or compensation to that child or to a third person, (a) for the purpose of engaging in a sexual act with that child, irrespective of whether the sexual act is committed or not, or (b) by committing a sexual act with that child.<sup>265</sup> Another of those offences is that of “being involved in the sexual exploitation of a child”. In this case, a person must unlawfully and intentionally offer the services of the child who is the alleged victim of the offence to a third person, with or without the consent of that child, for financial or other reward, favour or compensation to either the offender, the child or another person: (a) for purposes of the commission of a sexual act with the child by that third person; (b) by inviting, persuading or inducing the child to allow that third person to commit a sexual act with the child; (c) by participating in, being involved in, promoting, encouraging or facilitating the commission of a sexual act with the child by that third person; (d) by making available,

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256 Sec 50A(1) of the Child Care Act 1983, as amended by the Child Care Amendment Act 1999.

257 *Id.*, sec 51.

258 *Id.*, sec 52A(1). Exceptions are allowed under secs 52A(2)–(4).

259 *Id.*, sec 50A(2). Under sec 50A(3), any person who is convicted of an offence under sec 50A, is liable to a fine, imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment.

260 Bill no B50B-2003, available at: <<http://www.pmg.org.za/bills/061110b50b-03.doc>> (last accessed 12 April 2007).

261 Act no 23 of 1957, available in: *Juta's Statutes of South Africa* (2007, Juta) vol 1, sec 1 at 302.

262 Sexual Offences Amendment Bill, above at note 260, second para of the preamble. The provisions criminalizing child sex exploitation are included in the bill rather than the new Children's Act because the latter focuses on the protection of children rather than the prosecution of offenders; see South African Law Reform Commission report, above at note 219 at 187.

263 *Id.*, chap 3, secs 15–22.

264 That is “a person under the age of 18 years”: *id.*, sec 1(1).

265 *Id.*, sec 17(1).

offering or engaging the child for purposes of the commission of a sexual act with the child by that third person; or (e) by detaining the child, whether under threat, force, coercion, deception, abuse of power or authority, for purposes of the commission of a sexual act with the child by that third person.<sup>266</sup> A further offence is that of “furthering the sexual exploitation of a child”. A person will be guilty of such an offence if either: (a) s/he intentionally allows or knowingly permits the commission of a sexual act by a third person with the child who is the alleged victim of the offence, with or without the consent of that child, while being a primary care-giver,<sup>267</sup> parent or guardian of the child; or (b) owns, leases, rents, manages, occupies or has control of any movable or immovable property and intentionally allows or knowingly permits such movable or immovable property to be used for purposes of the commission of a sexual act with that child by that third person.<sup>268</sup> The offence of “benefiting from the sexual exploitation of a child” requires a person intentionally to receive financial or other reward, favour or compensation from the commission of a sexual act with the child who is the alleged victim of the offence by a third person.<sup>269</sup> On the other hand, a person will be guilty of an offence of “living from the earnings of the sexual exploitation of a child” if that person intentionally lives wholly or in part on rewards, favours or compensation for the commission of a sexual act with a child who is the alleged victim of an offence by a third person.<sup>270</sup> Moreover, a natural or juristic person will be guilty of the offence of “promoting child sex tours” if that person: (a) makes or organizes any travel arrangements for or on behalf of a third person, whether that other person is resident within or outside South Africa, with the intention of facilitating the commission of any sexual act with a child, irrespective of whether that act is committed or not; or (b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual act with a child.<sup>271</sup> Finally, the bill makes it an offence for a person who has knowledge that a sexual offence has been committed against a child not to report such knowledge immediately to a police official.<sup>272</sup>

Importantly, the bill provides that a child may not be convicted of the offence of benefiting from the sexual exploitation of a child, or the offence of living from the earnings of the sexual exploitation of a child, or the offence of failing to inform the police, if that child is not guilty of the offences of sexual exploitation of a child or of being involved in the sexual exploitation of a child.<sup>273</sup> Another

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266 *Id.*, sec 17(2).

267 As defined in sec 1 of the Social Assistance Act, 2004 (act no 13 of 2004), available at: <<http://www.info.gov.za/gazette/acts/2004/a13-04.pdf>> (last accessed 12 April 2007).

268 Sexual Offences Amendment Bill, above at note 260, sec 17(3).

269 *Id.*, sec 17(4).

270 *Id.*, sec 17(5).

271 *Id.*, sec 17(6).

272 *Id.*, sec 54(1).

273 *Id.*, sec 56(5).

innovation is the creation of the offences of sexual grooming of a child, promoting the sexual grooming of a child, exposing or displaying or causing the exposure or display of pornography to a child, using a child for child pornography, benefiting from child pornography, compelling or causing a child to witness a sexual offence, compelling or causing a child to witness a sexual act, compelling or causing a child to witness self-masturbation, and exposing or displaying or causing the exposure or display of genital organs, anus or female breasts to a child.<sup>274</sup> The bill also addresses a number of concerns raised about the common-law offence of rape. In future, any person, male or female, who unlawfully and intentionally commits an act of sexual penetration with a male or female child will be guilty of the offence of rape if the child did not consent, or statutory rape if the child was under 16 years of age and did consent.<sup>275</sup> On the other hand, any person, male or female, who unlawfully and intentionally sexually violates<sup>276</sup> a male or female child will be guilty of the offence of sexual assault if the child did not consent, or statutory sexual assault if the child was under 16 years of age and did consent.<sup>277</sup>

The bill makes provision for a national register of sex offenders.<sup>278</sup> It also provides for extra-territorial application, to the extent that the South African courts will have jurisdiction when the act alleged to constitute an offence occurred outside South Africa, irrespective of whether that act constitutes an offence at the place of its commission, if the person to be charged: (a) is a South African citizen; (b) is ordinarily resident in South Africa; (c) was arrested in South Africa, in its territorial waters or on board a South African ship or aircraft at the time the offence was committed; (d) is a South African company; or (e) committed the offence against a child who is a South African citizen or ordinarily resident in South Africa, was found in South Africa and is not being extradited.<sup>279</sup>

A number of other pieces of South African legislation also exist to combat international child sex tourism. The Domestic Violence Act

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274 *Id.*, secs 18(2), 18(1), 19, 20(1), 20(2), 21(1), 21(2), 21(3) and 22 respectively.

275 *Id.*, secs 3 and 15(1) respectively, read with sec 1(1). Under sec 57(a), a child under the age of 12 years is incapable of consenting to a sexual act. Furthermore, under sec 56(2)(a), it is a valid defence to a charge of statutory rape 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 the offence, and the accused person reasonably believed that the child was 16 years or older.

276 This includes any act which causes direct or indirect contact between the genital organs or the female breasts of one person and any part of the body of another person: *id.*, sec 1(1).

277 *Id.*, secs 5(1) and 16(1) respectively, read with sec 1(1). Under sec 56(2)(a), it is a valid defence to a charge of statutory sexual assault 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 the offence, and the accused person reasonably believed that the child was 16 years or older.

278 *Id.*, sec 42(1).

279 *Id.*, secs 61(1)(a)–(d) and 61(2) respectively. Sec 61(1)(e) also includes any corporate or unincorporated body of persons in South Africa.

1998<sup>280</sup> supplements the Children's Act in an important way in view of the high incidence of domestic violence in South African society, by making provision for the issue of protection orders in cases where any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of a child takes place in a domestic relationship.

The Prevention of Organised Crime Act 1998<sup>281</sup> is also crucial in the fight against child sex tourism in view of the widespread involvement of criminal groups.<sup>282</sup> This act makes it an offence, among others, for any person who actively participates in, or is a member of, a criminal gang<sup>283</sup> wilfully to aid and abet any criminal activity committed for the benefit of, at the direction of, or in association with that gang.<sup>284</sup> More generally, the act makes it an offence for any person to perform any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity.<sup>285</sup> The act also provides for the recovery of the proceeds of unlawful activity and for the civil forfeiture of criminal assets that have been used to commit an offence or assets that are the proceeds of unlawful activity.<sup>286</sup> Related pieces of legislation are the Extradition Act 1962<sup>287</sup> and the International Co-operation in Criminal Matters Act 1996<sup>288</sup> which facilitates the provision of evidence and the execution of sentences in criminal matters, as well as the confiscation and transfer of the proceeds of crime between South Africa and other states.<sup>289</sup> Also related, in view of the link between

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280 Act no 116 of 1998, available at: <<http://www.info.gov.za/gazette/acts/1998/a116-98.pdf>> (last accessed 12 April 2007).

281 Act no 121 of 1998, available at: <<http://www.info.gov.za/gazette/acts/1998/a121-98.pdf>> (last accessed 12 April 2007).

282 See Fitzgibbon "Modern-day slavery?", above at note 23 at 88.

283 Under sec 1(1) of the Prevention of Organised Crime Act (above at note 281), read with schedule 1 as amended by sec 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill 2003, a criminal gang includes "any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity". The latter involves "the planned, ongoing, continuous or repeated participation or involvement in" a number of offences including rape, sexual assault as well as the sexual exploitation of children, and requires at least two such offences to occur within ten years of each other.

284 The Prevention of Organised Crime Act (above at note 281), sec 9(1)(a).

285 *Id.*, sec 9(2)(a).

286 *Id.*, secs 12–62.

287 Act no 67 of 1962, available in: *Juta's Statutes of South Africa* (2007, Juta) vol 1, sec 1 at 314.

288 Act no 75 of 1996, available at: <<http://www.info.gov.za/gazette/acts/1996/a75-96.pdf>> (last accessed 12 April 2007).

289 South Africa acceded in 2003 to the Council of Europe's 1957 Convention on Extradition and its two additional protocols of 1975 and 1978: (2003) 28 *SAYIL* at 386–87. South Africa is a party to bilateral treaties with a wide range of states, including Australia, France, Nigeria and the United States of America, and in 2003 ratified the Southern African Development Community's 2002 Protocol on Extradition which has not yet entered

child sex tourism and internet child pornography, is the Films and Publications Act 1996.<sup>290</sup> This makes the exploitative use of children on the internet punishable by making it an offence for any person to create, produce, import, procure, obtain, access, distribute or be in possession of a film or publication that contains child pornography, or that advocates, advertises or promotes child pornography or the sexual exploitation of children.<sup>291</sup> This act also compels all internet service providers to take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography.<sup>292</sup> Providers who become aware that their services are being used for the hosting or distribution of child pornography must report its presence to the police and take all reasonable steps to keep the evidence and to prevent access to the child pornography by any person.<sup>293</sup> The Films and Publications Amendment Bill 2006<sup>294</sup> extends the reach of the act to interactive computer games as well as mobile cellular telephones,<sup>295</sup> and grants extensive powers to compliance officers.<sup>296</sup> The admissibility and evidential value of computer-related evidence are governed by the Electronic Communications and Transactions Act 2002.<sup>297</sup> This act provides that the rules of evidence must not be applied so as to deny the admissibility of a data message in evidence on the mere grounds that it consists of electronic data or that it is not in its original form, if it is the best evidence that the person adducing the evidence could reasonably be expected to obtain.<sup>298</sup> It also provides for cyber inspectors with extensive powers including inspection, search and seizure.<sup>299</sup> The Regulation of Interception of Communications and Provision of Communication-Related Information Amendment Bill 2006<sup>300</sup> provides for

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into force; see HB van Heerden "Extradition treaties negotiated since 1994" (2005) 30 *SAYIL* 173 at 183.

290 Act no 65 of 1996, available at: <<http://www.info.gov.za/gazette/acts/1996/a65-96.pdf>> (last accessed 12 April 2007). This act was amended by the Films and Publications Amendment Act 1999 (act no 34 of 1999), available at: <<http://www.info.gov.za/gazette/acts/1999/a34-99.pdf>> (last accessed 12 April 2007) to bring internet material within its ambit.

291 *Id.*, secs 28(1) and 27(1), as amended by sec 11(a) of the Films and Publications Amendment Act 2004 (act no 18 of 2004), available at: <<http://www.info.gov.za/gazette/acts/2004/a18-04.pdf>> (last accessed 12 April 2007).

292 *Id.*, sec 27A(1)(b).

293 *Id.*, sec 27A(2).

294 Bill no B27 of 2006, available at: <<http://www.info.gov.za/gazette/bills/2006/b27-06.pdf>> (last accessed 12 April 2007).

295 *Id.*, sec 2.

296 *Id.*, sec 13, inserting a sec 15A in the act.

297 Act no 25 of 2002, available at: <<http://www.info.gov.za/gazette/acts/2002/a25-02.pdf>> (last accessed 12 April 2007).

298 *Id.*, sec 15(1).

299 *Id.*, secs 80–84.

300 Bill no B9 of 2006, available at: <<http://www.info.gov.za/gazette/bills/2006/b9-06.pdf>> (last accessed 12 April 2007).

service providers to keep updated information about SIM cards and cellular phones.<sup>301</sup>

Finally, the Basic Conditions of Employment Act 1997<sup>302</sup> prohibits all forced labour<sup>303</sup> and makes it an offence to employ a child who is under 15 years of age.<sup>304</sup> This act also makes it an offence to employ a child who is 15 years of age or older if that employment is inappropriate for a person of that age, or places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.<sup>305</sup>

## CONCLUSION

The coming into effect in 1994 of the first fully democratic, non-racial constitutional dispensation led to a normalization of South Africa's international relations, including a dramatic increase in international tourism. At around the same time, child sex tourism became a global issue and many states which had long been confronted with this problem took legislative measures to address it. Under these circumstances, many offenders turned to South Africa to take advantage of a "new" destination plagued by the social scars of apartheid and under-development, and involved in the painstaking process of over-hauling the entire machinery of state, including its legislative and law enforcement agencies. As a result, too many children became prey to international sex tourists, over and above the domestic breed. The South African authorities did not remain inactive, however. Indeed, the country is now bound by most of the relevant international instruments. Parliament has also enacted, or is in the process of enacting, a wide range of far-reaching legislative tools. Unfortunately this does not yet mean the end of the long walk to freedom for the victims of child sex tourists. But it is now possible to focus on tackling the law enforcement obstacles and addressing the socio-economic causes of the phenomenon.

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301 *Id.*, sec 40.

302 Act no 75 of 1997, available at: <<http://www.info.gov.za/gazette/acts/1997/a75-97.pdf>> (last accessed 12 April 2007).

303 *Id.*, sec 48(1).

304 *Id.*, sec 43.

305 *Id.*, sec 43.